

**CHINA – MEASURES RELATED TO THE EXPORTATION
OF VARIOUS RAW MATERIALS**

Reports of the Panel

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<i>EC – Asbestos</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243
<i>EC – Asbestos</i>	Panel Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/R and Add.1, adopted 5 April 2001, as modified by Appellate Body Report WT/DS135/AB/R, DSR 2001:VIII, 3305
<i>EC – Bananas III</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591
<i>EC – Bananas III (US)</i>	Panel Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by the United States</i> , WT/DS27/R/USA, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, 943
<i>EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)</i>	Appellate Body Reports, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador</i> , WT/DS27/AB/RW2/ECU, adopted 11 December 2008, and Corr.1 / <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008

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<i>EC – Computer Equipment</i>	Appellate Body Report, <i>European Communities – Customs Classification of Certain Computer Equipment</i> , WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, 1851
<i>EC – Chicken Cuts</i>	Appellate Body Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts</i> , WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, 9157
<i>EC – Chicken Cuts (Brazil)</i>	Panel Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts, Complaint by Brazil</i> , WT/DS269/R, adopted 27 September 2005, as modified by Appellate Body Report WT/DS269/AB/R, WT/DS286/AB/R, DSR 2005:XIX, 9295
<i>EC – Chicken Cuts (Thailand)</i>	Panel Report, <i>European Communities – Customs Classification of Frozen Boneless Chicken Cuts, Complaint by Thailand</i> , WT/DS286/R, adopted 27 September 2005, as modified by Appellate Body Report WT/DS269/AB/R, WT/DS286/AB/R, DSR 2005:XX, 9721
<i>EC – Computer Equipment</i>	Appellate Body Report, <i>European Communities – Customs Classification of Certain Computer Equipment</i> , WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, adopted 22 June 1998, DSR 1998:V, 1851
<i>EC – Computer Equipment</i>	Panel Report, <i>European Communities – Customs Classification of Certain Computer Equipment</i> , WT/DS62/R, WT/DS67/R, WT/DS68/R, adopted 22 June 1998, as modified by Appellate Body Report WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, DSR 1998:V, 1891
<i>EC – Export Subsidies on Sugar</i>	Appellate Body Report, <i>European Communities – Export Subsidies on Sugar</i> , WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, adopted 19 May 2005, DSR 2005:XIII, 6365
<i>EC – Export Subsidies on Sugar (Australia)</i>	Panel Report, <i>European Communities – Export Subsidies on Sugar, Complaint by Australia</i> , WT/DS265/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, DSR 2005:XIII, 6499
<i>EC – Export Subsidies on Sugar (Brazil)</i>	Panel Report, <i>European Communities – Export Subsidies on Sugar, Complaint by Brazil</i> , WT/DS266/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, DSR 2005:XIV, 6793
<i>EC – Export Subsidies on Sugar (Thailand)</i>	Panel Report, <i>European Communities – Export Subsidies on Sugar, Complaint by Thailand</i> , WT/DS283/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, DSR 2005:XIV, 7071
<i>EC – Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
<i>EC – Hormones (Canada)</i>	Panel Report, <i>EC Measures Concerning Meat and Meat Products (Hormones), Complaint by Canada</i> , WT/DS48/R/CAN, adopted 13 February 1998, as modified by Appellate Body Report WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998:II, 235
<i>EC – Hormones (US)</i>	Panel Report, <i>EC Measures Concerning Meat and Meat Products (Hormones), Complaint by the United States</i> , WT/DS26/R/USA, adopted 13 February 1998, as modified by Appellate Body Report WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998:III, 699

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<i>EC – IT Products</i>	Panel Report, <i>European Communities and its member States – Tariff Treatment of Certain Information Technology Products</i> , WT/DS375/R, WT/DS376/R, WT/DS377/R, adopted 21 September 2010
<i>EC – Salmon (Norway)</i>	Panel Report, <i>European Communities – Anti-Dumping Measure on Farmed Salmon from Norway</i> , WT/DS337/R, adopted 15 January 2008, and Corr.1, DSR 2008:I, 3
<i>EC – Sardines</i>	Appellate Body Report, <i>European Communities – Trade Description of Sardines</i> , WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3359
<i>EC – Sardines</i>	Panel Report, <i>European Communities – Trade Description of Sardines</i> , WT/DS231/R and Corr.1, adopted 23 October 2002, as modified by Appellate Body Report WT/DS231/AB/R, DSR 2002:VIII, 3451
<i>EC – Selected Customs Matters</i>	Appellate Body Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, 3791
<i>EC – Selected Customs Matters</i>	Panel Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/R, adopted 11 December 2006, as modified by Appellate Body Report WT/DS315/AB/R, DSR 2006:IX-X, 3915
<i>EC – Scallops (Canada)</i>	Panel Report, <i>European Communities – Trade Description of Scallops – Request by Canada</i> , WT/DS7/R, 5 August 1996, unadopted, DSR 1996:I, 89
<i>EC – Scallops (Peru and Chile)</i>	Panel Report, <i>European Communities – Trade Description of Scallops – Requests by Peru and Chile</i> , WT/DS12/R, WT/DS14/R, 5 August 1996, unadopted, DSR 1996:I, 93
<i>EC – Tariff Preferences</i>	Appellate Body Report, <i>European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries</i> , WT/DS246/AB/R, adopted 20 April 2004, DSR 2004:III, 925
<i>EC – Tariff Preferences</i>	Panel Report, <i>European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries</i> , WT/DS246/R, adopted 20 April 2004, as modified by Appellate Body Report WT/DS/246/AB/R, DSR 2004:III, 1009
<i>India – Additional Import Duties</i>	Appellate Body Report, <i>India – Additional and Extra-Additional Duties on Imports from the United States</i> , WT/DS360/AB/R, adopted 17 November 2008
<i>India – Additional Import Duties</i>	Panel Report, <i>India – Additional and Extra-Additional Duties on Imports from the United States</i> , WT/DS360/R, adopted 17 November 2008, as reversed by Appellate Body Report WT/DS360/AB/R
<i>India – Autos</i>	Appellate Body Report, <i>India – Measures Affecting the Automotive Sector</i> , WT/DS146/AB/R, WT/DS175/AB/R, adopted 5 April 2002, DSR 2002:V, 1821
<i>India – Autos</i>	Panel Report, <i>India – Measures Affecting the Automotive Sector</i> , WT/DS146/R, WT/DS175/R and Corr.1, adopted 5 April 2002, DSR 2002:V, 1827
<i>India – Patents (US)</i>	Appellate Body Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9
<i>India – Patents (US)</i>	Panel Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products, Complaint by the United States</i> , WT/DS50/R, adopted 16 January 1998, as modified by Appellate Body Report WT/DS50/AB/R, DSR 1998:I, 41

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<i>India – Quantitative Restrictions</i>	Appellate Body Report, <i>India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products</i> , WT/DS90/AB/R, adopted 22 September 1999, DSR 1999:IV, 1763
<i>India – Quantitative Restrictions</i>	Panel Report, <i>India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products</i> , WT/DS90/R, adopted 22 September 1999, upheld by Appellate Body Report WT/DS90/AB/R, DSR 1999:V, 1799
<i>Japan – Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97
<i>Japan – Alcoholic Beverages II</i>	Panel Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/R, WT/DS10/R, WT/DS11/R, adopted 1 November 1996, as modified by Appellate Body Report WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, DSR 1996:I, 125
<i>Japan – DRAMs (Korea)</i>	Appellate Body Report, <i>Japan – Countervailing Duties on Dynamic Random Access Memories from Korea</i> , WT/DS336/AB/R and Corr.1, adopted 17 December 2007, DSR 2007:VII, 2703
<i>Japan – Film</i>	Panel Report, <i>Japan – Measures Affecting Consumer Photographic Film and Paper</i> , WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, 1179
<i>Japan – Quotas on Laver</i>	Panel Report, <i>Japan – Import Quotas on Dried Laver and Seasoned Laver</i> , WT/DS323/R, 1 February 2006, unadopted
<i>Korea – Alcoholic Beverages</i>	Appellate Body Report, <i>Korea – Taxes on Alcoholic Beverages</i> , WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I, 3
<i>Korea – Alcoholic Beverages</i>	Panel Report, <i>Korea – Taxes on Alcoholic Beverages</i> , WT/DS75/R, WT/DS84/R, adopted 17 February 1999, as modified by Appellate Body Report WT/DS75/AB/R, WT/DS84/AB/R, DSR 1999:I, 44
<i>Korea – Dairy</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
<i>Korea – Dairy</i>	Panel Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/R and Corr.1, adopted 12 January 2000, as modified by Appellate Body Report WT/DS98/AB/R, DSR 2000:I, 49
<i>Korea – Various Measures on Beef</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, 5
<i>Korea – Various Measures on Beef</i>	Panel Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/R, WT/DS169/R, adopted 10 January 2001, as modified by Appellate Body Report WT/DS161/AB/R, WT/DS169/AB/R, DSR 2001:I, 59
<i>Mexico – Anti-Dumping Measures on Rice</i>	Appellate Body Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, 10853
<i>Mexico – Anti-Dumping Measures on Rice</i>	Panel Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/R, adopted 20 December 2005, as modified by Appellate Body Report WT/DS295/AB/R, DSR 2005:XXIII, 11007

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<i>Mexico – Corn Syrup (Article 21.5 – US)</i>	Appellate Body Report, <i>Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6675
<i>Thailand – Cigarettes (Philippines)</i>	Panel Report, <i>Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines</i> , WT/DS371/R, circulated to WTO Members 15 November 2010 [adoption/appeal pending]
<i>Turkey – Rice</i>	Panel Report, <i>Turkey – Measures Affecting the Importation of Rice</i> , WT/DS334/R, adopted 22 October 2007, DSR 2007:VI, 2151
<i>US – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, 3779
<i>US – Carbon Steel</i>	Panel Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/R and Corr.1, adopted 19 December 2002, as modified by Appellate Body Report WT/DS213/AB/R, DSR 2002:IX, 3833
<i>US – Certain EC Products</i>	Appellate Body Report, <i>United States – Import Measures on Certain Products from the European Communities</i> , WT/DS165/AB/R, adopted 10 January 2001, DSR 2001:I, 373
<i>US – Certain EC Products</i>	Panel Report, <i>United States – Import Measures on Certain Products from the European Communities</i> , WT/DS165/R and Add.1, adopted 10 January 2001, as modified by Appellate Body Report WT/DS165/AB/R, DSR 2001:II, 413
<i>US – Continued Suspension</i>	Appellate Body Report, <i>United States – Continued Suspension of Obligations in the EC – Hormones Dispute</i> , WT/DS320/AB/R, adopted 14 November 2008, DSR 2008:X, 3507
<i>US – Continued Suspension</i>	Panel Report, <i>United States – Continued Suspension of Obligations in the EC – Hormones Dispute</i> , WT/DS320/R, adopted 14 November 2008, as modified by Appellate Body Report WT/DS320/AB/R, DSR 2008:XI, 3891
<i>US – Continued Zeroing</i>	Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/AB/R, adopted 19 February 2009
<i>US – Continued Zeroing</i>	Panel Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/R, adopted 19 February 2009, as modified as Appellate Body Report WT/DS350/AB/R
<i>US – Corrosion-Resistant Steel Sunset Review</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3
<i>US – Corrosion-Resistant Steel Sunset Review</i>	Panel Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/R, adopted 9 January 2004, as modified by Appellate Body Report WTDS244/AB/R, DSR 2004:I, 85
<i>US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)</i>	Panel Report, <i>United States – Countervailing Measures Concerning Certain Products from the European Communities – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS212/RW, adopted 27 September 2005, DSR 2005:XVIII, 8950

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<i>US – Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, 5663 (Corr.1, DSR 2006:XII, 5475)
<i>US – Gambling</i>	Panel Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/R, adopted 20 April 2005, as modified by Appellate Body Report WT/DS285/AB/R, DSR 2005:XII, 5797
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
<i>US – Gasoline</i>	Panel Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/R, adopted 20 May 1996, as modified by Appellate Body Report WT/DS2/AB/R, DSR 1996:I, 29
<i>US – Lamb</i>	Appellate Body Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, 4051
<i>US – Line Pipe</i>	Panel Report, <i>United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea</i> , WT/DS202/R, adopted 8 March 2002, as modified by Appellate Body Report WT/DS202/AB/, DSR 2002:IV, 1473
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, 3257
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Panel Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/R and Corr.1, adopted 17 December 2004, as modified by Appellate Body Report W/DS/268/AB/R, DSR 2004:VIII, 3421
<i>US – Offset Act (Byrd Amendment)</i>	Appellate Body Report, <i>United States – Continued Dumping and Subsidy Offset Act of 2000</i> , WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, DSR 2003:I, 375
<i>US – Offset Act (Byrd Amendment)</i>	Panel Report, <i>United States – Continued Dumping and Subsidy Offset Act of 2000</i> , WT/DS217/R, WT/DS234/R, adopted 27 January 2003, as modified by Appellate Body Report WT/DS217/AB/R, WT/DS234/AB/R, DSR 2003:II, 489
<i>US – Poultry (China)</i>	Panel Report, <i>United States – Certain Measures Affecting Imports of Poultry from China</i> , WT/DS392/R, adopted 25 October 2010
<i>US – Section 211 Appropriations Act</i>	Appellate Body Report, <i>United States – Section 211 Omnibus Appropriations Act of 1998</i> , WT/DS176/AB/R, adopted 1 February 2002, DSR 2002:II, 589
<i>US – Section 211 Appropriations Act</i>	Panel Report, <i>United States – Section 211 Omnibus Appropriations Act of 1998</i> , WT/DS176/R, adopted 1 February 2002, as modified by Appellate Body Report WT/DS176/AB/R, DSR 2002:II, 683
<i>US – Section 301 Trade Act</i>	Panel Report, <i>United States – Sections 301-310 of the Trade Act of 1974</i> , WT/DS152/R, adopted 27 January 2000, DSR 2000:II, 815
<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755

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<i>US – Shrimp</i>	Panel Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/R and Corr.1, adopted 6 November 1998, as modified by Appellate Body Report WT/DS58/AB/R, DSR 1998:VII, 2821
<i>US – Shrimp (Article 21.5 – Malaysia)</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia</i> , WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6481
<i>US – Shrimp (Thailand) / US – Customs Bond Directive</i>	Appellate Body Report, <i>United States – Measures Relating to Shrimp from Thailand / United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties</i> , WT/DS343/AB/R / WT/DS345/AB/R, adopted 1 August 2008, DSR 2008:VII, 2385 / DSR 2008:VIII, 2773
<i>US – Shrimp (Thailand)</i>	Panel Report, <i>United States – Measures Relating to Shrimp from Thailand</i> , WT/DS343/R, adopted 1 August 2008, as modified by Appellate Body Report WT/DS343/AB/R / WT/DS345/AB/R, DSR 2008:VII, 2539
<i>US – Shrimp (Ecuador)</i>	Panel Report, <i>United States – Anti-Dumping Measure on Shrimp from Ecuador</i> , WT/DS335/R, adopted on 20 February 2007, DSR 2007:II, 425
<i>US – Shrimp (Viet Nam)</i>	<i>United States – Anti-Dumping Measures on certain Shrimp from Viet Nam (WT/DS404)</i>
<i>US – Softwood Lumber IV</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, 571
<i>US – Softwood Lumber IV</i>	Panel Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/R and Corr.1, adopted 17 February 2004, as modified by Appellate Body Report WT/DS257/AB/R, DSR 2004:II, 641
<i>US – Softwood Lumber V</i>	Panel Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/R, adopted 31 August 2004, as modified by Appellate Body Report WT/DS264/AB/R, DSR 2004:V, 1937
<i>US – Softwood Lumber III</i>	Panel Report, <i>United States – Preliminary Determinations with Respect to Certain Softwood Lumber from Canada</i> , WT/DS236/R, adopted 1 November 2002, DSR 2002:IX, 3597
<i>US – Stainless Steel (Mexico)</i>	Appellate Body Report, <i>United States – Final Anti-Dumping Measures on Stainless Steel from Mexico</i> , WT/DS344/AB/R, adopted 20 May 2008, DSR 2008:II, 513
<i>US – Stainless Steel (Mexico)</i>	Panel Report, <i>United States – Final Anti-Dumping Measures on Stainless Steel from Mexico</i> , WT/DS344/R, adopted 20 May 2008, as modified by Appellate Body Report WT/DS344/AB/R, DSR 2008:II, 599
<i>US – Steel Safeguards</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, 3117
<i>US – Tuna II (Mexico)</i>	<i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (WT/DS381)</i>
<i>US – Tyres (China)</i>	Panel Report, <i>United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China</i> , WT/DS399/R, circulated to WTO Members 13 December 2010 [appeal/adoption pending]

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<i>US – Underwear</i>	Appellate Body Report, <i>United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear</i> , WT/DS24/AB/R, adopted 25 February 1997, DSR 1997:I, 11
<i>US – Underwear</i>	Panel Report, <i>United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear</i> , WT/DS24/R, adopted 25 February 1997, as modified by Appellate Body Report WT/DS24/AB/R, DSR 1997:I, 31
<i>US – Upland Cotton</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, 3
<i>US – Upland Cotton</i>	Panel Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/R, Corr.1, and Add.1 to Add.3, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, 299
<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717
<i>US – Wheat Gluten</i>	Panel Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/R, adopted 19 January 2001, as modified by Appellate Body Report WT/DS166/AB/R, DSR 2001:III, 779
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, 323
<i>US – Wool Shirts and Blouses</i>	Panel Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/R, adopted 23 May 1997, upheld by Appellate Body Report WT/DS33/AB/R, DSR 1997:I, 343
<i>US – Zeroing (Japan)</i> (Article 21.5 – Japan)	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan</i> , WT/DS322/AB/RW, adopted 31 August 2009

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<i>Canada – FIRA</i>	GATT Panel Report, <i>Canada – Administration of the Foreign Investment Review Act</i> , L/5504, adopted 7 February 1984, BISD 30S/140
<i>Canada – Herring and Salmon</i>	GATT Panel Report, <i>Canada – Measures Affecting Exports of Unprocessed Herring and Salmon</i> , L/6268, adopted 22 March 1988, BISD 35S/98
<i>Canada – Ice Cream and Yoghurt</i>	GATT Panel Report, <i>Canada – Import Restrictions on Ice Cream and Yoghurt</i> , L/6568, adopted 5 December 1989, BISD 36S/68
<i>EEC – Dessert Apples</i>	GATT Panel Report, <i>European Economic Community – Restrictions on Imports of Dessert Apples – Complaint by Chile</i> , L/6491, adopted 22 June 1989, BISD 36S/93
<i>EEC – Import Restrictions</i>	GATT Panel Report, <i>EEC – Quantitative Restrictions Against Imports of Certain Products from Hong Kong</i> , L/5511, adopted 12 July 1983, BISD 30S/129

Short Title	Full Case Title and Citation
<i>EEC – Minimum Import Prices</i>	GATT Panel Report, <i>EEC – Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables</i> , L/4687, adopted 18 October 1978, BISD 25S/68
<i>EEC – Oilseeds I</i>	GATT Panel Report, <i>European Economic Community – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins</i> , L/6627, adopted 25 January 1990, BISD 37S/86
<i>France – Import Restrictions</i>	GATT Panel Report, <i>French Import Restrictions</i> , L/1921, adopted 14 November 1962, BISD 11S/94 (See also BISD 11S/55)
<i>Japan – Agricultural Products I</i>	GATT Panel Report, <i>Japan – Restrictions on Imports of Certain Agricultural Products</i> , L/6253, adopted 2 March 1988, BISD 35S/163
<i>Japan – Semi-Conductors</i>	GATT Panel Report, <i>Japan – Trade in Semi-Conductors</i> , L/6309, adopted 4 May 1988, BISD 35S/116
<i>US – Customs User Fee</i>	GATT Panel Report, <i>United States – Customs User Fee</i> , L/6264, adopted 2 February 1988, BISD 35S/245
<i>US – MFN Footwear</i>	GATT Panel Report, <i>United States – Denial of Most-Favoured-Nation Treatment as to Non-Rubber Footwear from Brazil</i> , DS18/R, adopted 19 June 1992, BISD 39S/128
<i>US – Sugar</i>	GATT Panel Report, <i>United States Restrictions on Imports of Sugar</i> , L/6514, adopted 22 June 1989, BISD 36S/331
<i>US – Sugar Quota</i>	GATT Panel Report, <i>United States – Imports of Sugar from Nicaragua</i> , L/5607, adopted 13 March 1984, BISD 31S/67
<i>US – Sugar Waiver</i>	GATT Panel Report, <i>United States – Restrictions on the Importation of Sugar and Sugar-Containing Products Applied under the 1955 Waiver and under the Headnote to the Schedule of Tariff Concessions</i> , L/6631, adopted 7 November 1990, BISD 37S/228
<i>US – Tuna (Mexico)</i>	GATT Panel Report, <i>United States – Restrictions on Imports of Tuna</i> , DS21/R, DS21/R, 3 September 1991, unadopted, BISD 39S/155
<i>US – Tuna (EEC)</i>	GATT Panel Report, <i>United States – Restrictions on Imports of Tuna</i> , DS29/R, 16 June 1994, unadopted

**ABBREVIATIONS OF MEASURES, EVIDENCE, AND OTHER INSTRUMENTS
 REFERRED TO IN THIS RULING¹**

Short Titles	Full Titles
"system of self-discipline"	"system of self-discipline" (No Exhibits)
1994 CCCMC Charter	Charter of the China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters (1994) (Exhibit JE-86, No Chinese Exhibit)
1996 Circular on Printing and Issuing the Provisions on the Administration of Export License	1996 Circular on the Printing and Issuing the Certain Provisions on the Administration of Export License Wai Jing Mao Guan Fa (1995) No. 760, promulgated by MOFTEC on 2 January 1996 (Exhibit CHN-451, No Joint Exhibit)
1998 Price Coordination Circular	MOFTEC Circular on Strengthening the Job in the Coordination of Export Commodities (1998) (Exhibit JE-110, No Chinese Exhibit)
2001 CCCMC Charter	Charter of the China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters (2001) (Exhibits JE-87, CHN-16)
2001 Export License Administration Provisions	Provisions on the Administration of Export Licenses, Order No. 9, promulgated by MOFTEC on 20 December 2001 (Exhibit CHN-359, No Joint Exhibit)
2002 PVC Notice	2002 Notice for the Adjustment of the Catalogue of Export Products Subject to Price Review by Customs (Ministry of Foreign Trade and Economic Cooperation and the General Administration of Customs, wajingmaomaofa (2002) No. 187, May 1, 2002) (Exhibit JE-121, No Chinese Exhibit)
2004 Export Licence Administration Measures	Measures for the Administration of License for Export of Goods, Order No. 28, promulgated by MOFCOM on 10 December 2004 (Exhibit CHN-360, No Joint Exhibit)
2004 PVC Notice	Notice Regarding the Trial Administration of 36 Types of Products such as Citric Acid (Ministry of Commerce and General Administration of Customs, Notice (2003) No. 36, November 29, 2003) (Exhibits JE-122, CHN-364)
2006 Adjust of Interim Tariff Rates of Certain Import and Export Commodities	"State will Adjust Interim Tariff Rates of Certain Import and Export Commodities" (27 October 2006) (Exhibit CHN-452, No Joint Exhibit)
2007 Adjust of Tariff Rates from June 1 to Control the Export of High-Energy Consumption Products	"State Will Adjust Tariff Rates from June 1 to Control the Export of High-Energy Consumption Products" (22 May 2007) (Exhibit CHN-453, No Joint Exhibit)
2007 Plan for Energy Conservation and Pollutant Discharge Reduction	2007 General Work Plan for Energy Conservation and Pollutant Discharge Reduction, Guo Fa [2007] No. 15 (Exhibit CHN-145, No Joint Exhibit)
2008 Arrangement for Energy Conservation and Pollutant Discharge Reduction	Circular on the General Office of the State Council on Printing and Distributing the 2008 Work Arrangement for Energy Conservation and Pollutant Discharge Reduction Guo Ban Fa (2008) No. 80, promulgated by the State Council on 15 July 2008 (Exhibit CHN-287, No Joint Exhibit)
2008 Export Licence Administration Measures	Measures for the Administration of Licence for the Export of Goods (Order of the Ministry of Commerce (2008) No. 11, July 1, 2008) (Exhibits JE-74, CHN-342)

¹ When the relevant exhibits were submitted by the complainants and by China, this has been indicated.

Short Titles	Full Titles
2008 Export Licensing Working Rules	Working Rules on Issuing Export Licences (Ministry of Commerce, shangpeifa (2008) No. 398, October 9, 2008) (Exhibits JE-97, CHN-344)
2008 Notice Ceasing the Work of PVC for Export Contract of 9 Types of Commodities	Notice Regarding Ceasing the Work of Price Verification and Chop for Export Contract of 9 Types of Commodities including Glyphosate, issued by the CCCMC on 9 January 2008 (Exhibit CHN-352, No Joint Exhibit)
2008 PVC Notice	Communication (Ministry of Commerce and General Administration of Customs (2008) No. 33, May 26, 2008) (Exhibits JE-125, CHN-2)
2009 Adjustment and Revitalization of the Steel Industry	2009 Blueprint for the Adjustment and Revitalization of the Steel Industry (promulgated by the General Office of the State Council on 20 March 2009) (Exhibits JE-9, CHN-258)
2009 Announcement of Second Bidding Round for Talc and Silicon Carbide	Announcement on the Second Invitation for the Bidding of Select Industrial Product Export Quotas in 2009 (Committee for the Invitation for bid for Export Commodity Quotas, September 16, 2009) (Exhibit JE-132, No Chinese Exhibit)
2009 Arrangement for Energy Conservation and Pollutant Discharge Reduction	Circular of the General Office of the State Council on Printing and Distributing the 2009 Work Arrangement for Energy Conservation and Pollutant Discharge Reduction, Guo Ban Fa (2009) No. 48, promulgated by the State Council on 19 July 2009 (Exhibit CHN-288, No Joint Exhibit)
2009 Coke Export Quota Application Procedures	2009 Coke Export Quota Declaration Conditions and Declaration Procedures (Ministry of Commerce, Notice (2008) No. 76, October 13, 2008) (Exhibits JE-85, CHN-308)
2009 Export Licensing Catalogue	Notice "2009 Export Licensing Management Commodities List" (Ministry of Commerce and General Administration of Customs, Notice (2008) No. 100, January 1, 2009) (Exhibits JE-22, CHN-6)
2009 Export Quota Amounts	Notice Regarding 2009 Export Quota Amounts for Agricultural and Industrial Products (Ministry of Commerce, Notice (2008) No. 83, January 1, 2009) (Exhibit JE-79, No Chinese Exhibit)
2009 First Batch Coke Export Quotas	Notice Regarding Passing Down the 2009 First Batch Regular Trade Coke Export Quota (Ministry of Commerce, shangmaohan (2008) No. 140, January 1, 2009) (Exhibit JE-80, No Chinese Exhibit)
2009 First Batch Coke Export Quotas for FIEs	Ministry of Commerce Notice to Foreign-Invested Enterprises Regarding Amounts for the 2009 Industrial Products Export Quotas (2008) No. 92, January 1, 2009 (Exhibit JE-82, No Chinese Exhibit)
2009 First Round Bauxite Bidding Procedures	Quotas of Bauxite of 2009 (Committee for the Invitation for bid for Export Commodity Quotas, December 10, 2008) (Exhibit JE-94, No Chinese Exhibit)
2009 First Round Export Quota Bidding Announcement	Announcement of Ministry of Commerce on Matters regarding the First Bidding for Export Quotas of Industrial Products in 2009 (Ministry of Commerce, Announcement (2008) No. 85, October 30, 2008) (Exhibits JE-90, CHN-309)
2009 First Round Fluorspar Bidding Procedures	Quotas of Fluorspar Lump (Powder) of 2009 (Committee for the Invitation for bid for Export Commodity Quotas, December 10, 2008) (Exhibits JE-93, No Chinese Exhibit)
2009 First Round Silicon Carbide Bidding Procedures	Quotas of Silicon Carbide of 2009 (Committee for the Invitation for bid for Export Commodity Quotas, December 10, 2008) (Exhibit JE-95, No Chinese Exhibit)
2009 Further Adjust of Import and Export Tariffs	"State will further adjust customs import and export tariffs as of January 1, 2009" (17 December 2008) (Exhibit CHN-100, No Joint Exhibit)

Short Titles	Full Titles
2009 Graded Export Licensing Entities Catalogue	Announcement of the Ministry of Commerce Issuing the "2009 Graded Licence-Issuing List of Commodities Subject to Export Licence Administration" (Ministry of Commerce, Notice (2008) No. 124, January 1, 2009) (Exhibit JE-96, No Chinese Exhibit)
2009 Second Batch Coke Export Quota	Notice Regarding Passing Down the 2009 Second Batch Regular Trade Coke Export Quota (Ministry of Commerce, shangmaohan (2009) No. 60, issued June 29, 2009) (Exhibits JE-81, CHN-338)
2009 Second Batch Coke Export Quotas for FIEs	Notice Regarding Passing Down the 2009 Second Batch Regular Trade Coke and Rare Earth Export Quota Amounts for Foreign-Invested Enterprises (Ministry of Commerce, shangzihan (2009) No. 73, September 8, 2009) (Exhibit JE-83, No Chinese Exhibit)
2009 Second Round Export Quota Bidding Announcement	Announcement of Ministry of Commerce on the Notice for the Second Invitation for the Bidding for Industrial Product Export Quotas in 2009 (Ministry of Commerce, Announcement (2009) No. 42, June 8, 2009) (Exhibits JE-91, CHN-310)
2009 Second Round Silicon Carbide Bidding Procedures	Quotas of Silicon Carbide of 2009, Second Round (Committee for the Invitation for bid for Export Commodity Quotas, September 16, 2009) (Exhibit JE-131, No Chinese Exhibit)
2009 Tariff Implementation Program	Notice Regarding the 2009 Tariff Implementation Program (State Council Tariff Policy Commission, shuiweihui (2008) No. 40, January 1, 2009) (Exhibit JE-21, No Chinese Exhibit)
2010 Abolition of Price Review of Export Commodities	2010 Circular of the Ministry of Commerce and the General Administration of Customs on Abolishing Two Documents Regarding Price Review of Export Commodities by Customs Shang Fa Fa (2010) No. 321, promulgated by MOFCOM and the General Administration of Customs on 16 August 2010 (Exhibit CHN-434, No Joint Exhibit)
2010 Amendment of Measures for Administration of Licensing Entities	2010 Decision of the Ministry of Commerce on Amending the Measures for the Administration of the Organs for Issuing the Licenses of Import and Export Commodities (Order No. 3, promulgated by MOFCOM on 12 September 2010) (Exhibit CHN-449, No Joint Exhibit)
2010 Application Qualifications and Procedures for Export Quota of Coke	Public Notice on 2010 Application Qualifications and Application Procedures for Export Quota of Coke, Notice No. 95, promulgated by MOFCOM on 6 November 2009 (Exhibit CHN-317, No Joint Exhibit)
2010 CCCMC Charter	2010 Charter of the China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters, approved on 29 April 2010 (Exhibit CHN-314, No Joint Exhibit)
2010 Export Licensing Catalogue	2010 Catalogue of Goods Subject to Export Licensing Administration, Notice No. 125 of 2009, promulgated by MOFCOM and the General Administration of Customs on 25 December 2009 (Exhibit CHN-7, No Joint Exhibit)
2010 Export Quota Amounts	Notice on Announcement of the 2010 Export Quota Amounts for Agricultural and Industrial Products, Notice No. 88 of 2009, promulgated by MOFCOM on 29 October 2009 (Exhibit CHN-8, No Joint Exhibit)
2010 First-Batch Bidding Qualifications for Export Quotas of Industrial Products	Public Notice on Qualifications of Bidding Enterprises in the 2010 First-Batch Bidding for Export Quotas of Certain Industrial Products (Notice No. 100, promulgated by MOFCOM on 18 November 2009) (Exhibit CHN-311, No Joint Exhibit)

Short Titles	Full Titles
2010 First-Batch Export Quota Bidding of Bauxite	Public Notice on 2010 First-Batch Export Quota Bidding of Bauxite (promulgated by the Bidding Committee on 16 December 2009) (Exhibit CHN-284, No Joint Exhibit)
2010 First-Batch Export Quota Bidding of Silicon Carbide	Public Notice on 2010 First-Batch Export Quota Bidding of Silicon Carbide (Committee for the Invitation for bid for Export Commodity Quotas, on December 16, 2009, with regard to the announcement on the invitation for the bidding of Silicon Carbide (Exhibit CHN-560, No Joint Exhibit)
2010 First-Batch Export Quota of Coke	Public Notice of the Ministry of Commerce on Passing Down the 2010 First-Batch Export Quota of Coke under Regular Trade (Shang Mao Han [2009] No. 144, promulgated by MOFCOM on 29 December 2009) (Exhibit CHN-318, No Joint Exhibit)
2010 First Batch Coke Export Quota for FIEs	MOFCOM Notice on the First Batch of 2010 Coke export quotas for enterprises with foreign investment, International Trade Division of the Department of Commerce, Shanxi Province, March 9, 2010 (Exhibit JE-129)
2010 First-Batch Export Quotas of Industrial Products for FIEs	Circular of the Ministry of Commerce on Passing Down the 2010 First-Batch Export Quotas of Industrial Products for Foreign Invested Enterprises (Shang Mao Han [2010] No. 106, promulgated by the Ministry of Commerce on 23 February 2010) (Exhibit JE-128, CHN-552)
2010 Graded Export Licensing Entities Catalogue	2010 Graded License-Issuing Catalogue of Goods Subject to Export Licensing Administration (Notice No 132, promulgated by MOFCOM on 10 December 2009) (Exhibit CHN-343, No Joint Exhibit)
2010 List of Enterprises Subject to Elimination of Outdated Capacity in Industry Sector	Announcement of the 2010 List of Enterprises Subject to Elimination of Outdated capacity in Industry Sector Gong Chan Ye (2010) No. 111, Public Announcement of the Ministry of Industry and Information Technology of the People's Republic of China on 5 August 2010 (Exhibit CHN-446, No Joint Exhibit)
2010 Measures to Control the Extraction and Production of Refractory-grade Bauxite and Fluorspar	2010 Circular of the General Office of the State Council on Taking Comprehensive Measures to Control the Extraction and Production of Refractory-grade Bauxite and Fluorspar (Guo Ban Fan [2010] No. 1, promulgated by the General Office of the State Council on 2 January 2010 (Exhibits JE-167, CHN-87)
2010 Public Notice on Fluorspar Standards	2010 Public Notice on Fluorspar Industry Entrance Standards, Gong Lian Yuan (2010) No. 87, promulgated by various government ministries and agencies on 24 February 2010 (Exhibit CHN-96, No Joint Exhibit)
2010 Public Notice on Refractory-Grade Bauxite Standards	2010 Public Notice on Refractory- Grade Bauxite (High Alumina Bauxite) Industry Entrance Standards, Gong Lian Yuan (2010) No. 86, promulgated by various government ministries and agencies on 22 February 2010 (Exhibit CHN-275, No Joint Exhibit)
2010 Quota of High-alumina refractory-Grade Bauxite and Fluorspar	Circular on Passing Down the Controlling Quota of the 2010 Total Production Quantity of High-alumina refractory-Grade Bauxite and Fluorspar (Gong Xin Bu Yuan Han [2010] No. 244), promulgated by the Ministry of industry and Information Technology on 19 May 2010 (Exhibits JE-169, CHN-98)
2010 Quota on Extraction of High-alumina Bauxite Ores and Fluorspar Ores	Circular of the Ministry of Land and Resources on Passing Down the 2010 Controlling Quota of Total Extraction Quantity of High-alumina Bauxite Ores and Fluorspar Ores (Guo Tu Zi Han [2010] No. 187), promulgated by the Ministry of Land and Resources on 20 April 2010 (Exhibits JE-168, CHN-97)

Short Titles	Full Titles
2010 Recommendations of Quotas on Extraction of High-Alumina Bauxite and Fluorspar	Analysis and Recommendation Report on the 2010 Controlling Quota of Total Extraction Quantity of High- Alumina Bauxite and Fluorspar, issued by the Department of minerals Exploitation Administration of the Ministry of Land and Resources on 24 March 2010 (Exhibits JE-166, CHN-86)
2010 Second-Batch Bidding Qualifications and Review for Export Quotas	Public Notice on Qualifications and Initial Review for the 2010 Second-Batch Bidding for Export Quotas of Industrial Products, Notice No. 32, promulgated by MOFCOM on 25 May 2010 (Exhibit CHN-307, No Joint Exhibit)
2010 Tariff Implementation Plan	Circular of the State Council Tariff Commission on the 2010 Tariff Implementation Plan (Shui Wei Hui [2009] No. 28, promulgated by the Customs Tariff Commission of the State Council on 8 December 2009) (Exhibit CHN-5, No Joint Exhibit)
Adjustment and Revitalization Plan for Non- Ferrous Industry	Adjustment and Revitalization Plan for Non- Ferrous Industry, promulgated by the State Council (Exhibits JE-13, CHN-99)
Adjustment of Export Tariffs Circular	Circular of the State Council Tariff Commission on the Adjustment of Export Tariffs on Certain Commodities (Shui Wei Hui [2009] No. 6, promulgated by the Customs Tariff Commission of the State Council on 19 June 2009 (Exhibit CHN-1, No Joint Exhibit)
Administration of Collection of the Mineral Resources Compensation Fees	Provisions on the Administration of Collection of the Mineral Resources Compensation Fees, Order No. 150, promulgated by the State Council on 24 February 1994 (Exhibit CHN-92, No Joint Exhibit)
Administration of Registration of Mining of Mineral Resources	Measures for the Administration of Registration of Mining of Mineral Resources, Order No. 241, promulgated by the state Council on 12 February 1998 (Exhibit CHN-93, No Joint Exhibit)
Announcement of Publishing the Catalogue of High- Energy Consumption Electromechanical Equipment	Announcement of Publishing the Catalogue of Outdated High- Energy Consumption Electromechanical Equipment (Products) Subject to Elimination (First Batch), Gong Jie (2009) No. 67, promulgated by the Ministry of Industry and Information Technology on 4 December 2009 (Exhibit CHN-478, No Joint Exhibit)
Announcement on Printing Working Rules on Issuing Export Licenses	Announcement Regarding Printing "Working Rules on Issuing Export Licenses" (Ministry of Commerce, shangpeifa (2008) No. 398, October 9, 2008)
Assessment on Application of Export Quota Administration to Bauxite in 2010	Assessment on Relevant Issues Regarding Continued Application of Export Quota Administration to Bauxite in 2010, prepared by the Department of Foreign Trade of MOFCOM (Exhibit CHN-283, No Joint Exhibit)
Assessment on Application of Export Quota Administration to Silicon Carbide in 2010	Assessment on Relevant Issues Regarding Continued Application of Export Quota Administration to Silicon Carbide in 2010, prepared by the Department of Foreign Trade of MOFCOM (Exhibit CHN-286, No Joint Exhibit)
Bauxite Branch Charter	CCCMC Bauxite Branch Charter (Exhibit JE-112, No Chinese Exhibit)
CCCMC Bauxite Branch Coordination Measures	CCCMC Bauxite Branch Coordination Measures (Exhibit JE-108, No Chinese Exhibit)
CCCMC Branch-Specific Coordination Measures	CCCMC Branch-Specific Coordination Measures
CCCMC Export Coordination Measures	CCCMC Export Coordination Measures (Exhibit JE-107, No Chinese Exhibit)

Short Titles	Full Titles
CCCMC PVC Rules	Notice Regarding Rules for Contract Declaration for Chemicals-Related Verification and Stamp Products (China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters Petroleum and Chemicals Products Department, 30 December 2003) (Exhibit JE-127, No Chinese Exhibit)
CCCMC Resolution on Abolition of Coordination and Administration of Export Commodities	Resolution of the Fifth Standing Committee of the CCCMC on Abolishing Certain Documents Including Measures of the CCCMC on the Coordination and Administration of Export Commodities (28 June 2010) (Exhibit CHN-4, No Joint Exhibit)
Charter of the China Coking Industry Association	Charter of the China Coking Industry Association (Exhibit)
Circular of Second Batch of Trial Works on the Construction of Recycling System for Regenerated Resources	Circular of the General Office of the Ministry of Commerce on Organizing to Carry out the Second Batch of Trial Works on the Construction of Recycling System for Regenerated Resources (Shang Shang Mao Zi (2009) No. 53) (Exhibit CHN-527, No Joint Exhibit)
Circular of the Catalogue of Enterprises Income Tax Preference for Environmental, Conservation, Energy and Water Conservation, and Safe Production Equipments	Circular of the Ministry of Finance and the State Administration of Taxation on the Relevant Issues Concerning the Implementation of the Catalogue of Enterprise Income Tax Preference Specialized Environmental Protection Equipments, the Catalogue of Enterprise Income Tax Preference for Specialized Environmental Protection Equipments, the Catalogue of Enterprise Income Tax Preference for Specialized Energy and Water Conservation Equipments and the Catalogue of Enterprises Income Tax Preference for Specialized Safe Production Equipments (Cai Shui (2008) No. 48, promulgated by the Ministry of Finance and the State Administration of Taxation on 23 September 2008 (Exhibit CHN-477, No Joint Exhibit)
Circular on Distribution of Export Quota Bidding Implementation Rules	Circular of the Ministry of Foreign Trade and Economic Cooperation on Distribution of the "Implementation Rules of Export Quota Bidding for Industrial Products" (Ministry of Foreign Trade and Economic cooperation, issued on November 8, 2001)
Circular on Further Strengthening the Checks on Clean Production of Key Enterprises	Circular of the Ministry of Environmental Protection on Further Strengthening the Checks on Clean Production of Key Enterprises (Huan Fa (2008) No. 60, promulgated by the Ministry of Environmental Protection on 1 July 2008 (Exhibit CHN-475, No Joint Exhibit)
Circular on Implementation Plans and Measures regarding Energy Conservation and Pollutant Discharge Reduction	Circular of the State Council on Approving and Forwarding Implementation Plans and Measures for Statistics, Monitoring and Examination on Energy Conservation and Pollutant Discharge Reduction (Guo Fa (2007) No. 36), promulgated by the State Council on 17 November 2007 (Exhibit CHN-467, No Joint Exhibit)
Circular on Organizing the Recycled Economy Demonstration Trials	Circular on Organizing and Carrying out the Recycled Economy Demonstration Trials (Second Batch), Fa Gai Huan Zi (2007) No. 3420, promulgated on 13 December 2007 (Exhibit CHN-468, No Joint Exhibit)
Circular on Strengthening and Regulating the Administration of New Projects	Circular of the State Council on Strengthening and Regulating the Administration on Commencement of New Projects (Guo Ban Fa (2007) No. 64, promulgated by the General Office of the State Council on 17 November 2007 (Exhibit CHN-469, No Joint Exhibit)
Circular on Strengthening the Elimination of Outdated Capacity	Circular of the State Council on Further Strengthening the Elimination of Outdated Capacity, Guo Fa (2010) No. 7, promulgated by the State Council on 6 February 2010 (Exhibit CHN-479, No Joint Exhibit)

Short Titles	Full Titles
Circular on the Application for the Construction of Recycling System	Circular of the General Office of the Ministry of Finance and the General Office of the Ministry of Commerce on Relevant Issues Regarding the organization of the Application for the Construction of Recycling System for Regenerated Resources, 2010, No. 63 (Exhibit CHN-528, No Joint Exhibit)
Circular on the Measures to Control the Export of EPR products	Circular on the Measures to Control the Export of High-energy-consumption, High-pollution, and Resources-based Products Fa Gai Jing Mao (2005) No. 1482, promulgated by the NDRC, Ministry of Finance, MOFCOM, Ministry of Land and Resources, General Administration of Customs, State Administration of Taxation, State Environmental Protection Administration on 28 July 2005 (Exhibit CHN-444, No Joint Exhibit)
Circular on Trial Works on the Construction of Recycling System for Regenerated Resources	Circular on Organizing to Carry out the Trial Works on the Construction of Recycling System for Regenerated Resources (Shang Gai Zi 2006) No. 22 (Exhibit CHN-526, No Joint Exhibit)
Coking Industry Entrance Rules	Coking Industry Entrance Rules, Chuan Ye [2008] No. 15, promulgated by MIIT on 13 December 2008 (Exhibit CHN-192, No Joint Exhibit)
Customs Export Price Review Rules	Notice of the Rules on Price Reviews of Export Products by the Customs, (Ministry of Foreign Trade and Economic Cooperation guanzonghanzi No. 21, 1997) (No exhibit)
Customs Law	Customs Law of the People's Republic of China (adopted at the 19th Meeting of the Standing Committee of the Sixth National People's Congress on January 22, 1987, amended July 8, 2000) (Exhibits JE-68, CHN-14)
Customs Export Price Review Coordinating Rules	Rules for Coordination with Respect to Customs Price Review of Export Products, (Ministry of Foreign Trade and Economic Cooperation guanzonghanzi No. 21, 1997) (No exhibit)
Development Policies for the Iron and Steel Industry	Development Policies for the Iron and Steel Industry (Exhibit JE-18, No Chinese Exhibit)
Eleventh Five-Year Plan for Environmental Protection (2006-2010)	The National Eleventh Five-Year Plan for Environmental Protection (2006-2010), Guo Fa [2007] No. 37, promulgated by the State Council on 22 November 2007 (Exhibit CHN-123, No Joint Exhibit)
Energy Conservation Law	of the President of the People's Republic of China, promulgated by the National People's Congress Standing Committee on 28 October 2007 (Exhibit CHN-272, No Joint Exhibit)
Energy Consumption Caps on Coke	Energy Consumption Caps per Unit of Product for Coke (Exhibit CHN-470, No Joint Exhibit)
Energy Consumption Caps on Ferro-alloys	Energy Consumption Caps per Unit of Product for Ferro-alloys (Exhibit CHN-473, No Joint Exhibit)
Energy Consumption Caps on Magnesium	Energy Consumption Caps per Unit of Product for Magnesium Smelting Enterprises (Exhibit CHN-471, No Joint Exhibit)
Energy Consumption Caps Zinc Smelting	Energy Consumption Caps per Unit of Product for Zinc Smelting Enterprises (Exhibit CHN-472, No Joint Exhibit)
Environmental Protection Law	Environmental Protection Law of the People's Republic of China, Order No. 22 of the President of the People's Republic of China, promulgated by the National People's Congress Standing Committee on 26 December 1989 (Exhibit CHN-88, No Joint Exhibit)

Short Titles	Full Titles
Export Price Penalties Regulations	Interim Regulations of the Ministry of Foreign Trade and Economic Cooperation on Punishment for Conduct at Exporting at Lower-than-Normal Price (Ministry of Foreign Trade and Economic Cooperation, March 20, 1996) (Exhibits JE-113, CHN-350)
Export Quota Administration Measures	Measures for the Administration of Export Commodities Quotas (Order of the Ministry of Foreign Trade and Economic Cooperation No. 12, adopted at the 9th ministerial office meeting of the Ministry of Foreign Trade and Economic Cooperation of 2001 January 1, 2002) (Exhibits JE-76, CHN-312)
Export Quota Bidding Implementation Rules	Implementation Rules of Export Quota Bidding for Industrial Products (Ministry of Foreign Trade and Economic Cooperation, November 8, 2001) (Exhibits JE-78, CHN-305)
Export Quota Bidding Measures	Measures of Quota Bidding for Export Commodities (Decree of the Ministry of Foreign Trade and Economic Cooperation No. 11, adopted at the 9th ministerial office meeting of the Ministry of Foreign Trade and Economic Cooperation January 1, 2002) (Exhibits JE-77, CHN-304)
Foreign Trade Law	Foreign Trade Law of the People's Republic of China (adopted at the 8th Session of the Standing Committee of the Tenth National People's Congress on April 6, 2004, on July 1, 2004) (Exhibits JE-72, CHN-151)
Further Adjust of Import and Export Tariffs of 2008	"State will Further Adjust Customs Import and Export Tariffs as of 2008" 21 December 2007 (Exhibit CHN-146, No Joint Exhibit)
Guidance for Enhancing the Management of Raw Materials Industries	Guidance for Enhancing the Management of Raw Materials Industries (Exhibit JE-10, No Chinese Exhibit)
Guidelines of the Eleventh Five-Year Plan for National Economic and Social Development	Guidelines of the Eleventh Five-Year Plan for National Economic and Social Development, approved by the Fourth Session of the Tenth National People's Congress on 14 March 2006 (Exhibit CHN-144, No Joint Exhibit)
Guiding Opinions on Strengthening the Recycling for Regenerated Resources	Guiding Opinions on Strengthening the Recycling for Regenerated Resources (Exhibit CHN-525, No Joint Exhibit)
Law on Environmental Impact Assessments	Law of the People's Republic of China on Environmental Impact Assessments, Order No. 77 of the President of the People's Republic of China, promulgated by the National People's Congress Standing Committee on 28 October 2002 (Exhibit CHN-276, No Joint Exhibit)
Law on Promoting Clean Production	Law of the People's Republic of China on Promoting Clean Production, Order No. 72 of the President of the People's Republic of China, promulgated on 29 June 2002 (Exhibit CHN-271, No Joint Exhibit)
Law on Renewable Energies	Law of the People's Republic of China on Renewable Energies, Order No. 23 of the President of the People's Republic of China, promulgated by the National People's Congress Standing Committee on 26 December 2009 (Exhibit CHN-273, No Joint Exhibit)
Law on the Prevention and Control of Atmospheric Pollution	Law of the People's Republic of China on the Prevention and Control of Atmospheric Pollution, Order No. 87 of the President of the People's Republic of China, promulgated by the National People's Congress Standing Committee on 29 April 2000 (Exhibit CHN-268, No Joint Exhibit)

Short Titles	Full Titles
Law on the Prevention and Control of Environmental Pollution by Solid Wastes	Law of the People's Republic of China on the Prevention and Control of Environmental Pollution by Solid Wastes, Order No.31 of the President of the People's Republic of China, promulgated by the National People's Congress Standing Committee on 29 December 2004 (Exhibit CHN-270, No Joint Exhibit)
Law on the Prevention and Control of Water Pollution	Law of the People's Republic of China on the Prevention and Control of Water Pollution, Order No. 87 of the President of the People's Republic of China, promulgated by the National People's Congress Standing Committee on 28 February 2008 (Exhibit CHN-269, No Joint Exhibit)
Law on the Promotion of Recycle Economy	Law of the People's Republic of China on the Promotion of Recycle Economy, Order No. 4 of the President of the People's Republic of China, promulgated by the National People's Congress Standing Committee on 29 August 2008 (Exhibit CHN-101, No Joint Exhibit)
Measures for Administration of Licensing Entities	Measures for the Administration of the Organs for Issuing the Licences of Import and Export Commodities (Ministry of Foreign Trade and Economic Cooperation, waijingmaopeiguanhanzi (1999) No. 68, September 21, 1999) (Exhibits JE-75, CHN-358)
Measures for Administration of Trade Social Organizations	Measures for the Administration over Foreign Trade and Economic Social Organizations (Ministry of Foreign Trade and Economic Cooperation, February 26, 1991) (Exhibits JE-101, CHN-313)
Measures for the Administration of the Rates for Pollutant Discharge Fees	Measures for the Administration of the Levying Rates for Pollutant Discharge Fees, Order No. 31, promulgated by various government ministries and agencies on 28 February 2003 (Exhibit CHN-278, No Joint Exhibit)
Medium and Long Term Energy Conservation Plan	Medium and Long Term Energy Conservation Plan, Fa Gai Huan Zi [2004] No. 2505, promulgated by the NDRC on 10 November 2004 (Exhibit CHN-105, No Joint Exhibit)
Mineral Resources Law	Mineral Resources Law of the People's Republic of China, Order No. 74 of the President of the People's Republic of China, promulgated by the National People's Congress Standing Committee on 29 August 1996 (Exhibit CHN-78, No Joint Exhibit)
National Mineral Resources Plan	National Mineral Resources Plan, promulgated by the Ministry of Land and Resources on 11 April 2001 (Exhibit JE-17, CHN-94)
National Mineral Resources Plan (2008-2015)	Notice of the Ministry of Land and Resources on Promulgating and Implementing the National Mineral Resources Plan (2008-2015), Guo Tu Zi Fa [2008] No. 309, issued by the Ministry of Land and Resources on 31 December 2008 (Exhibit CHN-80, No Joint Exhibit)
Notice Adjusting the Mineral Resource Tax Rates on High-Alumina Bauxite and Fluorspar	Notice of the Ministry of Finance and the General Administration of Taxation on Adjusting the Applicable Tax Rates of the Mineral Resource Taxes on High- Alumina Bauxite and Fluorspar, promulgated by the Ministry of Finance and the General Administration, promulgated by the Ministry of Finance and the General Administration of Taxation on 11 May 2010 (Exhibit CHN-90, No Joint Exhibit)
Notice of Opinions of Authorities on the Integration of Exploitation of Mineral Resources	Notice of the General Office of the State Council on Forwarding the Opinions of the Ministry of Land and Resources and other Authorities on the Integration of Exploitation of Mineral Resources, Guo Ban Fa (2006) No. 108, promulgated by the General Office of the State Council on 31 December 2006 (Exhibit CHN-95, No Joint Exhibit)

Short Titles	Full Titles
Notice on Ceasing the Administration of PVC for the Export of Towels	Notice Regarding the Chamber of Commerce of Textile's Ceasing the Administration of Price Verification and Chop for the Export of Towels, issued by the CCCMMCIE on 2 June 2008 (Exhibit CHN-353, No Joint Exhibit)
Notice on Ceasing the Work of PVC for Export Commodities	Notice Regarding Ceasing the Work of Price Verification and Chop for Export Commodities, issued by the CCCIEMEP on 2 June 2008 (Exhibit CHN-426, No Joint Exhibit)
Notice on the Implementation of the Catalogue of Enterprises Tax Preferences for Integrated Utilization of Resources	Notice of the Ministry of Finance and the State Administration of Taxation on Relevant Issues Concerning the Implementation of the Catalogue of Enterprises Income Tax Preferences for Integrated Utilization of Resources (Cai Shui (2008) No. 47, promulgated by the Ministry of Finance, the State Administration of Taxation, the State Development and Reform Commission on 23 September 2008) (Exhibit CHN-476, No Joint Exhibit)
Online PVC Instructions	Online Verification and Certification Operating Steps (China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters) (Exhibit JE-123, No Chinese Exhibit)
Opinions of the State Council on Further Accelerating the Recycle Economy	Several Opinions of the State Council on Further Accelerating the Recycle Economy (Guo Fa (2005) No. 22) (Exhibit CHN-523, No Joint Exhibit)
Order No. 2 of 2010 of MOFCOM	Order No. 2 of 2010 (promulgated by MOFCOM on 12 September 2010) (Exhibit CHN-448, No Joint Exhibit)
Policies and Actions for Addressing Climate Change	China's Policies and Actions for Addressing Climate Change, promulgated by the State Council on 29 October 2008 (Exhibit CHN-420, No Joint Exhibit)
Pollutant Discharge Standards	Pollutant Discharge Standards implemented in China in relation to the Products at Issue (Exhibit CHN-484, No Joint Exhibit)
Program of Action for Sustainable Development in China	Program of Action for Sustainable Development in China in the Early 21st Century, Guo Fa [2003] No. 3, issued by the State Council on 14 January 2003 (Exhibit CHN-82, No Joint Exhibit)
Provisional Regulations on Resource Tax	Provisional Regulations of the People's Republic of China on Resource Tax, Order No. 139, promulgated by the State Council on 25 December 1993 (Exhibit CHN-89, No Joint Exhibit)
Provisional Rules on Export PVC	Provisional Rules on Export Price Verification and Chop for Key Products Subject to Price Review (Ministry of Foreign Trade and Economic Cooperation guanzonghanzi No. 21, 1997) (No exhibit)
Quota & License Administrative Bureau's Statement on the Issuance of Export License	Statement on Relevant Matters Regarding the Issuance of Export License (by the Quota & License Administrative Bureau of MOFCOM (20 July 2010) (Exhibit CHN-345, No Joint Exhibit)
Quota and License Administrative Bureau's Further Statement on Relevant Matters Regarding the Issuance of Export License	Further Statement on Relevant Matters Regarding the Issuance of Export License (by the Quota and License Administrative Bureau of MOFCOM (11 November 2010) (Exhibit CHN-529, No Joint Exhibit)

Short Titles	Full Titles
Regulation on Import and Export Administration	Regulation of the People's Republic of China on the Administration of the Import and Export of Goods (passed at the forty-sixth executive meeting of the State Council on October 31, 2001, January 1, 2002) (Exhibits JE-73, CHN-152)
Regulations for Personnel Management of Chambers of Commerce	Notice Regarding Printing and Distribution of Several Regulations for Personnel Management of Chambers of Commerce for Importers and Exporters (Ministry of Foreign Trade and Economic Cooperation, September 23, 1994) (Exhibits JE-102, CHN-315)
Regulations for the Administration of the Pollutant Discharge Fees	Regulations for the Administration of the Charging and Use of Pollutant Discharge Fees, Order No. 369 promulgated by the State Council on 2 January 2003 (Exhibit CHN-279, No Joint Exhibit)
Regulations of the Environmental Protection of Construction Projects	Regulations on the Administration of Environmental Protection of Construction Projects, State Council Order No. 253, promulgated by the State Council on 29 November 1998 (Exhibit CHN-277, No Joint Exhibit)
Regulations on Import and Export Duties	Regulations of the People's Republic of China on Import and Export Duties (Order of the State Council (2003) No. 392, adopted at the 26th executive meeting of the State Council on October 29, 2003, January 1, 2004) (Exhibits JE-67, CHN-13)
Rules for Coordination of Customs Price Review	Rules for Coordination with Respect to Customs Price Review of Export Products (Ministry of Foreign Trade and Economic Cooperation guanzonghanzi No. 21, 1997) (No Exhibits)
Rules for Implementation of Regulations on Resource Tax	Detailed Rules for the Implementation of the Provisional Regulations of the People's Republic of China on Resource Tax, Cai Fa [1993] No. 43, promulgated by the Ministry of Finance on 30 December 1993 (Exhibit CHN-91, No Joint Exhibit)
Rules on Price Reviews of Export Products	Notice on the Rules on Price Reviews of Export Products by the Customs (Ministry of Foreign Trade and Economic Cooperation guanzonghanzi No. 21, 1997) (No Exhibits)
Rules on the Administration of License Certificates	Rules on the Administration of import and Export License Certificates (Ministry of Foreign Trade and Economic Cooperation, waijingmaopeizi (1999) No. 87, December 6, 1999)
State Council Decision on Reform of the Foreign Trade System	Decision of the State Council on Various Questions on the Further Reform and Improvement of the Foreign Trade System (State Council, guofa (1990) No. 70, January 1, 1991) (Exhibit JE-99, No Chinese Exhibit)
Various Provisions on the Strengthening of Export Product Coordination and Management	Notice on the Issuance of "Various Provisions on the Strengthening of Export Product Coordination and Management" (Ministry of Foreign Trade Economic Relations and Trade, jinfchufa (1991) No. 52, February 22, 1991) (Exhibit JE-100, No Chinese Exhibit)

TABLE OF ABBREVIATIONS

Abbreviations	Description
Accession Protocol	Protocol on the Accession of the People's Republic of China
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
BOP Understanding	Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994
CCCMC	China Chamber of Commerce of Metals Minerals & Chemicals Importers & Exporters
China	People's Republic of China
Complainants	European Union, Mexico, and the United States
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EKC	Environmental Kuznets Curve
EPR products	Energy-intensive, highly-polluting, resource-based products
EU	European Union
GATT 1994	General Agreement on Tariffs and Trade 1994
Import Licensing Agreement	Agreement on Import Licensing Procedures
MEP	Minimum export price
MOFCOM	Ministry of Commerce of the People's Republic of China
MOFTEC	Ministry of Trade and Economic Cooperation
SCM Agreement	Agreement on Subsidies and Countervailing Measures
US	United States
US NRC	United States National Research Council
Working Party Report	Report of the Working Party on the Accession of China
WTO	World Trade Organization
WTO Agreement	Agreement Establishing the World Trade Organization

I. INTRODUCTION

A. COMPLAINTS OF THE UNITED STATES, THE EUROPEAN UNION AND MEXICO

1.1 On 23 June 2009, the United States and the European Communities² and on 21 August 2009, Mexico, each requested consultations with the People's Republic of China ("China")³, pursuant to Article 1 and Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Article XXII of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") with respect to China's restraints on the export from China of various forms of bauxite, coke, fluor spar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus, and zinc.

1.2 On 4 November 2009, the United States, the European Communities and Mexico requested the Dispute Settlement Body ("DSB") to establish a panel pursuant to Article 6 of the DSU.

B. ESTABLISHMENT AND COMPOSITION OF THE PANEL

1.3 At its meeting of 21 December 2009, the DSB established a single panel pursuant to the requests of the United States in document WT/DS394/7, the European Communities in document WT/DS395/7 and Mexico in document WT/DS398/6, in accordance with Article 9.1 of the DSU. At that meeting, the parties agreed that the Panel should have standard terms of reference. The terms of reference are, therefore, the following:

"To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the United States in document WT/DS394/7, the European Communities in document WT/DS395/7 and Mexico in document WT/DS398/6, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

1.4 On 19 March 2010, the United States, the European Union and Mexico requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU.

1.5 On 29 March 2010, the Director-General accordingly composed the Panel as follows:

Chairman: Mr Elbio Rosselli

Members: Ms Dell Higgie
Mr Nugroho Wisnumurti

1.6 Argentina, Brazil, Canada, Chile, Colombia, Ecuador, the European Union (with respect to WT/DS394 and WT/DS398), India, Japan, Korea, Mexico (with respect to WT/DS394 and WT/DS395), Norway, Chinese Taipei, Turkey, the Kingdom of Saudi Arabia and the United States (with respect to WT/DS395 and WT/DS398) reserved their rights to participate in the Panel proceedings as third parties.

² On 1 December 2009, the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (done at Lisbon, 13 December 2007) entered into force. On 29 November 2009, the WTO received a Verbal Note (WT/L/779) from the Council of the European Union and the Commission of the European Communities stating that, by virtue of the Treaty of Lisbon, as of 1 December 2009, the European Union replaces and succeeds the European Community.

³ WT/DS394/1, WT/DS395/1 and WT/DS398/1.

1.7 Following the first substantive meeting with the parties, Japan on 17 September 2010, and Canada on 20 September 2010, requested the Panel to grant them enhanced third-party rights in order to participate in the second substantive meeting of the Panel with the parties. In a letter dated 24 September 2010, the Panel informed Japan and Canada that it had declined to accept their requests. The Panel informed these third parties that, *inter alia*, granting enhanced third-party rights at this stage of the proceedings would lead to delays and would have an important impact on the Panel's timetable.

1.8 The Panel met with the parties on 31 August and 2 September 2010 and 22 to 23 November 2010. It met with the third parties on 1 September 2010.

1.9 The Panel issued the descriptive part of its reports to parties and third parties on 20 December 2010. The Panel issued the interim panel reports to the parties on 18 February 2011. The Panel submitted its final reports to the parties on 1 April 2011. The Panel Reports were circulated to WTO Members on 5 July 2011.

C. PROCESS FOR THE PRELIMINARY RULING ON THE PANEL'S TERMS OF REFERENCE WITH RESPECT TO THE MEASURES AND PRODUCTS AT ISSUE

1.10 At the DSB meeting of 21 December 2009, China informed the DSB of its intention to seek a preliminary ruling on the adequacy of the complainants' requests for the establishment of a panel and their consistency with the requirements of Article 6.2 of the DSU.⁴

1.11 On 30 March 2010, China filed a request for a preliminary ruling.⁵ The complainants submitted a joint response to China's request.⁶ The parties were invited to comment on each others' written argumentation; China commented on the complainants' submission on 23 April 2010. The Panel invited the third parties to comment on China's request and on the complainants' joint response. On 23 April 2010, Korea and Japan submitted written submissions on the preliminary ruling request. On 29 April 2010, the Panel held a hearing with the parties, as well as a separate session with the third parties on China's request. During this session with the third parties, Japan and Korea delivered oral statements. On the same date, the Panel sent written questions to the parties.⁷ The parties responded to the Panel's questions on 3 May 2010⁸ and submitted comments on each other's responses on 5 May 2010.⁹

1.12 The Panel issued its preliminary ruling to the parties on 7 May 2010.¹⁰ In its communication to the parties, the Panel informed the parties of its intention to rule on China's request in two phases. The Panel addressed, in a first phase, those issues that it considered were relevant to the Panel's jurisdiction that could not be clarified by the parties' subsequent first written submissions or at any other stage during this panel process.

⁴ WT/DSB/M/277, para. 74.

⁵ Communication from China to the Panel: China's request for a preliminary ruling pursuant to Article 6.2 of the DSU, 30 March 2010.

⁶ Joint Communication from the United States, European Union, and Mexico to the Request for a Preliminary Ruling submitted by China, 21 April 2010.

⁷ Communication from the Panel to the parties: 29 April 2010. The Panel informed the parties during the hearing of its intention to provide written questions. The parties did not object.

⁸ Communication from China to the Panel and Joint Communication from the United States, European Union, and Mexico to the Panel: 3 May 2010.

⁹ Communication from China to the Panel and Joint Communication from the United States, European Union, and Mexico to the Panel: 5 May 2010.

¹⁰ Communication from the Panel to the parties and third parties: 7 May 2010.

1.13 The first phase of the preliminary ruling, which was circulated as WTO document WT/DS394/9, WT/DS395/9 and WT/DS398/9, is attached to these reports as an annex (see List of Annexes, pages ix and x). The Panel issued the second phase of its preliminary ruling to the parties on 1 October 2010. This second phase was not initially circulated at the request of the United States and Mexico.¹¹ Following consultation with the parties, the second phase of the preliminary ruling was circulated only to the third parties. The second phase of the Panel's preliminary ruling is attached to these reports as an annex (see List of Annexes, pages ix and x).

II. FACTUAL ASPECTS

A. BACKGROUND

2.1 This dispute concerns China's use of certain export restraints on the exportation of certain forms of bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus and zinc (the "raw materials").¹² The complainants identify the following as four types of restraints that China imposes on the exportation of these raw materials: (1) export duties; (2) export quotas; (3) export licensing; and (4) minimum export price requirements. The complainants challenge the existence of these restraints as well as aspects of the allocation and administration of export quotas, export licences and minimum export prices, and the alleged non-publication of certain measures.

B. PRODUCTS AT ISSUE

2.2 The various forms of the nine raw materials at issue either occur naturally or have undergone initial processing. The following chart identifies the particular raw materials at issue in this dispute by category, product name, product name short form, 2009 Chinese HS Number¹³, and 2009 Chinese Commodity Codes.¹⁴ This chart takes into account the parties' submissions, responses to questions and the Panel's preliminary ruling (discussed in paragraphs 1.10 to 1.13 above).

Raw Material Category	Product Name	Product Name Short Form	Chinese HS No.	Chinese Customs Commodity Code
Bauxite	Refractory-grade clay	Refractory-grade clay	2508.3000	2508.30.00.00
	Aluminium ores and concentrates	Aluminium ores and concentrates	2606.0000	2606.00.00.00
	Ash and residues primarily containing aluminium	Aluminium ash and residues	2620.4000	N/A
Coke	Coke and semi-coke made from coal whether or not agglomerated	Coke	2704.0010	2704.00.10.00
Fluorspar	Fluorspar containing, by weight ≤ 97% calcium fluoride	Met-spar	2529.2100	2529.21.00.00
	Fluorspar containing, by weight > 97% calcium fluoride	Acid-spar	2529.2200	2529.22.00.00

¹¹ Communication from the United States, dated 12 October 2010; Communication from Mexico, dated 21 October 2010. See also Communications from China, dated 13 October 2010 and 15 October 2010 opposing this request.

¹² These raw materials are discussed in further detail in paragraph 2.2 below. See also Exhibit JE-4.

¹³ See 2009 Tariff Implementation Program, Table 7 (Exhibit JE-21).

¹⁴ See 2009 Export Licensing List Notice, Appendix (Exhibit JE-22).

Raw Material Category	Product Name	Product Name Short Form	Chinese HS No.	Chinese Customs Commodity Code
Magnesium	Magnesium containing, by weight, at least 99.8% magnesium	Magnesium metal	8104.1100	N/A
	Other unwrought magnesium	Unwrought magnesium	8104.1900	N/A
	Magnesium waste and scrap	Magnesium waste and scrap	8104.2000	N/A
Manganese	Manganese ores and concentrates, including ferromanganese ores and concentrates containing more than 20% manganese by dry weight	Manganese ores and concentrates	2602.0000	N/A
	Unwrought manganese; manganese waste and scrap; powder	Manganese metal	8111.0010	8111.00.10.10 (unwrought waste & scrap) 8111.00.10.90 (unwrought; powder)
Silicon Carbide	Silicon carbide	Silicon carbide	N/A	2849.20.00.00
	Crude silicon carbide (of which the silicon carbide content is greater than 15% by weight)	Crude silicon carbide	N/A	3824.90.99.10
Silicon Metal	Silicon containing by weight less than 99.99% silicon	Silicon metal	2804.6900	N/A
Yellow Phosphorus	Yellow phosphorus (white phosphorus)	Yellow phosphorus	2804.7010	N/A
Zinc	Zinc ores and concentrates (excluding gray feed zinc oxide containing more than 80% zinc oxide)	Zinc ores and concentrates excluding gray feed grade zinc oxide	2608.0000 ex	2608.00.00.90
	Gray feed zinc oxide containing more than 80% zinc oxide	Gray feed grade zinc oxide	2608.0000 ex	2608.00.00.01
	Unwrought zinc containing by weight 99.995% or more zinc	Unwrought \geq 99.995% zinc	7901.1110	7901.11.10.00
	Unwrought zinc containing by weight 99.99% or more but less than 99.995% zinc	Unwrought 99.99% < zinc content \leq 99.995% zinc	7901.1190	7901.11.90.00
	Unwrought zinc containing by weight less than 99.99% zinc	Unwrought < 99.99% zinc	7901.1200	7901.12.00.00
	Unwrought zinc alloys	Unwrought zinc alloys	7901.2000	7901.20.00.00
	Zinc waste and scrap	Zinc waste and scrap	7902.0000	N/A
	Hard zinc ash and residues	Hard zinc spelter	2620.1100	N/A
	Other zinc ash and residues	Other zinc ash and residues	2620.1900	N/A

C. MEASURES AT ISSUE

2.3 The United States, the European Union and Mexico collectively identified 40 specific measures in their Panel Requests¹⁵ in connection with their claims concerning export duties, export quotas, export licensing requirements and minimum export price requirements. These include measures concerning the imposition of these restraints, as well as aspects of the allocation, administration and the alleged non-publication of certain measures. In response to questions from the Panel following the first and second substantive meetings, the complainants narrowed down the measures for which they request rulings and recommendations.¹⁶

2.4 The complainants identify the following measures in their requests for establishment of the Panel:¹⁷

(a) The imposition of export duties:

- *Customs Law*
- *Regulations on Import and Export Duties*
- *2009 Tariff Implementation Program*
- *Foreign Trade Law*
- *Regulations on Import and Export Duties*
- *2008 Export License Administration Measures*
- *Export Quota Bidding Measures*
- *Export Quota Bidding Implementation Rules*
- *2009 Export Quota Amounts*
- *2009 Export Licensing Catalogue*
- *2009 First Round Export Quota Bidding Announcement*
- *2009 Second Round Export Quota Bidding Announcement*
- *Circular on Distribution of Export Quota Bidding Implementation Rules*
- *2009 First Round Fluorspar Bidding Procedures*
- *2009 First Round Bauxite Bidding Procedures*
- *2009 First Round Silicon Carbide Bidding Procedures*
- *2009 Announcement of Second Bidding Round for Talc and Silicon Carbide*
- *2009 Second Round Silicon Carbide Bidding Procedures*
- *2010 Export Quota Amounts*

(b) The imposition of export quotas:

¹⁵ WT/DS394/7, WT/DS395/7, WT/DS398/6.

¹⁶ See complainants' responses to Panel question No. 1 following the first substantive meeting and complainants' responses to Panel question No. 2, following the second substantive meeting.

¹⁷ The full titles of the measures referred to below can be found on pages xxi-xxxi. The Panel's terms of reference were subsequently modified either at the request of the parties or as a result of the Panel's rulings and findings.

- *Foreign Trade Law*
 - *Regulation on Import and Export Administration*
 - *2008 Export License Administration Measures*
 - *Export Quota Administration Measures*
 - *Export Quota Bidding Measures*
 - *Measures for Administration of Licensing Entities*
 - *Export Quota Bidding Implementation Rules*
 - *2008 Export Licensing Working Rules*
 - *Rules on the Administration of License Certificates*
 - *2009 Export Quota Amounts*
 - *2009 First Batch Coke Export Quotas*
 - *2009 Coke Export Quota Application Procedure*
 - *2009 Export Licensing Catalogue*
 - *2009 Graded Export Licensing Entities Catalogue*
 - *Announcement on Printing Working Rules on Issuing Export Licenses*
 - *2009 First Round Export Quota Bidding Announcement*
 - *2009 Second Round Export Quota Bidding Announcement*
 - *Circular on Distribution of Export Quota Bidding Implementation Rules*
 - *2009 First Round Fluorspar Bidding Procedures*
 - *2009 First Round Bauxite Bidding Procedures*
 - *2009 First Round Silicon Carbide Bidding Procedures*
 - *2009 Announcement of Second Bidding Round for Talc and Silicon Carbide*
 - *2009 Second Round Silicon Carbide Bidding Procedures*
 - *2009 Second Batch Coke Export Quotas for FIEs*
 - *2010 Export Quota Amounts*
- (c) Additional restraints imposed on exportation:
- *Foreign Trade Law*
 - *Regulations on Import and Export Duties*
 - *2008 Export License Administration Measures*
 - *Export Quota Administration Measures*
 - *Export Quota Bidding Measures*
 - *Measures for Administration of Licensing Entities*
 - *2008 Export Licensing Working Rules Division*
 - *Rules on the Administration of License Certificates*

- *Export Quota Bidding Implementation Rules*
- *2009 Export Quota Amounts*
- *2009 First Batch Coke Export Quotas*
- *2009 Coke Export Quota Application Procedure*
- *2009 Export Licensing Catalogue*
- *Licensing Entities Catalogue*
- *Announcement on Printing Working Rules on Issuing Export Licenses*
- *2009 First Round Export Quota Bidding Announcement*
- *2009 Second Round Export Quota Bidding Announcement*
- *Circular on Distribution of Export Quota Bidding Implementation Rules*
- *2009 First Round Fluorspar Bidding Procedures*
- *2009 First Round Bauxite Bidding Procedures*
- *2009 First Round Silicon Carbide Bidding Procedures*
- *2009 Announcement of Second Bidding Round for Talc and Silicon Carbide*
- *2009 Second Round Silicon Carbide Bidding Procedures*
- *2009 Second Batch Coke Export Quota for FIEs*
- *2010 Export Quota Amounts*
- *1994 CCCMC Charter*
- *2001 CCCMC Charter*
- *Charter of the China Coking Industry Association*
- *Measures for Administration of Trade Social Organizations*
- *Regulations for Personnel Management of Chambers of Commerce*
- *Export Price Penalties Regulations*
- *CCCMC PVC Rules*
- *Online PVC Instructions*
- *Rules for Coordination of Customs Price Review*
- *Rules on Price Review of Export Products*
- *Various Provisions on the Strengthening of Export Product Coordination and Management*
- *State Council Decision on Reform of the Foreign Trade System*

D. ADDITIONAL LEGAL INSTRUMENTS IDENTIFIED BY CHINA¹⁸

2.5 China has identified various measures that it considers relevant to the Panel's assessment.

¹⁸ The full title of the measures referred to below can be found on pages xxi–xxxi.

- (a) The imposition of export duties:
- *2010 Tariff Implementation Plan*
- (b) The imposition of export quotas:
- *2010 Catalogue*
 - *2010 Export Quota Amounts for Agricultural and Industrial Products*
 - *Application of Export Quota Administration to Bauxite in 2010*
 - *2010 First-Batch Export Quota Bidding of Bauxite*
 - *Qualifications and Review for the 2010 Second- Batch Bidding for Export Quotas*
 - *Qualifications for the 2010 First-Batch Bidding for Export Quotas of Industrial Products*
 - *2010 Application Qualifications and Procedures for Export Quota of Coke*
 - *2010 First-Batch Export Quota of Coke*
 - *2010 Catalogue of Goods Subject to Export Licensing Administration*
 - *2010 First-Batch Export Quotas of Industrial Products for Foreign Invested Enterprises*
 - *Public Notice on 2010 First-Batch Export Quota Bidding of Silicon Carbide*
- (c) The administration and allocation of export quotas:
- *2010 Catalogue*
 - *2010 Export Quota Amounts for Agricultural and Industrial Products*
 - *2010 First-Batch Export Quota Bidding of Bauxite*
 - *Qualifications and Review for the 2010 Second- Batch Bidding for Export Quotas*
 - *Qualifications for the 2010 First-Batch Bidding for Export Quotas of Industrial Products*
 - *2010 CCCMC Charter*
 - *2010 Application Qualifications and Procedures for Export Quota of Coke*
 - *2010 First-Batch Export Quota of Coke*
 - *2010 Catalogue of Goods Subject to Export Licensing Administration*
 - *2010 First-Batch Export Quotas of Industrial Products for Foreign Invested Enterprises*
 - *Public Notice on 2010 First-Batch Export Quota Bidding of Silicon Carbide*

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1 The parties' requests for findings and recommendations as set out below, take into account the parties' first written submissions as well their responses to Panel question No.1 following the second substantive meeting.

A. COMPLAINANTS

1. The United States and Mexico

3.2 The United States and Mexico request that the Panel make findings and recommendations with respect to the following measures:

The United States' and Mexico's claims	Measures <i>i.e.</i> , Legal Instruments
Export Duties¹⁹	
<p>The application of temporary export duties to bauxite, coke, fluorspar, magnesium, manganese, silicon metal, and zinc, is inconsistent with Paragraph 11.3 of China's Accession Protocol.</p> <p>The application of special export duties to yellow phosphorus, is inconsistent with Paragraph 11.3 of China's Accession Protocol.</p>	<p><i>Customs Law</i> (Articles 2, 9, 23) <i>Export Quota Administration Measures</i> (Articles 2, 4, 9, 11) <i>2009 Tariff Implementation Program</i></p>
Export Quotas²⁰	
<p>The application of export quotas to bauxite, coke, fluorspar and silicon carbide and the application of an export prohibition on zinc is inconsistent with Article XI:1 of the GATT 1994, and with Paragraph 1.2 of China's Accession Protocol and Paragraphs 162 and 165 of China's Working Party Report.</p>	<p><i>Foreign Trade Law</i> (Articles 2, 14-19, 34, 61, 63, 64) <i>Regulation on Import and Export Administration</i> (Articles 4, 35-41, 43, 44, 64-66) <i>2008 Export Licence Administration Measures</i> <i>2008 Export Licensing Working Rules</i> <i>Export Quota Administration Measures</i> <i>Export Quota Bidding Measures</i> <i>Export Quota Bidding Implementation Rules</i> <i>2009 Export Quota Amounts</i> <i>2009 First Batch Coke Export Quotas</i> <i>2009 Second Batch Coke Export Quota</i> <i>2009 First Batch Coke Export Quotas for FIEs</i> <i>2009 Coke Export Quota Application Procedure</i> <i>2009 Export Licensing Catalogue</i> <i>2009 Graded Export Licensing Entities Catalogue</i> <i>2009 First Round Export Quota Bidding Announcement</i> <i>2009 Second Round Export Quota Bidding Announcement</i> <i>2009 First Round Fluorspar Bidding Procedures</i> <i>2009 First Round Bauxite Bidding Procedures</i> <i>2009 First Round Silicon Carbide Bidding Procedures</i> <i>2009 Announcement of Second Bidding Round for Talc and Silicon Carbide</i> <i>2009 Second Round Silicon Carbide Bidding Procedures</i> <i>2009 Second Batch Coke Export Quotas for FIEs</i></p>

¹⁹ The specific forms of the raw materials subject to the United States' and Mexico's claims are identified in Exhibit JE-5.

²⁰ The specific forms of the raw materials subject to the United States' and Mexico's claims are identified in Exhibit JE-6.

The United States' and Mexico's claims	Measures <i>i.e.</i> , Legal Instruments
Export Quotas: Application Conditions²¹	
<p>The requirements to demonstrate minimum export performance and fulfil a minimum capital requirement to obtain a coke quota, are inconsistent with Paragraphs 1.2 and 5.1 of China's Accession Protocol and Paragraphs 83 and 84 of China's Working Party Report.</p> <p>The requirements to demonstrate prior export performance and minimum export capital requirements to obtain a quota for exportation of bauxite, fluorspar and silicon carbide are inconsistent with Paragraphs 1.2 and 5.1 of China's Accession Protocol and Paragraphs 83 and 84 of China's Working Party Report.</p>	<p><i>Foreign Trade Law</i> (Articles 2, 14-19, 34, 61, 63, 64) <i>Regulation on Import and Export Administration</i> (Articles 4, 35-41, 43, 44, 64-66) <i>2009 Export Quota Amounts</i> <i>Export Quota Administration Measures</i> <i>2009 Export Licensing Catalogue</i> <i>2009 Graded Export Licensing Entities Catalogue</i> <i>2008 Export Licence Administration Measures</i> <i>2008 Export Licensing Working Rules</i> <i>2009 Coke Export Quota Application Procedure</i> <i>2009 First Batch Coke Export Quotas</i> <i>2009 Second Batch Coke Export Quota</i> <i>2009 First Batch Coke Export Quotas for FIEs</i> <i>2009 Second Batch Coke Export Quotas for FIEs</i> <i>Export Quota Bidding Measures</i> <i>Export Quota Bidding Implementation Rules</i> <i>2009 First Round Export Quota Bidding Announcement</i> <i>2009 Second Round Export Quota Bidding Announcement</i> <i>2009 First Round Fluorspar Bidding Procedures</i> <i>2009 First Round Bauxite Bidding Procedures</i> <i>2009 First Round Silicon Carbide Bidding Procedures</i> <i>2009 Announcement of Second Bidding Round for Talc and Silicon Carbide</i> <i>2009 Second Round Silicon Carbide Bidding Procedures</i> <i>1994 CCCMC Charter</i> <i>2001 CCCMC Charter</i></p>
Export Quotas: Administration²²	
<p>The involvement of the CCCMC in determining whether an applicant satisfies the requisite conditions for the bauxite, coke, fluorspar and silicon carbide export quotas constitutes partial and unreasonable administration in contravention of Article X:3(a) of the GATT 1994.</p>	<p><i>Foreign Trade Law</i> (Articles 2, 14-19, 34, 61, 63, 64) <i>Regulation on Import and Export Administration</i> (Articles 4, 35-41, 43, 44, 64-66) <i>2008 Export Licence Administration Measures</i> <i>2008 Export Licensing Working Rules</i> <i>2009 Export Licensing Catalogue</i> <i>2009 Graded Export Licensing Entities Catalogue</i> <i>2009 Export Quota Amounts</i> <i>2009 Coke Export Quota Application Procedure</i> <i>2009 First Batch Coke Export Quotas</i> <i>2009 Second Batch Coke Export Quota</i> <i>2009 First Batch Coke Export Quotas for FIEs</i> <i>2009 Second Batch Coke Export Quotas for FIEs</i> <i>2009 Coke Export Quota Application Procedure</i></p>

²¹ The specific forms of the raw materials subject to the United States' and Mexico's claims are identified in Exhibit JE-6.

²² The specific forms of the raw materials subject to the United States' and Mexico's claims are identified in Exhibit JE-6.

The United States' and Mexico's claims	Measures <i>i.e.</i> , Legal Instruments
	1994 CCCMC Charter 2001 CCCMC Charter
	Export Quota Bidding Measures Export Quota Bidding Implementation Rules 2009 First Round Export Quota Bidding Announcement 2009 Second Round Export Quota Bidding Announcement 2009 First Round Fluorspar Bidding Procedures 2009 First Round Bauxite Bidding Procedures 2009 First Round Silicon Carbide Bidding Procedures 2009 Announcement of Second Bidding Round for Talc and Silicon Carbide 2009 Second Round Silicon Carbide Bidding Procedures
Export Quota Bid Winning Fee²³	
<p>The requirement for an exporter applicant to pay a bid-winning price for the right to export bauxite, fluorspar and silicon carbide is inconsistent with Article VIII:1(a) of the GATT 1994 and with Paragraph 11.3 of China's Accession Protocol.</p>	Foreign Trade Law (Articles 2, 14-19, 34, 61, 63, 64) Regulation on Import and Export Administration (Articles 4, 35-41, 43, 44, 64-66) 2008 Export Licence Administration Measures 2008 Export Licensing Working Rules Export Quota Bidding Measures Export Quota Bidding Implementation Rules 2009 Export Quota Amounts 2009 Export Licensing Catalogue 2009 Graded Export Licensing Entities Catalogue 2009 First Round Export Quota Bidding Announcement 2009 Second Round Export Quota Bidding Announcement 2009 First Round Fluorspar Bidding Procedures 2009 First Round Bauxite Bidding Procedures 2009 First Round Silicon Carbide Bidding Procedures 2009 Announcement of Second Bidding Round for Talc and Silicon Carbide 2009 Second Round Silicon Carbide Bidding Procedures 1994 CCCMC Charter 2001 CCCMC Charter

²³ The specific forms of the raw materials subject to the United States' and Mexico's claims are identified in Exhibit JE-6.

The United States' and Mexico's claims	Measures <i>i.e.</i> , Legal Instruments
Export Licensing	
<p>The authorization granted to MOFCOM to impose various conditions on the exportation of bauxite, coke, fluorspar, manganese, silicon carbide and zinc including the quantities of the products that can be exported, the price of products that can be exported, qualifications that exporters must possess in order to export, or any other conditions is inconsistent with Article XI:1 of the GATT 1994, and with Paragraph 1.2 of China's Accession Protocol and Paragraphs 162 and 165 of China's Working Party Report.</p>	<p><i>Foreign Trade Law</i> (Articles 2, 14-19, 34, 61, 63, 64) <i>Regulation on Import and Export Administration</i> (Articles 4, 35-41, 43, 44, 64-66) <i>2008 Export Licence Administration Measures</i> <i>Measures for Administration of Licensing Entities</i> <i>2008 Export Licensing Working Rules</i> <i>2009 Graded Export Licensing Entities Catalogue</i> <i>2009 Export Licensing Catalogue</i></p>
Minimum Export Pricing²⁴: Imposition of an MEP Requirement	
<p>The imposition of a minimum export price requirement on exporters of bauxite, coke, fluorspar, magnesium, silicon carbide, yellow phosphorus and zinc is inconsistent with Article XI:1 of the GATT 1994.</p>	<p><i>Measures for Administration of Trade Social Organizations</i> (Articles 2,8, 14, 16, 21) <i>Regulations for Personnel Management of Chambers of Commerce</i> (Articles 4, 8, 13, 17) <i>1994 CCCMC Charter</i> <i>2001 CCCMC Charter</i> <i>Export Price Penalties Regulations</i> <i>Measures for Administration of Licensing Entities</i> <i>Rules for Coordination of Customs Price Review</i> Customs Export Price Review Rules Provisional Rules on Export PVC CCCMC PVC Rules Online PVC Instructions CCCMC Export Coordination Measures CCCMC Bauxite Branch Coordination Measures Bauxite Branch Charter "System of self-discipline"</p>
Minimum Export Pricing: Administration of the MEP Requirement	
<p>The use of the Price Verification and Chop procedure to administer yellow phosphorus exports by the CCCMC is inconsistent with Article X:3(a) of the GATT 1994.</p>	<p><i>Measures for Administration of Trade Social Organizations</i> <i>Regulations for Personnel Management of Chambers of Commerce</i> <i>1994 CCCMC Charter</i> <i>2001 CCCMC Charter</i> <i>Customs Export Price Review Rules</i> <i>Customs Export Price Review Coordinating Rules</i> Provisional Rules on Export PVC Online PVC Instructions</p>
Minimum Export Pricing: Publication of the MEP requirement	
<p>The failure to publish certain measures providing rules and details on how the CCCMC coordinates export prices is inconsistent with Article X:1 of the GATT 1994.</p>	<p><i>CCCMC PVC Rules</i> <i>CCCMC Branch-Specific Coordination Measures</i> <i>Customs Export Price Review Rules</i></p>

²⁴ The specific forms of the raw materials subject to the United States' and Mexico's claims are identified in Exhibit JE-7.

The United States' and Mexico's claims	Measures <i>i.e.</i> , Legal Instruments
	<i>Customs Export Price Review Coordinating Rules</i> <i>Provisional Rules on Export PVC</i>

2. The European Union

3.3 The European Union requests that the Panel make the following findings:

The European Union's claim	Measures <i>i.e.</i> , Legal Instruments
Export Duties²⁵	
<p>The application of temporary export duties to bauxite, coke, fluorspar, magnesium, manganese, silicon metal, and zinc is inconsistent with Paragraph 11.3 of China's Accession Protocol.</p> <p>The application of special export duties to yellow phosphorus is inconsistent with Paragraph 11.3 of China's Accession Protocol.</p>	<p><i>Customs Law</i> (Articles 2, 3, 53, 55, 60)</p> <p><i>Export Quota Administration Measures</i> (Articles 4, 9, 11, 36, 37)</p> <p><i>2009 Tariff Implementation Program</i></p>
Export Quotas²⁶	
<p>The application of export quotas to bauxite, coke, fluorspar and silicon carbide and the application of an export prohibition on zinc is inconsistent with Article XI:1 of the GATT 1994, and with Paragraph 1.2 of China's Accession Protocol and Paragraphs 162 and 165 of China's Working Party Report.</p> <p>The failure to publish the total amount and procedure for the allocation of a zinc export quota is inconsistent with Article X:1 of the GATT 1994.</p>	<p><i>Foreign Trade Law</i> (Articles 19, 61)</p> <p><i>Regulation on Import and Export Administration</i> (Articles 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 64, 65, 66, 67, 70)</p> <p><i>Export Quota Administration Measures</i> (Articles 4, 9, 11, 17, 18, 19, 20, 21, 22, 23, 25, 26, 31)</p> <p><i>Export Quota Bidding Measures</i> (Articles 3, 8, 9, 10, 11, 13, 14, 16)</p> <p><i>Export Quota Bidding Implementation Rules</i> (Articles 2, 3, 4, 5, 6)</p> <p><i>2009 Export Licensing Catalogue</i></p> <p><i>2009 Coke Export Quota Application Procedure</i></p> <p><i>2010 First Batch Coke Export Quota for FIEs</i></p> <p><i>2009 First Batch Coke Export Quotas</i></p> <p><i>2009 Second Batch Coke Export Quota</i></p> <p><i>2009 First Batch Coke Export Quotas for FIEs</i></p> <p><i>2009 Second Batch Coke Export Quotas for FIEs</i></p> <p><i>2009 First Round Export Quota Bidding Announcement</i></p> <p><i>2009 Second Round Export Quota Bidding Announcement</i></p> <p><i>2009 Export Quota Amounts</i></p> <p><i>2009 First Round Bauxite Bidding Procedures</i></p> <p><i>2009 Announcement of Second Bidding Round for Talc and Silicon Carbide</i></p> <p><i>2009 First Round Silicon Carbide Bidding Procedures</i></p> <p><i>2009 Second Round Silicon Carbide Bidding</i></p>

²⁵ The specific forms of the raw materials subject to the European Union's claims are identified in Exhibit JE-5.

²⁶ The specific forms of the raw materials subject to the European Union's claims are identified in Exhibit JE-6.

The European Union's claim	Measures i.e., Legal Instruments
	<p><i>Procedures</i> <i>2009 First Round Fluorspar Bidding Procedures</i></p>
Export Quotas: Allocation²⁷	
<p>The requirement that exporter applicants demonstrate "certain levels of volumes exported or supplied for export" in order to have the right to participate in coke quota allocation procedures is inconsistent with Paragraph 1.2 of China's Accession Protocol, in combination with Paragraph 83(a) of China's Working Party Report, as well as paragraphs 5.1 and 1.2 of China's Accession Protocol, in combination with Paragraph 83(d) of China's Working Party Report.</p> <p>The requirement that foreign enterprises and individual exporter applicants demonstrate "certain levels of volumes exported or supplied for export" in order to have the right to participate in coke quota allocation procedures, is inconsistent with Paragraph 5.2 of China's Accession Protocol, and Paragraph 1.2 of China's Accession Protocol, in combination with Paragraphs 84(a) and 84(b) of China's Working Party Report.</p> <p>The requirement that exporter applicants demonstrate certain minimum capital requirement in order to have the right to export coke is inconsistent with Paragraphs 5.1 and 1.2 of China's Accession Protocol, in combination with Paragraphs 83(b), 83(d) and 84(a) of China's Working Party Report.</p>	<p><i>2009 Coke Export Quota Application Procedure</i></p>
<p>The requirement that exporter applicants demonstrate "certain levels of volumes exported or supplied for export" in order to have the right to participate in bauxite, silicon carbide and fluorspar quota bidding procedures is inconsistent with Paragraph 1.2 of China's Accession Protocol, in combination with Paragraph 83(a) of China's Working Party Report, as well as Paragraphs 5.1 and 1.2 of China's Accession Protocol, in combination with Paragraph 83(d) of China's Working Party Report.</p> <p>The requirement that foreign enterprises and individual exporter applicants demonstrate "certain levels of volumes exported or supplied for export" in order to have the right to participate in bauxite, silicon carbide and</p>	<p><i>Export Quota Bidding Measures (Article 11)</i> <i>Export Quota Bidding Implementation Rules (Article 6)</i> <i>2009 First Round Export Quota Bidding Announcement</i> <i>2009 Second Round Export Quota Bidding Announcement</i></p>

²⁷ The specific forms of the raw materials subject to the European Union's claims are identified in Exhibit JE-6.

The European Union's claim	Measures i.e., Legal Instruments
<p>fluorspar quota bidding procedures is inconsistent with Paragraph 5.2 of China's Accession Protocol and Paragraph 1.2 of China's Accession Protocol, in combination with Paragraphs 84(a) and 84(b) of China's Working Party Report.</p> <p>The requirement that exporter applicants demonstrate certain minimum capital requirement in order to have the right to export bauxite, silicon carbide and fluorspar is inconsistent with Paragraphs 5.1 and 1.2 of China's Accession Protocol, in combination with Paragraphs 83(b), 83(d) and 84(a) of China's Working Party Report.</p>	
Export Quotas: Administration of export quota direct allocation system	
<p>The requirement to consider, <i>inter alia</i>, an applicant's "business management/operation capacity" in determining whether to allocate "directly" export quotas to a particular exporter applicant, and the amount to be allocated to that exporter applicant is inconsistent with Article X:3(a) of the GATT 1994.</p>	<p><i>Export Quota Administration Measures (Article 19)</i></p>
Export Quotas: Publication of Export Quotas	
<p>Failure to publish the export quota for zinc ores and concentrates.</p>	<p><i>Export Quota Administration Measures (Article 9, 11)</i></p>
Export Licensing: Non-Automatic Export Licences²⁸	
<p>China's non-automatic export licences on bauxite, coke, fluorspar, manganese, silicon carbide are inconsistent with Article XI:1 of the GATT and with Paragraph 1.2 of China's Accession Protocol, in combination with Paragraphs 162 and 165 of China's Working Party Report.</p>	<p><i>Foreign Trade Law (Articles 19, 61)</i> <i>Regulation on Import and Export Administration (Articles 33, 35, 43)</i> <i>2008 Export License Administration Measures (Articles 3, 4, 5, 9, 10, 11, 19, 20, 21, 22, 28, 30, 31)</i> <i>2008 Export Licensing Working Rules (Articles 5, 6, 8, 9, 10, 17, 18, 19)</i> <i>Measures for Administration of Licensing Entities (Article 4)</i> <i>2009 Graded Export Licensing Entities Catalogue</i> <i>2009 Export Licensing Catalogue</i></p>
<p>China's non-automatic export licences on bauxite, coke, fluorspar, manganese, silicon carbide Inconsistent with Paragraph 5.1 and Paragraph 1.2 of China's Accession Protocol in combination with Paragraphs 83 and 84 of China's Working Party Report.</p>	<p><i>Foreign Trade Law (Articles 19, 61)</i> <i>Regulation on Import and Export Administration (Articles 33, 35, 43)</i> <i>2008 Export License Administration Measures (Articles 3, 4, 5, 9, 10, 11, 19, 20, 21, 22, 28, 30, 31)</i> <i>2008 Export Licensing Working Rules (Articles 5, 6, 8, 9, 10, 17, 18, 19)</i> <i>Measures for Administration of Licensing Entities (Article 4)</i> <i>2009 Graded Export Licensing Entities Catalogue</i> <i>2009 Export Licensing Catalogue</i></p>

²⁸ The specific forms of the raw materials subject to the European Union's claims are identified in Exhibit JE-6.

The European Union's claim	Measures i.e., Legal Instruments
Export Licensing: Publication of Export Licensing Requirements	
<p>Alternatively to the claim under Paragraph 5.1 and Paragraph 1.2 of China's Accession Protocol, in combination with Paragraphs 83(d), 84(a) and 84(b) of China's Working Party Report, the failure to publish the definition and list of "other materials required by China's Ministry of Commerce", or "documents of approval issued by the Ministry of Commerce", or the failure to publish the definition and method of verification of the "business qualifications" that applicants must have in order to be allocated an export licence for certain forms of bauxite, coke, fluorspar, manganese, silicon carbide and zinc, or to determine the amount to be exported, is inconsistent with Article X:1 of the GATT 1994.</p>	<p><i>Measures for the Administration of Export Licences (Article 5)</i> <i>Working Rules on Issuing Export Licenses (Articles 5 and 8)</i></p>
Export Licensing: Administration of Export Licensing Requirements	
<p>Alternatively, to the claim under Paragraph 5.1 and Paragraph 1.2 of China's Accession Protocol, in combination with Paragraphs 83(d), 84(a) and 84(b) of China's Working Party Report the absence of a definition and list of "other materials required by China's Ministry of Commerce" or limit on the discretion to require such materials, as well as the absence of a definition of "documents of approval issued by the Ministry of Commerce" or limit on the discretion to issue such additional "documents of approval" is inconsistent with the requirements of uniform, impartial and reasonable administration within the meaning of Article X:3(a) of the GATT 1994.</p>	<p><i>Measures for the Administration of Export Licences</i> <i>Working Rules on Issuing Export Licenses</i></p>
Minimum Export Pricing:²⁹ Imposition of an MEP Requirement	
<p>The imposition of a minimum export price requirement on exporters of bauxite, coke, fluorspar, magnesium, silicon carbide, yellow phosphorus and zinc is inconsistent with Article XI:1 of the GATT 1994</p>	<p><i>Measures for Administration of Trade Social Organizations (Articles 2,8, 14, 16, 21)</i> <i>Regulations for Personnel Management of Chambers of Commerce (Articles 4, 8, 13, 17)</i> <i>1994 CCCMC Charter</i> <i>2001 CCCMC Charter</i> <i>Export Price Penalties Regulations</i> <i>Measures for Administration of Licensing Entities</i> <i>Rules for Coordination of Customs Price Review</i> <i>Rules on Price Reviews of Export Products</i> <i>Provisional Rules on Export PVC</i> <i>CCCMC PVC Rules</i></p>

²⁹ The specific forms of the raw materials subject to the European Union's claims are identified in Exhibit JE-7.

The European Union's claim	Measures i.e., Legal Instruments
	<i>Online PVC Instructions</i> <i>CCCMC Export Coordination Measures</i> <i>CCCMC Bauxite Branch Coordination Measures</i> <i>Bauxite Branch Charter</i> <i>"System of self-discipline"</i>
Minimum Export Pricing: Administration of the MEP Requirement	
The use of the Price Verification and Chop procedure to administer yellow phosphorus exports by the CCCMC is inconsistent with Article X:3(a) of the GATT 1994.	<i>Measures for Administration of Trade Social Organizations</i> <i>Regulations for Personnel Management of Chambers of Commerce</i> <i>1994 CCCMC Charter</i> <i>2001 CCCMC Charter</i> <i>Customs Export Price Review Rules</i> <i>Customs Export Price Review Coordinating Rules</i> <i>Provisional Rules on Export PVC</i> <i>Online PVC Instructions</i>
Minimum Export Pricing: Publication of the MEP Requirement	
The failure to publish certain measures providing rules and details on how the CCCMC coordinates export prices is inconsistent with Article X:1 of the GATT 1994.	<i>CCCMC PVC Rules</i> <i>CCCMC Branch-Specific Coordination Measures</i> <i>Customs Export Price Review Rules</i> <i>Customs Export Price Review Coordinating Rules</i> <i>Provisional Rules on Export PVC</i>

3.4 The European Union requests, pursuant to Article 19.1 of the DSU, the Panel to recommend that China bring its measures into conformity with the GATT 1994 and China's Accession Protocol.

B. CHINA

3.5 China requests that the Panel reject certain of the complainants' claims listed in Section III of the complainants' Panel Requests, to the extent they are properly included within the Panel's terms of reference and to find that:³⁰

- (a) The application of temporary export duties applied to fluorspar are justified pursuant to Article XX(g) of the GATT 1994; and the application of temporary export duties to non-ferrous metal scrap of zinc, magnesium metal, and manganese metal, and to coke, magnesium metal and manganese metal are justified pursuant to Article XX(b) of the GATT 1994.
- (b) That the export quota applied to refractory-grade bauxite is justified pursuant to Article XI:2(a) of the GATT 1994, or is otherwise justified pursuant to Article XX(g) of the GATT 1994.
- (c) The export quotas applied to coke and silicon carbide are justified pursuant to Article XX(b) of the GATT 1994.

³⁰ China's first written submission, para. 873.

IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the United States, the European Union, Mexico and China as set out in the executive summaries of their submissions provided to the Panel are attached to these Reports as an addendum (see List of Annexes, pages ix and x).

V. ARGUMENTS OF THE THIRD PARTIES

5.1 Argentina, Brazil, Canada, Chile, Colombia, Ecuador, India, Japan, Korea, Norway, Chinese Taipei, Turkey and Saudi Arabia reserved their third-party's rights to participate in the three disputes. The European Union (with respect to WT/DS394 and WT/DS398), Mexico (with respect to WT/DS394 and WT/DS395), and the United States (with respect to WT/DS395 and WT/DS398) reserved their third-party rights to participate in the indicated Panel proceedings.

5.2 Chile, India and Ecuador did not present written submissions, and Argentina, and Turkey did not submit oral statements to the Panel. The arguments of Brazil, Canada, Colombia, Japan, Korea, and Saudi Arabia are set out in their written submissions and oral statements. Finally, Norway, Chinese Taipei, the European Union (with respect to WT/DS394 and WT/DS398), Mexico (with respect to WT/DS394 and WT/DS395), and the United States (with respect to WT/DS395 and WT/DS398), did not present either written submissions or oral statements to the Panel. The arguments of the third parties, as set out in their submissions, or executive summaries thereof, provided to the Panel, are attached to these Reports as an addendum.

VI. INTERIM REVIEW

6.1 On 18 February 2011, the Panel issued its Interim Reports to the parties. On 4 March 2011, the United States, the European Union, Mexico, and China submitted written requests for review of precise aspects of the Interim Reports pursuant to Article 15.2 of the DSU. On 18 March 2011, the United States, the European Union, Mexico, and China submitted written comments on each other's requests for interim review. No party requested an additional meeting with the Panel.

6.2 The numbering of paragraphs and footnotes in the Final Reports has changed from the Interim Reports. The text below refers to the paragraph and footnote numbers in the Interim Reports regarding which the parties requested review. The parties submitted several editorial revisions as well as other linguistic changes, which were not contested by the other parties; the Panel also made minor editorial and non-substantive consequential changes as a result of other adjustments. Such editorial, minor and non-substantial changes were made to paragraphs 7.2, 7.4, 7.60, 7.63, 7.68, 7.79, 7.80, 7.82, 7.83, 7.85, 7.86, 7.88, 7.89, 7.90, 7.91, 7.96, 7.97, 7.102, 7.124, 7.151, 7.195, 7.221, 7.224, 7.227, 7.229, 7.231, 7.232, 7.233, 7.234, 7.246, 7.327, 7.345, 7.352, 7.375, 7.376, 7.383, 7.389, 7.394, 7.404, 7.407, 7.415, 7.455, 7.456, 7.457, 7.459, 7.463, 7.464, 7.468, 7.469, 7.471, 7.495, 7.504, 7.505, 7.508, 7.512, 7.516, 7.518, 7.585, 7.588, 7.594, 7.599, 7.616, 7.623, 7.754, 7.781, 7.783, 7.860, 7.878, 7.879, 7.880, 7.965, and 7.1011; and footnotes 54, 524, 525, 526, 527, 546, 680, 1091, 1206, 1232, 1233 and 1234. The Panel has also corrected typographical and other non-substantive errors throughout the Report, including those identified by the parties, which are not referred to specifically below. In order to facilitate understanding of the interim review comments and changes made, the following section is structured to follow the organization of the Reports themselves.

A. THE DESCRIPTIVE PART OF THE REPORT

6.3 China requested minor changes to the Descriptive Part. The Panel adjusted paragraphs 1.9, 1.13 and footnotes 11, 2.2 and 3.5 accordingly.

B. ISSUES RELATING TO THE PANEL'S TERMS OF REFERENCE

6.4 Regarding paragraphs 7.6, 7.21, 7.24, 7.53, and 7.228, China argues that the Interim Reports reflect an "inaccurate" description of China's position in the dispute regarding the appropriate treatment of 2009 measures. According to China, a "proper description" of China's argument would reflect its position that "while the Panel could make findings regarding the 2009 measures, it was not entitled to make recommendations." China suggests *inter alia* that the Panel substitute the language used in the paragraphs at issue with: "[a]lthough China accepted that the Panel could make findings regarding the 2009 measures, it defended that the Panel could not formulate recommendations". The United States and Mexico disagree with China's request and submit that the Panel's description of China's position is generally correct. The European Union also submits that the Panel's description of its position on the 2009-2010 measures issue is inaccurate as it never requested the Panel to exclude from its terms of reference "amendment or replacement" of the 2009 measures. China disagrees with the European Union's request and submits that the Panel's description of the European Union's position is generally correct. Finally, the parties also disagree on how the Panel should characterize the situation of China with respect to its 2009 and 2010 measures including in paragraphs 7:26, 7.32, 7.74.

6.5 To ensure the most comprehensive description of the parties' arguments on this issue, the Panel has adjusted the relevant paragraphs of its Panel Reports accordingly and expanded its references to the parties' submissions, including in paragraphs 7.5, 7.6, 7.7, 7.21, 7.24, 7.26, 7.30, 7.31, 7.32, 7.33, 7.53, 7.56, 7.74 and 7.228.

C. EXPORT DUTIES

6.6 Regarding paragraphs 7.70, 7.71, 7.79, 8.2(d), 8.9(d) and 8.16(d), China and the complainants disagree as to the conclusion the Panel should reach with respect to China's measure imposing an export duty on yellow phosphorus.

6.7 The Panel has therefore adjusted its language to make clear that the relevant Chinese measure imposing an export tariff on yellow phosphorus at the time of the Panel's establishment did not include the special duty, which was removed by the *Adjustment of Export Tariffs Circular*. Thus, at the time of the Panel's establishment, yellow phosphorous was subject to the regular export duty of 20%, which is consistent with the maximum rate listed in Annex 6 of China's Accession Protocol and therefore consistent with China's WTO obligations. The Panel makes no findings with respect to China's *2009 Tariff Implementation Program* measure, (that is challenged by the complainants) which applied a special duty rate on yellow phosphorus but which was removed before the Panel's establishment.

6.8 The United States and Mexico request the Panel to refer to yellow phosphorus "special duty" in paragraph 7.63, to state "as of 21 December" instead of "on 21 December" in paragraphs 7.79, 7.82, 7.85, 7.88, 7.93, and 7.96, and to add that the Panel's conclusions in paragraphs 7.80, 7.83, 7.86 and 7.97 on export duties claims for which China invokes an Article XX justification could only be "provisional". These requests were not contested. The Panel adjusted these paragraphs accordingly.

6.9 Finally, China suggests changes to paragraph 7.73 where the Panel states that China had removed its export duties on bauxite as of 1 January; the United States disagreed in part. The Panel adjusted the paragraph to meet the concerns raised by both parties.

D. APPLICABILITY OF GATT ARTICLE XX TO VIOLATION OF PARAGRAPH 11.3 OF CHINA'S ACCESSION PROTOCOL

6.10 Regarding paragraph 7.120, China requested clarification of the manner in which its argument is presented with respect to the applicability of GATT Article XX to violations of its Accession Protocol. The complainants also requested minor clarifications with respect to the text in paragraphs 7.141, 7.142, 7.144 and 7.147, which China did not oppose. The Panel adjusted those paragraphs accordingly and made consequential changes to paragraphs 7.106, 7.107, 7.109, 7.110, 7.111, 7.112, 7.113, 7.121, 7.122, 7.125 and 7.126 to meet the concerns raised by both parties.

6.11 The European Union, regarding paragraph 7.136, and all the complainants regarding paragraph 7.140, and the United States and Mexico, with respect to paragraphs 7.150, 7.153 and 7.158, requested certain deletions and clarifications and suggested changes that were opposed by China. With a view to ensuring clarity in the Panel's explanation that the exceptions contained in GATT Article XX are not available to export duties commitments included in China's Accession Protocol, a number of consequential changes were introduced into paragraphs 7.139 to 7.152.

6.12 Regarding paragraph 7.160, the complainants requested that the Panel refrain from any comment on the nature and extent of China's accession commitments. China opposed this request. The Panel revised slightly the text of this paragraph.

E. EXPORT QUOTAS

6.13 China requested a series of minor modifications and clarifications to the Panel's description of its export quota regime, including in paragraphs 7.172, 7.174, 7.179, 7.183, 7.185, 7.192 and footnote 265, 7.195, 7.200, 7.214, 7.219 to 7.223, 7.227 and 7.764. The complainants did not oppose those requests, so the Panel adjusted its description accordingly.

6.14 Regarding paragraph 7.175, China requests the Panel to clarify that, under Chinese law, administrative authorities such as MOFCOM may only impose administrative sanctions, but not criminal sanctions, for unlawful exportation of goods subject to restriction, or for forging or altering import or export licences, quota certificates, or other documents. The United States and Mexico request the Panel not to revise this paragraph to refer only to administrative sanctions, but instead, to replace the term "MOFCOM" with "China". The Panel adjusted this paragraph accordingly.

6.15 Regarding paragraph 7.180, China requests the Panel to clarify that China does not require enterprises that seek to receive a zinc quota share for the first time to meet a prescribed quota utilization rate or return unused annual quotas. The European Union objects to China's request. The Panel has modified the paragraph.

6.16 Regarding paragraph 7.189 and footnote 258, China requests the Panel to refer to the group of relevant administrative provisions governing export licences, and not to an undefined "regulations on administration of export licenses". The United States and Mexico object to China's request. Consequently, the Panel has updated the relevant paragraph to refer to the appropriate measures (the *2008 Export License Administration Measures*), and the footnote to refer to the *2001 Export License Administration Provisions*, the *2004 Export License Administration Measures*, and the *2008 Export License Administration Measures*.

6.17 Regarding paragraphs 7.219 to 7.223, China requests the Panel to remove the reference on export quotas in respect of provisions that, in its view, do not "confer" or "relate to" "the authority to impose an export quota on the products at issue". The complainants object to China's request and submit that the measures identified by the Panel operate together to establish China's export quota for

each identified product, including measures imposing an export licensing framework and quota administration measures, such as those relating to the operation of the quota bidding process. As stated in paragraph 7.218 of the Interim Reports, the Panel considers that findings on such measures are necessary so that annually renewed measures do not evade WTO dispute settlement review merely through their expiration during the Panel proceedings. In light of this view, the Panel declines to make the changes proposed by China. The Panel has modified the text of paragraph 7.218 of the Interim Reports to clarify its position concerning the measures discussed above.

F. CHINA'S DEFENCES TO THE APPLICATION OF EXPORT RESTRICTIONS

6.18 Regarding paragraph 7.244, China requests the Panel to modify and expand its reference to China's submissions when describing the chemical and physical characteristics of refractory-grade bauxite. China contends that the complainants have also defined the product in the same manner. The European Union submits that it never defined or described refractory grade bauxite in the context of this dispute, but has only taken note of China's definition and description, and therefore objects to China's request to indicate that the European Union defined the product in the same manner. In addition, the European Union requests the Panel not attribute to the European Union the content of Exhibit CHN-126, entitled "Report of the Ad-hoc Working Group on Defining Critical Raw Materials". The United States and Mexico did not comment on China's proposed change.

6.19 The Panel has taken into account China's request. The Panel has also taken note of the European Union's concern with attributing statements made in Exhibit CHN-126 to the European Union. Finally, the Panel has reflected China's request to expand reference to its submissions.

6.20 Regarding paragraph 7.247, the European Union requests the Panel to delete the last sentence that reads: "In any event, Article XI:2(a) by its terms must be viewed through the prism of the Member applying the restriction". The European Union states that the meaning of this sentence is not clear. China objects to the European Union's request. The United States and Mexico did not comment. The Panel considers that the statement referred to by the European Union is clear. Accordingly, the Panel retains this language.

6.21 Regarding paragraph 7.271, China requests the Panel to include a description of the complainants' objection to the use of Article XXXVI of the GATT 1994 as relevant context for interpreting Article XI:2(a). China requests in particular that the Panel refer to comments made in the United States' response to Panel questions and closing statement at the first substantive meeting. The European Union submits that it has never argued that Article XXXVI of the GATT 1994 does not apply to China and the United States and Mexico did not comment. The Panel adjusted the relevant language.

6.22 Regarding paragraph 7.276, the European Union requests the Panel to remove the discussion of Article XXI of the GATT 1994, stating that Article XXI is not at issue in the present dispute, nor has it been discussed by the parties to the dispute. China objects to the European Union's request. Accordingly, the Panel retains the language.

6.23 Regarding footnote 452, the European Union requests the Panel to rephrase its discussion to reflect the European Union's argument made in connection with Article XX(i) of the GATT 1994. The European Union argues that it referred to this provision to show that China's interpretation of the term "essential product" was too broad, but did not argue that inputs can never be "essential products" under Article XX(i). China objects to the European Union's request. The Panel has modified the text of the footnote to paraphrase more closely the European Union's argument in paragraph 192 of its second written submission, without modifying the Panel's conclusion.

6.24 Regarding paragraph 7.280, the European Union requests the Panel to remove the last sentence of the paragraph, arguing that this sentence places emphasis on the notion of "critical shortage", while the remainder of the paragraph addresses the notion of "essential products". China submits that the request can better be addressed by modifying rather than deleting the sentence through removal of the reference to "shortages". The Panel considers the modification proposed by China clarifies the sentence in relation to the rest of the paragraph, and accordingly modified the relevant language.

6.25 Regarding paragraph 7.281, the European Union requests the Panel to modify the text to indicate that no agreement was reached on the conditions that should be met in order to determine whether a good is "essential" within the meaning of Article XI:2(a), including products for use by a downstream industry. The European Union requests the Panel to conclude that the discussion on merino sheep does not meet the conditions for the application of Article 31(2)(a) of the Vienna Convention in relation to the definition of the terms "essential products". China objects to the European Union's request to modify the final two sentences of the discussion. The Panel considers that paragraph 7.281 as formulated correctly reflects the Panel's view on the relevance to its interpretation of the discussions. Nevertheless, the Panel has incorporated a footnote to clarify its views.

6.26 Regarding paragraph 7.344, China requests the Panel to add an additional element to its assessment of the complexity of determining a substitute for refractory-grade bauxite by referring not only to the complexity in switching from one *material* to the next, but also in switching from one *supplier* to the next. The European Union objects to China's proposed change, submitting that Exhibit CHN-126 does not express the view of the European Union or the arguments in this dispute. The European Union further submits that there is no evidence on record to support the conclusion that changing the type of material used for refractory applications would necessarily entail a change in supplier.

6.27 The Panel notes that China's proposed modification is based on a statement it made in the second substantive meeting of the Panel in light of Exhibit CHN-511, not Exhibit CHN-126 as raised by the European Union when commenting on China's requested change. Unlike Exhibit CHN-126, Exhibit CHN-511 does not include any disclaimer that the report does *not* represent the views of the Commission. Exhibit CHN-511, however, calls attention to the time and costs involved with switching suppliers. Accordingly, the Panel considers it appropriate to reflect the requested change. In doing so, the Panel does not consider that China's proposal requires reaching the conclusion that changing the type of material used would necessarily entail a change in supplier. For clarity, the Panel has included the statement "and potentially, from one supplier to the next" and relevant citation.

6.28 Regarding paragraph 7.351, the European Union requests the Panel to remove the last two sentences of paragraph 7.351 addressing the remaining life span of the good at issue and capacity or reserve that may be developed. The European Union argues that these sentences address the factual situation of whether there is currently a "shortage" in the availability of the good, and not the question of whether China faces a "critical shortage" within the meaning of Article XI:2(a) of the GATT 1994. China objects to deleting the final two sentences of the paragraph. In addition, China requests the Panel to reflect its response to the complainants' assertion that refractory-grade bauxite has a remaining lifespan of 91 years, instead of 16 years. China also requests the Panel to provide a citation to its argument that lifespan reserve estimates could not change due to advances in reserve detection or extraction techniques. The complainants do not object to China's request to add references.

6.29 The Panel declines to make the change requested by the European Union. In the absence of objection, the Panel refers to China's response in its second oral statement.

6.30 Regarding paragraph 7.352, China requests the Panel to explain its statement that China has not provided specific evidence that there are "new" barriers to investment that have disrupted the availability of refractory-grade bauxite. The European Union submits that the word "new" should be replaced with "now". The Panel revised the sentence by removing the word "new".

6.31 All parties make comments on the Panel's use of the terms "bauxite" and "refractory bauxite" and high-alumina clay. The Panel understands that China's export restriction applies to bauxite while China's justifications pursuant to GATT Article XI.2(a) and GATT Article XX(g) are limited to refractory-grade bauxite (referred to interchangeably as high-alumina clay), which comprises some 75% of Customs Commodity Code 2508.3000.00. Therefore the Panel adjusted language in paragraphs 7.238, 7.239, 7.323, 7.324, 7.416 and its footnote 625, and 7.612, accordingly.

6.32 With respect to paragraphs 7.375, 7.376 and 7.383, the complainants challenge the Panel's use of the Appellate Body jurisprudence under GATT Article XX(b) when referring to a "comprehensive policy comprising a multiplicity of interacting measures", for justifications made pursuant to paragraph (g) of Article XX. The complainants' request was contested by China. The Panel made minor changes to the relevant paragraphs in order to ensure clarity.

6.33 In paragraph 7.381 and its footnote 588, China wants the Panel to add references to its arguments that WTO Members' actions over their natural resource-based products must in no case interfere with their sovereignty over natural resources. It asks the Panel to emphasize the need for developing countries to make optimum use of their resources for their development, as they deem appropriate, including the processing of their raw materials. China also asks the Panel to introduce references to Mexico's prior statement to that effect. The complainants oppose all these requests by China. With a view to ensuring that China's arguments are fully reflected, the Panel adjusted paragraph 7.356, 7.381 and footnote 588.

6.34 The United States and Mexico request clarification of the Panels' definition of the term "conservation" in paragraph 7.372 and its footnote 575. China in part contests this request. The Panel adjusted the language. On that occasion the Panel has also clarify the term "restricton" in paragraph 7.394 on restriction.

6.35 With respect to paragraphs 7.389, 7.390 and 7.459, China requests the Panel to modify the description of its arguments and that of the European Union with respect to the even-handedness requirement of paragraph (g) of Article XX. The European Unon contests. The Panel revised slightly the description of both parties's arguments.

6.36 With respect to paragraph 7.429, China requests deletion of this paragraph, which refers to an author who has argued that export restrictions can have the same effect as a subsidy. The European Union opposes any such change and the United States and Mexico suggest adding a precision. The Panel modified the language accordingly and added a footnote to clarify that it was not referring to a subsidy within the meaning of the SCM Agreement.

6.37 The United States and Mexico request for consistency considerations that the Panel refer to "WTO-consistent" alternatives and not to "less-trade restrictive" alternatives. China opposes this change. The Panel notes that the Appellate Body uses both expressions interchangeably. Nonetheless, the Panel adjusted paragraph 7.491, 7.563, 7.588 and the titles before paragraphs 7.488, 7.559, 7.563. and 7.609.

6.38 With respect to paragraphs 7.457 and 7.465, the complainants raise objections to the Panel's characterization of the nature of the new mechanisms ("caps") put in place by China in 2010 as well

as to the Panel's comments on the new efforts by China and reflected in some of China's new 2010 measures. China opposes such changes. The Panel introduced minor linguistic changes.

6.39 The European Union requests various revisions of paragraphs that refer to the Panel's assessment of the evidence put forward by the parties in the context of China's defence under GATT Article XX(b). With respect to paragraph 7.512, the European Union requests deletion of this paragraph whereas China opposes any deletion. With respect to paragraphs 7.537 on the evidence submitted for EPRs, and to 7.514 (and the related paragraph 7.525) dealing with the impact of the use of export restrictions on growth and pollution, the European Union requests deletion or rephrasing of certain phrases. China opposes this request. This is also the case with regard to paragraphs 7.518, 7.528 and 7.537.

6.40 With respect to paragraph 7.600, the United States and Mexico request the Panel to include a reference to their argument that secondary production of manganese metal is not feasible and did not occur. China contests this and requests a reference be inserted to its evidence in this regard. The Panel adjusted all of these paragraphs.

G. EXPORT QUOTA ALLOCATION AND ADMINISTRATION

6.41 Regarding paragraph 7.632, China requests the Panel to modify its description of China's defence regarding claims under Article X:1 with respect to publication of the zinc quota. The European Union comments that the current text accurately reflects the arguments advanced by the European Union and China and that there is no need for modification. The Panel notes that paragraph 7.632 is in the nature of a brief outline of the complainants' export quota allocation and administration claims and, consequently, will not include all the parties' arguments. However, the Panel agrees to make additions to the text as proposed by China.

6.42 Regarding paragraph 7.769, China states that the first sentence of paragraph 7.769 may suggest that the translation of the Chinese term into "operation capacity" is disputed by the European Union. The European Union considers that the current text does not need to be amended. The European Union continues that the preceding paragraph introduces the European Union's claim and the use of the term "business management capacity" and that paragraph 7.679 presents China's response and its use of the alternative term "operation capacity".

6.43 The Panel considers that when read together with paragraph 7.678, paragraph 7.679 makes clear that China disputes the translation of this phrase by the European Union. The Panel also refers to footnote 1047 to paragraph 7.717 wherein it described the use of this term by the parties. As this is the first substantive discussion by the Panel of the operation capacity criterion, this seems the most appropriate place for the footnote referred to above. The Panel agrees with China that there was no dispute as to the correct translation, but declines to make the modification requested by China for the stated reason.

6.44 Regarding paragraph 7.701, the European Union suggests that the Panel's description of the panel report in *Argentina – Hides and Leather* may be confusing. It proposes a description of that report which refers to the panel in that case finding a violation of Article X:3(a) on the basis that the disputed administration "caused prejudice to traders". China asks the Panel to reject the European Union's request, explaining that China has not been able to identify a passage in the report reflecting the standard asserted by the European Union.

6.45 The Panel has decided to maintain the description of the panel report in *Argentina – Hides and Leather* in light of the fact that it has been unable to find a reference in *Argentina – Hides and Leather* to the description proposed by the European Union.

6.46 Regarding paragraph 7.727, China asks the Panel to amend this paragraph to reflect its argument that a complainant must show that a measure "necessarily leads to" WTO-inconsistent administration. The European Union considers that China's suggestion is not justified, stating that the Panel has already considered China's interpretation of the phrase "necessarily leads to" and rejected it. The European Union notes that in paragraph 7.727, the Panel discusses other aspects of China's arguments and that there is no need to make any reference to the issue of "necessarily leads to" as this has already been resolved.

6.47 The Panel agrees to modify the final sentence of paragraph 7.727 so as to reflect the aspect of its arguments requested by China, but it does so without deleting the phrase proposed by China.

6.48 Regarding paragraph 7.770, China asks the Panel to amend the list of measures as relevant to the administration of China's export quotas, in particular, the CCCMC's involvement. The United States and Mexico submit that the measures identified operate together to establish China's export quota regime, including the administration of quotas, and argue that China's contentions are not supported by the record in the dispute. The Panel has modified paragraph 7.770 and made consequential changes to paragraphs 7.771 and 7.772 to reflect that the measures listed in paragraph 7.770 have been submitted by the United States and Mexico.

6.49 Regarding paragraphs 7.816 to 7.838 and 7.845, China requests the Panel to insert text to distinguish between what it describes as the "scope" and the "content" of application of Article VIII:1(a). Specifically, China asks the panel to include the phrase "imposed on or in connection with importation or exportation" in certain locations (in paragraphs 7.829, 7.830, 7.831, 7.838, and 7.845) as well as additional text. China contends that the Panel means that Article VIII:1(a) applies solely to fees and charges imposed on or in connection with importation or exportation, and prohibits such fees and charge only insofar as they are not limited to the approximate costs of services rendered. The complainants do not object to this change. The Panel has included China's requested changes to paragraphs 7.829, 7.830, 7.831, 7.838, and 7.845 to clarify its analysis.

6.50 Regarding paragraph 7.856, China requests the Panel to both revise the structure of the paragraph and provide greater detail concerning its method of interpretation and the application of its interpretation to conclude that the bid-winning price is not a "charge applied to exporters" within the meaning of Paragraph 11.3 of China's Accession Protocol. China requests the Panel to address the interpretation of Paragraph 11.3 and application of this interpretation separately, and to expand upon analysis and application of its interpretation. The United States and Mexico object to China's request for the Panel to provide further detail regarding its interpretation of Paragraph 11.3 and consequent assessment of the complainants' claim.

6.51 The Panel explained that it would interpret Paragraph 11.3 of China's Accession Protocol in accordance with the general rule of treaty interpretation as codified in Article 31 of the Vienna Convention, and therefore sees no reason to further expand upon its approach. The Panel has included a cross-reference to its consideration of the term "charge" in paragraph 7.819.

H. EXPORT LICENSING

6.52 Regarding paragraph 7.860, the United States requests the Panel to distinguish between products that are subject to export quota administration and those that are subject only to licensing requirements. China does not object to this change. The Panel has incorporated the United States' requested change.

6.53 Regarding paragraphs 7.884 and 7.927, China requests the Panel to include a description of the *2008 Export Licensing Working Rules* at paragraph 7.884, instead of 7.927. In addition, China

asks the Panel to include the additional description that the *2008 Export Licensing Working Rules* are "an internal guide for the personnel of the license-issuing authorities on how to apply the applicable laws and regulations", with citation.

6.54 The United States and Mexico submit that the final sentence of paragraph 7.927 sets out China's arguments on the role and function of the *2008 Export Licensing Working Rules* and should not be relocated. They submit that paragraph 7.884 sets forth undisputed facts relating to the operation of China's export licensing system. The United States and Mexico do not however object to China's request to amend the text of this sentence.

6.55 The Panel has included additional description of the *2008 Working Rules on Issuing Export Licenses*, but considers it inappropriate to move the description to paragraph 7.884.

6.56 Regarding paragraph 7.906, the United States requests the Panel to state that export restrictions under Articles XI, XIII, XVIII, XIX, XX and XXI could be implemented through a licensing regime, as opposed necessarily being implemented through such regime. China does not object to the change, but requests that the second sentence of this paragraph be revised to substitute "may" for "would necessarily", and to refer to a licensing regime as an example. Accordingly, the Panel has reflected the parties' requests.

6.57 Regarding paragraph 7.907, China requests the Panel to include an additional sentence referring to its argument that "there is no reason to assume that" the drafters intended to exclude contextual guidance from the *Import Licensing Agreement* for the purposes of interpreting Article XI:1. The European Union requests the Panel to reject China's proposed changes, submitting that the current paragraph accurately represents the relevant views. The Panel considers China's views on the relevance of the *Import Licensing Agreement* as context for interpretation of Article XI:1 are adequately reflected in the first sentence of paragraph 7.907, and therefore declines China's request to modify the text. The Panel has included the additional reference proposed by China at the end of the first sentence to paragraph 7.907.

6.58 Regarding footnote 1290, the European Union requests the Panel to refer to Exhibit JE-73, the *Regulation on Import and Export Administration*. China does not object to this change, but asks the Panel to also refer to Exhibit CHN-152 and its translation of the *Regulation on Import and Export Administration* in footnotes 1290, 1291 and 1292. The Panel has incorporated the requested changes.

6.59 Regarding paragraph 7.927, China requests the Panel to clarify the phrase "goods subject to quota licence administration" either by replacing it with the phrase "goods subject to quotas directly allocated", or by adding a footnote to clarify the meaning of the phrase. The complainants do not object to this change. The Panel has incorporated the requested change.

6.60 Regarding paragraph 7.928 and footnote 1309, China requests the Panel to revise the first and second sentences to reflect that Article 11(7) of the *Measures for the Administration of Licenses for the Export of Goods* applies solely to goods that are not subject to a quota, and that the *2010 Export Licensing Catalogue* includes a notation that export licences for unwrought zinc and manganese will be "applied for and granted" upon presentation of an export contract in the *2010 Catalogue*, which constitutes an "approval" by MOFCOM under Article 11(7).

6.61 The European Union submits that the current paragraph accurately presents China's view, and therefore objects to the change. The European Union further submits that it is not clear how the *2010 Export Licensing Catalogue* can be understood as an "approval within the meaning of Article 11(7)".

6.62 The Panel has incorporated the changes to the paragraph given that the requested modification reflects China's arguments as presented to the Panel. In addition, the Panel has clarified references to aspects of the complainants' claims concerning goods that are not subject to a quota in paragraphs 7.883, 7.884, 7.925, 7.929, 7.941, 7.944, 7.948 and 7.950.

6.63 Regarding paragraph 7.930, the European Union requests the Panel to harmonize its reference to the *Measures for the Administration of Export Licenses*. China does not object to this change. The Panel has incorporated the requested change.

6.64 Regarding paragraph 7.934, China requests the Panel to delete the paragraph or otherwise modify what China describes as an "incomplete and inaccurate" characterization of China's notification to the Market Access Committee of automatic and non-automatic licensing rules. China submits that statements made on licensing requirements in place amount to an "inference" made by the complainants. In addition, China argues there is no basis to conclude that any measure notified to the Committee and characterized as "quantitative restrictions" was in reference to the "licensing requirement" as opposed to the export quota itself. Finally, China submits that the notification to the Market Access Committee does not constitute an independent assessment of whether the measures are inconsistent with Article XI:1. The European Union agrees with China's proposed deletion. The United States and Mexico did not comment.

6.65 The Panel has removed the second sentence of paragraph 7.934 given that the Panel's discussion does not depend on China's 2008 notification to the Committee on Market Access. The Panel has retained the first sentence of paragraph 7.934 and merged it with the subsequent paragraph.

6.66 Regarding paragraph 7.936, the European Union requests the Panel to remove the language "including for numerous reasons similar to those sets out in GATT Articles XX and XXI", arguing that these provisions as reflected in Chinese law are not at issue in the present dispute. China objects to the suggest change. The Panel has retained its reference to this provision.

6.67 Regarding paragraph 7.967, the European Union requests the Panel to modify the text to conclude that none of the underlying measures implemented through the export licences at issue is justified by any provision of the GATT, and therefore the export licences are inconsistent with Paragraph 1.2 of China's Accession Protocol and Paragraph 162 of China's Working Party Report. The European Union submits that, pursuant to these provisions, China cannot impose a requirement to obtain an export licences unless there is justification for imposing the export licence under some provision of the GATT 1994. The European Union contends that China has not argued that there is some GATT provision that justifies the imposition of its export licences. Therefore, the European Union considers China's export licences are also inconsistent with Paragraph 162 of the Working Party Report.

6.68 China submits that the European Union did not argue that Paragraph 162 requires the repeal of "all" export licences unless they can be justified until its final submission, and that this is a new position and fundamentally changes the nature of the European Union's claim. China objects to this change on due process grounds. In the event the Panel were to forgo the exercise of judicial economy, as requested by the European Union, China requests the Panel to find that the European Union has failed to make a prima facie case of inconsistency.

6.69 In light of the European Union's request, the Panel has added language explaining the complainants' claims under Paragraphs 162 and 165 as concerns China's export licensing requirements at issue. The Panel does not agree with the request of the European Union to reverse its decision in respect of certain aspects of the complainants' claims and considers that such a request goes beyond the scope of Article 15.2 of the DSU.

I. MINIMUM EXPORT PRICES

6.70 Regarding paragraph 7.1020, the European Union requests the Panel to delete the words "at least until 28 July 2010" and requests the Panel to refer to the date of establishment of the Panel.

6.71 China objects to the European Union's request. China submits that the Panel reached its finding that China had the authority to coordinate export prices until the formal repeal of measures in 28 July 2010. China submits that this finding in paragraph 7.1030 addresses the separate question of whether China enforces an MEP requirement through penalties imposed on exporters and licensing entities, and does not justify making the change.

6.72 The Panel declines to make the change requested by the European Union. The Panel's reference to 28 July 2010 reflects evidence provided by China of the formal repeal of measures authorizing the coordination of export prices in 2010 (the *CCCMC Resolution on Abolition of Coordination and Administration of Export Commodities*). The Panel's acknowledgement of this date does not affect the Panel's conclusion that China had in place a system to coordinate export prices at the time of the Panel's establishment. For consistency, the Panel has also amended paragraphs 7.1030 and 7.1045 to refer to the date 12 September 2010, when China formally repealed the *Export Price Penalties Regulations* and Article 40(3) of the *Measures for Administration of Licensing Entities by Order No. 2 of 2010 of MOFCOM*. These changes do not affect the Panel's conclusion that China had in place a system to impose penalties on exporters and licensing entities at the time of the Panel's establishment.

6.73 Regarding paragraph 7.1038, which discusses the repeal by resolution of the *CCCMC Bauxite Branch Coordination Measures* on 28 July 2010 and China's argument that the measure was declared inapplicable on 9 January 2008, the United States requests the Panel to cross refer to its explanation that the *CCCMC Bauxite Branch Coordination Measures* remained "on the books" at the time of the Panel's establishment. China does not object to this change. The Panel has included a footnote to indicate its earlier discussion on the status of *CCCMC Bauxite Branch Coordination Measures*.

J. CONCLUSIONS AND RECOMMENDATIONS

6.74 Regarding paragraph 8.1, the United States and Mexico request the Panel to format its conclusions and recommendations such that conclusions and recommendations for each dispute are set out on separate pages, with each page bearing only the report symbol relating to that dispute. The Panel has incorporated the requested change.

VII. FINDINGS

A. ISSUES RELATING TO THE PANEL'S TERMS OF REFERENCE

1. Preliminary rulings

7.1 This dispute raises several issues affecting the competence and the terms of reference of the Panel. The Panel recalls that it issued two sets of preliminary rulings concerned, *inter alia*, with aspects of its terms of reference. As noted, the first phase of the preliminary ruling was issued to the parties on 7 May 2010 and circulated on 18 May. The Panel issued the second phase of its preliminary ruling to the parties on 1 October 2010. At the request of the United States and Mexico, this second phase was circulated only to the third-parties but not to the entire WTO Membership.³¹ These

³¹ Communication from the United States, dated 12 October 2010; Communication from Mexico, dated 21 October 2010. See also Communications from China, dated 13 October 2010 and 15 October 2010.

preliminary rulings are an integral part of the present findings and are attached to the Panel Reports as an annex (see List of Annexes, pages ii and iii).

7.2 The Panel made the following rulings in the first phase of its preliminary ruling dated 7 May 2010:

- (a) The Panel's terms of reference are limited to those measures explicitly identified by bullet points in each of the three sections of the complainants' Panel Requests.
- (b) Of these measures, the term "related measures" referred to in the last bullet point in each of the listed measures is too broad and unspecific a term and therefore falls outside the Panel's terms of reference.
- (c) The Panel's terms of reference are not limited to those products falling under the tariff lines described in footnotes one to nine of the Panel Requests; rather, these tariff lines are only indicative of the broad scope of the challenge.
- (d) The Panel Requests include the two corrected tariff lines regarding zinc.
- (e) The complainants' claims under paragraph 342 of the Report of the Working Party on the Accession of China fall outside the Panel's terms of reference.
- (f) The Panel will not consider the preliminary ruling submitted by the complainants in a separate, ongoing panel proceeding.
- (g) Until it has examined the Complainants' first written submissions and in order to preserve fully China's ability to defend itself, the Panel decides to reserve its decision on:
 - (i) Whether the Complainants' Panel Requests sufficiently identify the measures at issue and the products possibly affected by such measures.
 - (ii) Whether the Complainants' Panel Requests provide for a summary of the legal basis of the complaint sufficient to present the problem clearly.

7.3 The Panel made the following additional rulings in the second phase of its preliminary ruling dated 1 October 2010, after assessing the first written submissions of the complainants:

- (a) Sections I, II and III of the complainants' Panel Requests sufficiently identify the products concerned by the challenged measures.
- (b) The complainants' Panel Requests, as clarified by their first submissions, provide sufficient connection between the measures listed in Section III and the listed claims of violations, with the exception of the European Union's publication claim concerning coke quotas.
- (c) The Panel's terms of reference with respect to claims relating to China's alleged coordination of minimum export prices are limited to assessing the WTO compatibility of the following six measures that were identified in the complainants' Panel Requests: (i) *Measures for Administration of Trade Social Organizations*³²;

³² Exhibits CHN-313, JE-101.

(ii) *Regulations for Personnel Management of Chambers of Commerce*³³; (iii) *1994 CCCMC Charter*³⁴; (iv) *2001 CCCMC Charter*³⁵; (v) *Export Price Penalties Regulations*³⁶; and (vi) *Measures for Administration of Licensing Entities*.³⁷

7.4 Other issues relating to the Panel's terms of reference are addressed by the Panel throughout the Panel Reports. When necessary, the Panel ruled on such matters in the relevant section of the findings of its Panel Reports.

2. Additional legislative instruments enacted by China during the Panel process

7.5 During this Panel process – that is, between the date of the Panel's establishment on 21 December 2009 and the date parties submitted comments on parties' responses to questions posed by the Panel on 15 December 2010 – China enacted 109 legislative instruments in areas relevant to this dispute. Several of the measures challenged by the complainants expired during the Panel process and some of the 2009 measures were replaced in 2010 with different provisions. The parties disagree as to whether the Panel should consider the 2010 measures. Several of the 2010 laws and regulations that were put in place, according to China, in the context of its economic, development, environment and health policies, are discussed in the section of our Reports dealing with China's defence under Articles XX(b) and XX(g).

7.6 China makes a general point in respect of all claims that the Panel should not consider the 2009 measures invoked by the complainants in support of their claims where those measures have been replaced by 2010 measures. Several of the measures challenged by the complainants are annual measures. China submits that it would serve no purpose for the Panel to rule on annual measures that have ceased to exist since they no longer violate WTO obligations or nullify or impair benefits.³⁸ Although China also noted that panels can make findings regarding an expired measure³⁹, the overall thrust of China's arguments throughout the proceedings was that the Panel should not review or examine the 2009 measures. China presented no defence or justification for the export restraints imposed by the 2009 annual measures that were not imposed by the 2010 annual measures. In its first submission China explicitly stated, "China's submission addresses the new [2010] measures, and not the expired [2009] measures."⁴⁰ This is the case, for example, with the *Notice Regarding the 2009 Tariff Implementation Program*, which was replaced by the *2010 Notice Regarding the Tariff Implementation Program*. For China, the Panel should base its consideration of the complainants' claims against certain export duties on the *2010 Notice* and should not consider the *2009 Notice*.⁴¹

³³ Exhibits CHN-315, JE-102.

³⁴ Exhibit JE-86.

³⁵ Exhibits CHN-16, JE-87.

³⁶ Exhibits CHN-350, JE-113.

³⁷ Exhibits CHN-358, JE-75.

³⁸ See for instance China's first written submission paras 49-51, 56, 62, 64 and 67; see also China's second written submission, section II entitled "Panel Should Rule on the 2010 Measures To resolve the Disputes, and Should Not Rule on the 2009 Measure" and para. 12, "In sum, the prompt and positive resolution of this dispute calls for the Panel to address the 2010 measures, and not the 2009 measures."

³⁹ See China's first written submission, para. 52.

⁴⁰ China's first written submission, para 70. See China's response to Panel question No.2 following the second substantive meeting, para. 9 ("For this reason, China makes arguments and defences regarding the 2010 export duties and export quotas").

⁴¹ This is the case for export duties on bauxite, for example. The complainants claim that in 2009, when this Panel was established, China maintained export duties on bauxite. China's contention is that as of 1 January 2010, it no longer maintains export duties on bauxite and hence China does not seek to justify the export duties that it imposed on bauxite during 2009, or on 21 December 2009 – the date of establishment of

7.7 For the complainants, the Panel's competence should be derived from the legal situation prevailing on the date of the establishment of the Panel, namely 21 December 2009. They maintain that the Panel is obliged to make findings and recommendations on the invoked 2009 measures, even if they have ceased to exist during the panel process. They also argue that the Panel should not consider the claims as addressing the 2010 measures. According to the complainants, the measures invoked in the context of China's defence under GATT Article XX form part of China's evidence and should be evaluated as evidence, but not as measures *per se*.

7.8 The Panel will consider first whether its WTO consistency assessments and related findings and recommendations should be based on the measures in force at the time of the Panel's establishment or rather on replacement measures enacted during this Panel process. This analysis will be carried out bearing in mind that after 21 December 2009 and during this Panel process, some of the 2009 annual measures ceased to exist and were replaced by 2010 annual measures that remained in force until 15 December 2010 when the parties filed their last submissions with the Panel.

7.9 The Panel recalls that it was established on 21 December 2009.⁴² This is the date the DSB mandated the Panel to examine the claims of the United States, the European Union and Mexico relating to a series of measures taken by China and identified in the complainants' Panel Requests.

7.10 Article 7 of the DSU provides that panels shall have standard terms of reference unless the parties agree otherwise. These standard terms of reference are to examine in the light of the relevant provisions the matter referred to the DSB by the complainant in the request for establishment and to make such findings as will assist the DSB in making recommendations. This Panel has been established with standard terms of reference.⁴³ A panel's terms of reference are important because they set the parameters of the panel's jurisdiction and define which specific measures must be the object of findings and recommendations pursuant to Articles 11, 12.7 and 19 of the DSU. Article 7 of the DSU provides that a panel's terms of reference are based on the complainant's panel Request.

7.11 A panel request must comply with Article 6 of the DSU, which sets out conditions for establishment of panels. WTO panels and the Appellate Body have clarified the requirements of Article 6.2 of the DSU, stating that the requirement that a panel request identify the "specific measures at issue", implies that "the measures included in a panel's terms of reference must be measures that are in existence at the time of the establishment of the panel".⁴⁴

7.12 Some panel requests, such as those of the complainants in this dispute, include a phrase that broadens a panel's terms of reference by adding to measures specifically listed the following measures: "any amendments or extensions; related measures; replacement measures; renewal measures; and implementing measures". This phrase has been interpreted as authorising a panel to consider within its terms of reference measures enacted *after* the panel's establishment.

7.13 In *Chile – Price Band System*, for instance, where the panel's terms of reference included a similar phrase, the Appellate Body concluded that the panel in that case had the authority to examine a legal instrument enacted after the establishment of the panel because that particular instrument amended a measure identified in the Panel Request but the amendment did not change the "essence"

this Panel. China asserts that since 2010, it has not imposed a tariff duty on any of the three forms of bauxite at issue: refractory-grade bauxite (2508.3000), aluminium ores and concentrates (2606.0000) and aluminium ash and residues (2620.4000), and that the Panel should make findings and recommendations on China's 2010 measure only. (China's first written submission, para. 84).

⁴² WT/DSB/M/277 (Minutes of the Dispute Settlement Body).

⁴³ WT/DSB/M/277 (Minutes of the Dispute Settlement Body).

⁴⁴ Appellate Body Reports, *EC – Chicken Cuts*, para.156 and *EC – Selected Customs Matters*, para. 184.

of the identified measure.⁴⁵ The Appellate Body explained that it did not "condone a practice of amending measures during dispute settlement proceedings if such changes are made with a view to shielding a measure from scrutiny by a panel or by [the Appellate Body]".⁴⁶ It observed that "the demands of due process are such that a complaining party should not have to adjust its pleadings throughout dispute settlement proceedings in order to deal with a disputed measure as a 'moving target'. If the terms of reference in a dispute are broad enough to include amendments to a measure – as they are in this case – and if it is necessary to consider an amendment in order to secure a positive solution to the dispute – as it is here – then it is appropriate to consider the measure *as amended* in coming to a decision in a dispute."⁴⁷ The Appellate Body did not consider that including the amended measure within the panel's terms of reference raised due process issues in that case.⁴⁸

7.14 The recent panel in *EC – IT Products* addressed the issue of measures updated annually; in that dispute, the Panel Request referred to certain measures as well as to amendments thereto.⁴⁹ One of the measures had been updated on at least one occasion during the panel proceedings. Specifically, the panel considered an annex to a 1987 regulation, which had been amended annually to update the European Union's domestic tariff nomenclature. The panel considered its terms of reference were broad enough to address not only the version in force at the time of the panel's establishment, but also subsequent versions of the regulation, as amended. Under the particular facts of that case, the panel determined that the subsequent versions did not change the *essence* of the original measure.⁵⁰ The panel in *EC – IT Products* thus applied the approach taken in the *Chile – Price Band System* dispute, where the Appellate Body concluded that the measure at issue should include the amendment at issue "because that law amends [the original measure] without changing its essence."⁵¹ That panel also reasoned that to include such measures within the panel's terms of reference would prevent changing measures from evading review.⁵²

7.15 The Panel observes that the complainants' Panel Requests in this dispute refer, in addition to the measures specifically identified, to "any amendments or extensions; related measures; replacement measures; renewal measures; and implementing measures". Thus, *a priori* this Panel has the authority⁵³ to consider within its terms of reference amendments and replacement measures adopted after the Panel's establishment. In other words, the Panel is entitled to examine measures that existed

⁴⁵ Appellate Body Report, *Chile – Price Band System*, para. 139; see also para. 135: "First of all, we note that Argentina's request for the establishment of a panel refers to the measure in issue as the price band system "under Law 18.525, as amended by Law 18.591 and subsequently by Law 19.546, *as well as the regulations and complementary provisions and/or amendments*" (emphasis added). Such *amendments*, in our view, include Law 19.772. The broad scope of the Panel Request suggests that Argentina intended the request to cover the measure even as amended. Thus, we conclude that Law 19.772 falls within the Panel's terms of reference."

⁴⁶ Appellate Body Report, *Chile – Price Band System*, para. 144.

⁴⁷ Appellate Body Report, *Chile – Price Band System*, para. 144.

⁴⁸ Panel report, *India – Additional Import Duties*, para. 7.63, the panel determined that the two measures examined (CN 32/2003 and CN 82/2007) had opposite legal effect. While the first measure specified the tax rates of additional duties applicable to certain products, the second one exempted those same products from such duty rates. Thus, the panel observed that both the legal and practical effects resulting from the old measure and the new one were substantially different, thus of a different essence. Under the circumstances, the panel considered that ruling on the old measure could contribute to securing a positive solution to the dispute, whereas ruling on the new measure (that modified importantly the original one) would not do so.

⁴⁹ WT/DS375/R, WT/DS376/R, WT/DS377/R

⁵⁰ Panel Report, *EC – IT Products*, paras. 7.141, 7.142, and 7.146.

⁵¹ Appellate Body Report, *Chile-Price Band System*, paras. 136-139.

⁵² Panel Report, *EC – IT Products*, paras. 7.141, 7.142, and 7.146.

⁵³ The Panel recalls that the complainants requested the Panel only to consider the original 2009 measures and should abstain from making any findings on the WTO consistency of the 2010 measures.

at the time of its establishment as well as measures that came into effect after that date if they are of the *same essence* as the original ones that formed the basis of the Panel's terms of reference.⁵⁴

7.16 In the Panel's view, this approach originally developed in connection with amendments enacted after a panel's establishment should also apply to replacement measures that are of the same essence as original measures specifically identified in the Panel Request. The Appellate Body's rationale for including amendments of the same essence applies equally to replacement measures so that replacement measures of the same essence should also be assessed by a panel in order to secure a positive solution to a dispute.

7.17 The Panel turns now to consider the issue in this case concerning annual and replacement measures. China's legislative system for the imposition of duties comprises a basic framework legislation, an implementation regulation and annual measures that set the level of duty for specific products.⁵⁵ For quotas, there is also a basic framework legislation and an implementation regulation, then a set of regulations applicable to the relevant allocation system – direct allocation or quota bidding – and finally a set of measures (of varying duration, from a few months to a year or indefinite) that determine the level of quotas for specific products.⁵⁶ The question before us is whether, if a new annual measure corrects the WTO inconsistency of the measure it replaces, the new measure can be said to be of the same essence and hence, fall within our terms of reference. In our view, the WTO consistency of a measure is necessarily relevant to its "essence", at the very least in the context of WTO dispute settlement procedures. If a new measure appears to be WTO consistent, while the original was not, the new measure takes on a different character in the context of WTO dispute settlement and cannot be said to be of the "same essence". In such a situation, enlarging the Panel's terms of reference to include replacement measures having a different essence would run counter to DSU Articles 6.2 and 7, which circumscribe the task of a panel in a particular case, and to the tenets of due process referred to above.

7.18 Applying this conclusion to the case before us, to include within our terms of reference measures that are not of the same essence as the related 2009 measures would, in our view, not be legally justifiable. Moreover, a respondent would not know from one day to the next what the case is that it has to meet. This is particularly important where, as in this dispute, numerous measures came into existence during the course of a panel proceeding.

7.19 In sum, the date of a panel's establishment is critical in deciding which measures may be included in a panel's terms of reference. As noted earlier, a panel's terms of reference prescribe which specific measures will be the object of findings and recommendations by the panel. Generally, therefore, a panel will make findings and recommendations on existing measures specially listed in the complainant's Panel Request. In some circumstances, a panel's jurisdiction may extend to measures adopted after the panel's establishment, provided the request for establishment of the panel refers to amendments or replacement measures and such measures are of the same essence.

⁵⁴ The panels in *EC – Bananas III* and *Japan – Film* explained that the inclusion of such a phrase in a panel request can serve to adequately identify measures for the purposes of Article 6.2, even if a measure is not explicitly listed in the panel request (Panel Report, *EC – Bananas III*, paras. 7.22-7.27 and Panel Report, *Japan – Film*, paras. 10.8-10.9). The Appellate Body also ruled that broad terms of reference could include replacement or amended measures so long as they were sufficiently linked and discernable in the complainants' panel request and fall within the "gist" of what is at issue (Appellate Body Report, *Chile – Price Band System*, para. 139 and *US – Continued Zeroing*, paras. 235 and 236).

⁵⁵ The complainants' Panel Requests identified measures comprising China's system for applying export duties, see para 3.2 and 3.3 above, and this system is further described in paras. 7.59-7.63 below.

⁵⁶ The complainants' Panel Requests identified measures comprising China's system for applying export quotas, see paras. 3.2 and 3.3 above, and this system is further described in paras. 7.172-7.201 below.

7.20 The enquiry into our terms of reference does not end here, however, because the situation before us involves an additional factor. Our terms of reference do include "any amendments or extensions; replacement measures; renewal measures; and implementing measures". Indeed in the first stage of our preliminary ruling, we decided that we would consider all measures listed in the complainants' Panel Requests as well as measures covered by the phrase "any amendments or extensions; replacement measures; renewal measures; and implementing measures".⁵⁷ Consequently, it is clear that the Panel has the authority to include within its terms of reference amendments or replacement measures of the 2009 measures challenged by the complainants.

7.21 Following the issuance of our preliminary ruling, parties submitted their second written submissions responding to each other's first written submissions. In their responses to China's first submission in which China requested the Panel to rule only on the 2010 measures and not on the 2009 measures⁵⁸, the complainants asked the Panel to make findings only on the 2009 original measures. The complainants specifically requested the Panel not to make findings or recommendations on the legal instruments taking effect on 1 January 2010.⁵⁹ According to the United States and Mexico, China's 2010 measures "changed the essence" of the legal instruments that were in effect at the time of the Panel's establishment⁶⁰, and examining them creates a "moving target" that would permit China to shield its measures from review.⁶¹ The European Union expressly stated that "it agrees with the views expressed by the United States and Mexico in their opening statement".⁶² When referring to the restrictions on bauxite, it stated that the 2009 measure on bauxite is the measure that was in force at the time of the Panel's establishment and that should be examined by the Panel.⁶³ Furthermore, the Panel requested the complainants to list clearly all measures relevant to this dispute for which they are seeking "recommendations" from the Panel within the meaning of Article 19.1 of the DSU.⁶⁴ In their responses to this question, Mexico and the United States requested the Panel to make findings and recommendations only with respect to measures in force during 2009.⁶⁵ The European Union answered similarly⁶⁶, with the exception of only one measure in force in 2010.⁶⁷

7.22 In the Panel's view, the complainants when requesting the Panel not to make any findings and recommendations on any of the 2010 measures invoked by China, are in fact narrowing the Panel's terms of reference during the course of these proceedings.

⁵⁷ See para. 20 of the first phase of the Panel's preliminary ruling dated 7 May 2010 (Annex J).

⁵⁸ China's first written submission, para. 50-52, 63-70; China's closing oral statement at the first substantive meeting, paras 14, 15, 18, and 19; China's second written submission, paras 7, 16, and 18; China's opening oral statement at the second substantive meeting, para. 3.

⁵⁹ United States' second written submission, paras. 335-340; United States' opening oral statement at the first substantive meeting, paras. 38-52; Mexico's second written submission, paras. 340-345.

⁶⁰ United States' second written submission, para. 338; Mexico's second written submission, para. 343.

⁶¹ United States' second written submission, paras. 341-343; Mexico's second written submission, paras. 346- 348.

⁶² European Union's opening oral statement at the second substantive meeting, para.2 together with the United States' opening oral statement at the second substantive meeting, para 109; Mexico's opening oral statement at the second substantive meeting, para.2.

⁶³ European Union's second written submissions paras 18-21.

⁶⁴ Panel question No. 2 following the first substantive meeting; Panel question No. 1 following the second substantive meeting.

⁶⁵ United States' response to Panel question No. 2 following the first substantive meeting, United States' response to Panel question No. 1 following the second substantive meeting; Mexico's response to Panel question No. 2 following the first substantive meeting, Mexico's response to Panel question No. 1 following the second substantive meeting.

⁶⁶ European Union's response to Panel question No. 2 following the first substantive meeting, European Union's response to Panel question No. 1 following the second substantive meeting.

⁶⁷ 2010 First Batch Coke Export Quota for FIEs (JE-129) para. 7.165.

7.23 As noted above, a complainant's Panel Request determines the scope of a panel's terms of reference. It is for complainants to decide what claims they present to a panel. By the same logic, a complainant can unilaterally withdraw a claim, or the complaint in its entirety, or seek to settle a particular dispute. On numerous occasions, panels have not examined claims abandoned by complainants in the course of panel proceedings. Indeed this Panel in its preliminary ruling noted that the complainants had abandoned their claims concerning Paragraph 342 of China's Working Party report and ruled that it would not examine such claims.⁶⁸

7.24 As noted earlier, several of the measures relating to export duties and export quotas are annual measures that are replaced at least once a year. In light of the fact that the complainants have withdrawn the Panel's authority to consider claims related to those replacement measures, the Panel is not able to agree with China's request to make findings only on the 2010 replacement measures and not on the expired 2009 measures.⁶⁹ China is seeking to defend a different set of claims than the complainants have authorised the Panel to consider. China's arguments seek to turn the principle of due process on its head; although a defendant should not have to defend a "moving target" of claims, there is nothing unfair in a complainant reducing, as opposed to enlarging, the case the defendant has to meet. The Panel will, therefore, make findings only on the 2009 measures that fall within the Panel's original terms of reference.

7.25 That is not to say that the Panel will not have regard to the 2010 measures at all. As noted above, these measures have been discussed in the context of China's defence under GATT Article XX. The Panel will consider these measures in as far as they form part of the evidence submitted by China.⁷⁰

7.26 The Panel turns now to decide whether it will *make recommendations* on the 2009 measures. Panels and the Appellate Body have declined to make "recommendations"⁷¹ on measures that have ceased to exist at the time the recommendations are made.

7.27 In *US – Certain EC Products*, the panel made a recommendation on an expired measure. The Appellate Body, in reviewing that decision, noted that a panel's mandate to make recommendations is found in Article 19.1 of the DSU, which foresees only one type of recommendation, namely, that a Member bring its measure into conformity with a covered agreement. The Appellate Body concluded that measures cannot be brought into conformity if they have ceased to exist.⁷² It is worth noting that, in that dispute, the measure at issue had expired before the Panel was established.

7.28 Several panels have declined to make recommendations on expired measures. For instance, the panel in *US – Stainless Steel (Mexico)* established that when a party has already abandoned the WTO-inconsistent practice (zeroing), a panel should refrain from making recommendations, even if it finds the measure to be inconsistent with a party's WTO obligations.⁷³ In *EC – Trademarks and Geographic Indications*, the panel noted that it could not make recommendations on measures that no

⁶⁸ First phase of the preliminary ruling WT/DS394/9, WT/DS395/9 and WT/DS398/9.

⁶⁹ See for instance China's first written submission paras. 49-51, 56, 62, 64, and 67; see also China's second written submission, section II entitled "Panel Should Rule on the 2010 Measures To resolve the Disputes, and Should Not Rule on the 2009 Measure" and para. 12, "In sum, the prompt and positive resolution of this dispute calls for the Panel to address the 2010 measures, and not the 2009 measures."

⁷⁰ *China – Publications and Audiovisual Products*, para. 177; *China - Auto Parts*, para. 225; *US - Section 211 Appropriations Act*, para. 105; *India - Patents (US)*, paras. 65.

⁷¹ Pursuant to Article 19 of the DSU, when a panel concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member bring its measure into conformity with that agreement.

⁷² Appellate Body Report, *US – Certain EC Products*, para. 81.

⁷³ Panel Report on *US – Stainless Steel (Mexico)*, para. 7.50.

longer existed.⁷⁴ In *US – Poultry (China)*, the panel considered it appropriate to make *findings* on an expired measure, but recognized that it would not be appropriate to make *recommendations* pursuant to Article 19 of the DSU with respect to a WTO-inconsistent measure that had been repealed and that had ceased to have legal effect.⁷⁵

7.29 Nonetheless, as the panel in *US – Stainless Steel (Mexico)* correctly noted, there is no specific provision in the DSU that addresses whether a WTO panel may or may not make findings or recommendations on a measure that has expired after the panel's establishment. It noted that in previous cases panels have made such determinations on a case-by-case basis.⁷⁶

7.30 More recently, in *US – Continued Zeroing*, the Appellate Body determined that measures that are "alleged to be ongoing, with prospective application and a life potentially stretching into the future"⁷⁷ can be subject to WTO dispute settlement. In that case, the European Union sought a remedy related to measures that had not come into effect at the time of the panel's establishment. The panel found that the particular measure fell outside its terms of reference, reasoning that it could not make findings on events that may occur in the future. The Appellate Body disagreed with the panel on that matter. Although the measure in the zeroing dispute was different from the measures at issue in the present dispute, this Panel sees some relevance in the Appellate Body's ruling in that case. This Panel must decide how to address the WTO consistency of annual measures, i.e., measures that will expire within a year, although "prospective application" remains likely through annual replacement measures. The Panel bears in mind that it must operate to ensure that the dispute settlement system functions efficiently in resolving disputes.⁷⁸

7.31 In light of the above, the Panel has concluded that it has some discretion to decide how to take into account a measure covered by its terms of reference that has ceased to exist at the end of the panel proceedings.⁷⁹ The Panel must of course bear in mind that the complainants have requested the Panel not to make *findings* on any of the 2010 measures - even those of the same essence as the original 2009 measures - notwithstanding the fact that the Panel's original terms of reference included amendments and replacement measures. Nevertheless, the Panel does not consider that it can entirely set aside the 2010 measures from consideration. As noted above, they have been discussed, *inter alia*, in the context of China's defences under GATT Article XX and we will have regard to them in that context. Moreover, we will necessarily need to examine them to consider whether the expired measures have a prospective application in the form of annually renewed measures.

⁷⁴ Panel Report, *EC – Trademarks and Geographic Indications*, para. 7.14.

⁷⁵ Panel Report, *US – Poultry*, para. 7.56, citing the following cases: Appellate Body Report, *US – Certain EC Products*, para. 81; Appellate Body Report, *US – Upland Cotton*, para. 272; and Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II)*, para. 271.

⁷⁶ Panel Report, *US-Stainless Steel (Mexico)*, para. 7.48, citing the following cases: Panel Report, *Indonesia – Autos*, para. 14.9; Panel Report, *India – Autos*, paras. 7.26- 7.29; Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.340-7.344; Panel Report, *EC – Approval and Marketing of Biotech Products*, paras. 7.1303-7.1312.

⁷⁷ Appellate Body Report, *US – Continued Suspension*, paras. 170-171. Panel Report, *US – Poultry (China)* where the Panel declined to issue recommendations to the United States not to repeat the measure found to be inconsistent.

⁷⁸ For instance, in its second written submission China argues that the prompt and positive resolution of this dispute calls for the Panel to address the 2010 measures, and not the 2009 measures. China insisted that the measures that are the source of the dispute today are the 2010 measures and the Panel would fail to resolve the dispute if it ruled only on the 2009 measures. The complainants argued that the logic of China's approach, if accepted, would still fail to resolve the dispute because the Panel's findings and recommendations would likely not be adopted until sometime in 2011 when the 2010 measures are no longer in effect (complainants' joint opening oral statement at the first substantive meeting, para. 45).

⁷⁹ Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II)*, para. 270. This line of reasoning was also followed in the Panel Report, *China – Publications and Audiovisual Products*, para. 7.452.

7.32 The Panel recalls that several measures on which the complainants' claims are based have expired, ceased to exist, or were amended after the Panel's establishment on 21 December 2009. As noted earlier, China enacted more than 100 legislative instruments in areas relevant to this dispute during the course of these proceedings. As further discussed in these findings, some of the new 2010 measures would appear not to be WTO-inconsistent, although the equivalent 2009 measures were inconsistent.

7.33 In light of our analysis and conclusions above, the Panel has determined that its approach will be the following:

- (a) The Panel will make *findings* on the WTO consistency of original measures included in its terms of reference. In light of the request by the complainants that the Panel not make any *findings* on any amendments or replacement measures, the Panel will only make findings on 2009 measures and the Panel will not make findings on 2010 measures.
- (b) In situations where a 2010 replacement measure appears to correct the WTO inconsistency of the original 2009 measure – in whole or in part (and therefore is considered not to have the same essence, in whole or in part, as the expired measure) – the Panel will decline to make *findings* or *recommendations* on the 2010 measure, as it falls outside its terms of reference. However, in order to make a determination on whether the new measure is of the same essence as the expired measure, and hence imbues the expired measure with ongoing effect or prospective application, the Panel will necessarily have to determine (without making a formal finding) whether the WTO inconsistency is no longer present in the new measure.⁸⁰
- (c) Nonetheless, with a view to ensuring that annually renewed measures do not evade review by virtue of their annual nature – and relying on the Appellate Body ruling in *US-Continued Zeroing* where the Appellate Body recognized the possibility for a panel to make a ruling on measures that have a "prospective application and a life potentially stretching into the future" – the Panel will make *findings* with respect to the series of measures comprised of the relevant framework legislation, the implementing regulation(s), other applicable laws and the specific measure imposing export duties or export quotas in force at the date of the Panel's establishment.
- (d) With respect to *recommendations*, generally the Panel will not make recommendations on any original measure or on any measure no longer in existence (or part thereof) on 15 December 2010, unless there is clear evidence that the measure has ongoing effect.
- (e) In situations where the claim is based on an annual measure, as is the case with measures imposing export duties and with some of the measures relating to export quotas, the Panel will make *recommendations* with respect to the series of measures comprised of the relevant framework legislation, the implementing regulation(s), other applicable laws and the specific measure imposing export duties or export quotas in force at the date of the Panel's establishment.

⁸⁰ This determination could be relevant in the context of an eventual panel process reviewing China's implementation of the recommendations of this Panel on such a measure(s).

3. Whether the European Union's claims under Article X:1 and Article X:3(a) of the GATT 1994 regarding China's administration of its export licensing system fall outside the Panel's terms of reference because they were not identified in the European Union's Panel Request

7.34 The European Union claims that China's administration of its export licensing system is inconsistent with Article X:1 and Article X:3(a) of the GATT 1994. These are alternative claims to the European Union's claim that China's export licences are inconsistent with Article XI of the GATT and with Paragraphs 5.1 and 1.2 of China's Accession Protocol, in combination with Paragraphs 83, 84, 162 and 165 of the Working Party Report.⁸¹ Specifically, the European Union considers that China's failure to publish sufficient definitions and explanations on the interpretation of certain terms i.e "other documents", "management qualifications" and "documents of approval" is inconsistent with GATT Article X:1.⁸² The European Union also considers that the administration of China's licensing system is based on a "nexus of [of] vague and opaque provisions and requirements [which] fails to satisfy the conditions of 'uniform, impartial and reasonable', within the meaning of Article X(3)a of the GATT."⁸³

7.35 China responds that to the extent that the European Union considers that the requirements for export licence applicants to provide documents and furnish evidence of their qualification to do business are in and of themselves non-uniform, partial, and unreasonable, it has not stated a claim concerning the *administration* of China's export licensing regime that is cognizable under Article X:3(a).⁸⁴ China further submits that even were the Panel to consider that the European Union's claim against China's export licensing system involves a claim against an "administrative process"⁸⁵ leading to an administrative decision concerning the allocation of direct quotas, the claim fails for lack of evidence.⁸⁶

7.36 In its comments on the complainants' responses to the questions posed by the Panel following the first substantive meeting, China requests the Panel to find that the European Union's claims under Articles X:1 and X:3(a) regarding export licensing fall outside the Panel's terms of reference, because the European Union failed to include these claim in its Panel Request.⁸⁷

7.37 In response to a question from the Panel concerning this request, the European Union asks the Panel to reject China's request and to find that its Panel Request: (i) identifies the measures at issue; and (ii) provides a brief summary of the legal basis of the complaint sufficient to present the problem clearly, as required by Article 6.2 of the DSU.⁸⁸

7.38 Section III of the request addresses concerns regarding additional restraints imposed on exportation. Narrative paragraph one of Section III describes in general terms the additional restraints that the European Union alleges that China imposes:

"China imposes other restraints on the exportation of the materials, administers its measures in a manner that is not uniform, impartial, and reasonable, imposes

⁸¹ European Union's first written submission, para. 21.

⁸² European Union's first written submission, paras. 341, and 347-349.

⁸³ European Union's first written submission, para. 351.

⁸⁴ China's first written submission, para. 826.

⁸⁵ See the discussion on administrative processes in para. 7.689.

⁸⁶ China's first written submission, para. 828.

⁸⁷ China's comments on the complainants' responses to Panel question No. 2 following the first substantive meeting, paras. 42-46.

⁸⁸ European Union's response to Panel question No. 56 following the second substantive meeting, para. 76.

excessive fees and formalities on exportation, and does not publish certain measures pertaining to requirements, restrictions, or prohibitions on exports"

7.39 The subsequent paragraphs of Section III provide specific information on the details of the European Union's request.

7.40 Narrative paragraphs two, three, and six of Section III state that China's administration of its quota and alleged MEP regimes are "not uniform, impartial and reasonable", thereby advancing claims of inconsistent administration under GATT Article X:3(a).

7.41 In narrative paragraph 4, the European Union claims that China "does not publish the amount for the export quota for zinc or any conditions or procedures for applying entities to qualify to export zinc", thereby presenting a claim concerning non-publication under Article X:1. A similar statement appears in narrative paragraph 6, thus stating a claim of alleged non-publication under Article X:1 in relation to an alleged MEP requirement.

7.42 The fifth narrative paragraph, which relates to the European Union's concerns regarding China's export licensing regime, reads, in its entirety:

"In addition, China restricts the exportation of bauxite, coke, fluorspar, manganese, silicon carbide, and zinc by subjecting these materials to non-automatic licensing. China imposes the non-automatic export licensing for bauxite, coke, fluorspar, silicon carbide, and zinc in connection with the administration of the export quotas discussed in Section I, as an additional restraint on the exportation of those materials."

7.43 Following the list of legal instruments that the European Union alleges the disputed Chinese measures are reflected in, Section III concludes with the following statement:

"The European Communities considers that these measures are inconsistent with Article VIII:1 and VIII:4, Article X:1 and X:3(a), and Article XI:1 of the GATT 1994 and paragraphs 2(A)2, 5.1, 5.2 and 8.2 of Part I of the Accession Protocol, as well as China's obligations under the provisions of paragraph 1.2 of Part I of the Accession Protocol, which incorporates commitments in paragraphs 83, 84, 162, and 165 of the Working Party Report."

7.44 Narrative paragraphs 2, 3, 4 and 6 do not, on their face, indicate that the European Union intended to make claims concerning WTO-inconsistent publication or administration of China's export licensing regime under Articles X:1 and X:3(a). Nor, on its face, does narrative paragraph 5 indicate that the EU is making a claim of non-uniform, unreasonable or partial administration of China's export licensing system. Similarly there is no indication that the European Union is intending to pursue a claim relating to the non-publication of definitions and explanations on the interpretation of certain terms. However, the European Union asserts that its claims relating to China's export licences are found through the combined reading of three sub-paragraphs: the first, the fifth and the last of Section III, together with the list of the relevant legal instruments. It states, "Such combined reading shows that the European Union has satisfied the conditions of Article 6.2 of the DSU in relation to its export licenses' claims."⁸⁹

7.45 The question for the Panel is whether a combined reading of these paragraphs is indeed sufficient to satisfy the conditions of Article 6.2 of the DSU as the European Union claims.

⁸⁹ European Union's response to Panel question No. 56 following the second substantive meeting, para. 78.

7.46 The Panel first recalls its preliminary ruling wherein it considered the European Union's claim under Article X:1 of the GATT 1994 concerning non-publication of the coke quota. In its ruling, the Panel took note of the "specific language" used by the European Union in narrative paragraph 4 of Section III.⁹⁰ The Panel then continued that the inclusion by the European Union of the reference to the zinc quota in the Panel Request demonstrated that "the European Union was aware of, as well as capable of identifying the measures which had not been published". The Panel continued that "considering the omission of the coke quota from the text of the Panel Request as a whole, it was reasonable for China to infer that the exclusion of the coke quota from Section III of the Panel Request was deliberate".⁹¹

7.47 The Panel continues to bear in mind this finding in considering the European Union's claims regarding the licensing system under Article X:1 and Article X.3(a).

7.48 In the Panel's view, the European Union used specific language in narrative paragraphs 4 and 6 concerning a failure to publish the zinc quota and certain alleged MEP-related requirements. However, the European Union excluded any reference to a failure to publish from narrative paragraph 5 of Section III concerning export licensing measures. Likewise, the European Union used specific language in narrative paragraphs 2, 3, and 6 referring to "uniform", "impartial" and "reasonable". However the European Union excluded such reference from narrative paragraph 5.

7.49 The principle of *expressio unius est exclusio alterius* referred to by the Panel in rejecting the European Union's claim regarding non-publication of the coke quota would seem highly relevant in this situation. Consequently, the European Union's decision to include "specific language" in relation to Articles X:1 and X:3(a) in narrative paragraphs 2, 3, 4 and 6, concerning quota measures and alleged MEP-related requirements, as opposed to its decision to exclude that "specific language" from paragraph 5, concerning export licensing-related measures, should be given its proper meaning. To recall, the Panel agrees with the panel on *China – Publications and Audiovisual Products* that "to express or include one thing implies the exclusion of the other".

7.50 The European Union asserts that its claims are found through a "combined reading" of the first, the fifth and the last narrative paragraphs together with the list of the relevant legal instruments in its Panel Request. The Panel disagrees with this assertion. The first narrative paragraph is a general introductory paragraph and the last paragraph is in the way of a concluding paragraph listing the provisions with which the measures are allegedly inconsistent. It is the other narrative paragraphs that served to inform China of the nature of the case it had to defend. These other narrative paragraphs, specifically narrative paragraph 5, did not inform China that the European Union would be claiming that China's licensing system was inconsistent with Article X:1 and Article X:3(a) of the GATT 1994.

7.51 Given the specific language of the European Union's Panel Request, the Panel finds that the European Union has not brought its claims concerning China's licensing system under Articles X:1 and X:3(a) of the GATT 1994.

⁹⁰ Preliminary Ruling of 1 October 2010, para. 74 (annex F).

⁹¹ Preliminary Ruling of 1 October 2010, para. 75 (annex F). See also footnote 10 of para. 75 wherein the Panel noted that the "panel on *China – Publications and Audiovisual Products* referred to the general legal canon of construction *expressio unius est exclusio alterius* in assessing the decision by the complainant to exclude a particular provision from the text of its panel request. That panel noted that the canon of construction holds that to express or include one thing implies the exclusion of the other or of the alternative (see Panel Report on *China – Publications and Audiovisual Products*, para. 7.60, referring to Black's Law Dictionary, 8th ed., B.A. Garner (ed) (West Group 2004), p. 620); also Ian Brownlie, *Principles of Public International Law*, 6th ed. (2003) p. 602, 604. The Panel finds this principle relevant to its assessment of the European Union's failure to reference the coke quota in its Panel Request in this dispute."

B. EXPORT DUTIES

7.52 The complainants claim that China imposes duties on bauxite, coke, fluorspar, magnesium, manganese, silicon metal, yellow phosphorous, and zinc⁹² at the time of the Panel's establishment on 21 December 2009 that are inconsistent with China's obligations in Paragraph 11.3 of China's Accession Protocol and its Annex 6. The complainants allege that these export duties are imposed pursuant to China's *Customs Law*⁹³, *Regulations on Import and Export Duties*⁹⁴, and *2009 Tariff Implementation Program*.⁹⁵

7.53 China invokes general and specific defences against the export duties claims. As noted earlier, China's general argument is that the Panel should not consider the 2009 measures invoked by the complainants in support of their claims when those measures have been replaced by 2010 measures.⁹⁶ China acknowledges the existence of certain export duties in place in 2009 but argues that the Panel should consider only the 2010 measures.⁹⁷ As noted earlier, the complainants explicitly narrowed down the Panel's terms of reference to a consideration of the WTO consistency of the 2009 measures. Therefore, we will make findings only on the 2009 measures.

7.54 For one specific product identified as yellow phosphorous, China argues that contrary to the complainants' assertion, the export duty in force as of 21 December 2009 was not in excess of the rate allowed in Annex 6 of its Protocol of Accession, and thus was WTO consistent.

7.55 With respect to some of the products, China acknowledges the existence of certain export duties imposed pursuant to 2010 measures, as well as their inconsistency with China's Protocol of Accession, and does not offer any justification for them.⁹⁸ China requests the Panel to consider only 2010 measures, even those for which it offers no justification.⁹⁹

7.56 In the previous section of these Panel Reports, the Panel reached the conclusion that, as a general matter, its terms of reference are limited to measures that were in force on 21 December 2009 – the date of the establishment of this Panel. The Panel also determined that upon the request of the complainants, the Panel will not assess the WTO consistency of any 2010 replacement measure even if they are of the same essence as the measures in force on 21 December 2009. We shall be guided by this principle when examining the export duties claims for each of the products concerned.

7.57 For certain of the raw materials not included in Annex 6 of its Protocol of Accession, China does not attempt to justify the imposition of export duties. In those cases, the duties result in a violation of Article 11.3 of China's Protocol of Accession, which establishes the obligation to eliminate all taxes and charges applied to exports of products not listed in Annex 6 of its Protocol, nor

⁹² The specific forms of the raw materials subject to the complainants' claims are identified in Exhibit JE-5 and para. 2.2 of the Descriptive Part to these Reports.

⁹³ *Customs Law*, (Exhibits CHN-14, JE-68).

⁹⁴ *Regulations on Import and Export Duties*, (Exhibit CHN-13, JE-67).

⁹⁵ *2009 Tariff Implementation Program*, (Exhibit JE-21).

⁹⁶ See for instance China's first written submission paras 49-51, 56, 62, 64 and 67; see also China's second written submission, section II entitled "Panel Should Rule on the 2010 Measures To resolve the Disputes, and Should Not Rule on the 2009 Measure" and para. 12, "In sum, the prompt and positive resolution of this dispute calls for the Panel to address the 2010 measures, and not the 2009 measures."

⁹⁷ See China's first written submission, para. 49-51, 56, 62, 64 and 67; China's second written submission, Section II entitled "The Panel should rule on the 2010 Measures To resolve the Disputes, and Should not Rule on the 2009 Measures"; and para. 12 "In sum, the prompt and positive resolution of this dispute call the Panel to address the 2010 measures and not the 2009 measures."

⁹⁸ See China's response to Panel question No. 4 following the first substantive meeting, para. 26.

⁹⁹ See China, first written submission, paras. 69, 70, and second written submission, paras. 6-18.

applied in conformity with the provisions of Article VIII of the GATT 1994. For certain other raw materials, China raises a defence under Article XX(b) or XX(g) of the GATT 1994.

7.58 The Panel will consider the complainants' claims below. Before doing so, however, the Panel considers it helpful to set out the operation of China's export duty system for the raw materials at issue.

1. China's application of export duties

7.59 In 2009, China imposed export duties on various forms of bauxite, coke, fluorspar, magnesium, manganese, silicon metal, yellow phosphorous, and zinc. China's legal framework regarding the imposition of export duties is described below.

7.60 China maintains basic framework legislation authorizing the imposition of export duties. This comprises the following measures: (i) *Customs Law*¹⁰⁰, and (ii) *Regulations on Import and Export Duties*.¹⁰¹ In addition, China publishes a specific annual measure setting out an export duty with respect to certain products. In December 2008, China published the *2009 Tariff Implementation Program* which took effect on 1 January 2009.

7.61 According to China's basic legal framework on export duties, Customs is responsible for supervision and control over departures from the Customs territory, as well as for collecting customs duties on articles permitted to leave the territory.¹⁰² The Tariff Commission is responsible for making adjustments to tariff items, and tariff rates.¹⁰³ The *Customs Law* and the *Regulations on Import and Export Duties* provide that the declaration and payment of tariffs on exports may be completed by the exporters¹⁰⁴ within a specific time-period; in case of late payment, several penalties and sanctions would apply.¹⁰⁵

7.62 The *2009 Tariff Implementation Program* sets out specific export duty rates applicable to certain products during a given year. During 2009, China imposed export duties on bauxite, coke, fluorspar, magnesium, manganese, silicon metal, yellow phosphorous, and zinc pursuant to the *2009 Tariff Implementation Program*.¹⁰⁶ From 1 January 2010, China imposed export duties pursuant to the *2010 Tariff Implementation Program*.¹⁰⁷

7.63 There is also a fourth measure, relevant to the complainants' claim on export duties. The *Adjustment of Export Tariffs Circular*¹⁰⁸ removed the special export duty on yellow phosphorous, from 1 July 2009.

¹⁰⁰ *Customs Law* (Exhibit CHN-14, JE-68).

¹⁰¹ *Regulations on Import and Export Duties* (Exhibit CHN-13, JE-67).

¹⁰² Article 2, and 53 of the *Customs Law*, and Article 2 of the *Regulations on Import and Export Duties* (Exhibit JE-67, CHN-13).

¹⁰³ Article 4 of the *Regulations on Import and Export Duties* (Exhibit JE-67, CHN-13).

¹⁰⁴ Article 9 of the *Customs Law* (Exhibit JE-68, CHN-14).

¹⁰⁵ Article 60 of the *Customs Law* (Exhibit JE-68, CHN-14), Articles 9, and 37 of the *Regulations on Import and Export Duties* (Exhibit JE-67, CHN-13).

¹⁰⁶ *2009 Tariff Implementation Program* (Exhibit JE-21).

¹⁰⁷ *2010 Tariff Implementation Plan* (CHN-5).

¹⁰⁸ *Adjustment of Export Tariffs Circular* (CHN-1).

2. Whether export duties on bauxite, coke, fluorspar, magnesium, manganese, silicon metal, zinc and yellow phosphorus are inconsistent with Paragraph 11.3 of China's Accession Protocol

7.64 The second sentence of Paragraph 1.2 of China's Accession Protocol states that provisions of the Protocol are "an integral part of the WTO Agreement". Thus, the provisions of the Accession Protocol are enforceable in WTO dispute settlement proceedings pursuant to Article 1.1 of the DSU. This is consistent with the approach taken by panels and the Appellate Body.¹⁰⁹

7.65 Paragraph 11.3 of China's Accession Protocol¹¹⁰ contains specific obligations with respect to export duties and provides that:

"China shall eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of this Protocol or applied in conformity with the provisions of Article VIII of the GATT 1994."

7.66 Annex 6 of China's Accession Protocol¹¹¹, entitled "Products Subject to Export Duty", lists 84 different products, each identified by an eight-digit HS (Harmonized System) number, and product description. The Note to Annex 6 states that:

"China confirmed that the tariff levels included in this Annex are maximum levels which will not be exceeded. China confirmed furthermore that it would not increase the presently applied rates, except under exceptional circumstances. If such circumstances occurred, China would consult with affected members prior to increasing applied tariffs with a view to finding a mutually acceptable solution."

7.67 Generally, the complainants claim that the export duties imposed by China on the exportation of the relevant raw materials cannot be justified by either of the exceptions mentioned in Paragraph 11.3 quoted above. They submit that, except for yellow phosphorus, the relevant raw materials at issue are not included in Annex 6 of China's Accession Protocol. The complainants add that such duties are not covered by Article VIII of the GATT 1994 which, in any case, is not invoked by China to justify such export duties.¹¹²

7.68 The Panel considers that an analysis of the WTO consistency of the *2009 Tariff Implementation Program* must also involve an analysis of the *Customs Law* and the *Regulations on Import and Export Duties*. This is not to say that individually each of those measures would necessarily be WTO-inconsistent; rather, when they operate in concert to result in WTO-inconsistent duties, it is then that they would become *prima facie* WTO-inconsistent. It is only by examining these three measures as they work in concert that the Panel can reach a final determination on the complainants' export duty claims. The Panel considers that findings on the measures acting in concert is necessary so that annually renewed measures do not evade WTO dispute settlement review merely through their expiration during the Panel proceedings.

¹⁰⁹ See Panel and Appellate Body reports, *China – Auto Parts* and *China – Publications and Audiovisual Products*.

¹¹⁰ China's Accession Protocol to the WTO, WT/L/432 (Exhibit JE-2).

¹¹¹ China's Accession Protocol to the WTO WT/L/432, p. 93 (Exhibit JE-2).

¹¹² The United States and Mexico claim that China's export duties are inconsistent with Article VIII of the GATT 1994; the Panel considers those claims in Section VII.B of these Panel Reports.

(a) Export duties on "yellow phosphorous" (HS 2804.7010)

7.69 The complainants challenge the export duty imposed on yellow phosphorus (HS 2804.7010). They submit that China committed, pursuant to Article 11.3 and Annex 6 of its Accession Protocol, not to exceed an export duty rate maximum level of 20% on yellow phosphorous. According to the complainants, China imposes a "regular" *ad valorem* export duty rate of 20% on yellow phosphorus. From 1 January 2009, in addition to this regular export duty, they argue that China imposed a "special" export duty rate of 50% on yellow phosphorus pursuant to the *2009 Tariff Implementation Program*.¹¹³

7.70 China claims that the *Adjustment of Export Tariffs Circular* terminated the special export duty rate of 50% from 1 July 2009 – before the date of establishment of this Panel. Therefore, according to China, at the time of the Panel's establishment, China maintained a total export duty of 20% on yellow phosphorous, consistent with its obligation under the Protocol of Accession.¹¹⁴ China requests the Panel to make no findings on the *2009 Tariff Implementation Program*¹¹⁵, in respect of yellow phosphorus.¹¹⁶

7.71 The Panel agrees with China that the *Adjustment of Export Tariffs* removed the special export duty rate as of 1 July 2009, before the date of establishment of this Panel. Furthermore, the Panel notes that this measure was duly published.¹¹⁷ Therefore, on 21 December 2009, yellow phosphorous was subject to the regular export duty of 20%, which does not exceed the maximum rate listed in Annex 6 of China's Accession Protocol and is therefore consistent with China's WTO obligations.¹¹⁸ Accordingly, the Panel concludes that the provision of the *2009 Tariff Implementation Program*¹¹⁹ applicable to yellow phosphorus that was in force at the time of the Panel's establishment is not inconsistent with China's WTO obligations. The Panel makes no findings with respect to previous measure – actually challenged by the complainants – that removed the special duty of 50% imposed on yellow phosphorus before the Panel's establishment.¹²⁰

(b) Export duties on bauxite, including "refractory clay" (HS 2508.3000), "aluminium ores and concentrates" (HS 2606.0000) and "aluminium ash residues" (HS 2620.4000)

7.72 The complainants claim that from 1 January 2009, China imposed an export duty rate at the level of 15% on refractory clay (HS 2508.3000)¹²¹ and on "aluminium ores and concentrates" (HS 2606.0000)¹²², and an export duty at the level of 10% on "aluminium ash residues" (HS 2620.4000).¹²³ The complainants add that none of the three categories of bauxite referred to above are listed in Annex 6 of China's WTO Accession Protocol and that the duties cannot be justified under Article VIII of the GATT 1994.

¹¹³ *2009 Tariff Implementation Program* (Exhibit JE-21).

¹¹⁴ See China's first written submission, para. 56.

¹¹⁵ *2009 Tariff Implementation Program* (Exhibit JE-21).

¹¹⁶ The Panel notes that the *Adjustment of Export Tariffs Circular* (CHN-1) removed the special duty of 50% imposed on yellow phosphorus.

¹¹⁷ See China's response to Panel question No. 8 following the second substantive meeting, para. 27.

¹¹⁸ See China's response to Panel question No. 4 following the second substantive meeting, para. 25.

¹¹⁹ *2009 Tariff Implementation Program* (Exhibit JE-21).

¹²⁰ The *Adjustment of Export Tariffs Circular* (CHN-1) removed the special duty of 50% imposed on yellow phosphorus.

¹²¹ *2009 Tariff Implementation Program* (Exhibit JE-21), Section II(2).

¹²² *2009 Tariff Implementation Program* (Exhibit JE-21), Section II(2).

¹²³ *2009 Tariff Implementation Program* (Exhibit JE-21).

7.73 China asserts that the *2010 Tariff Implementation Program*¹²⁴ removed the duties as of 1 January 2010.¹²⁵ China argues that the Panel should consider only the 2010 measure on bauxite and hence the Panel should conclude that China does not maintain WTO-inconsistent export duties on the three categories of bauxite at issue.

7.74 The Panel recalls its earlier decision that its terms of reference are limited to measures in force at the time of its establishment on 21 December 2009 and that, at the request of the complainants, it will not make findings on any 2010. The Panel notes, however, that China's *2010 Tariff Implementation Program* does not maintain an export duty on any category of bauxite.

7.75 The three categories of bauxite at issue are not listed in Annex 6 of China's Accession Protocol. Moreover, China does not invoke Article VIII to justify any of the export duties challenged by the complainants. China does not contest that it imposed such export duties on bauxite on 21 December 2009.

7.76 The Panel finds that the series of measures, made up of the *Customs Law*¹²⁶, *Regulations on Import and Export Duties*¹²⁷, and *2009 Tariff Implementation Program*¹²⁸ when operating in concert, results in the imposition of export duties on different forms of bauxite, which is inconsistent with Paragraph 11.3 of China's Accession Protocol. This is not to say that individually each of those measures is necessarily WTO-inconsistent; rather, when they operate in concert to result in WTO-inconsistent duties, it is then that they become *prima facie* WTO-inconsistent. The Panel recalls WTO jurisprudence that "a *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party".¹²⁹

7.77 The Panel finds, therefore, that, with respect to its export duty on bauxite, China has acted inconsistently with its WTO obligations.

(c) Export duties on "coke" (HS 2704.0010)

7.78 The complainants claim that China imposed a temporary export duty at the level of 40% on coke and semi-coke (HS 2704.0010) from 1 January 2009.¹³⁰ They add that "coke" is not listed in Annex 6 of China's Accession Protocol and that the duties cannot be justified by Article VIII of the GATT 1994.

7.79 China does not contest that it imposed this duty on 21 December 2009. China does not invoke Article VIII and reiterates its position with respect to the 2010 measures. In addition, China claims that its export duties as applied to coke are justified pursuant to Article XX(b) of the GATT 1994.¹³¹

7.80 The Panel notes that coke is not listed in Annex 6 of China's Accession Protocol. The Panel finds that the series of measures, made up of the *Customs Law*¹³², *Regulations on Import and Export Duties*¹³³, and *2009 Tariff Implementation Program*¹³⁴ when operating in concert, result in the

¹²⁴ *2010 Tariff Implementation Plan* (Exhibit CHN-5).

¹²⁵ China's first written submission, para. 84.

¹²⁶ *Customs Law* (Exhibit CHN-14, JE-68).

¹²⁷ *Regulations on Import and Export Duties* (Exhibits CHN-13, JE-67).

¹²⁸ *2009 Tariff Implementation Program*, (Exhibit JE-21).

¹²⁹ Appellate Body Report, *EC – Hormones*, para. 104.

¹³⁰ *2009 Tariff Implementation Program*, (Exhibit JE-21).

¹³¹ China's first written submission, paras. 197, 199.

¹³² *Customs Law* (Exhibit CHN-14, JE-68).

¹³³ *Regulations on Import and Export Duties* (Exhibits CHN-13, JE-67).

imposition of export duties on coke which is inconsistent with Paragraph 11.3 of China's Accession Protocol. This is not to say that individually each of those measures is necessarily WTO-inconsistent; rather, when they operate in concert to result in WTO-inconsistent duties, it is then that they become *prima facie* WTO-inconsistent.

7.81 The Panel provisionally finds, therefore, that China has acted inconsistently with its WTO obligations. The Panel will consider below China's defence that the application of export duties to coke is justified pursuant to GATT Article XX(b).

- (d) Export duties on fluorspar, including "met-spar" (HS 2529.2100) and "acid-spar" (HS 2529.2200)

7.82 The complainants claim that China imposed a temporary export duty at the level of 15% on "met-spar" (HS 2529.2100), and on "acid-spar" (HS 2529.2200) as from the January 1, 2009.¹³⁵ They add that these forms of fluorspar are not listed in Annex 6 of China's Accession Protocol and the duties cannot be justified by Article VIII of the GATT 1994.

7.83 China does not contest that it imposed these duties as of 21 December 2009. China does not invoke Article VIII and reiterates its position with respect to the 2010 measures. In addition, China claims that its export duties are justified pursuant to Article XX(g) of the GATT 1994.

7.84 The Panel notes that these forms of fluorspar are not listed in Annex 6 of China's Accession Protocol. The Panel finds that the series of measures, made up of the *Customs Law*¹³⁶, *Regulations on Import and Export Duties*¹³⁷, and *2009 Tariff Implementation Program*¹³⁸ when operating in concert, result in the imposition of export duties on fluorspar which is inconsistent with Paragraph 11.3 of China's Accession Protocol. This is not to say that individually each of those measures is necessarily WTO-inconsistent; rather, when they operate in concert to result in WTO-inconsistent duties, it is then that they become *prima facie* WTO-inconsistent.

7.85 The Panel provisionally finds, therefore, that China has acted inconsistently with its WTO obligations. The Panel will consider below China's defence that the application of export duties to fluorspar is justified pursuant to GATT Article XX(g).

- (e) Export duties on magnesium, including "magnesium metal" (HS 8104.1100), "unwrought magnesium" (HS 8104.1900), and "magnesium waste and scrap" (HS 8104.2000)

7.86 The complainants claim that China imposed a temporary export duty at the level of 10% on "magnesium metal" (HS 8104.1100), "unwrought magnesium" (HS 8104.1900) and "magnesium waste and scrap" (HS 8104.2000) from 1 January 2009.¹³⁹ They add that these forms of magnesium are not listed in Annex 6 of China's Accession Protocol and that the duty cannot be justified by Article VIII of the GATT 1994.

7.87 China does not contest that it imposed these duties as of 21 December 2009. China does not invoke Article VIII and reiterates its position with respect to the 2010 measures. In addition, China it claims that its export duties as applied to these forms of magnesium are justified pursuant to Article XX(b) of the GATT 1994.

¹³⁴ *2009 Tariff Implementation Program*, (Exhibit JE-21).

¹³⁵ *2009 Tariff Implementation Program*, (Exhibit JE-21).

¹³⁶ *Customs Law* (Exhibit CHN-14, JE-68).

¹³⁷ *Regulations on Import and Export Duties* (Exhibits CHN-13, JE-67).

¹³⁸ *2009 Tariff Implementation Program*, (Exhibit JE-21).

¹³⁹ *2009 Tariff Implementation Program*, (Exhibit JE-21).

7.88 The Panel notes that these forms of magnesium are not listed in Annex 6 of China's Accession Protocol. The Panel finds that the series of measures, made up of the *Customs Law*¹⁴⁰, *Regulations on Import and Export Duties*¹⁴¹, and *2009 Tariff Implementation Program*¹⁴² when operating in concert, result in the imposition of export duties on magnesium which is inconsistent with Paragraph 11.3 of China's Accession Protocol. This is not to say that individually each of those measures is necessarily WTO-inconsistent; rather, when they operate in concert to result in WTO-inconsistent duties, it is then that they become *prima facie* WTO-inconsistent.

7.89 The Panel provisionally finds, therefore, that China has acted inconsistently with its WTO obligations. The Panel will consider below China's defence that the application of export duties to magnesium is justified pursuant to GATT Article XX(b).

- (f) Export duties on manganese, including "manganese ores and concentrates" (HS 2602.0000) and "unwrought manganese waste and scrap" (HS 8111.00.10) and "unwrought manganese powder" (HS 8111.0010)

7.90 The complainants claim that China imposed a temporary export duty at the level of 15% on "manganese ores and concentrates" (HS No. 2602.0000) and a temporary export duty at the level of 20% on "unwrought manganese waste and scrap" (HS 8111.00.10) and "unwrought manganese powder" (HS 8111.0010) from 1 January 2009.¹⁴³ They add that these materials are not listed in Annex 6 of China's Accession Protocol and that the duties cannot be justified by Article VIII of the GATT 1994.

7.91 China does not contest that it imposed such duty as of 21 December 2009. China does not invoke Article VIII with respect to manganese and reiterates its position with respect to the 2010 measures. In addition, China claims that its export duties as applied to unwrought manganese waste and scrap and unwrought manganese powder are justified pursuant to Article XX(b) of the GATT 1994.¹⁴⁴

7.92 The Panel notes that these forms of manganese are not listed in Annex 6 of China's Accession Protocol. The Panel finds that the series of measures, made up of the *Customs Law*¹⁴⁵, *Regulations on Import and Export Duties*¹⁴⁶, and *2009 Tariff Implementation Program*¹⁴⁷ when operating in concert, result in the imposition of export on those forms of manganese which is inconsistent with Paragraph 11.3 of China's Accession Protocol. This is not to say that individually each of those measures is necessarily WTO-inconsistent; rather, when they operate in concert to result in WTO-inconsistent duties, it is then that they become *prima facie* WTO-inconsistent.

7.93 With respect to unwrought manganese waste and scrap and unwrought manganese powder, the Panel finds, provisionally, that China has acted inconsistently with its WTO obligations and will consider below China's defence that the application of export duties is justified pursuant to GATT Article XX(b).

¹⁴⁰ *Customs Law* (Exhibit CHN-14, JE-68).

¹⁴¹ *Regulations on Import and Export Duties* (Exhibits CHN-13, JE-67).

¹⁴² *2009 Tariff Implementation Program*, (Exhibit JE-21).

¹⁴³ *2009 Tariff Implementation Program*, (Exhibit JE-21).

¹⁴⁴ China's response to Panel question No. 4 following the first substantive meeting.

¹⁴⁵ *Customs Law* (Exhibit CHN-14, JE-68).

¹⁴⁶ *Regulations on Import and Export Duties* (Exhibits CHN-13, JE-67).

¹⁴⁷ *2009 Tariff Implementation Program*, (Exhibit JE-21).

7.94 With respect duties on manganese ores and concentrates the Panel recalls WTO jurisprudence that "a *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party".¹⁴⁸

(g) Export duties on "silicon metal" (HS 2804.6900)

7.95 The complainants claim that China imposed a temporary export duty at the level of 15% on silicon metal (HS 2804.6900) from 1 January 2009.¹⁴⁹ They add that "silicon metal" is not listed in Annex 6 of China's Accession Protocol and that the duties cannot be justified under Article VIII of the GATT 1994.

7.96 China does not contest that it imposed this duty as of 21 December 2009. China does not invoke Article VIII and reiterates its position with respect to the 2010 measures. China does not attempt to justify the export duty rate that it imposed on silicon metal during 2009.¹⁵⁰

7.97 The Panel notes that silicon metal is not one of the products listed in Annex 6 of China's Accession Protocol. The Panel finds that the series of measures, made up of the *Customs Law*¹⁵¹, *Regulations on Import and Export Duties*¹⁵², and *2009 Tariff Implementation Program*¹⁵³ when operating in concert, result in the imposition of export duties on silicon metal which is inconsistent with Paragraph 11.3 of China's Accession Protocol. This is not to say that individually each of those measures is necessarily WTO-inconsistent; rather, when they operate in concert to result in WTO-inconsistent duties, it is then that they become *prima facie* WTO-inconsistent.

7.98 The Panel finds, therefore, that China has acted inconsistently with its WTO obligations. The Panel recalls WTO jurisprudence that "a *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party".¹⁵⁴

(h) Export duties on zinc, including "zinc waste and scrap" (HS 7902.0000), "hard zinc spelter" (HS 2620.1100), and "other zinc ash and residues" (HS 2620.1900)

7.99 The complainants claim that from 1 January 2009, China imposed temporary export duties at a rate of 10% on "zinc waste and scrap" (HS 7902.0000)¹⁵⁵, "hard zinc spelter" (HS 2620.1100)¹⁵⁶, and "other zinc ash and residues" (HS 2620.1900).¹⁵⁷ They add that the three forms of zinc are not listed in Annex 6 of China's Accession Protocol and that the duties cannot be justified by Article VIII of the GATT 1994.

7.100 China does not contest that it imposed these duties as of 21 December 2009. China does not invoke Article VIII and reiterates its position on the 2010 measures. In addition, China claims that its export duties applied to these forms of zinc are justified pursuant to Article XX(b) of the GATT 1994.

¹⁴⁸ Appellate Body Report, *EC – Hormones*, para. 104.

¹⁴⁹ *2009 Tariff Implementation Program*, (Exhibit JE-21).

¹⁵⁰ See China's response to Panel question No. 4 following the first substantive meeting.

¹⁵¹ *Customs Law* (Exhibit CHN-14, JE-68).

¹⁵² *Regulations on Import and Export Duties* (Exhibits CHN-13, JE-67).

¹⁵³ *2009 Tariff Implementation Program*, (Exhibit JE-21).

¹⁵⁴ Appellate Body Report, *EC – Hormones*, para. 104.

¹⁵⁵ *2009 Tariff Implementation Program*, (Exhibit JE-21).

¹⁵⁶ *2009 Tariff Implementation Program*, (Exhibit JE-21), Section II(2).

¹⁵⁷ *2009 Tariff Implementation Program*, (Exhibit JE-21), Section II(2).

7.101 The Panel notes that these forms of zinc are not listed in Annex 6 of China's Accession Protocol. The Panel finds that the series of measures, made up of the *Customs Law*¹⁵⁸, *Regulations on Import and Export Duties*¹⁵⁹, and *2009 Tariff Implementation Program*¹⁶⁰ when operating in concert, result in the imposition of export duties on zinc which is inconsistent with Paragraph 11.3 of China's Accession Protocol. This is not to say that individually each of those measures is necessarily WTO-inconsistent; rather, when they operate in concert to result in WTO-inconsistent duties, it is then that they become *prima facie* WTO-inconsistent. The Panel provisionally finds, therefore, that China has acted inconsistently with its WTO obligations. The Panel will consider below China's defence that the application of export duties to zinc is justified pursuant to GATT Article XX(b).

3. Whether China failed to consult pursuant to the Note to Annex 6 to China's Accession Protocol

7.102 In its first written submission, the European Union claims¹⁶¹ that China has violated the obligation under Annex 6 to China's Accession Protocol to consult "with other affected WTO Members prior to the imposition of the export duties imposed on bauxite, coke, fluorspar, magnesium, manganese, silicon metal and zinc."¹⁶² China acknowledges that it failed to consult pursuant to the Note to Annex 6.¹⁶³

7.103 The Panel recalls that the Note to Annex 6 of China's Accession Protocol states:

"China confirmed that the tariff levels included in this Annex are maximum levels which will not be exceeded. China confirmed furthermore that it would not increase the presently applied rates, except under exceptional circumstances. If such circumstances occurred, China would consult with affected members prior to increasing applied tariffs with a view to finding a mutually acceptable solution."

7.104 Pursuant to this requirement, and in light of China's admission, the Panel concludes that China has in fact failed to consult with other affected WTO Members prior to the imposition of the export duties imposed on bauxite, coke, fluorspar, magnesium, manganese, silicon metal and zinc, in violation of its obligations under Annex 6 to China's Accession Protocol.

4. Summary

7.105 For each of these products (bauxite, coke, fluorspar, magnesium, manganese, silicon metal and zinc¹⁶⁴), the series of measures operating in concert has resulted in the imposition of export duties that are inconsistent with China's obligations under Paragraph 11.3 of China's Accession Protocol. It is only by examining these three measures as they work in concert that the Panel concluded that it could reach a final determination on the complainants' export duty claims. The Panel did not reach the conclusion that individually each of those measures is necessarily WTO-inconsistent; rather, when they operate in concert to result in WTO-inconsistent duties, it is then that they become *prima facie*

¹⁵⁸ *Customs Law* (Exhibit CHN-14, JE-68).

¹⁵⁹ *Regulations on Import and Export Duties* (Exhibits CHN-13, JE-67).

¹⁶⁰ *2009 Tariff Implementation Program*, (Exhibit JE-21).

¹⁶¹ European Union's first written submission, paras. 254, 258, 262, 266, 270, 274, 278, 286, 290, 294, 298, 302, 306 and 310.

¹⁶² The specific forms of the bauxite, coke, fluorspar, magnesium, manganese, silicon metal and zinc subject to the European Union's claims are identified in Exhibit JE-5 and para. 2.2 of the Descriptive Part to these Reports.

¹⁶³ China's first written submission, para. 92.

¹⁶⁴ The specific forms of the raw materials subject to the complainants' claims are identified in Exhibit JE-5 and para. 2.2 of the Descriptive Part to these Reports.

WTO-inconsistent. The Panel recalls its view that findings on the measures acting in concert is necessary so that annually renewed measures do not evade WTO dispute settlement review merely through their expiration during the Panel proceedings. The Panel does not make any findings on the complainants' claims relating to yellow phosphorus for the reasons mentioned above.¹⁶⁵ The Panel further concludes that China did not consult with other affected WTO Members prior to the imposition of the export duties imposed on bauxite, coke, fluorspar, magnesium, manganese, silicon metal and zinc, contrary to its obligations under Annex 6 to China's Accession Protocol.

7.106 The Panel will consider below China's defence that its export duty applied to fluorspar may be justified pursuant to Article XX(g) of the GATT 1994. The Panel will also consider China's defence that its export duties applied to coke, magnesium, zinc and certain forms of manganese (unwrought manganese waste and scrap and unwrought manganese powder) may be justified pursuant to Article XX(b) of the GATT 1994.

5. Whether export duties on bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, and zinc are justified pursuant to Article XX of the GATT 1994

7.107 The Panel determined above that the application of temporary export duties to non-ferrous metal scrap of zinc, magnesium metal, and manganese metal; to coke, magnesium metal and manganese metal; and to fluorspar, is inconsistent with Paragraph 11.3 of China's Accession Protocol.

7.108 China argues that temporary export duties applied to non-ferrous metal scrap of zinc, magnesium metal, and manganese metal; and to coke, magnesium metal and manganese metal, are justified pursuant to Article XX(b). In addition, China argues that temporary duties applied to fluorspar are justified pursuant to Article XX(g). As a threshold matter, the complainants argue that China is not entitled to resort to the defences of Article XX to justify export duties that are inconsistent with Paragraph 11.3 of China's Accession Protocol. Accordingly, they argue that China cannot justify the application of such duties to these raw materials. The complainants further argue that were the Panel to conclude that Article XX may be invoked as a defence to violations of Paragraph 11.3 of China's Accession Protocol, China failed to demonstrate that the application of duties to these raw materials is justified pursuant to Article XX(b) or Article XX(g).

7.109 The Panel will first assess whether China is entitled to invoke the defences provided for in Article XX for violations of Paragraph 11.3 of its Accession Protocol. If the provisions of Article XX are available to China, the Panel will then consider whether China has demonstrated that the application of duties to these raw materials is justified pursuant to Article XX(b) or Article XX(g).

(a) Whether Article XX of the GATT 1994 is available as a defence to a claim under Paragraph 11.3 of China's Accession Protocol

7.110 China argues that Paragraph 11.3 of its Accession Protocol and the reference to exceptional circumstances in Annex 6 support China's rights to invoke the defences of Article XX. For China, Article XX may be used to justify the application of export duties to non-ferrous metal scrap of zinc, magnesium metal, and manganese metal; to coke, magnesium metal and manganese metal; and to fluorspar. For China, the wording of Paragraph 11.3 of the Accession Protocol and of Paragraph 170 of the Working Party Report support the interpretation that China's Accession Protocol as a whole, together with the covered agreements forming the WTO Single Undertaking¹⁶⁶, provide China with

¹⁶⁵ See para. 7.71.

¹⁶⁶ China's second written submission, para. 155.

the right to invoke GATT Article XX justifications for its export duties inconsistent with its Accession Protocol.¹⁶⁷

7.111 The complainants argue that China is not entitled to resort to the defences of Article XX to justify export duties inconsistent with Paragraph 11.3 of China's Accession Protocol. For the complainants, this is clear from the wording of Paragraph 11.3 of the Accession Protocol and the related provisions of the Working Party Report. They argue that the defences of Article XX are available only for GATT violations, or when Article XX justifications have been incorporated by reference into the relevant part of another WTO agreement.¹⁶⁸ WTO Members' Accession Protocols are integral parts of the WTO Agreement

(i) *WTO Members' Accession Protocols are integral parts of the WTO Agreement*

7.112 Accession to the WTO is achieved through negotiation with other WTO Members. Pursuant to Article XII of the Marrakesh Agreement, accessions take place "on terms to be agreed" between the acceding Member and the WTO membership. Most accession processes take several years to complete and lead to detailed negotiated provisions. The terms of each WTO Member's accession are set out in its Accession Protocol and accompanying Working Party Report. The negotiated agreement between the WTO membership and the acceding Member results in a delicate balance of rights and obligations, which are reflected in the specific wording of each commitment set out in these documents. Ultimately, the acceding Member and the WTO membership recognize that the intensively negotiated content of an accession package is the "entry fee" to the WTO system.

7.113 WTO Members' accession protocols are considered to form integral parts of the WTO Agreement. For example, Paragraph 1.2 of Part I of China's Accession Protocol provides:

"The WTO Agreement to which China accedes shall be the WTO Agreement as rectified, amended or otherwise modified by such legal instruments as may have entered into force before the date of accession. This Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, *shall be an integral part of the WTO Agreement.*" (italics added)

7.114 In this dispute, as with previous disputes concerned with China's Accession Protocol, all parties agree that China's Accession Protocol forms an integral part of the WTO Agreement. Moreover, all parties agree that WTO Members can initiate WTO dispute settlement proceedings on the basis of a claim of violation of China's Accession Protocol.¹⁶⁹ Finally, all parties agree that commitments included in the related Working Party Report, and incorporated into the Accession Protocol by cross-reference, are binding and enforceable through WTO dispute settlement proceedings.

¹⁶⁷ China's second written submission, para. 166.

¹⁶⁸ European Union's second written submission, paras. 219, and 220; United States' first written submission, para. 13; Mexico's first written submission, para. 16. The European Union suggests that the fact that GATT Article XX cannot serve as a justification for violations outside GATT has most recently been confirmed by the Panel in *US – Poultry (China)*, European Union's second written submission, para. 226.

¹⁶⁹ This was recognized in *China – Auto Parts*, adopted on 15 December 2008 and in *China – Publications and Audiovisual Products*, adopted on 19 January 2010 when both panels and Appellate Body assessed claims based on China's Accession Protocol.

7.115 Accordingly, the Panel will interpret the provisions of China's Accession Protocol – like those of the WTO covered agreements – in accordance with the customary rules of interpretation of public international law, including those codified in Articles 31, 32 and 33 of the *Vienna Convention*.¹⁷⁰

(ii) *The availability of Article XX of the GATT 1994 for violations of Paragraph 11.3 of China's Accession Protocol*

7.116 The availability of the defences provided for in Article XX of the GATT 1994 raises questions on the legal status of accession protocols within the WTO Agreement, and the relationship between different instruments within the WTO legal and institutional system, and in particular in this dispute, between Paragraph 11.3 of China's Accession Protocol and the other components of the WTO Agreement.

7.117 The Appellate Body has interpreted China's Accession Protocol on two previous occasions¹⁷¹, once dealing with the availability of Article XX as a defence to justify a violation of China's Accession Protocol.¹⁷² In *China – Publications and Audiovisual Products*, China invoked Article XX of the GATT 1994 to justify a violation of Paragraph 5.1 of its Accession Protocol dealing with trading rights. In its assessment, the Appellate Body did not discuss the systemic relationship between provisions of China's Accession Protocol and those of the GATT 1994, within the WTO Agreement. The Appellate Body instead focussed on the text of the relevant provisions of the Protocol, including an examination of the meaning of the particular terms at issue, as well as the surrounding context and overall structure of the Accession Protocol.¹⁷³

7.118 Paragraph 5.1 of China's Accession Protocol provides:

"Without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement, China shall progressively liberalize the availability and scope of the right to trade, so that, within three years after accession, all enterprises in China shall have the right to trade in all goods throughout the customs territory of China, except for those goods listed in Annex 2A which continue to be subject to state trading in accordance with this Protocol..."

7.119 The Appellate Body interpreted the language contained in the introductory clause of Paragraph 5.1 of China's Accession Protocol – "without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement" – to mean that the justifications of Article XX of the GATT 1994 were incorporated, by way of reference, into the Protocol and this formed a constituent part of this specific accession commitment. Consequently, China could rely on this incorporation to invoke Article XX as a defence for a violation of Article 5.1 of its Accession Protocol.¹⁷⁴ Ultimately, the Appellate Body rejected China's Article XX defence because the conditions set out in Article XX, as incorporated into this specific accession commitment, had not been met.¹⁷⁵

7.120 In the present dispute, the Panel is not dealing with Paragraph 5.1 of China's Accession Protocol; rather the Panel must interpret the altogether different language found in Paragraph 11.3 of

¹⁷⁰ *The Vienna Convention on the Law of Treaties*, done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679.

¹⁷¹ Appellate Body Reports, *China – Publications and Audiovisual Products*, and *China – Auto Parts*.

¹⁷² Appellate Body Report on *China – Publications and Audiovisual Products*; Panel Report on *China – Publications and Audiovisual Products*.

¹⁷³ Appellate Body Report on *China – Publications and Audiovisual Products*, para. 217.

¹⁷⁴ Appellate Body Report on *China – Publications and Audiovisual Products*, para. 230.

¹⁷⁵ *Ibid.*, para. 337.

China's Accession Protocol in order to determine whether GATT Article XX defences are available to justify violations of Paragraph 11.3 of China's Accession Protocol.

Interpretation of Paragraph 11.3 of China's Accession Protocol

Ordinary meaning

7.121 Paragraph 11.3 of China's Accession Protocol provides:

"China shall eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of this Protocol or applied in conformity with the provisions of Article VIII of the GATT 1994."

7.122 For the Panel, the ordinary meaning of the terms "shall eliminate" is that China, at the time of the conclusion of its Accession Protocol, was maintaining export duties. The complainants report that at the time of its accession to the WTO, China maintained export duties on 58 products.¹⁷⁶ Annex 6 of China's Accession Protocol lists 84 products on which some export duties were possible. At the time of China's accession to the WTO, WTO Members and China agreed that China would not maintain any export tariff taxes and charges, except on those 84 products and within the maximum levels provided in Annex 6, or if such charges could be justified under GATT Article VIII.

7.123 In Annex 6, at the end of this list of 84 products for which maximum duty rates are provided, the following paragraph appears:

"China confirmed that the tariff levels included in this Annex are maximum levels which will not be exceeded. China confirmed furthermore that it would not increase the presently applied rates, except under exceptional circumstances. If such circumstances occurred, China would consult with affected members prior to increasing applied tariffs with a view to finding a mutually acceptable solution."

7.124 The Panel notes that Paragraph 11.3 of China's Accession Protocol does not include any express reference to Article XX of the GATT 1994, or to provisions of the GATT 1994 more generally. Moreover, Paragraph 11.3 does not include an introductory clause such as that found in Paragraph 5.1, which refers generally to "without prejudice to China's rights to regulate trade in a manner consistent with the WTO Agreement". As noted above, in *China – Publications and Audiovisual Products*, the Appellate Body interpreted this introductory clause to mean that the provisions of Article XX are available, by way of incorporation, as a defence to violations of Paragraph 5.1 of China's Accession Protocol.

7.125 China argues that Paragraph 11.3 and the reference to "exceptional circumstances" in Annex 6 support China's right to invoke the defences of GATT Article XX. The complainants argue that the wording of Paragraph 11.3 is clear and does not include any reference to GATT Article XX.

7.126 The Panel notes that Paragraph 11.3 of China's Accession Protocol refers to a specific set of exceptions: those covered by Annex 6 and those covered by GATT Article VIII. Paragraph 11.3 generally prohibits the use of export duties *unless* those duties are applied to products expressly set out in Annex 6. Annex 6 provides maximum export duty rates for listed products and states that:

¹⁷⁶ The United States and Mexico submit that at the time of China's accession, China maintained export duties on 58 products while, at the time these panel proceedings were initiated, China was maintaining export duties on 350 products. This allegation is not contested by China. United States' first written submission, paras. 1-3 and Mexico's first written submission, paras. 1-2.

"China confirmed that the tariff levels included in this Annex are maximum levels which will not be exceeded. China confirmed furthermore that it would not increase presently applied rates except under exceptional circumstances."¹⁷⁷

It then contains a list of 84 products for which maximum export duty rates are stated.

7.127 In the Panel's view, the ordinary meaning of these two sentences of Annex 6 is very clear. The use of the term "maximum levels" sets a definitive ceiling in excess of which China may not impose export duties. Furthermore, the second sentence makes clear that any increase in the export duty rates applied at the time of the conclusion of China's Accession Protocol could be effected only in exceptional circumstances following consultations with affected Members.

7.128 The second exception in Paragraph 11.3 refers to "taxes and charges . . . applied in conformity with the provisions of Article VIII of the GATT 1994". In the Panel's view, this phrase makes it clear that China and the WTO Members decided that China would not maintain any export duties, taxes or charges (additional to those provided for in Annex 6) *unless* they were imposed consistently with Article VIII.

7.129 The Panel recalls that Article VIII allows WTO Members to impose, at the border, a variety of fees or charges provided that they are limited in amount to the approximate costs of services rendered and that they are imposed on or in connection with importation or exportation. As such, Article VIII is clearly intended to govern fees and charges imposed in particular circumstances. The Panel can find no general exception in the language of Paragraph 11.3 that would authorize China to maintain export duties other than in circumstances described in Annex 6 or in Article VIII of the GATT 1994. Notably, the language in Paragraph 11.3 expressly refers to Article VIII, but leaves out reference to other provisions of the GATT 1994, such as Article XX.¹⁷⁸ In contrast to the language of Paragraph 5.1 of the Accession Protocol before the Appellate Body in *China – Publications and Audiovisual Products*, there is no general reference to the WTO Agreement or even to the GATT 1994. While it would have been possible to include a reference to the GATT 1994 or to Article XX, WTO Members evidently decided not to do so. The deliberate choice of language providing for exceptions in Paragraph 11.3, together with the omission of general references to the WTO Agreement or to the GATT 1994, suggest to us that the WTO Members and China did not intend to incorporate into Paragraph 11.3 the defences set out in Article XX of the GATT 1994.

Context provided by other provisions of China's Working Party Report

7.130 China argues that its position that Paragraph 11.3 of its Accession Protocol allows it to invoke the justifications of Article XX is confirmed by the provisions of Paragraph 170 of its Working Party Report, which it regards as context.¹⁷⁹ The complainants disagree.

7.131 Paragraph 170 falls under the Section D of China's Working Party Report, which is entitled "Internal Policies Affecting Foreign Trade in Goods", subsection (1) is entitled "Taxes and Charges Levied on Imports and Exports". Paragraph 170 provides:

"[U]pon accession, China would ensure that its laws and regulations relating to all fees, charges or taxes levied on imports and exports would be in full conformity with its WTO obligations, including Articles I, III:2 and 4, and XI:1 of the GATT 1994..."

¹⁷⁷ Exhibit JE-2).

¹⁷⁸ The Panel recalls the doctrine *expressio unius est exclusio alterius* see footnote 91 above.

¹⁷⁹ China's second written submission, paras. 165 and 166.

7.132 According to China, the use of the term "including" makes clear that the list of provisions cited in Paragraph 170 is not exhaustive – it refers to all goods-related obligations assumed under the WTO covered agreements, including the rights and obligations of GATT Article XX.¹⁸⁰

7.133 China submits that the language in Paragraph 5.1 of its Accession Protocol – which authorizes recourse to Article XX – "is very similar to the language in Paragraph 170".¹⁸¹ China notes the finding by the Appellate Body in *China – Publications and Audiovisual Products* that "[t]he reference in the introductory clause to 'consistent with the WTO Agreement' constrains the exercise of [China's] regulatory power such that China's regulatory measures must be shown to conform to WTO disciplines".¹⁸² For China, "the Appellate Body's unwitting phrasing shows that the relevant language in Paragraph 5.1 and Paragraph 170 is *synonymous* and not, as the complainants allege, fundamentally different."¹⁸³ Therefore, China suggests, if Paragraph 5.1 includes the flexibilities of Article XX, so does Paragraph 170 of the Working Party Report.

7.134 In addition, China argues that the DSU provides contextual support for the view that, under Paragraph 170, an export duty is "in full conformity with WTO obligations" when it complies with Article XX of the GATT 1994. Pointing to the language in Paragraph 170, China notes that it is universally accepted that, under the DSU, a Member may bring its measures fully into conformity with its WTO obligations by taking action to ensure that its measures comply with GATT Article XX. Thus, a measure that complies with the obligations in Article XX must be regarded as being "in full conformity with WTO obligations", as required by Paragraph 170.¹⁸⁴

7.135 The complainants argue that the explicit language of Paragraph 11.3 of the Accession Protocol and the parallel provisions of Paragraphs 155 and 156 of China's Working Party Report that prohibit the use of export duties except in accordance with Annex 6 and Article VIII, belie this interpretation.

7.136 Before considering the provisions of China's Working Party Report invoked by the parties, the Panel considers it useful to recall first the wording of the sub-paragraphs 11.1 and 11.2 of China's Accession Protocol, which provide:

- "1. China shall ensure that customs fees or charges applied or administered by national or sub-national authorities shall be in conformity with the GATT 1994.
2. China shall ensure that internal taxes and charges, including value-added taxes, applied or administered by national or sub-national authorities shall be in conformity with the GATT 1994."

7.137 As noted above, China emphasizes the phrase "in full conformity with its WTO obligations" contained in Paragraph 170 of the Working Party Report. For China, this phrase, which is similar to the introductory phrase of paragraph 5.1 of China's Accession Protocol, incorporates the flexibilities of GATT Article XX.

7.138 The Panel observes that the phrase "in conformity with the GATT 1994" does not appear in Paragraph 11.3. Nor do the words "[w]ithout prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement" appear in that paragraph. However, it does appear in

¹⁸⁰ China's second written submission, para. 166.

¹⁸¹ China's opening oral statement at the second substantive meeting, para. 176.

¹⁸² Appellate Body Report, *China – Publications and Audiovisual Products*, para. 222.

¹⁸³ China's opening oral statement at the second substantive meeting, para. 177.

¹⁸⁴ China's opening oral statement at the second substantive meeting, paras. 177, and 178.

Paragraphs 11.1 and 11.2, quoted above. In the Panel's view, this difference in wording between the three sequential sub-paragraphs is evidence of a deliberate choice made by China and the WTO Members in setting out China's rights and obligations and it must be given effect and respected. In addition, the fact that Paragraph 11.3 does not include the language "in conformity with WTO obligations" (which appears in Paragraphs 11.1 and 11.2) can only be understood to reflect agreement at the time of China's accession that since China's export duties commitments arose exclusively from China's Accession Protocol, Article XX would not apply to such commitments.

7.139 Moreover, the Panel does not see how the language of Paragraph 5.1 of China's Accession Protocol can be equated with the language of Paragraph 11.3 of the Accession Protocol or with the wording of Paragraph 170 of China's Working Party Report. To use China's expression, the Panel is of the view that the language of Paragraph 5.1 is not "synonymous" or even similar to that of Paragraph 11.3 of the Accession Protocol or Paragraph 170 of the Working Party Report.

7.140 If China and WTO Members wanted the defences of GATT Article XX to be available to violations of China's export duty commitments, they could have said so in Paragraph 11.3 or elsewhere in China's Accession Protocol.¹⁸⁵ In addition, China and the WTO Members could have agreed that China's export duty commitments were an integral part of China's commitments under the GATT 1994. For instance, WTO Members could have done this by incorporating China's export duties commitments into China's GATT 1994 Schedule. If China's export duties commitments were part of China's GATT 1994 Schedule, the general defences of Article XX of the GATT 1994 would be available to justify potential violations. However, this is not what China and WTO Members chose to do.

7.141 The Panel notes, in particular, that Paragraph 170 does not refer to China's specific obligations on export duties; it refers to "charges and taxes levied on imports and exports". Paragraph 170 is permissible and authorises China to use such charges or taxes so long as they respect Articles I, III:2 and III:4 and XI:1 of GATT 1994. Thus Paragraph 170 essentially repeats the commitments existing under certain GATT rules. The matter at issue in this dispute, and governed by Paragraph 11.3, is different; it is concerned with duties and taxes that are imposed only on exports, and that are specifically prohibited under Paragraph 11.3 of the Accession Protocol¹⁸⁶ and not regulated by the GATT 1994. In the Panel's view, Paragraph 170 of the Working Party Report neither explicitly nor implicitly refers to any exceptions or GATT 1994 flexibilities in relation to the prohibition on China to use export duties as prescribed by Paragraph 11.3 of the Accession Protocol.

7.142 Paragraph 342 of China's Working Party Report takes note of commitments undertaken by China that are reproduced in Paragraph 170 of the Working Party Report.¹⁸⁷ Thus the provisions of Paragraph 170 of the Working Party Report, like those of Paragraph 11.3 of the Protocol, are binding on China but impose different obligations: Paragraph 170 deals with domestic taxes imposed on imports and exports and that must respect the specific rules of the GATT, while Paragraph 11.3 deals with an obligation that does not otherwise exist in the GATT 1994: namely the prohibition on the use of export duties.

¹⁸⁵ As discussed, the WTO Members and China did make such a reference to the availability of GATT Article XX to justify export quotas.

¹⁸⁶ The Panel notes that five other WTO Members have commitments in their Accession Protocols and Working Party Reports regarding export duties: Croatia, Kingdom of Saudi Arabia, Latvia, Mongolia, Ukraine, Vietnam.

¹⁸⁷ Paragraphs 155 and 156 are not listed in Paragraph 342 of the Working Party Report, which is itself explicitly mentioned in Article 1.2 of China's Accession Protocol.

7.143 This interpretation is confirmed by Paragraphs 155 and 156 of China's Working Party Report, which deal explicitly with the specific commitments undertaken by China with respect to the elimination of export duties. The Panel recalls that Paragraphs 155 and 156 fall under Section C of China's Working Party Report, entitled "Export Regulations". Subsection C(1), under which these two provisions fall, is entitled "Customs Tariffs, Fees and Charges for Services Rendered, Application of Internal Taxes to Exports".

7.144 The Panel recalls, first, the importance of the provisions of the Working Party Report have in shedding light on the interpretation to be given to related provisions of the Working Party Report or China's Accession Protocol.

7.145 Paragraph 155 of China's Working Party Report has the same content as Paragraph 11.3 of China's Accession Protocol, providing that "taxes and charges should be eliminated unless applied in conformity with GATT Article VIII or listed in Annex 6 to the Draft Protocol". Paragraph 156 provides: "China noted that the majority of products were free of export duty, although 84 items, including tungsten ore, ferrosilicon and some aluminium products, were subject to export duties". There is no reference, explicit or implicit, to the availability of Article XX defences for such commitments. Although they do not form part of the explicit commitments covered by China's Accession Protocol, the provisions of Paragraphs 155 and 156 of China's Working Party Report are part of the legal context of Paragraph 11.3 of China's Accession Protocol and articulate clearly the concerns of WTO Members at the time with respect to China's use of export duties.

7.146 When those prohibitions on the use of export duties were negotiated, the WTO Members and China could have made reference to the defences of GATT Article XX - the way they did, for instance, concerning the use of quantitative restrictions in Paragraphs 164 and 165 of China's Working Party Report - but the WTO Members and China evidently decided not to do so.

7.147 The Panel fails to see how Paragraph 170 of China's Working Party Report can be interpreted to mean that the defences of Article XX are available for China to justify violations of specific commitments on export duties. This view is reinforced by the fact that China and the WTO Members did make explicit reference to exceptions when they intended to incorporate them. For the Panel, the clear meaning of Paragraph 11.3, which deals explicitly with export taxes and charges, is not altered by Paragraph 170 of China's Working Party Report or by any other provisions of China's Accession Protocol.

7.148 In sum, the Panel does not find in China's Working Party Report any explicit or implicit provision that would allow China to invoke the general exceptions of Article XX of the GATT 1994 to justify violations of Paragraph 11.3 of its Accession Protocol.

Context provided by other provisions of the WTO Agreement

7.149 The Panel has also considered whether other provisions of the GATT 1994 could support China's proposition that Article XX of the GATT 1994 should be available as a defence to the application of export duties in excess of commitments undertaken in Paragraph 11.3 (and Annex 6) of its Accession Protocol.

7.150 The Panel observes that there are no general umbrella exception in the Marrakesh Agreement.¹⁸⁸ Each WTO agreement provides its own set of exceptions or flexibilities applicable to the specific obligations found in each covered agreement.

7.151 Other provisions of the GATT 1994 may be relevant to export duties, but none of them contains disciplines applicable to export duties similar to those included in Paragraph 11.3 of China's Accession Protocol and none of them refer to GATT Article XX.

7.152 This brings us to the issue of whether Article XX of the GATT 1994 can be invoked to justify a violation of a provision falling outside the GATT 1994.

7.153 The Panel notes that Article XX provides that "nothing in this Agreement should be construed to prevent the adoption or enforcement ... of [certain] measures...." *A priori*, the reference to *this* "Agreement" suggests that the exceptions therein relate only to the GATT 1994, and not to other agreements. On occasion, WTO Members have incorporated, by cross-reference, the provisions of Article XX of the GATT 1994 into other covered agreements. This was done, for example, with the TRIMs Agreement, which explicitly incorporates the right to invoke the justifications of Article XX of the GATT 1994. In the Panel's view, the legal basis for applying Article XX exceptions to TRIMs obligations is the text of the incorporation of the TRIMs Agreement, not the text of Article XX of the GATT 1994. Other WTO agreements include their own exceptions. For example, general exceptions are provided for in Article XIV of the GATS for GATS violations. Other covered agreements, like TRIPS, the TBT or the SPS agreements, include their own flexibilities and exceptions.

7.154 In the Panel's view, it is reasonable under these circumstances to assume that, were GATT Article XX intended to apply to Paragraph 11.3 of China's Accession Protocol, language would have been inserted to suggest this relationship. However, as noted above, no such language is found in Paragraph 11.3 of China's Accession Protocol.

7.155 According to China, its right to apply export duties is found in the text of the covered agreements *read as a whole*. For China, the covered agreements affirm the inherent and sovereign right of every WTO Member to regulate trade, described by the Appellate Body in *China – Publications and Audiovisual Products* as "an inherent power enjoyed by a Member government", rather than a "right bestowed by international treaties such as the *WTO Agreement*".¹⁸⁹ According to China, the text of Paragraph 11.3 of its Accession Protocol shows that WTO Members, in imposing an obligation on China to forego export duties in certain circumstances, did not exclude the inherent right to regulate trade.¹⁹⁰

7.156 The Panel agrees with China that WTO Members have an inherent and sovereign right to regulate trade.¹⁹¹ WTO Members and China have exercised this right, *inter alia*, in negotiating and ratifying the WTO Agreement. China has exercised its inherent and sovereign right to regulate trade in negotiating, among other actions, the terms of its accession into the WTO.

7.157 To the Panel, the implication of China's argument is that because it has an inherent right to regulate trade, this right prevails over WTO rules intended to govern the exercise of that right. In the Panel's view, it is China's sovereign right to regulate trade that enabled it to negotiate and agree with the provisions of Paragraph 11.3 of its Accession Protocol. Thus, there is no contradiction between

¹⁸⁸ For instance the Marrakesh Agreement contains voting rules that are applicable to all WTO agreements but there is no "general exception" applicable to all WTO agreements.

¹⁸⁹ China's second written submission, para. 162.

¹⁹⁰ China's second written submission, para. 164.

¹⁹¹ China's second written submission, para. 162.

China's sovereign right to regulate trade, the rights acquired, and the commitments undertaken by China that are contained in its Accession Protocol, including in its Paragraph 11.3. On the contrary, China's Accession Protocol and its various rights and obligations, are the ultimate expression of China's sovereignty.

(iii) *Conclusions*

7.158 For the Panel, the wording and the context of Paragraph 11.3 precludes the possibility for China to invoke the defence of Article XX of the GATT 1994 for violations of the obligations contained in Paragraph 11.3 of China's Accession Protocol.

7.159 For the foregoing reasons, the Panel concludes that there is no basis in China's Accession Protocol to allow the application of Article XX of the GATT 1994 to China's obligations in Paragraph 11.3 of the Accession Protocol. To allow such exceptions to justify a violation when no exception was apparently envisaged or provided for, would change the content and alter the careful balance achieved in the negotiation of China's Accession Protocol. It would thus undermine the predictability and legal security of the international trading system.

7.160 The Panel is mindful that excluding the applicability of Article XX justifications from the obligations contained in Paragraph 11.3 means that China is in a position unlike that of most other WTO Members who are not prohibited from using export duties, either via the terms of their respective accession protocols or their membership to the WTO at the time of its inception. However, based on the text before us, the Panel can only assume that this was the intention of China and the WTO Members when negotiating China's Accession Protocol. The situation created by this provision taken in isolation may be perceived as imbalanced¹⁹², but the Panel can find no legal basis in the Protocol or otherwise to interpret Paragraph 11.3 of China's Accession Protocol as permitting resort to Article XX of the GATT 1994.

C. EXPORT QUOTAS

7.161 The complainants allege that China's export quotas as applied to bauxite, coke, fluorspar, silicon carbide and zinc are inconsistent with Article XI:1 of the GATT 1994.¹⁹³ For zinc, in particular, the complainants claim that China did not publish a 2009 quota level or any application procedures for interested enterprises, which effectively amounts to a ban, or zero quota, on zinc. The complainants submit that these export quotas are also inconsistent with Paragraph 1.2 of China's Accession Protocol and Paragraphs 162 and 165 of China's Working Party Report. The European Union further claims that China's export quota maintained on coke under the *2010 First Batch Coke Export Quota for FIEs* (foreign-invested enterprises) is inconsistent with China's obligations.¹⁹⁴

7.162 China requests the Panel to reject the complainants' claims. First, China submits that the Panel should reject the European Union's claim because the European Union did not sufficiently identify the measures in its submissions. In any event, China requests the Panel to reject the complainants' claims for failing to demonstrate that Article XI:1 applies to the export quotas. China also submits that in order to demonstrate inconsistency with Article XI:1, the complainants have the burden to demonstrate that the conditions of Article XI:2(a) are not met. Finally, China argues that the

¹⁹² Another panel was also asked to interpret China's Accession Protocol and reached a similar conclusion, i.e. that it was not for it to "recalibrate what WTO Members has agreed to in the negotiation that led to the accession of China to the WTO": Panel Report, *US – Tyres (China)*, para. 7.10.

¹⁹³ The specific forms of the raw materials subject to complainants' claims are identified in Exhibit JE-6 and in para. 2.2 of the Descriptive Part of these Reports.

¹⁹⁴ *2010 First Batch Coke Export Quota for FIEs* (Exhibit JE-129).

Panel should only consider the complainants' claims in respect of measures in place in 2010. China argues that the 2010 measures replaced those identified by the complainants in their Panel Requests and submissions and that they should form the focus of the Panel's analysis. Under the 2010 measures, China submits that fluorspar is not subject to an export quota.

7.163 To the extent the Panel were to find the export quotas to be inconsistent with Article XI:1, China submits that the export quota applied to refractory-grade bauxite is not inconsistent with Article XI:1 because the export quota is temporarily applied to prevent or relieve critical shortages of refractory-grade bauxite within the meaning of Article XI:2(a). In the alternative, China submits that the export quota applied to refractory-grade bauxite is justified pursuant to Article XX(g) of the GATT 1994. China also argues that export quotas applied to coke and silicon carbide are justified pursuant to Article XX(b) of the GATT 1994.

7.164 If the Panel were to find the export quotas to be inconsistent with Article XI:1 and not justified pursuant to Article XX(g) or XX(b), China requests the Panel to exercise judicial economy with respect to the complainants' claims under Paragraphs 162 and 165 of China's Working Party Report. China argues these provisions contain obligations that are "duplicative of" those under Article XI:1.

7.165 As a preliminary matter, the Panel recalls its finding in paragraph 7.33 *au-dessus* that, in general, measures that were in force when the Panel was established on 21 December 2009 form the basis of its terms of reference.¹⁹⁵ The Panel notes the European Union's identification of the *2010 First Batch Coke Export Quota for FIEs*¹⁹⁶. Because the *2010 First Batch Coke Export Quota for FIEs* was not yet in force on 21 December 2009, the Panel considers that it is outside its terms of reference. In addition, China submits that the Panel should not consider the complainants' claim in respect of fluorspar because the 2010 measures do not impose a quota. At the request of the complainants, the Panel will only assess the WTO consistency of the 2009 measures while taking note that the 2010 measures do not set a quota for fluorspar.¹⁹⁷

7.166 Before proceeding to consider the complainants' claims, the Panel will assess whether the European Union failed to identify the measures subject to its claims. Thereafter, the Panel sets out the operation of China's measures as they pertain to export quotas. In the event the measures are determined to be inconsistent with China's obligations, the Panel will consider China's defences as applicable to bauxite, coke and silicon carbide.

1. Whether the European Union properly identified the measures subject to its Article XI:1 and Working Party Report claims on bauxite, fluorspar, silicon carbide and zinc

7.167 In its first written submission, China argues that the European Union fails to identify the Chinese measures at issue in developing arguments asserting that export quotas are inconsistent with GATT Article XI:1. It argues that the identification of twenty measures does not suffice to provide the necessary "degree of specificity required to enable the Panel to make sufficiently specific findings" and make recommendations pursuant to Article 19.1 of the DSU.¹⁹⁸

¹⁹⁵ The Panel observes, however, that its decision to assess the complainants' claims here does not foreclose the possibility of considering 2010 measures in other contexts.

¹⁹⁶ *2010 First Batch Coke Export Quota for FIEs* (Exhibit JE-129).

¹⁹⁷ See section VII.A above.

¹⁹⁸ China's second written submission, para. 27.

7.168 China submits that the European Union solely identifies China's *Foreign Trade Law*¹⁹⁹ and *Regulation on Import and Export Administration*²⁰⁰, neither of which subjects any of the Raw Materials at issue to an export quota. China observes that the European Union identifies the *2009 Export Licensing Catalogue*²⁰¹ in relation to its claim on the *allocation* of the export quota applied to coke, but not in respect of its Article XI:1 or Working Party Report claims concerning the imposition of quotas. Accordingly, it argues that the European Union has not established its claims in respect of the raw materials at issue, and asks the Panel to reject those claims.²⁰²

7.169 The European Union argues that the challenged measures are "the export quotas on the relevant Raw Materials".²⁰³ The European Union submits that the relevant measures are identified in paragraphs 197 and 199 of its first written submission and that the measures are discussed in the footnotes of its first written submission, in particular footnotes in the Facts section of its first written submission, and in the subsections for each raw material subject to an export quota.²⁰⁴ In addition, the European Union submits Table 1 in response to a question from the Panel, which identifies 20 measures that relate to its quota-related claims. Through these measures, the European Union submits that the Panel can make precise recommendations.

7.170 The Panel notes that the Facts section of the European Union's first written submission contains references to particular provisions of Chinese measures, including China's *Foreign Trade Law*,²⁰⁵ China's *Regulation on Import and Export Administration*²⁰⁶, *Export Quota Administration Measures*²⁰⁷, *Export Quota Bidding Measures*²⁰⁸, various Notices on export quotas for coke and zinc, and various announcements concerning quota bidding for bauxite, silicon carbide and fluorspar. The European Union has specified the precise amounts for quotas in 2009, whether allocated directly or through bidding, for the raw materials at issue.²⁰⁹ The European Union also included the above measures in its response to questions from the Panel in the context of the first and second substantive meetings.²¹⁰

7.171 As discussed in further detail below, the Panel considers the European Union's identification of these provisions sufficient to enable the Panel to make specific findings and recommendations pursuant to Article 19.1 of the DSU. Accordingly, the Panel will consider the European Union's claims below, as well as those of the United States and Mexico.

¹⁹⁹ Exhibits CHN-151, JE-72.

²⁰⁰ Exhibits CHN-152, JE-73.

²⁰¹ Exhibits CHN-6, JE-22.

²⁰² China's first written submission, paras. 346-348.

²⁰³ European Union's comments on China's response to Panel question No. 7 following the first substantive meeting, para. 7.

²⁰⁴ European Union's opening oral statement at the first substantive meeting, paras. 26-28; European Union's second written submission, paras. 35-38.

²⁰⁵ Exhibits CHN-151, JE-72.

²⁰⁶ Exhibits CHN-152, JE-73.

²⁰⁷ Exhibits CHN-312, JE-76.

²⁰⁸ Exhibits CHN-304, JE-77.

²⁰⁹ European Union's first written submission, paras. 70, 87-88, 105-108, 109-112, and 113-115.

²¹⁰ European Union's response to Panel question No. 2 following the first substantive meeting; European Union's response to Panel's question No. 2 following the second substantive meeting.

2. China's export quota regime

7.172 China's *Foreign Trade Law* confers the authority to restrict or prohibit the exportation of goods through export quotas²¹¹ and subjects those goods to an export quota administration.²¹² China may restrict or prohibit exportation in pursuance of certain specific objectives, such as protecting human life or health, or forbidding the export of resources that are exhaustible.²¹³

7.173 Under China's *Foreign Trade Law*, MOFCOM is responsible for the centralized administration of all export quotas for China.²¹⁴ MOFCOM, in collaboration with Customs, is responsible for "formulating, adjusting, and publishing" the catalogue listing all goods subject to export quotas.²¹⁵ MOFCOM also determines and announces the total amount of the annual export quota for each product covered by the relevant measure by 31 October of the previous year.²¹⁶

7.174 Applications to receive an allocation of an export quota must be submitted between 1 and 15 November.²¹⁷ China allocates quotas either directly or through a quota bidding system.²¹⁸ A decision on allocation must be issued within 30 days from the date of submission of the application and no later than 15 December of the year of application.²¹⁹ Enterprises that are approved to export under the quotas are issued a certificate of quota. After obtaining a certificate of quota, the exporter applies for the export licence, which must be issued by the relevant authority within three working days of receiving the application.²²⁰ The exporter then seeks export clearance from Customs by presenting the export quota licence to Customs for declaration and examination.²²¹

7.175 China may also impose administrative or criminal sanctions for the unlawful exportation of goods subject to restriction, or for forging or altering import or export licences, quota certificates, or other documents.²²² Under China's *Regulation on Import and Export Administration*²²³, the holder of an export quota may be subject to administrative sanction for failure to return the unused quotas by 31 October of the year for which the export quotas have been issued²²⁴; or for exporting without permission, exceeding the quantitative limitations, or buying or selling quota certificates or other

²¹¹ *Foreign Trade Law*, Articles 2, 14, 16-17, 19 (Exhibits CHN-151, JE-72); *Regulation on Import and Export Administration*, Article 4 (Exhibits CHN-152, JE-73).

²¹² *Regulation on Import and Export Administration*, Article 36 (Exhibits CHN-152, JE-73); *Export Quota Administration Measures*, Article 1 (Exhibits CHN-312, JE-76).

²¹³ *Foreign Trade Law*, Articles 16, and 17 (Exhibits CHN-151, JE-72).

²¹⁴ *Foreign Trade Law*, Article 19 (Exhibits CHN-151, JE-72).

²¹⁵ *Foreign Trade Law*, Article 18 (Exhibits CHN-151, JE-72), *Regulation on Import and Export Administration*, Article 37-39 (Exhibits CHN-152, JE-73).

²¹⁶ *Regulation on Import and Export Administration*, Article 38 (Exhibits CHN-152, JE-73); *Export Quota Administration Measures*, Articles 9-11 (Exhibits CHN-312, JE-76).

²¹⁷ *Regulation on Import and Export Administration*, Article 38 (Exhibits CHN-152, JE-73).

²¹⁸ *Regulation on Import and Export Administration*, Article 39 (Exhibits CHN-152, JE-73).

²¹⁹ *Regulation on Import and Export Administration*, Article 40 (Exhibits CHN-152, JE-73).

²²⁰ *Measures for the Administration of License for the Export of Goods*, Article 19 (Exhibit CHN-342); *Working Rules on Issuing Export Licenses*, Article 10 (Exhibit CHN-344); Regulations of the People's Republic of China on the Administration of the Import and Export of Goods (Exhibit CHN-152); *Statement on Relevant Matters Regarding the Issuance of Export License*, by the Quota and License Administrative Bureau of MOFCOM (20 July 2010) (Exhibit CHN-345).

²²¹ *Measures for the Administration of Export Commodities Quotas*, Article 25 (Exhibit CHN-312).

²²² *Foreign Trade Law*, Articles 34, 61, 63, 64 (Exhibit JE-72); *Regulation on Import and Export Administration*, Articles 64, 65 (Exhibit JE-73); *Export Quota Measures*, Article 26 (Exhibit JE-76).

²²³ Exhibits CHN-152, JE-73.

²²⁴ *Regulation on Import and Export Administration*, Article 42 (Exhibits JE-73, and CHN-152).

documents without approval.²²⁵ Sanctions include revocation of the business licence for foreign trade or reduction in allocation of quotas and possible criminal punishment.²²⁶ Quota administering authorities that distribute quotas exceeding their authority may also be subject to sanction.²²⁷

7.176 On 10 December 2008, MOFCOM and Customs published the *2009 Export Licensing Catalogue*²²⁸ announcing those goods subject to restriction for 2009. This *2009 Export Licensing Catalogue* identifies bauxite, coke, fluorspar, silicon carbide, and zinc among those goods subject to restriction. Export quotas on coke and zinc are to be allocated directly²²⁹, while export quotas on bauxite, fluorspar, and silicon carbide are to be allocated through a bidding system.²³⁰

(a) Quotas allocated directly for coke and zinc

7.177 Under China's *Export Quota Administration Measures*, MOFCOM determines the total quota amount for quotas allocated directly quota based on: (i) the needs of guaranteeing the safety of the national economy; (ii) the needs of protecting the limited domestic resources; (iii) development planning, objectives and policies of the State on the relevant industries; and (iv) demands on the international and domestic markets, and the production and sales status.²³¹ China's *Export Quota Administration Measures* apply to the direct allocation of zinc, but expressly exclude from its scope of application the quota on coke.²³² China's *Export Quota Administration Measures* do not apply to foreign-invested enterprises interested in applying for an allocation of the zinc quota.²³³

7.178 Only enterprises that have the "license or qualification for import and export management and whose economic activities did not violate laws and regulations in the most recent three years" may apply for a quota.²³⁴ Enterprises are required to submit their applications for export quotas to MOFCOM directly, or to the relevant local authorities, for review.²³⁵ MOFCOM then distributes the quotas to enterprises directly or distributes quotas to local administrative authorities, which further distribute the quotas to the enterprises.²³⁶ In directly allocating quotas, MOFCOM and the local administrative authorities are directed to take into consideration: (i) the export performance of the particular good; (ii) the utilization rate of the export quota; (iii) the business management/operation capacity of the applicant; and (iv) the "production scale and resources status of the applicant enterprise or area" during the previous three years.²³⁷

7.179 The export quotas allocated to enterprises may be adjusted by MOFCOM under the following circumstances: (i) major changes in the international market; (ii) major changes in domestic resources;

²²⁵ *Regulation on Import and Export Administration*, Articles 64, 65, 66, 67 and 70 (Exhibit JE-73, CHN-152).

²²⁶ *Regulation on Import and Export Administration*, Articles 64, 65, 66, 67 and 70 (Exhibit JE-73, CHN-152).

²²⁷ *Export Quota Administration Measures*, Article 29 (Exhibit JE-76); *Export Quota Bidding Measures*, Article 36 (Exhibit JE-77); *Export Quota Bidding Implementation Rules*, Article 32 (Exhibit JE-78).

²²⁸ Exhibits CHN-6, JE-22.

²²⁹ *2009 Export Licensing Catalogue*, Article I(1) (Exhibits CHN-6, JE-22).

²³⁰ *2009 Export Licensing Catalogue*, Article I(2) (Exhibits CHN-6, JE-22).

²³¹ *Export Quota Measures*, Article 10 (Exhibit CHN-151, JE-76). MOFCOM may also adjust the annual quota amount by September 30 of the preceding year.

²³² *Export Quota Administration Measures*, Article 4 (Exhibits CHN-312, JE-76). Article 4 indicates that the *Export Quota Administration Measures* do not apply to the commodities listed in its appendix. Products listed in the appendix include coke.

²³³ *Export Quota Administration Measures*, Article 31 (Exhibits CHN-312, JE-76).

²³⁴ *Export Quota Administration Measures*, Article 13 (Exhibits CHN-312, JE-76).

²³⁵ *Export Quota Administration Measures*, Article 14 (Exhibits CHN-312, JE-76).

²³⁶ *Export Quota Administration Measures*, Article 17 (Exhibits CHN-312, JE-76).

²³⁷ *Export Quota Administration Measures*, Article 19 (Exhibits CHN-312 JE-76).

or (iii) "obvious imbalances in the quota-use-pace" between enterprises or areas.²³⁸ To that end, the *Export Quota Administration Measures* direct the local administrative authorities to inspect the utilization rate of export quotas and, where prescribed utilization rate requirements are not met, to redistribute quota amounts.²³⁹

(i) *2009 zinc export quota allocation*

7.180 Enterprises that have received a zinc quota share must meet a prescribed quota utilization rate or return unused annual quotas, which are reallocated the following year.²⁴⁰ MOFCOM and local administrative authorities may reallocate the unused and returned export quotas to other enterprises within their respective areas.²⁴¹ If the local administrative authorities fail either to return or use the quotas by the end of the year, MOFTEC may deduct a corresponding amount from their quotas for the following year.²⁴² Successful enterprises that have been awarded a quota certificate must apply to the relevant licence-issuing authority and satisfy applicable procedures for inspection and release with Customs.²⁴³ MOFCOM did not publish a quota amount in relation to zinc in 2009.

(ii) *2009 coke export quota allocation*

7.181 China requires enterprises to apply in October of the preceding year to receive a coke quota allocation. China requires enterprises to satisfy certain criteria in order to be eligible to receive an allocation under the quota. MOFCOM has different application processes for Chinese enterprises and for foreign-invested enterprises.²⁴⁴

Application requirements for Chinese and foreign-invested enterprises

7.182 The *2009 Coke Export Quota Application Procedure*²⁴⁵ requires that Chinese production enterprises satisfy certain criteria to be eligible to receive an allocation under the quota. An applicant must be registered pursuant to national legislation on economic, industrial and trade management administration, qualify for import and export operations or proceed with the registration as a foreign trade operator, and qualify as an independent legal person. An applicant must have supplied at least 250,000 metric tonnes of coke for export in 2008 in accordance with certain relevant standards, or have exported an average yearly volume of at least 200,000 metric tonnes of coke during the period 2005-07. In addition, an applicant must comply with national standards in force and possess ISO 9000 certification, comply with national and local governments' relevant regulations including those relating to employment and environmental standards, and demonstrate a record of no legal or regulatory infringements.²⁴⁶ In addition to the requirements applicable to Chinese production companies, Chinese trading companies must also demonstrate that they have supplied an average volume of at least 400,000 metric tonnes of coke for export during the period 2005-07. Trading companies are also required to have a registered capital of at least RMB 50 million.²⁴⁷

²³⁸ *Export Quota Administration Measures*, Article 20 (Exhibits CHN-312, JE-76).

²³⁹ *Export Quota Administration Measures*, Article 21 (Exhibits CHN-312, JE-76).

²⁴⁰ *Export Quota Administration Measures*, Article 21 (Exhibits CHN-312, JE-76).

²⁴¹ *Export Quota Administration Measures*, Article 22 (Exhibits CHN-312, JE-76).

²⁴² *Export Quota Administration Measures*, Article 23 (Exhibits CHN-312, JE-76).

²⁴³ *Export Quota Administration Measures*, Article 25 (Exhibits CHN-312, JE-76).

²⁴⁴ See opening paragraph of *2009 Coke Export Quota Application Procedure* (Exhibits CHN-308, JE-85).

²⁴⁵ Exhibits CHN-308, JE-85.

²⁴⁶ *2009 Coke Export Quota Application Procedures*, Section I(1) (Exhibits CHN-308, JE-85).

²⁴⁷ *2009 Coke Export Quota Application Procedures*, Section I(1) (Exhibits CHN-308, JE-85).

7.183 Chinese enterprises applying to export coke under the quota must submit the following documents: (i) business licence, registered Foreign Trade Operator Registration Form or the PRC Import and Export Enterprise Qualification Certificate and the Customs number and Identification number; (ii) ISO 9000 quality management system certificate; and (iii) supporting documents issued by the labour and social insurance administration confirming the enterprise's participation in certain social programs. New Chinese enterprises that apply for a coke export quota are required to submit the aforementioned documents covering the previous three years, while enterprises that have previously been allocated a portion of a coke export quota must submit documents covering only the preceding year.²⁴⁸

7.184 Foreign-invested enterprises seeking to export coke are required to satisfy the above application and eligibility criteria as well as meet additional requirements.²⁴⁹ The *2009 First Batch Coke Export Quotas for FIEs*, and the *2009 Second Batch Coke Export Quotas for FIEs* state that if necessary, the local authorities and MOFCOM should re-examine the "export scale" of foreign-invested enterprises as set forth in their applications.²⁵⁰ The application procedures do not appear to have been published for 2009. However, China has published coke export quota application procedures for foreign-invested enterprises in 2010. The 2010 measures make reference to China's authorities examining the applicants prior exports for foreign-invested enterprises.²⁵¹

7.185 Chinese enterprises applying to export coke must submit their applications to MOFCOM and the CCCMC, either directly, or through local authorities that in turn submit applications to MOFCOM and the CCCMC.²⁵² The *2009 Coke Export Quota Application Procedures* specifically direct the CCCMC to review and evaluate the applications of enterprises seeking to export under the quota.²⁵³ The CCCMC is a membership organization whose members must be legally listed and registered entities engaged in the import and export, or other trade-related activities, of metals, minerals, and chemicals in China.²⁵⁴ After receiving applications, the CCCMC in conjunction with the China Coking Industry Association, formulates and sends its opinion to MOFCOM regarding whether applicant enterprises have satisfied the requisite eligibility criteria.²⁵⁵ MOFCOM then decides which companies are qualified for coke export quotas and publishes the list of all companies.²⁵⁶

2009 Coke quota amounts

7.186 MOFCOM did not publish an export quota amount for coke in advance in 2009, but instead announced that certain "batches" of the coke export quota were allocated throughout the year to specific Chinese and foreign-invested enterprises.²⁵⁷ On 26 December 2008, China allocated an initial

²⁴⁸ *2009 Coke Export Quota Application Procedures*, Article III (Exhibits CHN-308, JE-85).

²⁴⁹ *2009 Coke Export Quota Application Procedures* (Exhibits CHN-308, JE-85).

²⁵⁰ *2009 First Batch Coke Export Quota for FIEs* (Exhibit JE-82); *2009 Second Batch Coke Export Quota for FIEs* (Exhibit JE-83).

²⁵¹ Allocation of *2010 First Batch Coke Export Quotas for FIEs* (Exhibits CHN-552, JE-128); *First Batch of 2010 Coke Export Quotas for FIEs* (Exhibit JE-129); Allocation of *2010 First Batch Coke Export Quotas for FIEs* (Exhibits CHN-552, JE-128).

²⁵² *2009 Coke Export Quota Application Procedure*, Article II (Exhibit CHN-308, JE-85).

²⁵³ *2009 Coke Export Quota Application Procedure*, Article II (Exhibit CHN-308, JE-85).

²⁵⁴ *2001 CCCMC Charter*, Article 8 (Exhibits CHN-16, JE-87). For additional details regarding the CCCMC, see Section III.G.

²⁵⁵ *2009 Coke Export Quota Application Procedures*, Article II (Exhibits CHN-308, JE-85).

²⁵⁶ *2009 Coke Export Quota Application Procedures*, Article II (Exhibits CHN-308, JE-85).

²⁵⁷ *2009 First Batch Coke Export Quotas* (Exhibit JE-80); *2009 Second Batch Coke Export Quota* (Exhibit CHN-338, JE-81); *2009 First Batch Coke Export Quotas for FIEs* (Exhibit JE-82); *2009 Second Batch Coke Export Quotas for FIEs* (Exhibit JE-83); *2009 Coke Export Quota Application Procedure* (Exhibits CHN-308, JE-85).

5,780,000 metric tonnes of the coke export quota to specific Chinese enterprises²⁵⁸, and on 29 June 2009, China allocated an additional 6,130,000 metric tonnes.²⁵⁹ On 9 January 2009, China allocated an initial 591,000 metric tonnes to foreign-invested enterprises²⁶⁰, and on 8 September 2009, China allocated an additional 591,000 metric tonnes.²⁶¹ The total amount of coke allocated to Chinese and foreign-invested enterprises for export in 2009 was 13,092,000 metric tonnes.

(b) Bauxite, fluorspar and silicon carbide quotas allocated through bidding

7.187 China's *Regulation on Import and Export Administration* provides that export "quotas may be allocated ... through bidding"²⁶² and that "the administrative departments of export quotas ... shall, on the basis of the provisions of the present Regulation, formulate specific measures of administration to lay out clear instructions on the qualifications of the applicants ...".²⁶³ The rules and procedures governing the quota bidding process are set out in the *Export Quota Bidding Measures*²⁶⁴, in conjunction with the *Export Quota Bidding Implementation Rules*.²⁶⁵

7.188 The *Export Quota Bidding Measures* define quota bidding as the procedure through which "an export enterprise may obtain with certain compensation the quotas", through "voluntary bidding."²⁶⁶ The *Export Quota Bidding Measures* further provide that goods can be subject to quota bidding where: (i) they are "non-renewable, staple-resource-type" goods; (ii) they are "well-positioned on the international market and upon the export volume of which the impact of price fluctuation is relatively little"; (iii) they are in "oversupply, supplied in a relatively decentralized way and liable to be dumped at low price, thereby giving rise to anti-dumping prosecution in foreign countries"; or (iv) they must be the subject of an export quota on the basis of international treaties with other countries that "have imposed relevant restrictions."²⁶⁷

7.189 Article 32 of the *Export Quota Bidding Measures* provides that after being awarded any quota, "an enterprise shall apply to the designated licensing authority for an export licence within the quota's validity period."²⁶⁸ The issuance of licences is subject to China's *2008 Export License Administration Measures*.²⁶⁹

7.190 MOFCOM is responsible for the centralized administration of export quota bidding, for determining the types of goods that are subject to export quota bidding, and for determining the total quantity of export quotas to be allocated through bidding.²⁷⁰

²⁵⁸ *2009 First Batch Coke Export Quotas* (Exhibit JE-80).

²⁵⁹ *2009 Second Batch Coke Export Quota* (Exhibit CHN-338, JE-81).

²⁶⁰ *2009 First Batch Coke Export Quotas for FIEs* (Exhibit JE-82).

²⁶¹ *2009 Second Batch Coke Export Quotas for FIEs* (Exhibit JE-83).

²⁶² *Regulation on Import and Export Administration*, Article 39 (Exhibit CHN-152, JE-73).

²⁶³ *Regulation on Import and Export Administration*, Article 44 (Exhibit CHN-152, JE-73).

²⁶⁴ *Export Quota Bidding Measures* (Exhibits CHN-304, JE-77).

²⁶⁵ *Export Quota Bidding Implementation Rules* (Exhibits CHN-305, JE-78).

²⁶⁶ *Export Quota Bidding Measures*, Article 2 (Exhibits CHN-304, JE-77).

²⁶⁷ *Export Quota Bidding Measures*, Article 6 (Exhibits CHN-304, JE-77).

²⁶⁸ *Export Quota Bidding Measures*, Article 32 (Exhibits CHN-304, JE-77); See also *Export Quota Bidding Implementation Rules*, Article 29 (Exhibits CHN-305, JE-78).

²⁶⁹ *Export Quota Bidding Measures*, Chapter VII, Article 33 (CHN-304, Exhibit JE-77), *2001 Export License Administration Provisions* (Exhibit CHN-359); *2004 Export License Administration Measures* (Exhibit CHN-360); See also *Export Quota Bidding Implementation Rules*, Articles 29-30 (Exhibits CHN-305, JE-78); *2009 Graded Export Licensing Entities Catalogue*, Articles 1(2), 5 (Exhibit JE-96).

²⁷⁰ *Export Quota Bidding Measures*, Article 3 (Exhibits CHN-304, JE-77).

7.191 The *Export Quota Bidding Measures* provide that MOFCOM is responsible for leading and supervising the work of bidding invitation through the Export Quota Bidding Committee.²⁷¹ Under the *Export Quota Bidding Measures*, the Bidding Committee "shall, according to the types of commodities subject to bidding, establish the corresponding offices of quota bidding for export commodities under the relevant chambers of commerce for import and export," known as Bidding Offices.²⁷² The Bidding Offices are composed of representatives of the CCCMC, the China Association of Enterprises with Foreign Investment and the "authority responsible for the coordination of the relevant industry." The head of the CCCMC also serves as the director of the Bidding Offices.²⁷³ The Bidding Committee sets a base or minimum bid price and invalidates bid prices that are "excessively high and obviously deviate from the law of price".²⁷⁴ The Bidding Committee is authorized to set a maximum and minimum quantity that each enterprise may bid.²⁷⁵

(i) *The quota-bidding application process*

7.192 The Bidding Committee handle various responsibilities concerning the application process and other bidding-related matters. These include: (i) determining the quantity of the export quotas, the bidding mode adopted for each bidding, the number of biddings and the quantity to be distributed under each bidding mode; (ii) determining the plan of quota bidding for each good, take charge of opening and evaluating the bids and approving the outcome of the bidding procedure; (iii) publishing all necessary notices and announcements; (iv) accepting the filings submitted by local bidding offices on unused quotas that are returned to the Ministry of Commerce, or quotas that the winning companies may assign and transfer to other companies; (v) inspecting the collection of security deposits and bid-winning prices; and (vi) and determining the qualifications that bidders should have, verifying the existence of these qualifications and approving the list of companies that have the right to participate in the bidding procedure in accordance with these qualifications.²⁷⁶

7.193 The relevant regional, municipal, or provincial office of MOFCOM is directed to preliminarily examine the qualifications of local bidding enterprises and provide the relevant materials to the relevant Bidding Office. The Bidding Office is then directed to re-examine the qualifications of bidding enterprises within the specified period and report the outcome of such re-examination to the Bidding Committee for examination and approval.²⁷⁷

7.194 The *Export Quota Bidding Measures*²⁷⁸, in conjunction with the *Export Quota Bidding Implementation Rules*²⁷⁹, set forth certain general eligibility criteria that bidders must satisfy. In general, in order to participate in the bidding process, both Chinese and foreign-invested enterprises

²⁷¹ *Export Quota Bidding Measures*, Article 7 (Exhibits CHN-304, JE-77); *Export Quota Bidding Implementation Rules*, Article 2 (Exhibits CHN-305, JE-78).

²⁷² *Export Quota Bidding Measures*, Article 9 (Exhibits CHN-304, JE-77).

²⁷³ *Export Quota Bidding Measures*, Article 9 (Exhibits CHN-304, JE-77); *Export Quota Bidding Implementation Rules*, Article 4 (Exhibits CHN-305, JE-78).

²⁷⁴ *Export Quota Bidding Measures*, Article 16 (Exhibits CHN-304, JE-77); *Export Quota Bidding Implementation Rules*, Article 7 (Exhibits CHN-305, JE-78).

²⁷⁵ *Export Quota Bidding Measures*, Article 17 (Exhibits CHN-304, JE-77); *Export Quota Bidding Implementation Rules* Article 8 (Exhibits CHN-305, JE-78).

²⁷⁶ *Export Quota Bidding Measures*, Articles 8 (Exhibits CHN-304, JE-77); *Export Quota Bidding Implementation Rules*, Articles 3 (Exhibits CHN-305, JE-78).

²⁷⁷ *Export Quota Bidding Measures*, Article 12 (Exhibits CHN-304, JE-77); See also *Export Quota Bidding Implementation Rules*, Article 15 (Exhibits CHN-305, JE-78); *2009 First Round Export Quota Bidding Announcement*, Article V(I)1 (Exhibits CHN-309, JE-90); *2009 Second Round Export Quota Bidding Announcement*, Article IV(2) (Exhibits CHN-310, JE-91).

²⁷⁸ Exhibits CHN-304, JE-77.

²⁷⁹ Exhibits CHN-305, JE-78.

must be: (i) qualified for engaging in export; (ii) registered with the business administration authority; (iii) members of the relevant chamber of commerce for import and export (in case of foreign-invested enterprises, members of the China Association of Enterprises with Foreign Investment); and (iv) have exported or supplied for export volumes of the relevant commodity that "reach[] a certain level."²⁸⁰ The Export Quota Bidding Implementation Rules further require that a bidder must "have reached certain levels in terms of registered capital".²⁸¹ They also provide that "other enterprises that satisfy the relevant government requirements and have been approved by MOFCOM may participate in public biddings."²⁸²

7.195 MOFCOM sets forth additional criteria that enterprises were required to satisfy in order to qualify to participate in bidding for specific rounds of bidding for bauxite, fluorspar and silicon carbide in 2009.²⁸³ Article III(I)i of the *2009 First Round Export Quota Bidding Announcement* provides that a bidding enterprise must have been registered with the appropriate government department, be qualified for importing and exporting, and "be an independent legal person".²⁸⁴ Where a bidder is a distribution enterprise, the goods procured by it must be supplied by a manufacturing enterprise that has satisfied all necessary requirements. Finally, a bidder may not have been involved in any violations of "relevant national laws and regulations" during the preceding three years.²⁸⁵ The following additional specific requirements apply:

- (a) In order to participate for the right to export bauxite in 2009, a bidding enterprise must: (i) have a registered capital of RMB 5 million; (ii) where the bidder is a trading company, have exported an average annual volume of 1,200 metric tonnes in the period 2006-2007; and (iii) where the bidder is a manufacturing enterprise, have exported an average annual volume of 500 metric tonnes during the period 2006-07 or an average annual volume of supply for export of 20,000 metric tonnes during period 2006-07.
- (b) In order to participate for the right to export fluorspar in 2009, a bidding enterprise must: (i) have a registered capital of RMB 5 million; and (ii) have achieved an average annual volume of export of 4,000 metric tonnes during the period 2005-07 or have an average annual volume of supply for export of 10,000 metric tonnes during the period 2005-07.²⁸⁶
- (c) In order to participate for the right to export silicon carbide in 2009, a bidding enterprise must: (i) have a minimum registered capital of RMB 4 million; (ii) where the bidder is a trading company, have achieved an annual average volume of export of 600 metric tonnes during the period 2005-07; (iii) where the bidder is a manufacturing enterprise, have exported an average annual volume of 300 metric tonnes during the period 2005-07 or have supplied for export an average annual volume of 1,200 metric tonnes during the period 2005-07; and (iv) where the bidder is an export enterprise, the average unit export price of such commodity must exceed \$1,300 per metric tonne.

²⁸⁰ *Export Quota Bidding Measures*, Article 11, (Exhibits CHN-304, JE-77).

²⁸¹ *Export Quota Bidding Implementation Rules*, Article 6 (I), (Exhibits CHN-305, JE-78).

²⁸² *Export Quota Bidding Implementation Rules*, Article 6 (I), (Exhibits CHN-305, JE-78).

²⁸³ *2009 First Round Export Quota Bidding Announcement* (Exhibits CHN-309, JE-90); *2009 Second Round Export Quota Bidding Announcement* (Exhibits CHN-310, JE-91).

²⁸⁴ *2009 First Round Export Quota Bidding Announcement*, Article III(I)i (Exhibits CHN-309, JE-90).

²⁸⁵ *2009 First Round Export Quota Bidding Announcement*, Article III (Exhibits CHN-309, JE-90).

²⁸⁶ *2009 First Round Bidding Invitation*, Article III(II)3 (Exhibits CHN-309, JE-90).

7.196 The *2009 First Round Export Quota Bidding Announcement*²⁸⁷ also provides a list of documents that must be submitted and reviewed by the relevant authority in order to determine whether an applicant can participate in the bidding process. In particular, applicants must submit a Statement of Enterprise Applying for Participation in Bidding, as well as the Statistics of Qualifications of Bidding Enterprises.²⁸⁸ Additionally, applicants are required to submit: (i) a balance sheet and income statement for the most recently completed financial year, together with an audit certificate issued by a certified public accounting firm; (ii) certificates issued by the competent labour and social security departments confirming the timely and full payment of all relevant fees and premiums to the social security and workers' rights funds; and (iii) for companies producing the raw materials, certificates and environmental monitoring reports confirming their compliance with the Chinese environmental and pollution control rules and regulations.²⁸⁹

7.197 The *2009 Second Round Export Quota Bidding Announcement* states that the eligibility criteria for Chinese enterprises can be found in the *2009 First Round Bidding Invitation*.²⁹⁰ However, the export experience requirements that must be satisfied for the second round of bidding are based on only one year of exports.²⁹¹ For bauxite, a bidding enterprise's export volume in 2008 must have reached 500 metric tonnes or the volume of supply for export in 2008 must have reached 20,000 metric tonnes.²⁹² For fluorspar, a bidding enterprise's export volume in 2008 must have reached 1,000 metric tonnes or the volume of supply for export in 2008 must have reached 10,000 metric tonnes.²⁹³ For silicon carbide, a bidding enterprise's export volume in 2008 must have reached 200 metric tonnes, or the volume of supply for export must have reached 1,200 metric tonnes.²⁹⁴

(ii) *Determining the bid-winners for bauxite, fluorspar and silicon carbide*

7.198 In addition to satisfying the eligibility criteria set out above and being approved by MOFCOM to participate in export quota bidding, an enterprise must also be awarded a portion of the export quota as part of the bidding process in order to export. Any enterprise that wishes to export these raw materials must submit a bidding price and bidding quantity to China's Bidding Office and must apply for an export licence.²⁹⁵ The bidding price represents the amount per metric tonne that a bidding enterprise is willing to pay for the right to export. The bidding quantity is the amount of the relevant material the enterprise seeks to export. The bidding price and quantity, multiplied together, are used to determine the bid-winning price.²⁹⁶

7.199 China's Bidding Office then determines based on the applicable rules the enterprises that will receive an allocation (or share) of the export quota based on the submitted bidding price and bidding

²⁸⁷ Exhibits CHN-309, JE-90.

²⁸⁸ *2009 First Round Export Quota Bidding Announcement*, Article V(I)3 (Exhibits CHN-309, JE-90).

²⁸⁹ *2009 First Round Export Quota Bidding Announcement*, Article V(I)3 (2) (Exhibits CHN-309, JE-90). See also *2009 Second Round Export Quota Bidding Announcement*, Article IV.1(3)(2) (Exhibits CHN-310, JE-91).

²⁹⁰ *2009 Second Round Export Quota Bidding Announcement*, Article III (Exhibits CHN-310, JE-91).

²⁹¹ *2009 Second Round Export Quota Bidding Announcement*, Article III (Exhibits CHN-310, JE-91).

²⁹² *2009 Second Round Export Quota Bidding Announcement*, Article III(6) (Exhibits CHN-310, JE-91).

²⁹³ *2009 Second Round Export Quota Bidding Announcement*, Article III(3) (Exhibits CHN-310, JE-91).

²⁹⁴ *2009 Second Round Export Quota Bidding Announcement*, Article III(5) (Exhibits CHN-310, JE-91).

²⁹⁵ *Export Quota Bidding Measures*, Article 14 (Exhibit CHN-304, JE-77); *Export Quota Bidding Implementation Rules*, Articles 20 and 21 (Exhibit CHN-305, JE-78).

²⁹⁶ *Export Quota Bidding Measures*, Article 20 (Exhibit CHN-304, JE-77); *Export Quota Bidding Implementation Rules*, Article 14 (Exhibit CHN-305, JE-78).

quantity. China's Bidding Office ranks all bids from enterprises in descending order, based on the bidding prices that are submitted.²⁹⁷ The Bidding Office then adds up the bid quantities proposed by the bidding enterprises in this descending list until the total quantity bid is equal to the total quantity of quota available. Those enterprises whose bid quantities are included in the total quantity of quota available are the winning bidders.²⁹⁸ The winning bidders are thus determined based on the highest bid prices.²⁹⁹

7.200 Enterprises that are awarded a portion of the quota must pay the balance of the bid-winning price and a security deposit before applying for an export licence.³⁰⁰ The security deposit may not exceed 20% of the total award price.³⁰¹ An enterprise may pay the full award price where it wishes to export the full allocation or a proportionate amount where it wishes to export less than the full allocation. The Bidding Office will refund the corresponding bid price that has been paid, although it will not refund the security deposit.³⁰² An enterprise that is allocated a quota through bidding must present a certificate of quota issued by China's Bidding Office when applying for an export licence.³⁰³ Exporting enterprises must present the export licence to China's Customs authorities for declaration and examination.³⁰⁴

(iii) *2009 quota amounts for bauxite, fluorspar and silicon carbide*

7.201 MOFCOM published the 2009 export quota amounts for bauxite as 930,000 metric tonnes, fluorspar as 550,000 metric tonnes, and silicon carbide as 216,000 metric tonnes.³⁰⁵ MOFCOM determined minimum and maximum bid quantities for bauxite, fluorspar and silicon carbide during a first round of public bidding for the 2009 export quota, held in December 2008.³⁰⁶ A second invitation for public bidding for silicon carbide was held in September 2009.³⁰⁷

3. Whether export quotas applied to bauxite, coke, fluorspar, silicon carbide, and zinc are inconsistent with Article XI:1 of the GATT 1994

7.202 The complainants allege that China's export quotas as applied to bauxite, coke, fluorspar, silicon carbide, and zinc are inconsistent with GATT Article XI:1.

7.203 China has indicated that its *Foreign Trade Law* is a "legislative act that delegates (through the State Council) to MOFCOM, an executive branch agency, implementing authority, *inter alia* (1) to specify the products subject to export quota and export licensing requirements, and (2) to adopt

²⁹⁷ *Export Quota Bidding Implementation Rules*, Article 5 (Exhibit CHN-305, JE-78).

²⁹⁸ *Export Quota Bidding Measures*, Article 26 (Exhibits CHN-304, JE-77); *Export Quota Bidding Implementation Rules*, Article 21 (Exhibit CHN-305, JE-78). *2010 First-Batch Export Quota Bidding of Bauxite*, Article VII (Exhibit CHN-284); *Export Quota Bidding Measures* (Exhibit CHN-304, JE-77).

²⁹⁹ *Export Quota Bidding Measures*, Article 19 (Exhibits CHN-304, JE-77); *Export Quota Bidding Implementation Rules*, Article 19 (Exhibit CHN-305, JE-78).

³⁰⁰ *Export Quota Bidding Measures*, Article 25, 25(2), and 26 (Exhibits CHN-304, JE-77). *Export Quota Bidding Implementation Rules*, Article 20, 20(II), and 21 (Exhibit CHN-305, JE-78).

³⁰¹ *Export Quota Bidding Implementation Rules*, Article 20 (Exhibits CHN-305, JE-78); *Export Quota Bidding Measures*, Article 25 (Exhibit CHN-304, JE-77).

³⁰² *Export Quota Bidding Implementation Rules*, Articles 21, and 23 (Exhibit CHN-305, JE-78).

³⁰³ *Export Quota Bidding Measures*, Articles 32-33 (Exhibits CHN-304, JE-77); *Export Quota Bidding Implementation Rules* (Exhibit CHN-305, JE-78).

³⁰⁴ *Regulation on Import and Export Administration*, Article 41 (Exhibits CHN-153, JE-73).

³⁰⁵ *2009 Export Quota Amounts* (Exhibit JE-79).

³⁰⁶ *2009 First Round Bauxite Bidding Procedures* (Exhibits JE-94); *2009 First Round Fluorspar Bidding Procedures* (Exhibit JE-93); *2009 First Round Silicon Carbide Bidding Procedures* (Exhibit JE-95).

³⁰⁷ *2009 Second Round Silicon Carbide Bidding Procedures* (Exhibits JE-131); *2009 Announcement of Second Bidding Round for Talc and Silicon Carbide* (Exhibit JE-132).

implementing rules concerning the grant of export licenses".³⁰⁸ The Appellate Body confirmed that "any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings."³⁰⁹ In light of China's explanation, and in the absence of any assertion that the measures discussed above are not attributable to China, the Panel will consider these measures to be measures of China for purposes of its analysis below.

7.204 Article XI:1, entitled "General Elimination of Quantitative Restrictions", provides that:

"No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other [Member] or on the exportation or sale for export of any product destined for the territory of any other [Member]."

7.205 In short, Article XI:1 forbids import and export restrictions or *prohibitions*, including those "made effective through ... *quotas* ... on the exportation ... of any product."

7.206 The Appellate Body has not yet been required to consider the meaning of "restrictions" in Article XI:1. Some panels, however, have done so. In *Colombia – Ports of Entry*, after reviewing several GATT and WTO cases, the panel concluded that "restrictions" in the sense contemplated by Article XI:1 refers to measures that create uncertainties and affect investment plans, restrict market access for imports, or make importation prohibitively costly.³¹⁰ The panel in *India – Quantitative Restrictions* concluded that the scope of the term "restriction" is "broad" and, in terms of its ordinary meaning, is "a limitation on action, a limiting condition or regulation."³¹¹ The panel in *India – Autos* similarly endorsed a broad interpretation of the term "restriction", concluding that Article XI:1 applies to conditions that are "limiting" or have a "limiting effect ... on importation itself".³¹² Quotas have been found to be inconsistent with Article XI:1 on a number of occasions.³¹³

7.207 The Panel thus understands the obligation imposed in Article XI:1 is to explicitly forbid Members from maintaining a restriction made effective through a prohibition or quota on the exportation of any product. Export quotas are inconsistent with Members' obligations by virtue of Article XI:1 because they have a restrictive or limiting effect on exportation.

7.208 It is on this basis that the complainants request the Panel to conclude that China subjects the exportation of bauxite, coke, fluorspar, silicon carbide, and zinc to quotas under the measures at issue inconsistently with Article XI:1.

7.209 China does not contest that any of these products are subject to quotas under the 2009 measures. However, China considers that the complainants have failed to establish a violation under Article XI:1 of the GATT 1994 because they failed "to establish China's non-compliance with the

³⁰⁸ China's response to European Union question No. 2, following the first substantive meeting, para. 279.

³⁰⁹ Appellate Body Report, *US – Corrosion Resistant Steel Sunset Reviews*, para. 81.

³¹⁰ Panel Report, *Colombia – Ports of Entry*, para. 7.240.

³¹¹ Panel Report, *India – Quantitative Restrictions*, para. 5.128.

³¹² Panel Report, *India – Autos*, para. 7.270. Several WTO panels have cited with approval this interpretation of the term "restrictions" in Article XI:1: see Panel Report, *Colombia – Ports of Entry*, paras. 7.233-7.234; Panel Report, *Brazil – Retreaded Tyres*, para. 7.371; Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.252 and 7.258.

³¹³ See, e.g., GATT Panel Report, *France – Import Restrictions*; GATT Panel Report, *Japan – Agricultural Products I*; GATT Panel Report *US – Sugar*; GATT Panel Report, *US – Sugar Waiver*.

terms of Article XI:2(a) with respect to the export quotas on all of the products at issue."³¹⁴ China argues that the chapeau to Article XI:2 "links the scope of application of the obligation in Article XI:1 to the further requirements in Article XI:2(a)-(c)" by providing that Articles XI:1 shall "not extend to" the types of export restriction described in Article XI:2.³¹⁵ Accordingly, it requests the Panel to reject the complainants' claims on the basis that they failed to demonstrate that the quotas at issue do not "fall[] within Articles XI:2(a), (b), or (c)" and thereby demonstrate that a violation should apply.³¹⁶ China finds support for this in what it asserts was the Appellate Body's treatment in similar provisions, namely Article 27.2 of the SCM Agreement and GATT Articles II:1(a) and II:1(b) of the GATT 1994 in *India – Additional Import Duties*.³¹⁷

7.210 The complainants reject this view, arguing that the Appellate Body made clear in *US – Wool Shirts and Blouses* that the provisions under Article XI:2 are "affirmative defences" and that the burden is therefore on the respondent – and not the complainant – to demonstrate that Article XI:2 is somehow applicable.³¹⁸ China characterizes the Appellate Body's statement as "obiter" and no longer applicable in light of an evolving "taxonomy" adopted by the Appellate Body.³¹⁹

7.211 The Panel finds itself at odds with China's view that the Appellate Body statement in *US – Wools Shirts and Blouses* regarding Article XI:2 is not applicable to the matter at hand. The Appellate Body was clear in its statement on the operation of Article XI:2(c)(i), stating:

"Articles XX and XI:(2)(c)(i) are limited exceptions from obligations under certain other provisions of the GATT 1994, not positive rules establishing obligations in themselves. They are in the nature of affirmative defences. It is only reasonable that the burden of establishing such a defence should rest on the party asserting it".³²⁰

7.212 The Panel sees no basis to conclude that the logic applicable to Article XI:2(c)(i) would not apply as well to the separate subparagraph, Article XI:2(a), which falls under the same chapeau paragraph. In addition, as the European Union also points out, China's interpretation would suggest that a complainant might need to demonstrate that other GATT provisions, such as GATT Articles XII, XVIII, XX or XXI, are also inapplicable.³²¹

³¹⁴ China's first written submission, para. 350; China's second written submission, para. 36.

³¹⁵ China's first written submission, para. 353.

³¹⁶ China's first written submission, para. 353; China's second written submission, para. 29.

³¹⁷ China's first written submission, paras. 354-357. China refers to Article 27.2 of the SCM Agreement, which provides that "[t]he prohibition of paragraph 1(a) of Article 3 shall not apply to ... other developing country Members ... subject to compliance with the provisions in paragraph 4". The Appellate Body concluded that the "prohibition of Article 3.1(a)" would only "apply" if the complainant demonstrates non-compliance with Article 27.4. See Appellate Body Report, *Brazil - Aircraft*, para. 141. China's first written submission, paras. 358-359; referring to Appellate Body Report, *India – Additional Import Duties*, paras. 153 and 190.

³¹⁸ Complainants' joint opening oral statement at the first substantive meeting, para. 128. United States' second written submission, para. 205; European Union's second written submission, paras. 42-46; European Union's opening oral statement at the second substantive meeting; Mexico's second written submission, para. 210.

³¹⁹ China's second written submission, paras. 31-36.

³²⁰ Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16, DSR 1997:I, 323, at p. 337; see also GATT Panel Report, *EEC – Dessert Apples*, para. 12.3; GATT Panel Report, *Canada – Ice Cream and Yoghurt*, para. 59.

³²¹ See European Union's second written submission, para. 12. In addition, the Panel considers the nature of Article XI:2 is distinct from the positive obligations contained in Article 27 of the SCM Agreement, or the special relationship that exists between GATT Articles II and III in respect of duties and charges as border measures and internal charges. Like the European Union, the Panel agrees that the particular interpretation of

7.213 Accordingly, the Panel concludes that the burden is on the respondent (China in this case) to demonstrate that the conditions of Article XI:2(a) are met in order to demonstrate that no inconsistency arises under Article XI:1. With this in mind, the Panel will consider below the complainants' claims that China subjects the exportation of bauxite, coke, fluorspar, silicon carbide and zinc to quotas inconsistently with its obligations under Article XI:1.

7.214 As discussed in Section VII.C.2 above, China maintains measures that when operating together give effect to export quotas. Article 19 of China's *Foreign Trade Law*, for instance, provides that "[China] applies quota and licensing system to the management of goods subject to ... export restrictions ...".³²² Article 36 of the *Regulation on Import and Export Administration* provides that "[g]oods restricted from exportation that are subject to quantitative restrictions by the state are subject to the administration of quotas."³²³ The *Export Quota Administration Measures* provide that MOFCOM "applies export quota administration with respect to the commodities restricted from export by the State."³²⁴ Goods that are subject to restriction pursuant to Article 19 may be subject to licensing as "goods restricted from exportation."³²⁵ An enterprise must present the quota certificate to export licensing authorities to obtain the export licence and present such export licence to Customs in order to export.³²⁶ Administrative and criminal sanctions may be imposed, for instance, for the unlawful exportation of goods subject to restriction without approval, for exceeding quota allocations, for failure to return unused quotas, or for buying or selling quota certificates without approval.³²⁷

7.215 As discussed in paragraph 7.176 above, China's MOFCOM in conjunction with Customs identifies in a list published annually the goods subject to export quotas.³²⁸ China allocates export quotas either through direct allocation or a quota bidding system.³²⁹ In 2009, MOFCOM and Customs published the *2009 Export Licensing Catalogue*³³⁰, which identifies coke and zinc as products subject to export quotas that are allocated directly, and identifies bauxite, fluorspar and silicon carbide as products subject to export quotas that are allocated through bidding.³³¹ China's *Export Quota Administration Measures*³³² direct MOFCOM to allocate quotas for zinc based on prior export performance, quota utilization rate, operation/business management capacity, and the production of applicants over prior years, or based on other market factors.³³³ China's MOFCOM allocates coke

Article was influenced in *India – Additional Import Duties* by the "strong link" between Article II:2(a) and Article III:2. A challenge under Article III:2 should not be allowed to avoid the burden to show that the conditions of that provision are met by instead presenting its claim under Article II:1(b), and then requiring the respondent to prove that the charge is actually consistent with Article III:2 (and therefore with the exception in Article II:2(a)) (See European Union's second written submission, para. 19).

³²² *Export Quota Administration Measures* (Exhibits CHN-312, JE-76).

³²³ *Regulation on Import and Export Administration* (Exhibits CHN-152, JE-73).

³²⁴ *Export Quota Administration Measures* (Exhibits CHN-312, JE-76).

³²⁵ *2008 Export Licence Administration Measures*, Article 2 (Exhibits CHN-342, JE-74).

³²⁶ *Regulation on Import and Export Administration*, Articles 41, 43 (Exhibits CHN-152, JE-73); *Export Quota Administration Measures*, Article 25 (Exhibits CHN-312, JE-76).

³²⁷ *Foreign Trade Law*, Articles 61, 63 (Exhibits CHN-151, JE-72).

³²⁸ *Foreign Trade Law*, Article 18 (Exhibits CHN-151, JE-72); *Regulations on Import and Export Administration*, Article 35, 38, 40, 42, 64, 65, 66, 67, 70 (Exhibits CHN-152, JE-73); *Export Quota Administration Measures*, Article 7 (Exhibits CHN-312, JE-76).

³²⁹ *Regulation on Import and Export Administration*, Article 39 (Exhibits CHN-152, JE-73).

³³⁰ Exhibits CHN-6, JE-22.

³³¹ *2009 Export Licensing Catalogue* (Exhibits CHN-6, JE-22); *Regulation on Import and Export Administration*, Article 35-36 (Exhibits CHN-152, JE-73); *Export Quota Administration Measures* (Exhibits CHN-312, JE-76).

³³² Exhibits CHN-312, JE-76.

³³³ *Export Quota Administration Measures*, Articles 9, 11, 14, 17, 18, 19, 20, 21, 22, 23, 25, 26 (Exhibits CHN-312, JE-76).

quotas in batches during the course of the year.³³⁴ Enterprises must comply with the *2009 Coke Export Application Procedures* in order to be considered for an allocation.³³⁵ China's MOFCOM administers the allocation of quotas on bauxite, fluorspar and silicon carbide through a bidding system.³³⁶

7.216 In October 2008, MOFCOM published the total 2009 export quota amounts for bauxite, fluorspar, and silicon carbide.³³⁷ As discussed in paragraph 7.201 above, China imposed an export quota of 930,000 tonnes on bauxite, an export quota of 550,000 metric tonnes on fluorspar, and an export quota of 216,000 tonnes on silicon carbide. China did not publish an amount for coke in October 2008. As discussed in paragraph 7.186, China published various announcements in 2009 indicating that the export quota on coke would be distributed to specific enterprises.³³⁸ In total, China allocated 13,092,000 metric tonnes of coke pursuant to these announcements.

7.217 Finally, as discussed in paragraph 7.180 above, China did not publish any quota for the exportation of zinc in 2009, nor did it publish in advance procedures for enterprises to apply to be allocated a portion of any zinc quota. Nor were there announcements listing enterprises that had been allocated any quantity of zinc for export pursuant to an export quota. The complainants submit that this failure to publish amounts to an effective prohibition on exportation.³³⁹ China explained that when MOFCOM does not "make effective" an export quota on zinc, then no zinc can be exported for that year.³⁴⁰ In addition, China acknowledged that MOFCOM did not authorize any quota for zinc in 2010. China does not assert any defence in connection with this failure to set the quota amount. Because China did not set a zinc quota for 2009, the Panel concludes that China maintained a ban, or zero quota, on the exportation of zinc in 2009.

7.218 The Panel therefore concludes that China, through the following series of measures, when operating in concert, establishes export quotas on bauxite, coke, fluorspar, silicon carbide and zinc that results in a restriction or prohibition on the exportation of these products. The Panel considers that findings on the measures acting in concert – including measures imposing an export licensing framework and quota administration measures, such as those relating to the operation of the quota

³³⁴ *2009 First Batch Coke Export Quotas* (Exhibit JE-80); *2009 Second Batch Coke Export Quota* (Exhibit CHN-338, JE-81); *2009 First Batch Coke Export Quotas for FIEs* (Exhibit JE-82); *2009 Second Batch Coke Export Quotas for FIEs* (Exhibit JE-83); *2009 Coke Export Quota Application Procedure* (Exhibits CHN-308, JE-85).

³³⁵ *2009 Coke Export Quota Application Procedure*, Sections I and II (Exhibits CHN-308, JE-85); see also *2010 First Batch Coke Export Quota for FIEs* (Exhibit JE-129).

³³⁶ *Export Quota Bidding Measures*, Article 3, 8, 9, 10, 12, 14, 16, 19, 20, 25, 26 (Exhibits CHN-304, JE-77); *Regulation on Import and Export Administration*, Articles 39, 41, 44 (Exhibit CHN-152, JE-73); *Export Quota Bidding Implementation Rules*, Article 2, 3, 4, 5, 6, 20, 21, 23 (Exhibits CHN-305, JE-78); *2009 First Round Export Quota Bidding Announcement* (Exhibits CHN-309, JE-90); *2009 Second Round Export Quota Bidding Announcement* (Exhibits CHN-310, JE-91); *2009 First Round Export Quota Bidding Announcement* (Exhibit CHN-309, JE-90); *2009 Second Round Export Quota Bidding Announcement* (Exhibits CHN-310, JE-91).

³³⁷ *2009 Export Quota Amounts* (Exhibit JE-79); *Regulation on Import and Export Administration*, Article 38 (Exhibit CHN-152, JE-73); *Export Quota Administration Measures*, Articles 9-11 (Exhibits CHN-312, JE-76).

³³⁸ *2009 First Batch Coke Export Quotas* (Exhibit JE-80); *2009 Second Batch Coke Export Quota* (Exhibits CHN-338, JE-81); *2009 First Batch Coke Export Quotas for FIEs* (Exhibit JE-82); *2009 Second Batch Coke Export Quotas for FIEs* (Exhibit JE-83).

³³⁹ United States' first written submission, para. 249; European Union's first written submission, para. 206; Mexico's first written submission, para. 252.

³⁴⁰ China's first written submission, paras. 559, 740; China's response to question No. 8 from the European Union following the first substantive meeting para. 37.

bidding process – are necessary so that annually renewed measures do not evade WTO dispute settlement review merely through their expiration during the Panel proceedings.

- (a) Export quotas on bauxite, including "refractory clay" (HS No. 2508.3000) and "aluminium ores and concentrates" (HS No. 2606.0000)

7.219 China imposed an export quota to these forms of bauxite in 2009, pursuant to: *Foreign Trade Law*³⁴¹, Articles 2, 14-19, 34, 61 63, 64; *Regulation on Import and Export Administration*³⁴², Articles 4, 35-44, 64, 66; 67 and 70; *Export Quota Bidding Measures*³⁴³, Articles 3, 8, 9, 10, 11, 13, 14, 16; *2008 Export Licence Administration Measures*³⁴⁴, Article 25; *2009 Graded Export Licensing Entities Catalogue*³⁴⁵, Articles 1(2), 5, Attachment; *2008 Export Licensing Working Rules*³⁴⁶; *Export Quota Bidding Implementation Rules*³⁴⁷, Articles 2-6; *2009 Export Quota Amounts*³⁴⁸; *2009 Announcement of Second Bidding Round for Talc and Silicon Carbide*³⁴⁹; *2009 Export Licensing Catalogue*³⁵⁰; *2009 First Round Export Quota Bidding Announcement*³⁵¹; *2009 Second Round Export Quota Bidding Announcement*³⁵²; and *2009 First Round Bauxite Bidding Procedures*.³⁵³

- (b) Export quotas on fluor spar, including "met-spar" (HS 2529.2100), and "acid-spar" (HS 2529.2200)

7.220 China imposed an export quota to these forms of fluor spar in 2009 pursuant to: *Foreign Trade Law*³⁵⁴, Articles 2, 14-19, 34, 61 63, 64; *Regulation on Import and Export Administration*³⁵⁵, Articles 4, 35-44, 64, 66; 67 and 70; *Export Quota Bidding Measures*³⁵⁶, Articles 3, 8, 9, 10, 11, 13, 14, 16; *2008 Export Licence Administration Measures*³⁵⁷, Article 25; *2009 Graded Export Licensing Entities Catalogue*³⁵⁸, Articles 1(2), 5, Attachment; *2008 Export Licensing Working Rules*³⁵⁹; *Export Quota Bidding Implementation Rules*³⁶⁰, Articles 2-6; *2009 Export Quota Amounts*³⁶¹; *2009 Announcement of Second Bidding Round for Talc and Silicon Carbide*³⁶²; *2009 Export Licensing Catalogue*³⁶³; *2009 First Round Export Quota Bidding Announcement*³⁶⁴; *2009 Second Round Export Quota Bidding*

³⁴¹ *Foreign Trade Law* (Exhibits CHN-151, JE-72).

³⁴² *Regulation on Import and Export Administration* (Exhibits CHN-152, JE-73).

³⁴³ *Export Quota Bidding Measures* (Exhibits CHN-304, JE-77).

³⁴⁴ *2008 Export Licence Administration Measures* (Exhibits CHN-342, JE-74).

³⁴⁵ *2009 Graded Export Licensing Entities Catalogue* (Exhibit JE-96).

³⁴⁶ *2008 Export Licensing Working Rules* (Exhibits CHN-344, JE-97).

³⁴⁷ *Export Quota Bidding Implementation Rules* (Exhibits CHN-305, JE-78).

³⁴⁸ *2009 Export Quota Amounts* (Exhibit JE-79).

³⁴⁹ *2009 Announcement of Second Bidding Round for Talc and Silicon Carbide* (Exhibit JE-132).

³⁵⁰ *2009 Export Licensing Catalogue* (Exhibits CHN-6, JE-22).

³⁵¹ *2009 First Round Export Quota Bidding Announcement* (Exhibits CHN-309, JE-90).

³⁵² *2009 Second Round Export Quota Bidding Announcement* (Exhibits CHN-310, JE-91).

³⁵³ *2009 First Round Bauxite Bidding Procedures* (Exhibit JE-94).

³⁵⁴ *Foreign Trade Law* (Exhibits CHN-151, JE-72).

³⁵⁵ *Regulation on Import and Export Administration* (Exhibits CHN-152, JE-73).

³⁵⁶ *Export Quota Bidding Measures* (Exhibits CHN-304, JE-77).

³⁵⁷ *2008 Export Licence Administration Measures* (Exhibits CHN-342, JE-74).

³⁵⁸ *2009 Graded Export Licensing Entities Catalogue* (Exhibit JE-96).

³⁵⁹ *2008 Export Licensing Working Rules* (Exhibits CHN-344, JE-97).

³⁶⁰ *Export Quota Bidding Implementation Rules* (Exhibits CHN-305, JE-78).

³⁶¹ *2009 Export Quota Amounts* (Exhibit JE-79).

³⁶² *2009 Announcement of Second Bidding Round for Talc and Silicon Carbide* (Exhibit JE-132).

³⁶³ *2009 Export Licensing Catalogue* (Exhibits CHN-6, JE-22).

³⁶⁴ *2009 First Round Export Quota Bidding Announcement* (Exhibits CHN-309, JE-90).

*Announcement*³⁶⁵; and *2009 First Round Fluorspar Bidding Procedures*.³⁶⁶ The Panel notes that in 2010 China no longer had in place an export quota for fluorspar.

(c) Export quotas on silicon carbide, including silicon carbide and crude silicon carbide

7.221 China imposed an export quota to these forms of silicon carbide in 2009, pursuant to: *Foreign Trade Law*³⁶⁷, Articles 2, 14-19, 34, 61 63, 64; *Regulation on Import and Export Administration*³⁶⁸, Articles 4, 35-44, 64, 66; 67 and 70; *Export Quota Bidding Measures*³⁶⁹, Articles 3, 8, 9, 10, 11, 13, 14, 16; *2008 Export Licence Administration Measures*³⁷⁰, Article 25; *2009 Graded Export Licensing Entities Catalogue*³⁷¹, Articles 1(2), 5, Attachment; *2008 Export Licensing Working Rules*³⁷²; *Export Quota Bidding Implementation Rules*³⁷³, Articles 2-6; *2009 Export Quota Amounts*³⁷⁴; *2009 Export Licensing Catalogue*³⁷⁵; *2009 First Round Export Quota Bidding Announcement*³⁷⁶; *2009 Second Round Export Quota Bidding Announcement*³⁷⁷; *2009 Second Round Silicon Carbide Bidding Procedures*³⁷⁸; *2009 First Round Silicon Carbide Bidding Procedures*³⁷⁹; and *2009 Announcement of Second Bidding Round for Talc and Silicon Carbide*.³⁸⁰

(d) Export quotas on coke (HS 2704.0010)

7.222 China imposed an export quota to coke in 2009, pursuant to: *Foreign Trade Law*³⁸¹, Articles: 2, 14-19, 34, 61 63, 64; *Regulation on Import and Export Administration*³⁸², Articles 4, 35-44, 64, 66; 67 and 70; *2008 Export Licence Administration Measures*³⁸³, Article 25; *2009 Graded Export Licensing Entities Catalogue*³⁸⁴, Articles 1(2), Attachment; *2008 Export Licensing Working Rules*³⁸⁵; *2009 Export Licensing Catalogue*³⁸⁶; *2009 First Batch Coke Export Quotas*³⁸⁷; *2009 Second Batch Coke Export Quota*³⁸⁸; *2009 First Batch Coke Export Quotas for FIEs*³⁸⁹; *2009 Second Batch Coke Export Quotas for FIEs*³⁹⁰; and *2009 Coke Export Quota Application Procedure*.³⁹¹

³⁶⁵ *2009 Second Round Export Quota Bidding Announcement* (Exhibits CHN-310, JE-91).

³⁶⁶ *2009 First Round Fluorspar Bidding Procedures* (Exhibit JE-93).

³⁶⁷ *Foreign Trade Law* (Exhibits CHN-151, JE-72).

³⁶⁸ *Regulation on Import and Export Administration* (Exhibits CHN-152, JE-73).

³⁶⁹ *Export Quota Bidding Measures* (Exhibits CHN-304, JE-77).

³⁷⁰ *2008 Export Licence Administration Measures Exhibit* (Exhibit CHN-342, JE-74).

³⁷¹ *2009 Graded Export Licensing Entities Catalogue* (Exhibit JE-96).

³⁷² *2008 Export Licensing Working Rules* (Exhibits CHN-344, JE-97).

³⁷³ *Export Quota Bidding Implementation Rules* (Exhibits CHN-305, JE-78).

³⁷⁴ *2009 Export Quota Amounts* (Exhibit JE-79).

³⁷⁵ *2009 Export Licensing Catalogue* (Exhibits CHN-6, JE-22).

³⁷⁶ *2009 First Round Export Quota Bidding Announcement* (Exhibits CHN-309, JE-90).

³⁷⁷ *2009 Second Round Export Quota Bidding Announcement* (Exhibits CHN-310, JE-91).

³⁷⁸ *2009 Second Round Silicon Carbide Bidding Procedures* (Exhibit JE-131).

³⁷⁹ *2009 First Round Silicon Carbide Bidding Procedures* (Exhibit JE-95).

³⁸⁰ *2009 Announcement of Second Bidding Round for Talc and Silicon Carbide* (Exhibit JE-132).

³⁸¹ *Foreign Trade Law* (Exhibit CHN-151, JE-72).

³⁸² *Regulation on Import and Export Administration* (Exhibits CHN-152, JE-73).

³⁸³ *2008 Export Licence Administration Measures* (Exhibits CHN-342, JE-74).

³⁸⁴ *2009 Graded Export Licensing Entities Catalogue* (Exhibit JE-96).

³⁸⁵ *2008 Export Licensing Working Rules* (Exhibits CHN-344, JE-97).

³⁸⁶ *2009 Export Licensing Catalogue* (Exhibit CHN-6, JE-22).

³⁸⁷ *2009 First Batch Coke Export Quotas* (Exhibit JE-80).

³⁸⁸ *2009 Second Batch Coke Export Quota* (Exhibit CHN-338, JE-81).

³⁸⁹ *2009 First Batch Coke Export Quotas for FIEs* (Exhibit JE-82).

³⁹⁰ *2009 Second Batch Coke Export Quotas for FIEs* (Exhibit JE-83).

³⁹¹ *2009 Coke Export Quota Application Procedure* (Exhibits CHN-308, JE-85).

- (e) Export quotas on zinc, including "zinc ores and concentrates excluding gray feed grade zinc oxide" (HS 2608.0000 ex) and "gray feed grade zinc oxide" (HS 2608.0000 ex)

7.223 China imposed an export prohibition to these forms of zinc in 2009, pursuant to: *Foreign Trade Law*³⁹², Articles 2, 14-19, 34, 61-63, 64; *Regulation on Import and Export Administration*³⁹³, Articles 4, 35-44, 64, 66; 67 and 70; *2008 Export Licence Administration Measures*³⁹⁴, Article 25; *2009 Graded Export Licensing Entities Catalogue*³⁹⁵, Articles 1(2), Attachment; *2008 Export Licensing Working Rules*³⁹⁶; *Export Quota Administration Measures*³⁹⁷, Articles 4, 9, 11, 17-23, 25, 26, 31; and *2009 Export Licensing Catalogue*.³⁹⁸

4. Summary

7.224 For each of these products (bauxite, coke, fluorspar, silicon carbide and zinc³⁹⁹), the series of measures operating in concert has resulted in the imposition of a restriction or prohibition on their exportation that are inconsistent with China's obligations under Article XI:1 of the GATT 1994. This is not to say that individually each of those measures is WTO-inconsistent; rather, when they operate collectively to result in WTO-inconsistent quotas that is not otherwise justified, it is then that they become *prima facie* WTO-inconsistent. The Panel recalls its view that findings on the measures acting in concert is necessary so that annually renewed measures do not evade WTO dispute settlement review merely through their expiration during the Panel proceedings.

7.225 The Panel will consider below whether the export quota applied to refractory-grade bauxite is justified within the meaning of Article XI:2(a). In the alternative, the Panel will consider whether China's export quota applied to refractory-grade bauxite is justified pursuant to Article XX(g) of the GATT 1994. Finally, the Panel will consider whether export quotas applied to coke and silicon carbide are justified pursuant to Article XX(b) of the GATT 1994.

D. CHINA'S DEFENCES TO THE APPLICATION OF EXPORT RESTRICTIONS

7.226 The Panel has concluded above that, on 21 December 2009, China maintained export duties on certain forms of bauxite, coke, fluorspar, magnesium, manganese, silicon metal and zinc⁴⁰⁰ that are inconsistent with Paragraph 11.3 of China's Accession Protocol.⁴⁰¹ The Panel also concluded, that on 21 December 2009 China maintained certain export quotas or a prohibition on bauxite, coke, fluorspar, silicon carbide and zinc⁴⁰² that are inconsistent with Article XI:1 of the GATT 1994.⁴⁰³

³⁹² *Foreign Trade Law* (Exhibits CHN-151, JE-72).

³⁹³ *Regulation on Import and Export Administration* (Exhibits CHN-152, JE-73).

³⁹⁴ *2008 Export Licence Administration Measures* (Exhibits CHN-342, JE-74).

³⁹⁵ *2009 Graded Export Licensing Entities Catalogue* (Exhibit JE-96).

³⁹⁶ *2008 Export Licensing Working Rules* (Exhibits CHN-344, JE-97).

³⁹⁷ *Export Quota Administration Measures* (Exhibits CHN-312, JE-76).

³⁹⁸ *2009 Export Licensing Catalogue* (Exhibits CHN-6, JE-22).

³⁹⁹ The specific forms of the raw materials subject to complainants' claims are identified in Exhibit JE-6 and in paragraph 2.2 of the Descriptive Part of these Reports.

⁴⁰⁰ The specific forms of the raw materials subject to the complainants' claims are identified in Exhibit JE-5 and para. 2.2 of the Descriptive Part to these Reports.

⁴⁰¹ See para. 7.105 above.

⁴⁰² The specific forms of the raw materials subject to complainants' claims are identified in Exhibit JE-6 and in para. 2.2 of the Descriptive Part of these Reports.

⁴⁰³ See para. 7.224 above.

7.227 China seeks to justify the application of export duties to particular forms of coke, magnesium, manganese (excluding manganese ores and concentrates), and zinc⁴⁰⁴ under Article XX(b), and the application of export duties to the particular forms of fluorspar pursuant to Article XX(g). China seeks to justify the application of export quotas on refractory-grade bauxite⁴⁰⁵ under Article XI:2(a) of the GATT 1994, or in the alternative, under Article XX(g); and its export quotas on coke and silicon carbide under Article XX(b). China does not seek to justify export duties imposed on bauxite, manganese ores and concentrates, or silicon metal, nor does it seek to justify export quotas applied to fluorspar or zinc.

7.228 China reiterates its position that the Panel should not consider any 2009 measures⁴⁰⁶, including those imposing export duties and export quotas in 2009.⁴⁰⁷ China stated its defences concern 2010 measures only.⁴⁰⁸ The Panel decided⁴⁰⁹ that it will only make findings on China's 2009 measures and not on any of China's 2010 measures. Since the 2010 measures for which China offers defences are similar to its 2009 measures, in the interest of a prompt resolution of disputes, the Panel considers it appropriate to examine China's defences in the context of its assessment of China's 2009 measures.⁴¹⁰ In doing so, the Panel recognises China's argument that it terminated its quota on fluorspar in 2010, and only seeks to justify the application of export duties on fluorspar in 2010. The Panel will examine China's defence under Article XX(g) in respect of the application of export duties applied to fluorspar in 2009 only.

7.229 The Panel has reached the conclusion, in paragraph 7.158, that China cannot invoke Article XX of the GATT 1994 to justify export *duties* inconsistent with its Accession Protocol. However, the complainants have submitted extensive argumentation and evidence suggesting that, even assuming *arguendo* that Article XX were available, China has not demonstrated that its export duties can be justified pursuant to Article XX(b) or (g) of the GATT 1994. Therefore, in their oral and written submissions, all parties have extensively debated the interpretation and application of Articles XX(b) and (g) with respect to the above-mentioned WTO-inconsistent export *duties*.

7.230 The Panel recalls that it determined that it is useful to pursue an *arguendo* analysis in order not to undermine the parties' right to prompt settlement of the dispute. Hence, the Panel will analyse and determine, *arguendo*, whether Article XX(b) could justify China's WTO-inconsistent export duties on various forms of coke, magnesium, manganese, and zinc; and whether GATT Article XX(g) could justify China's WTO-inconsistent export duties on fluorspar.

⁴⁰⁴ The specific forms of the raw materials subject to the United States' and Mexico's claims are identified in Exhibit JE-5 and para. 2.2 of the Descriptive Part to these Reports.

⁴⁰⁵ See Section VII.D.

⁴⁰⁶ See China's first written submission, para. 49-51, 56, 62, 64 and 67; China's second written submission, Section II entitled "The Panel should rule on the 2010 Measures To resolve the Disputes, and Should not Rule on the 2009 Measures"; and para. 12 "In sum, the prompt and positive resolution of this dispute call the Panel to address the 2010 measures and not the 2009 measures."

⁴⁰⁷ See for instance in China's first written submission, para. 70 "China's submission addresses the new [2010] measures, and not the expired [2009] measures". See China's response to Panel question No.2 following the second substantive meeting, para. 9. ("For this reason, China makes arguments and defences regarding the 2010 export duties and export quotas").

⁴⁰⁸ China's response to Panel question No.2 following the second substantive meeting: See China's response to Panel question No.2 following the second substantive meeting, para. 9 ("For this reason, China makes arguments and defences regarding the 2010 export duties and export quotas").

⁴⁰⁹ See para. 7.33 above.

⁴¹⁰ As noted, China offers no defence to the application of a quota on fluorspar in 2009. Accordingly, the Panel will not consider China's defence in respect of this quota, but only duties applied in 2009.

7.231 The Panel has also decided to follow China's approach in defending collectively its export duties and export quotas in the context of its Article XX defence. In this context, China submits that an export duty and an export quota are "functionally equivalent measures" that "have similar effect on the volume of export and, hence, international and domestic supply (...). Thus, the restrictive effect of an export duty may be equal to that of an export quota, and vice-versa".⁴¹¹

7.232 With respect to the order of the Panel's analysis, the Panel will follow China's approach in making its defence, grouping some arguments under Article XX(g) and others under Article XX(b).

7.233 In its first written submission, China defends its export duties on fluorspar under Article XX(g) separately from its defence to its export quota on refractory-grade bauxite under Article XX(g). In its second written submission, China defends its export restrictions on fluorspar (duties) and refractory-grade bauxite (quota) under Article XX(g) together. The Panel will therefore address China's defence under Article XX(g) in combination, as China did in its second submission. The Panel recalls that it will only analyse China's defence to its WTO-inconsistent export duties on fluorspar on an *arguendo* basis.

7.234 When making its Article XX(b) defence in its second submission, China addresses, first, its export restrictions (both in the form of duties and quotas) on what China labels certain "energy-intensive, highly polluting, resource-based products" ("EPR products"). These include export duties on coke, manganese metal, magnesium metals and its export quotas on coke and silicon carbide. Second, China addresses its export restrictions in the form of export duties on scrap forms of zinc, manganese and magnesium which it calls the "non-ferrous metal scrap products" (hereafter called "scrap products"). The Panel will consider China's defences under GATT Article XX(b) in that same order, recalling that it will analyse China's defence to its WTO-inconsistent export duties on EPRs and on scrap products on an *arguendo* basis.

7.235 In sum, the Panel's order of analysis will be as follows: the Panel will begin with China's Article XI:2(a) defence concerning refractory-grade bauxite, and then turn to China's invocation of Article XX(g) to justify its export quota on refractory-grade bauxite and its export duties on fluorspar. Finally, the Panel will consider China's invocations of Article XX(b), first with respect to EPR products, and secondly, with respect to scrap products.

7.236 Finally, China argues that all of its export restrictions also satisfy the requirements of the "chapeau" of Article XX. The Panel will only consider China's invocation of the chapeau of Article XX, to the extent that the application of an export restriction is justified pursuant to the relevant subparagraph of Article XX, whether (b) or (g).

7.237 The Panel's understanding of China's measures of 2009 for which it invokes its defences pursuant to Articles XI:2(a), XX(b) and (g) of the GATT 1994 are represented in the chart below.

⁴¹¹ China's response to Panel question No. 19 following the second substantive meeting.

Raw Material	Relevant Chin. HS Number	Relevant Chin. Comm. Code	Product Name Short Form	Export Duties	Export Quotas
Bauxite	2508.3000	2508300000	"Refractory clay"	No defence	For refractory-grade bauxite/high alumina clay: Articles XI:2(a)and XX(g). For other categories: No defence
	2606.0000	2606000000	"Aluminium ores and concentrates"		No defence
	2602.4000		"Aluminium ash and residues"		No export quota claim
Coke	2704.0010	2704001000	"Coke"	Article XX (b)	Article XX (b)
Fluorspar	2529.2100	2529210000	"Met-spar"	Article XX (g)	No defence
	2529.2200	2529220000	"Acid-spar"	Article XX (g)	No defence
Magnesium	8104.1100		"Magnesium metal"	Article XX (b)	No export quota claim
	8104.1900		"Unwrought magnesium"	Article XX (b)	
	8104.2000		"Magnesium waste and scrap"	Article XX (b)	
Manganese	2602.0000		"Manganese ores and concentrates"	No defence	No export quota claim
	8111.0010	8111001010	"Unwrought manganese waste and scrap"	Article XX (b)	
		8111001090	Unwrought manganese; powder	Article XX (b)	
Silicon Carbide		2849200000	"Silicon carbide"	No export duty claim	Article XX (b)
		3824909910	"Crude Silicon Carbide"		Article XX (b)
Silicon Metal	2804.6900		"Silicon Metal"	No defence	No export quota claim
Yellow Phosphorous	2804.7010		"Yellow phosphorous"	China claims that since July 2009 is WTO-consistent	
Zinc	2608.0000 ex	2608000090	"Zinc ores and concentrates excluding gray feed grade zinc oxide"	No export duty claim	No defence
	2608.0000 ex	2608000001	"Gray feed grade zinc oxide"		No defence
	7901.1110	7901111000	"Unwrought \geq 99.995 zinc"		No export quota claim
	7901.1190	7901119000	"Unwrought 99.99 but < zinc content \leq 99.9995% zinc"		
	7901.1200	7901120000	"Unwrought < 99.99% zinc"		
	7901.2000	7901200000	Unwrought zinc alloys		
	7902.0000		"Zinc waste and scrap"		
	2620.1100		"Hard zinc spelter"		Article XX (b)
	2620.1900		"Other zinc ash and residues"	Article XX (b)	

1. Whether the export quota applied to refractory-grade bauxite is justified pursuant to Article XI:2(a) of the GATT 1994

7.238 The Panel recalls its conclusion above that China's export quotas of 930,000 metric tonnes applied to bauxite in 2009, is inconsistent with GATT Article XI:1.

7.239 China argues that, if the Panel were to conclude that the complainants have stated a prima facie claim under Article XI:1 with respect to the export quota on bauxite, the application of an export quota to a subset of bauxite products subject to the export quota is justified because the quota is "temporarily applied to prevent or relieve critical shortages of ... other products essential to" China, in accordance with Article XI:2(a) of the GATT 1994.⁴¹² The subset of bauxite products subject to export quota for which China asserts a defence under Article XI:2(a) of the GATT 1994 is referred to by China as "refractory bauxite" or "refractory grade bauxite" and referred to by the complainants as "high alumina clay." The Panel uses these terms interchangeably to indicate the same subset of bauxite classifiable under Customs Commodity Code 2508.3000.00 that is used to produce refractories.

7.240 Article XI:2(a) states: "The provisions of paragraph 1 of this Article shall not extend to ... [e]xport prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party". Article XI:2(a) of the GATT 1994 has not been interpreted previously by a WTO panel or the Appellate Body.

7.241 China argues that its export quota is justified because the supply of refractory-grade bauxite is, or has the potential to be, restricted by virtue of strong foreign demand, physical exhaustibility, and/or domestic regulatory limits on access.

7.242 China submits that the complainants themselves have recognized that refractory-grade bauxite is "essential", "necessary" and "critical" to their economies.⁴¹³ In addition, China argues that the complainants have themselves applied prohibitions and restrictions on products that they deem essential for downstream domestic industries, in some cases for periods exceeding 30 - 40 years.⁴¹⁴

7.243 The complainants argue that China has failed to provide a correct or "narrow"⁴¹⁵ interpretation of the meaning of Article XI:2 and, therefore, it has failed to demonstrate that its export quota on refractory grade bauxite is justified pursuant to Article XI:2(a). The complainants argue that China's quota is not temporarily applied, that refractory-grade bauxite is not a product that is essential to China, and that the quota is not applied to prevent or relieve a critical shortage of refractory-grade bauxite.⁴¹⁶ In addition, the complainants argue that examples of restrictions or prohibitions applied by other WTO Members should not form part of the Panel's analysis.⁴¹⁷

⁴¹² China's first written submission, para. 342.

⁴¹³ See, e.g., China's first written submission, paras. 361-363.

⁴¹⁴ China's first written submission, para. 368. In particular, China refers to "a 43-year-old restriction and prohibition on the export of unprocessed timber harvested from U.S. Federal lands", and the European Union's "37-year prohibition and restriction on the export of various types of ferrous and non-ferrous metal waste and scrap" (China's first written submission, paras. 405-406). China argues that these examples of application of prohibitions or restrictions for lengthy periods of time represent "views concerning the proper interpretation of Articles XI:1 and XI:2(a) expressed *outside* the context of this litigation", and are "compelling" in this dispute as "statements against interest" (China's first written submission, para. 404, emphasis original).

⁴¹⁵ European Union's second written submission, para. 191.

⁴¹⁶ Complainants' joint opening oral statement at the first substantive meeting, paras. 130-131.

⁴¹⁷ Complainants' joint opening oral statement at the first substantive meeting, para. 132.

7.244 The Panel notes first that China seeks to justify its export quota on a subset of bauxite, which, in the words of China, "is the predominant product exported under [Chinese HS number] 2508.3000", constituting "approximately 75% of exports" under that code.⁴¹⁸ China describes this product as having certain chemical and physical characteristics (such as "stringent physical and chemical specifications"⁴¹⁹) that distinguish it from other products classified in this same heading. The complainants have taken note of the distinction between different types of "bauxite".⁴²⁰ China describes this product as follows:

"Chemically, the product has a high aluminium oxide ("Al₂O₃") content normally in excess of 80%, a low iron oxide ("Fe₂O₃") content of less than 2.5%, and few other impurities ... Amongst the most important physical characteristics of the product is high density, at or higher than 3.25 g/cm³"⁴²¹

7.245 In light of this description, the Panel will consider China's arguments that the application of an export quota is justified pursuant to Article XI:2(a) in respect of this product only. As such, any conclusions under Article XI:2(a) would extend only to this product as described.

7.246 The Panel additionally recalls that Article 3.2 of the DSU directs panels to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law"; these rules include the principles codified in Articles 31, 32 and 33 of the *Vienna Convention*.⁴²² Article 31 of the *Vienna Convention* states in particular that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

7.247 Before proceeding, the Panel wishes to address China's reference to restrictions or prohibitions applied by other WTO Members. Regardless of their duration, the products to which they apply, the importance of that product to domestic downstream users or the degree of shortage of that product, the Panel does not consider that measures applied by other WTO Members are relevant to its analysis. Those measures are not in the Panel's terms of reference, and are not subject to this dispute. Moreover, these measures were not raised in response to the circumstances before this Panel, nor is it clear to the Panel that these restrictions were put into place with Article XI:2(a) in mind or that these restrictions themselves comply with the requirements of Article XI:2(a). Even if Members considered these measures to be justified pursuant to Article XI:2(a), their application does not demonstrate agreement on the meaning of Article XI:2(a).⁴²³ In any event, Article XI:2(a) by its terms must be viewed through the prism of the Member applying the restriction.

⁴¹⁸ China's opening oral statement at the second substantive meeting, para. 92; Exhibit CHN-513.

⁴¹⁹ China's opening oral statement at the second substantive meeting, para. 92.

⁴²⁰ See, e.g., United States' second written submission, paras. 188-200. China submits, through reference to "Critical Raw Materials for the EU: Report of the Ad-hoc working Group on Defining Critical Raw Materials" (Exhibit CHN-126), that the European Union defines "the product refractory bauxite in the same manner" (see China's Comments on the Interim Reports of the Panel, para. 104). The European Union submits that this document does not express the views of the European Union (see European Union's Comments dated 18 March 2011, p. 2).

⁴²¹ China's response to Panel question No. 8 following the first substantive meeting, paras. 34-35; China's first written submission, paras. 432-434; China's second written submission, para. 130; China's opening oral statement at the second substantive meeting, paras. 113, 136 and 137; see also Report by China on Refractory Bauxite, pp 6-8 (Exhibit CHN-10).

⁴²² Appellate Body Report, *US – Gasoline*, p. 17, DSR 1996:I, 3, at pp. 15-16; Appellate Body Report, *India – Patents (US)*, para. 45; and Appellate Body Report, *US – Shrimp*, para. 114.

⁴²³ Under Article 31(3)b of the *Vienna Convention*, a treaty interpreter may take into account the subsequent practice in the application of the treaty whenever such practice establishes the agreement of the

7.248 The Panel now turns to consider the terms of Article XI:2(a) on the basis of relevant jurisprudence.

(a) The ordinary meaning of Article XI:2(a) of the GATT 1994

7.249 The Panel will review briefly the arguments of the parties when considering the meaning of Article XI:2(a) and will then turn to its own analysis of the provisions. As a preliminary matter, however, the Panel wishes to address China's argument that the phrase "prohibitions or restrictions" in Article XI:2(a) of the GATT 1994 has the same meaning as the identical phrase used in Article XI:1; that is, it covers any "prohibitions or restrictions" that are covered by Article XI:1.⁴²⁴

7.250 The Panel agrees with China in this regard and observes that the complainants do not dispute China's view on this point. The Panel will now consider the remaining principal terms at issue, notably the meaning of "temporarily applied", "essential products" and "critical shortage".

(i) *Prohibitions or restrictions "temporarily applied" under Article XI:2(a)*

7.251 China argues that the term "temporarily" viewed in the immediate context of the term "applied", means that the application of an export prohibition or restriction must be limited in time and linked to the prevention or relief of a critical shortage of a product essential to the exporting Member.⁴²⁵ China submits that this determination must be made on a case-by-case basis, but may permit the application of a restriction or prohibition for an extended period of time, provided the measure is regularly reviewed.⁴²⁶ China submits that the time period will be defined in relation to the time required to prevent or relieve the critical shortage.⁴²⁷

7.252 China finds support for its interpretation in a ban that was maintained on merino sheep in Australia for over 80 years from 1929 until 2010, including for a stretch of 18 years preceding the GATT 1947 negotiations. China argues that assurances were given to Australia that its ban on merino sheep would be covered by Article XI:2(a) and this is important in understanding the scope of Article XI:2(a).⁴²⁸

parties regarding its interpretation. In *Japan – Alcoholic Beverages II*, the Appellate Body explained that "subsequent practice" within the meaning of Article 31(3)(b) entails a "...concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernible pattern implying the agreement of the parties [to a treaty] regarding its interpretation" (Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 13, DSR 1996:I, 97, at p. 106).

⁴²⁴ China's first written submission, para. 371.

⁴²⁵ China's first written submission, para. 373.

⁴²⁶ China's first written submission, paras. 374-376; China's second written submission, para. 112. In this latter respect, China refers to the European Union's position that export quotas on copper, aluminium, and lead waste, scrap, ash and residues were "reviewed annually": see GATT Multilateral Trade Negotiations, Inventory of Non-Tariff Measures – Addendum MTN/3B/1-5/Add.9 (23 August 1977), 406.1, p. 3 (Exhibit CHN-161).

⁴²⁷ China's second written submission, para. 112.

⁴²⁸ China's opening oral statement at the first substantive meeting, para 59, referring to U.N. Economic and Social Council, Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, Fortieth Meeting of Commission "A" (1) (Articles 25 & 27, 26, 28 & 29), Held on Friday 15 August 1947 at 10.30 a.m. in the Palais des Nations, Geneva, E/PC/T/A/PV/40(1) (15 August 1947), pp. 4-9 (Exhibit CHN-181) and N. Economic and Social Council, Third Committee: Commercial Policy, Summary Record of the Thirty-Seventh Meeting, Held on Monday, 16 February 1948 at 3.30 p.m., Consideration of the Report of Sub-Committee E (Articles 20 and 22), E/CONF.2/C.3/SR.37 (16 February 1948), pp. 1 to 3 (Exhibit CHN-184).

7.253 The complainants reject the view that an export restriction may be applied under Article XI:2(a) to situations involving finite reserves of a particular product or natural resource.⁴²⁹ In their view, the finite availability of a product is insufficient to constitute a critical shortage. Given that the availability of such a good would keep decreasing until the exhaustion of the good's reserves, they argue that such a shortage would not be temporary because after the exhaustion of the reserves the shortage of the good would become permanent. They consider this type of shortage would not be apt to be remedied or prevented through measures of limited time duration.⁴³⁰

7.254 Third parties Brazil and Canada agree with the complainants' view that a temporary measure must have an expiry date, or have as its purpose the prevention or the relief of a need whose existence is limited in time. Brazil argues that the term "temporarily applied" is defined as "lasting or meant to last for a limited time only; not permanent; made or arranged to supply a passing need".⁴³¹ Brazil considers that situations where the shortage of products could not be overcome, but only managed over time, are better addressed under Article XX(g).⁴³² Canada submits that measures may not be applied under Article XI:2(a) for an indefinite period, but may only be applied for a fixed time. It notes that, while Article XI:2 is subject to the particular requirements set out in each paragraph, Article XX is subject to additional requirements, specifically, those contained in the chapeau to Article XX.⁴³³

7.255 The Panel observes that the ordinary meaning of "temporarily" is "for a time (only)" and "during a limited time".⁴³⁴ The term "limited time" means "appointed, fixed" and "circumscribed within definite limits, bounded, restricted".⁴³⁵ These definitions suggest a fixed time-limit for the application of a measure. Thus, on its face, Article XI:2(a) would appear to justify measures that are applied for a limited timeframe to address "critical shortages" of "foodstuffs or other products essential to the exporting contracting party".

7.256 As noted above, Article 31 of the *Vienna Convention* requires a treaty to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The Appellate Body has stressed the importance of "read[ing] all applicable provisions of a treaty in a way that gives meaning to all of them,

⁴²⁹ United States' response to Panel question No. 16 following the first substantive meeting; United States' second written submission, para. 232; European Union's second written submission, para. 214; Mexico's second written submission, para. 237.

⁴³⁰ United States' response to Panel question No. 16 following the first substantive meeting, para. 26; United States' second written submission, para. 232; European Union's second written submission, para. 214; Mexico's second written submission, para. 237.

⁴³¹ Brazil's third party oral statement, para. 6, 9; *Shorter Oxford English Dictionary*, 5th edn., L. Brown (ed.) (Oxford University Press, 2002), Vol. 2, p. 3207.

⁴³² Brazil's third party oral statement, para. 9.

⁴³³ Canada's third party oral submission, para. 17.

⁴³⁴ *Oxford English Dictionary Online*, *temporarily*, adv. (Exhibit CHN-156). China notes that the term "*temporairement*", in French means "*à titre temporaire, pour un temps*" and "*momentanément*" (le Grand Robert de la langue française online, *temporairement* (Exhibit CHN-158)); the term "*momentanément*" means "*d'une manière momentanée*" and "*provisoirement*" (le Grand Robert de la langue française online, *momentanément* (Exhibit CHN-159)), or "of temporary nature" and "provisionally". China notes that the Spanish adverb "*temporalmente*" is defined as "*por algún tiempo*", meaning "for some time" (Diccionario de la Lengua Española, Real Academia Española, Vigésima Segunda Edición, 2001, "*temporalmente*", meaning 2. The full definition reads: *adv. m. En el orden de lo temporal y terreno. 2. adv. t. Por algún tiempo.* This translates as: "Adverb of mode: In the sphere of the temporal and terrestrial. 2. Adverb of time: For some time." (Exhibit CHN-160)).

⁴³⁵ *Oxford English Dictionary Online*, *limited*, ppl., a. (Exhibit CHN-157).

harmoniously."⁴³⁶ Thus, Article XI:2(a) should be interpreted taking into consideration other provisions.

7.257 In the Panel's view, an interpretation that Article XI:2(a) permits the application of a measure for a limited time under limited circumstances would be in harmony with the protection that may be available to a Member under Article XX(g), which addresses the conservation of exhaustible natural resources. To conclude otherwise would allow Members to resort indistinguishably to either Article XI:2(a) or XX(g) to address the problem of an exhaustible natural resource.

7.258 As mentioned above, Article XX(g) incorporates additional protections in its chapeau to ensure that the application of a measure does not result in arbitrary or unjustifiable discrimination or amount to a disguised restriction on international trade. Article XI:2(a) does not impose similar limitations on Members' actions. In the Panel's view, the absence of such safeguards in Article XI:2(a) lends support to our view that a restriction or ban applied under Article XI:2(a) must be of a limited duration and not indefinite.

7.259 China makes reference to Australia's application of an export ban on merino sheep for an extended period of time in support of its view that measures may be applied under Article XI:2(a) for extended periods. As China notes, Australia's ban on livestock was discussed at the time of negotiating the GATT 1947. Under Article 32 of the *Vienna Convention*, a treaty interpreter may resort to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, to confirm the meaning of the provision resulting from the application of Article 31 of the *Vienna Convention*, or to determine the meaning of a provision when interpretation leaves the meaning ambiguous or obscure or leads to an absurd or unreasonable result.

7.260 The Panel does not consider that the meaning of the term "temporarily" ascribed pursuant to an interpretative analysis under Article 31, is ambiguous or obscure and hence, we do not see a need to resort to Article 32.⁴³⁷ Accordingly, the Panel concludes preliminarily that Article XI:2(a) permits the application of restrictions or prohibitions for a limited time to address "critical shortages" of "essential products". The Panel turns next to the meaning of "essential" products and will thereafter examine the term "critical shortages".

(ii) *"Essential" products under GATT Article XI:2(a)*

7.261 China argues that Article XI:2(a) permits an exporting Member to determine those products that are "essential" to it when applying restrictions to prevent or relieve critical shortages. It argues that Article XI:2(a) neither precludes nor prescribes consideration of any particular criterion to determine whether a product is "essential for the exporting [Member]", but will depend on the particular circumstances at hand.⁴³⁸ China argues that the term "other products essential to the

⁴³⁶ See Appellate Body Report, *Argentina – Footwear (EC)*, para. 81 (original emphasis); see also Appellate Body Reports: *Korea – Dairy*, para. 81; *US – Gasoline*, p. 23, DSR 1996:I, 3, at p. 21; *Japan – Alcoholic Beverages II*, p. 12, DSR 1996:I, 97, at p. 106; *India – Patents (US)*, para. 45.

⁴³⁷ In any event, the Panel does not consider the ban on Australian merino sheep to be particularly helpful in our interpretation for purposes of the case before us. The negotiating parties' discussion of this ban appears to have centred on whether Article XI:2(a) could be used to address questions of shortages in times of drought, which is not instructive with respect to the facts before us. Moreover, the fact that Australia may have kept the measure in place for 80 years (up to today) does not support the conclusion that the negotiating parties foresaw then and therefore agreed that the continued application for such duration would be justified under Article XI:2(a).

⁴³⁸ China's second written submission, paras. 41-47.

exporting [Member]" may include "minerals, metals, and other basic commodities, as well as initial processed downstream products thereof."⁴³⁹

7.262 China submits that Article XI:2(a) does not limit the types of "other products" that may be subject to restrictions, except that the products must be "essential" to the exporting Member. China submits that the distinction made between "foodstuffs" and "other products" demonstrates that a product need not contribute to ensuring food security in order to be essential under Article XI:2.⁴⁴⁰ China argues further that the modifier "to the exporting [Member]" means that the importance of any product should be judged in relation to the particular Member concerned, not necessarily in relation to all Members.⁴⁴¹ China considers that for a product to be essential, it must be "material, important or requisite for the exporting Member".⁴⁴²

7.263 China argues that one may assess the "essentialness" of a product to a particular Member by assessing the quantitative contribution of the product through its entire value chain, e.g. by assessing the contribution of a product to a Member's gross domestic product, or to education, healthcare, infrastructure, technological progress, or scientific research.⁴⁴³ China also posits that the Preamble of the WTO Agreement provides relevant context to interpret the meaning of an "essential" product, additionally confirming that a product may be essential to an exporting Member due to its contribution to improved education, healthcare, infrastructure, technological progress, or scientific research.

7.264 China finds further support for its interpretation of the term "essential products" in the Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994 ("BOP Understanding") and Article XXXVI:5 of the GATT 1994 and its Ad Note. China submits that the use of the term "essential products" in Article 4 of the BOP Understanding confirms that a broad range of products can be considered "essential", whether serving "basic consumption" needs, or meeting economic needs, such as "inputs needed for production".⁴⁴⁴

7.265 China argues that Article XXXVI:5 and its Ad Note support the view that Article XI:2(a) may be applied to address a product that is important to domestic processing industries. China submits that Article XXXVI:5 shows that the essential nature of a "primary product" for a developing country may derive from the product's role in securing economic diversification through the development of domestic processing industries. According to China, the customary norm in international law of sovereignty over natural resources was developed in recognition of the "essential" role that natural resources play in the progress and development of states that possess those resources.⁴⁴⁵ China considers that Article XXXVI:5 applies to China in the same manner as it applies to other Members,

⁴³⁹ China's first written submission, para. 379, fn. 536, referring to Exhibits CHN-16; CHN-52; CHN-161; CHN-166; CHN-167; CHN-168; CHN-169, CHN-170; CHN-171; CHN-172.

⁴⁴⁰ China's second written submission, para. 52.

⁴⁴¹ China's first written submission, para. 383, referring to U.N. Economic and Social Council, *Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment. Commission A: Report of Sub-Committee on Articles 25 and 27 E/PC/T/141* (1 August 1947), p. 2 (Exhibit CHN-176); China's opening oral statement at the first substantive meeting, para. 34.

⁴⁴² China's second written submission, para. 50.

⁴⁴³ China's second written submission, para. 51.

⁴⁴⁴ China's first written submission, para. 388; China's opening oral statement at the first substantive meeting, para. 35; Article 4 of the *BOP Understanding* provides:

"The term 'essential products' shall be understood to mean products which meet basic consumption needs or which contribute to the Member's effort to improve its balance-of-payments situation, such as capital goods or inputs needed for production."

⁴⁴⁵ China's opening oral statement at the first substantive meeting, paras. 36-37; China's second written submission, paras. 58-59, 72-78.

and that China did not forgo – either through its Accession Protocol or Working Party Report – any particular treatment that may accrue to it under this provision as a developing country.⁴⁴⁶

7.266 Finally, China submits that the negotiators' position on Australia's export restrictions on merino wool sheep offers context to inform what features can legitimately make an "other product" essential, including the value derived from downstream production.⁴⁴⁷ China submits that the value sheep provided to the downstream domestic users in Australia at the time of negotiations is confirmed by the Official Yearbook of the Commonwealth of Australia for the years 1946-1947.⁴⁴⁸ China argues that Australia would not have agreed to the draft text of Article XI:2(a) without assurances that it could maintain export restrictions on sheep whenever affected by drought conditions.

7.267 The complainants argue that China's reliance on a broad definition of the term "product" as covering a raw material ignores the fact that the term "essential" serves to limit the scope of "products".⁴⁴⁹ Reading the phrase "other products essential to the exporting Member", the complainants argue that the type of products covered under Article XI:2(a) are "products, other than foodstuffs, that are indispensable to or pertaining to the essence of the exporting Member". The complainants argue that the inclusion of "foodstuffs" in the scope of the provision is relevant to convey the "level of importance of the product" that is contemplated by the provision.⁴⁵⁰

7.268 The European Union submits that a broad interpretation of the term "essential products" in Article XI:2(a) would render other provisions of the GATT redundant, specifically Article XX(i). The European Union argues that this provision allows export restrictions on domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry, during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan. Allowing a broad interpretation of Article XI:2(a) would lead Members to impose an export restriction even if not covered by Article XX(i).⁴⁵¹

7.269 The complainants criticize China's reliance on Australia's restriction on merino sheep as a basis to inform the interpretation of "essential products". They argue that negotiators in that discussion did not address the meaning of the term "essential", whether merino sheep were essential because of their value to downstream industry, on whether the particular circumstances would satisfy the meaning of "essential". The United States submits that China based its conclusions that the "essentialness" of merino sheep derives from their value to the downstream industry on a 2009

⁴⁴⁶ China's second written submission, paras. 66-67.

⁴⁴⁷ China's first written submission, paras. 385-387, referring to: U.N. Economic and Social Council, *Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, Fortieth Meeting of Commission "A" (1) (Articles 25 & 27, 26, 28 & 29), Held on Friday 15 August 1947 at 10.30 a.m. in the Palais des Nations, Geneva*, E/PC/T/A/PV/40(1) (15 August 1947), pp. 4-9 (Exhibit CHN-181); Australian Association of Stud Merino Breeders, "Evolution of the Australian Merino" (Exhibit CHN-182); U.N. Economic and Social Council, *Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Corrigendum to Verbatim Report of Fortieth Meeting of Commission "A"*, E/PC/T/A/PV/40(1)Corr.3 (19 August 1947) (Exhibit CHN-183); N. Economic and Social Council, *Third Committee: Commercial Policy, Summary Record of the Thirty-Seventh Meeting, Held on Monday, 16 February 1948 at 3.30 p.m., Consideration of the Report of Sub-Committee E (Articles 20 and 22)*, E/CONF.2/C.3/SR.37 (16 February 1948), pp. 1 to 3 (Exhibit CHN-184).

⁴⁴⁸ Chapter XIX Pastoral Production, 1946-1947 Official Yearbook of the Commonwealth of Australia pp. 853, 866, 871, 873, 882 (Exhibit CHN-465).

⁴⁴⁹ China's opening oral statement at the first substantive meeting, para. 135.

⁴⁵⁰ China's opening oral statement at the first substantive meeting, para. 136; United States' second written submission, para. 216; Mexico's second written submission, para. 221.

⁴⁵¹ European Union's second written submission, para. 192.

industry association document.⁴⁵² The United States argues that such a statement made outside of the framework of the GATT is not relevant.⁴⁵³

7.270 The complainants argue that the notion of "essential products" in Article 4 of the BOP Understanding does not mean that simply any "input needed for production" may satisfy the definition of "essential products".⁴⁵⁴ The European Union submits that Articles XII:3(b) and XVIII:10 of the GATT 1994 read together with the BOP Understanding allow Members to remove restrictions to prioritize the free importation of more essential products, thereby allowing the importation of goods that otherwise would have been subject to an import restriction.⁴⁵⁵ In contrast, it argues, Article XI:2(a) is an exception from the general prohibition of quantitative restrictions, and thus allows restrictions on exports; it is not related to the issue of MFN treatment of other WTO Members. Thus, the European Union argues that differences between the scope of the BOP Understanding and the scope of Article XI:2(a) indicate that a common definition of essential products "would lead to an incoherent application of the GATT."⁴⁵⁶

7.271 Finally, the complainants argue that Article XXXVI:5 of the GATT 1994 does not support China's view of the term "essential products" or that the term may have a different meaning for developing country Members as opposed to other WTO Members. The United States and Mexico submit that, by virtue of China's Working Party Report, Article XXXVI of the GATT 1994 is not relevant to an assessment of whether China's measures under discussion are WTO-inconsistent.⁴⁵⁷ In any event, the complainants maintain that nothing in Article XXXVI:5 indicates that Article XI should be interpreted differently for developing countries and that such an approach would lead to an incoherent interpretation of Article XI, granting different rights and obligations to developing countries under Article XI.⁴⁵⁸ The European Union submits that the text of Article XXXVI:5 focuses on market access under favourable conditions for goods as opposed to the imposition of quantitative restrictions.⁴⁵⁹ The European Union submits further that a GATT Secretariat background note circulated during the Uruguay Round Negotiations in 1989 does not support China's argument that Article XXXVI:5 can be used as context to interpret Article XI. The United States argues that China's reference to Article XXXVI:5 confirms that China's application of an export quota on refractory-grade bauxite relates to efforts to foster development of the domestic industry and not to conservation.⁴⁶⁰

⁴⁵² United States' response to Panel question No. 17, following the first substantive meeting, para. 32.

⁴⁵³ United States' second written submission, para. 220; Mexico's second written submission, para. 225.

⁴⁵⁴ United States' response to Panel question No. 17 following the first substantive meeting, para. 29; European Union's second written submission, para. 194; United States' second written submission, para. 218; Mexico's second written submission, para. 223.

⁴⁵⁵ European Union's opening oral statement at the second substantive meeting, para. 23.

⁴⁵⁶ European Union's second written submission, para. 194; European Union's opening oral statement at the second substantive meeting, para. 23.

⁴⁵⁷ United States' response to Panel question No. 17 following the first substantive meeting of the Panel, footnote 58; Mexico's response to Panel question No. 17 following the first substantive meeting of the Panel; United States' closing oral statement at the second substantive meeting of the Panel, paras. 7 and 8; Mexico's closing oral statement at the second substantive meeting of the Panel. The European Union does not express a view on whether China qualifies as a developing country or whether China could rely on provisions of Part IV of the GATT, including Article XXXVI:5 of the GATT 1994 (European Union's opening oral statement at the second substantive meeting, para. 26).

⁴⁵⁸ European Union's opening oral statement at the second substantive meeting, para. 27.

⁴⁵⁹ European Union's opening oral statement at the second substantive meeting, para. 32.

⁴⁶⁰ United States' response to Panel question No. 17, fn. 58 following the first substantive meeting.

7.272 Third party Japan notes that "shortage of crops, etc. in cases such as famine"⁴⁶¹ was contemplated at the time of negotiating the original language of Article XI:2(a), and that nothing in any amendments to the text altered the meaning of that language.⁴⁶²

7.273 The Panel turns now to examine the meaning of Article XI:2(a). Under the text of Article XI:2(a), products may be "foodstuffs" or "other products". The term "other products" is qualified by the term "essential to the exporting" Member.

7.274 The term "product" is defined as "a thing generated or produced by, or as if by, nature or a natural process"; "that which results from the operation of a cause, or is produced by a particular set of circumstances"; "an object produced by a particular action or process"; and, "an article or substance that is manufactured or refined for sale".⁴⁶³

7.275 The phrase "essential to" is defined as "affecting the essence of anything; 'material', important" "constituting, or forming part of, the essence of anything", and "absolutely necessary, indispensably requisite".⁴⁶⁴ The phrase "to the exporting" Member appears to have been added to the initial draft of Article XI:2(a) to clarify that "the importance of any product should be judged in relation to the particular country concerned".⁴⁶⁵ Thus, a product may fall within the meaning of Article XI:2(a) when it is "important" or "necessary" or "indispensable" to a particular Member.

7.276 The Panel does not consider that the terms of Article XI:2, nor the statement made in the context of negotiating the text of Article XI:2 that the importance of a product "should be judged in relation to the particular country concerned", means that a WTO Member may, on its own, determine whether a product is essential to it. If this were the case, Article XI:2 could have been drafted in a way such as Article XXI(b) of the GATT 1994, which states: "Nothing in this Agreement shall be construed ... to prevent any contracting party from taking any action *which it considers necessary* for the protection of its essential security interests" (emphasis added). In the Panel's view, the determination of whether a product is "essential" to that Member should take into consideration the

⁴⁶¹ EPCT/C.II/36 (30 Oct. 1946) ("Fifth Preparatory Committee Meeting of 30 Oct"), p. 9.

⁴⁶² Japan's third party oral statement, para. 14, referring to EPCT/C.II/QR/PV/4 (15 Nov. 1946) ("Fourth Sub-Committee Meeting of Nov.15"), page. 5.

⁴⁶³ *Oxford English Dictionary Online*, *product*, n. (Exhibit CHN-162). China also provides definitions of terms that appear in the other WTO language versions of Article XI:2(a). It argues that the definition of the French term "*produit*" and the Spanish term "*producto*" reveal that an "essential" "product" may be a raw material, such as a mineral, or a manufactured, processed material (le Grand Robert de la langue française online, *produit*, n.m.; Exhibit CHN-164: Diccionario de la Lengua Española, Real Academia Española, Vigésima Segunda Edición, 2001, "*producir*", meanings 1, 2, 5, and 7 (Exhibit CHN-163)).

⁴⁶⁴ *le Grand Robert de la Langue Française, essentiel* (Exhibit CHN-174). See, also Complainants' joint opening oral statement at the first substantive meeting, para. 136, referring to *New Shorter Oxford English Dictionary*, p. 852 (defining "essential" as "[o]f or pertaining to a thing's essence"; "absolutely indispensable or necessary"; "constituting or forming part of a thing's essence.") China notes that the French text uses the term "*essentiels*", an adjective defined as either "*qui est absolument nécessaire*", being a synonym for "*indispensable, nécessaire, vital, obligatoire*", or "*Qui est le plus important*", synonym for "*principal, fondamental, primordial. Tres important – incontournable, important*" (*Oxford English Dictionary Online, essential*, a. and n. (Exhibit CHN-173)). China notes that the Spanish text of Article XI:2(a) uses the term "*esenciales*", which is defined as "*Perteneciente o relativo a la esencia. [...] 2. Sustancial, principal, notable*" (Diccionario de la Lengua Española, Real Academia Española, Vigésima Segunda Edición, 2001, "*esencial*", meanings 1 and 2 (Exhibit CHN-175)). China submit that this definition is translated as "Pertaining or relating to the essence. [...] 2. Substantive, principal, noteworthy".

⁴⁶⁵ U.N. Economic and Social Council, *Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment. Commission A: Report of Sub-Committee on Articles 25 and 27 E/PC/T/141* (1 August 1947), p. 2 (Exhibit CHN-176).

particular circumstances faced by that Member at the time when a Member applies a restriction or prohibition under Article XI:2(a).

7.277 It is not clear from the terms of Article XI:2(a) whether the essentialness of a product should, as China suggests, be measured in terms of the significance of a product to a Member's gross domestic product, employment, welfare or any other particular variable. Nor is it clear from its terms that Article XI:2(a) excludes products that may be an "input" to an important product or industry.⁴⁶⁶

7.278 The parties have debated the use of the term "essential product" in the BOP Understanding. That instrument addresses a particular set of circumstances, namely the use of restrictive import measures taken to control the general level of imports when "necessary" to address a "Balance-of-Payments situation". Article 4 of the BOP Understanding states: "The term 'essential products' shall be understood to mean products which meet basic consumption needs or which contribute to the Member's effort to improve its Balance-of-Payments situation, such as capital goods or inputs needed for production." The BOP Understanding allows Members imposing the restrictions to prioritize the free importation of products meeting basic needs as well as those which permit the Member to address a balance of payments matter. We see little assistance here in determining the meaning of Article XI:2(a).

7.279 The Panel recognizes that parallels may exist between the need to ensure imports for consumption needs or to protect the needs of domestic industry in a balance-of-payments situation, and the need to temporarily restrict exports of certain goods to prevent or relieve critical shortages of foodstuffs or other essential products to domestic industry, for instance. Nevertheless, Article XI:2(a) by its terms is not confined to addressing a balance-of-payments issue. Its reach includes a potentially broad range of situations that may justify the application of a restrictive measure. An assessment of whether a product is "essential" under Article XI:2(a) would, it seems to the Panel, call for a case-by-case analysis. Thus, reliance on the notion of "essential product" as it appears under the BOP Understanding to inform an interpretation of "essential" in Article XI:2(a) is, in the Panel's view inapposite.

7.280 For the same reason, the Panel considers that GATT Article XXXVI:5 and its Ad Note does not assist the Panel in its interpretation of the meaning of "essential products" in Article XI:2(a). Regardless of the particular status of China's development, as the complainants note, neither Article XI nor Article XXXVI:5 provide that Article XI should hold a different meaning or be applied differently for developing countries. In other words, it is not clear that a panel should view foodstuffs or other products to be more or less "essential" by taking into consideration the development of a given WTO Member.

7.281 Nor does the Panel find much assistance in the negotiators' agreement that Article XI:2(a) would cover Australia's ban on the export on live merino sheep. China posits that this demonstrates that a product may be essential to a Member because of its importance for domestic processing industries. Even if the Panel were to agree that the drafters' agreement constitutes context within the meaning of Article 31(2)(a) of the *Vienna Convention* as an "agreement relating to the treaty which

⁴⁶⁶ The Panel does not agree with the European Union that if a WTO Member could impose export restrictions on any product that it would deem "essential" for itself under Article XI:2(a), including an input to domestic industry or otherwise, would reduce GATT Article XX(i) to redundancy. The Panel recalls that Article XI:2(a) applies where there is a "critical shortage" of an "essential" product to a given WTO Member. Article XX(i) applies in cases where "domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry" in instances where a government "as part of a government stabilization plan" hold the price below a benchmark world price. In the Panel's view, the circumstances under which each of these provisions apply are very different and hence their meanings are distinct.

was made between all parties in connection with the conclusion of the treaty"⁴⁶⁷, the Panel does not consider China's identification of Australia's restriction on merino sheep particularly useful to the Panel's interpretative exercise.⁴⁶⁸ In the documents submitted to the Panel, Australia sought clarification on whether Article XI:2 would permit it to apply a ban on sheep exports if a drought were to threaten its flocks. There does not appear to be any objection to applying Article XI:2(a) in such situation. It appears beyond debate that Australia considered then (and maintains today) that merino sheep are "essential" products. However, there is no evidence before the Panel that the drafters expressly discussed the notion of products for use by the downstream industry, or the meaning of "essential" products, when addressing Australia's concern with the potential application of a ban on the export of merino sheep.

7.282 Accordingly, the Panel concludes that a product may be "essential" within the meaning of Article XI:2(a) when it is "important" or "necessary" or "indispensable" to a particular Member. This may include a product that is an "input" to an important product or industry. However, the determination of whether a particular product is "essential" to a Member must take into consideration the particular circumstances faced by that Member at the time that a Member applied the restriction.

(iii) *Export prohibitions or restrictions applied to "prevent or relieve a critical shortage" of essential products*

7.283 China argues that Article XI:2(a) covers measures adopted "to avoid or prevent the occurrence of a critical shortage of essential products", and those adopted "to ease and mitigate the negative consequences resulting from a critical shortage of essential products, once that shortage has occurred".⁴⁶⁹ China submits that Article XI:2(a) neither precludes nor prescribes consideration of any particular criterion to determine whether a "critical shortage exists", but will depend on the particular circumstances at hand.⁴⁷⁰

7.284 China argues that the term "critical" indicates the degree of "shortage" required. It argues that shortage refers to a deficiency in quantity. The notion of critical refers to something "decisive", "crucial" or "grave", that is associated with "uncertainty" or "risk" or a "crisis".⁴⁷¹ Thus, China concludes that a "critical shortage" refers to "a deficiency in quantity that rises to the level of decisive importance or crisis, or that raises uncertainty or risk of the same".⁴⁷² In addition, China submits that the French text of Article XI:2(a), which uses the phrase "une situation critique due a une penurie", translated as "a serious or grave situation due to a shortage", informs an interpreter's consideration as to "whether the intensity of consequences resulting from a shortage of an essential product rises to the level of decisive importance or crisis".⁴⁷³

7.285 China argues that the verbs "to prevent" and "to relieve" further inform this interpretation. It suggests that the terms "to prevent" and "to relieve" indicate that "the occurrence or degree of the shortage is uncertain and/or poses a risk of severity", and confirm that Article XI:2(a) is intended to provide "pre-emptive action to reduce or avoid altogether the manifestation of the risk".⁴⁷⁴ Thus, China considers Article XI:2 may apply where a critical shortage is foreseen and not simply in cases

⁴⁶⁷ China's second written submission, paras. 83-84.

⁴⁶⁸ The Panel finds it difficult to regard this discussion amongst negotiators concerning live merino sheep as an "agreement relating to the treaty which was made between all parties in connection with the conclusion of the treaty" pursuant to Article 31.2(a) of the VCLT.

⁴⁶⁹ China's first written submission, para. 399.

⁴⁷⁰ China's second written submission, paras. 86.

⁴⁷¹ China's first written submission, paras. 390, 392.

⁴⁷² China's second written submission, para. 89.

⁴⁷³ China's second written submission, para. 90.

⁴⁷⁴ China's first written submission, para. 400.

of an exogenous shock.⁴⁷⁵ In its view, the degree of shortage need not be so extreme that it can only be relieved through an export ban.⁴⁷⁶

7.286 China considers that a Member's tolerance for risk in the face of a shortage or potential shortage is one relevant criterion in assessing whether a "critical shortage" exists within the meaning of Article XI:2. It submits that Members may respond differently to identical levels of risk, but that the language of Article XI:2(a) allows for these different risk levels. In this respect, China argues that Article XI:2(a) operates like the SPS Agreement, leaving Members with a "margin of appreciation to determine their own appropriate level of protection and level of risk tolerance".⁴⁷⁷

7.287 China submits that the textual relationship between the phrase "products essential for the exporting [Member]" and "critical shortage" provides relevant context, and means that preventative or remedial action is allowed to address a critical shortage of a highly essential product, before such action would be allowed to address a similarly critical shortage of a moderately essential product.⁴⁷⁸

7.288 China argues that the negotiating history supports the conclusion that Article XI:2(a) foresees preventative action, and allows a WTO Member to restrict or prohibit exports even if a critical shortage has not yet occurred.⁴⁷⁹ In this respect, China argues that the drafters decided at a later point to include the terms "to prevent", to allow Members to take such preventative action to avoid critical shortages.⁴⁸⁰

7.289 The complainants argue that China conflates the "essentialness" and "critical shortage" questions, the effect of which is to read "critical shortage" out of Article XI:2(a). The complainants accept China's definition of "shortage" as referring to "a deficiency in quantity", but add that the term "critical" means "in the nature of or constituting a crisis or of decisive importance". They read these terms together to mean "a deficiency in quantity that is in the nature of or constituting a crisis or of decisive importance".⁴⁸¹ Hence they argue that, for a shortage to be "critical", it must rise to "a level beyond mere 'relative scarcity'", and that the existence of "supply constraints", or the exhaustibility of a resource, would not suffice to establish the existence of a "critical shortage" under Article XI:2(a).⁴⁸²

7.290 The European Union argues that the words "critical shortage" must be read within the context of the entire provision of Article XI:2(a), such that a restriction must be "temporarily applied", and must be "relieving" the critical shortage, or "preventing" its occurrence. In other words, for a "shortage" to be "critical" in the sense of Article XI:2(a), the shortage must be, *inter alia*, temporary, i.e., limited in duration. In this sense, it argues, there should be a point in time when the critical shortage would cease to exist and the availability of the good would return to normal. If there is no possibility for the shortage ever to cease to exist, the European Union submits that it would not be possible to "relieve or prevent" it through an export restriction applied only for a limited period of time.⁴⁸³

7.291 The European Union offers examples of what it considers might result in a critical shortage, such as an extended drought or wildfires that severely decrease the crops of grain or cereal in a

⁴⁷⁵ China's second written submission, para. 95.

⁴⁷⁶ China's second written submission, para. 91.

⁴⁷⁷ China's second written submission, para. 100.

⁴⁷⁸ China's second written submission, paras. 105.

⁴⁷⁹ China's first written submission, paras. 401-402.

⁴⁸⁰ China's first written submission, paras. 403.

⁴⁸¹ Complainants' joint opening oral statement at the first substantive meeting, para. 140.

⁴⁸² Complainants' joint opening oral statement at the first substantive meeting, para. 141, 143; United States' second written submission, para. 230.

⁴⁸³ European Union's second written submission, paras. 201-202.

particular country, or a mining accident. The European Union compares these examples to Australia's export restriction on live merino sheep, where the alleged shortage was "the devastating impact of a drought on the stock of Merino sheep" in Australia.⁴⁸⁴

7.292 The complainants argue that statements by negotiators support the view that export restrictions could be "temporarily applied to cope with the consequences of a natural disaster, or to maintain year to year domestic stocks sufficient to avoid critical shortages of products ... which are subject to alternate annual shortages and surpluses".⁴⁸⁵ The complainants point to a statement by a representative of the United Kingdom that, "if you take out the word 'critical', almost any product that is essential will be alleged to have a degree of shortage and could be brought within the scope of this approach".⁴⁸⁶

7.293 Finally, the European Union submits, under China's interpretation, the protections of Article XX(g) are made redundant. In its view, Article XX(g) provides for stricter conditions (such as caps on domestic production or consumption) that must be met in order to allow derogations from the GATT obligations, including Article XI:1. These derogations are permitted to protect the reserves of exhaustible natural resources, which have a limited life span. If China's interpretation of "critical shortage" were accepted, according to the European Union, Article XI:2(a) would allow a Member to impose export restrictions even in the absence of caps on domestic production or consumption. This result, reasons the European Union, would pre-empt the application of Article XX(g) in the field of export restrictions, and would not be consistent with the customary rules of interpretation of public international law.⁴⁸⁷

7.294 The Panel notes that Article XI:2(a) covers export prohibitions or restrictions that either "prevent" or "relieve" critical shortages of products essential to the exporting Member. The verb "to prevent" means "to anticipate in action; to act in advance of", "to act in anticipation of, or in preparation for", and also "to preclude the occurrence of ...; to render ... impracticable or impossible by anticipatory action".⁴⁸⁸ The verb "to relieve" means "to ease or mitigate (pain, distress, or difficulty); to make (a condition) less burdensome", and "to raise out of some trouble, difficulty, or danger; to bring or provide aid or assistance to; to deliver from something troublesome or oppressive".⁴⁸⁹

⁴⁸⁴ European Union's second written submission, fn. 145.

⁴⁸⁵ Complainants' joint opening oral statement at the first substantive meeting, para. 141, referring to Exhibit CHN-180, para. 19.

⁴⁸⁶ Complainants' joint opening oral statement at the first substantive meeting, para. 143, referring to Exhibit CHN-181; United States' second written submission, para. 231; Mexico's second written submission, para. 236.

⁴⁸⁷ European Union's second written submission, para. 206.

⁴⁸⁸ *Oxford English Dictionary Online*, *prevent*, v. (Exhibit CHN-193). China notes that the French term "*prévenir*" means "*empêcher par ses précautions ... d'arriver, de nuire*" and "*éviter*" (le Grand Robert de la langue française online, *prévenir* (Exhibit CHN-194)), or "prevent through precautions [something] from happening, damaging" and "avoid". It notes that the Spanish term "*prevenir*" means "*prevacer, evitar, estorbar o impedir algo*", meaning "to take precautions against, avoid, pose obstacles to, or impede something" (Diccionario de la Lengua Española, Real Academia Española, Vigésima Segunda Edición, 2001, "*prevenir*", meaning 3 (Exhibit CHN-195)).

⁴⁸⁹ *Oxford English Dictionary Online*, *relieve*, v. (Exhibit CHN-196). China notes that the French text uses the term "*remédier*", which is defined as "*porter remède à ...*" and "*attenuer ou supprimer les effet néfastes de*" (le Grand Robert de la langue française online, *remédier*, v. (Exhibit CHN-197)), or "helps to cure ..." and "attenuates or suppresses harmful effects of". China notes that the Spanish term "*remediar*" is defined as "*Poner remedio al daño. 2. Corregir o enmendar algo. 3. Socorrer una necesidad o urgencia. [...] 5. Evitar que suceda algo de que pueda derivarse algún daño o molestia*" (Diccionario de la Lengua Española, Real Academia Española, Vigésima Segunda Edición, 2001, "*remediar*", meanings 1, 2, 3, and 5. Grammatical notes

7.295 The noun "shortage" means "deficiency in quantity; the amount by which a sum of money, a supply of goods, or the like, is deficient".⁴⁹⁰ The adjective "critical" is defined as "of the nature of, or constituting, a crisis", "involving suspense or grave fear as to the issue; attended with uncertainty or risk", "of decisive importance in relation to the issue", and "tending to determine or decide; decisive, crucial".⁴⁹¹ In turn, the term "crisis" is defined as "a turning-point, a vitally important or decisive stage; a time of trouble, danger or suspense in politics, commerce, etc.". ⁴⁹²

7.296 The meaning of "shortage" as a deficiency in the quantity of goods appears to be common ground with the parties and the Panel also considers this to be its meaning as used in Article XI:2(a). In the Panel's view, the term "critical" indicates that a shortage must be of "decisive importance" or "grave", or even rising to the level of a "crisis" or catastrophe. Article XI:2(a) states that measures in the form of restrictions or bans may be used on a temporary basis to either outright "prevent" or otherwise "relieve" such a shortage.

7.297 The Panel is persuaded by the complainants' argument that the requirement that measures be applied "temporarily" contextually informs the notion of "critical shortage". In this sense, as noted by the European Union, if there is no possibility for an existing shortage ever to cease to exist, it will not be possible to "relieve or prevent" it through an export restriction applied on a temporary basis. If a measure were imposed to address a limited reserve of an exhaustible natural resource, such measure would be imposed until the point when the resource is fully depleted. This temporal focus seems consistent with the notion of "critical", defined as "of the nature of, or constituting, a crisis".

7.298 In the Panel's view, China's interpretation cannot be correct, for it would have Article XI:2(a) duplicate Article XX(g), a result that a proper interpretation of these two provisions would not allow. As we have pointed out previously, the WTO Agreement must be interpreted in a harmonious way. If Article XI:2(a) were interpreted to permit the long-term application of measures in the nature of China's export restrictions on refractory grade bauxite, the import of Article XX(g) would be very much undermined, if not rendered redundant. Thus it is important that effect be given to the differences between Article XX(g) and Article XI:2(a).

omitted (Exhibit CHN-198)). China argues that this translates as "to remedy the damage. 2. To correct or rectify something. 3. To bring relief to a need or urgency. 5. To avoid the taking place of something from which some harm or nuisance might derive".

⁴⁹⁰ *Oxford English Dictionary Online*, *shortage* (Exhibit CHN-186). China notes the French term "*une pénurie*" is defined as "*manque de ce qui est nécessaire*", or "short of what is necessary", and is considered synonymous with "*défaut, faute, manque*" (le Grand Robert de la langue française online, *pénurie*, n.f. (Exhibit CHN-187)). It notes that the Spanish term "*escasez*" is defined as "2. *Poquedad, mengua de algo. Escasez de trigo, de agua.*" (Diccionario de la Lengua Española, Real Academia Española, Vigésima Segunda Edición, 2001, "*escasez*", meanings 2 and 3 (Exhibit CHN-188)), that means "Scarcity, scantness of something".

⁴⁹¹ *Oxford English Dictionary Online*, *critical*, adj. (Exhibit CHN-189). China notes that the Spanish adjective "*agudo*" is defined as "*Puntiagudo, punzante, afilado.* [...] 4. *Dicho de un dolor: Vivo y penetrante.* 5. *Dicho de una enfermedad: Grave y de no larga duración*" (Diccionario de la Lengua Española, Real Academia Española, Vigésima Segunda Edición, 2001, "*agudo, da*", meanings 1, 4, 5, and 9 (Exhibit CHN-190)), which can be translated as "that has a narrow point, pungent, sharp. [...] 4. Of pain: intense and penetrating. 5. Of an illness: serious and not long-lasting.". China notes further that the French text uses a different phrase, namely "*une situation critique due à une pénurie*". The adjective "*critique*" means "*dangereux, difficile, grave*" (le Grand Robert de la langue française online, *critique* (Exhibit CHN-191)). The definition of the term "*une pénurie*" is "*manque de ce que est nécessaire a une collectivité*" (le Grand Robert de la langue française online, *pénurie* (Exhibit CHN-184)). On the basis of these French dictionary definitions, China argues that the phrase "*une situation critique due à une pénurie*" can be translated to mean "a serious or grave situation arising due to a shortage". The French text, thus, suggests that the circumstances or situation arising from the shortage should be critical.

⁴⁹² (*Shorter Oxford English Dictionary*, 5th edn., L. Brown (ed.) (Oxford University Press, 2002), Vol. 1, p. 557.

7.299 It is clear that Article XI:2(a) is intended to address a different situation from that addressed by Article XX(g). Article XX of the GATT 1994 sets out several "general exceptions" to the obligations contained in other provisions of the GATT (including Article XI:1). One such exception is set out in paragraph (g), which allows Members to put in place measures contrary to other GATT obligations when they relate to the conservation of exhaustible natural resources. This right is not open-ended, however; the measures must be "made effective in conjunction with restrictions on domestic production or consumption." In addition, the chapeau to Article XX requires that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.

7.300 Article XI:2(a) authorizes derogation from the prohibition on export and import restrictions under Article XI:1 in order to prevent or relieve critical shortages of products essential to the Member taking action. Thus like Article XX(g), Article XI:2(a) operates as an exception, but only with respect to the obligations contained in Article XI:1, and not with respect to GATT obligations more broadly. This suggests to us that the reach of Article XI:2(a) would not be the same as that of Article XX(g); they are intended to address different situations and thus must mean different things.

7.301 As with Article XX(g), the right to invoke Article XI:2(a) is circumscribed, but in a much different way. The Panel considers that this difference, too, is important in interpreting the scope of Article XI:2(a). Article XI:2(a) is not confined to conservation measures and any exceptional measures must be "temporarily applied" to address "critical" shortages. Conservation measures tempered by the chapeau of Article XX, which takes into account conditions outside the Member taking action, and by operating together with domestic restrictions, will necessarily be different from temporary measures seeking to address a domestic crisis or a matter involving "suspense or grave fear" in the Member taking action.

7.302 For the Panel, conflating Article XI:2(a) and Article XX(g) as China appears to do would undermine the rights and obligations of Members under both provisions. The benefits and strictures of Article XX(g) must not be transposed to Article XI:2(a), or vice versa.

7.303 We observe, however, that both measures are exceptions and hence we find instructive the words of the Appellate Body in describing the task of interpreting and applying the limitation in the chapeau of Article XX. The Appellate Body said that it is a:

"... delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement."⁴⁹³

7.304 So, too, must the interpreter mark out a balance between the right of a Member to invoke the exception under Article XI:2(a) and the rights of other Members under Article XI:1 so as not to disturb the balance Members constructed between the two provisions. The interpreter will be guided in marking out the line of equilibrium by the requirement that exceptional measures be "applied temporarily" to address "critical" shortages under Article XI:2(a).

7.305 This is not to say that a Member may never take anticipatory measures within the bounds of Article XI:2(a) to "prevent" a "critical shortage" before it occurs. However, as discussed above, the

⁴⁹³ Appellate Body Report, *US – Shrimp*, para. 159.

Panel disagrees that Article XI:2(a) would permit long-term measures to be imposed to address an inevitable depletion of a finite resource.

(iv) *Preliminary conclusions on interpretation of Article XI:2(a)*

7.306 The Panel has concluded above that Article XI:2(a) permits the application of restrictions or prohibitions on a limited basis to address "critical shortages" of "essential products". The Panel further concluded that a product may be "essential" within the meaning of Article XI:2(a) when it is "important" or "necessary" or "indispensable" to a particular Member. This may include a product that is an "input" to an important product or industry. However, the determination of whether a particular product is "essential" to a Member must take into consideration the particular circumstances faced by that Member at the time a Member applies a restriction or prohibition under Article XI:2(a). Finally, the Panel concluded that the term "critical shortage" in Article XI:2(a) refers to those situations or events that may be relieved or prevented through the application of measures on a temporary, and not indefinite or permanent, basis.

7.307 With these conclusions in mind, the Panel will consider whether China's export quota on refractory-grade bauxite is applied in a manner consistent with Article XI:2(a).

(b) Whether China's export quota on refractory-grade bauxite is temporarily applied to prevent or relieve a critical shortage of an essential product

7.308 China argues that the export quota that it applies to refractory-grade bauxite is temporarily applied to prevent or relieve a critical shortage of an essential product to it, and accordingly, its export quota is justified pursuant to Article XI:2(a).

7.309 The Panel recalls that Article XI:2(a) permits the application of temporary restrictions or prohibitions on a limited basis to address "critical shortages" of "essential products". The Panel found that a product may be "essential" within the meaning of Article XI:2(a) when it is "important" or "necessary" or "indispensable" to a particular Member. This may include a product that is an "input" to an important product or industry, taking into consideration the particular circumstances faced by that Member. In addition, the Panel found that the term "critical shortage" in Article XI:2(a) refers to those situations or events that are "important" or "grave", or rise to the level of a "crisis" or catastrophe, and which may be relieved or prevented through the application of measures on a temporary, but not indefinite or permanent, basis. The Panel will assess below whether the export quota applied to refractory-grade bauxite meets these requirements.

(i) *The parties' views on the applicability of Article XI:2(a) to the circumstances in China*

Whether refractory-grade bauxite is an "essential" product to China

7.310 China offers a number of reasons and evidence in support of its view that refractory-grade bauxite is "essential" to China. China argues that "[t]he contribution of the product, its 'essentialness' or its importance of use, is defined by reference to a range of quantitative and qualitative factors, including geological, technical, environmental, social, economic, and political factors."⁴⁹⁴

7.311 China submits that methodology provided by criticality assessments of the United States and the European Union, including an evaluation of the "importance of use and availability" of a given product and review of "the net benefits customers receive from using a product" inform what makes a

⁴⁹⁴ China's first written submission, para. 436.

product essential.⁴⁹⁵ China cites a study by the United States National Resource Council, for instance, that concludes that bauxite among other materials is "essential, but not critical".⁴⁹⁶ In addition, China refers to a study by the European Union that considers bauxite to be an economically important product.⁴⁹⁷

7.312 China also submits a study that concludes that the relative scarcity of refractory-grade bauxite, the conservation-related restrictions placed on extraction of the product in China, other supply constraints, and the importance of the product's use to the Chinese economy, make the product essential to China, and the shortage of the product critical.⁴⁹⁸ China's study assesses the contribution of refractory-grade bauxite in terms of: the annual sales value of refractory-grade bauxite; the annual production value of intermediate products such as iron, steel and cement, the production of which is facilitated by refractory-grade bauxite; and the value-added contribution to the Chinese economy from manufacturing and construction activities that depend on iron, steel, and cement.⁴⁹⁹

7.313 China argues that refractory-grade bauxite is further demonstrated to be essential by the fact that it is indispensable for the production of iron and steel, as well as of other products such as glass, ceramics, and cement.⁵⁰⁰ China submits that approximately 70% of China's refractory-grade bauxite is consumed by its iron and steel industry (as part of the steel manufacturing process), which produces over three times that of the next largest steel producing country, and accounts for over one-third of global steel production.⁵⁰¹ China argues that it has a "more pressing" need for steel-making materials, like refractory-grade bauxite, than other countries.⁵⁰²

⁴⁹⁵ China's first written submission, paras. 435-436, referring to U.S. NRC Critical Materials Study, p. 32 (Exhibit CHN-77).

⁴⁹⁶ China's first written submission, paras. 437-439, fn. 639, referring to U.S. NRC Critical Materials Study, p. 11 (Exhibit CHN-77).

⁴⁹⁷ China's first written submission, para. 440-441, referring to European Commission, DG Enterprise and Industry, Report of the Ad-Hoc Working Group on Defining Critical Raw Materials (June 2010), p. 7 (Exhibit CHN-126); see also European Commission, DG Enterprise and Industry, Report of the Ad-Hoc Working Group on Defining Critical Raw Materials (June 2010), p. 24 (Exhibit CHN-126).

⁴⁹⁸ China's first written submission, paras. 443-446, referring to Report by China on Refractory Bauxite, p. 37 (Exhibit CHN-10). China argues that the its Report on Refractory Bauxite is modelled on the methodology used in criticality assessments undertaken by the United States and European Union: China's second written submission, para. 123.

⁴⁹⁹ Report by China on Refractory Bauxite, p. 20, based on data provided by MIIT and the China Non-Metallic Minerals Industry Association (Exhibit CHN-10).

⁵⁰⁰ China's first written submission, paras. 431-434. China argues that the unique refractory characteristics of refractory-grade bauxite "enable it to maintain performance at extremely high temperatures – a property deriving from its purity level and alumina content", thus making it "particularly suited to make refractory bricks, blocks, and tiles for use in blast furnaces, troughs, and ladles used to produce and handle molten iron". Report by China on Refractory Bauxite, pp. 6 and 7, Table 2 (Exhibit CHN-10); see also China's second written submission, para. 132.

⁵⁰¹ China's first written submission, para. 447, referring to Report by China on Refractory Bauxite, p. 21, Table 5 (Exhibit CHN-10). In 2008, domestic consumption of crude steel was 500 million metric tonnes, or 38% of global steel output. 2009 Blueprint for the Adjustment and Revitalization of the Steel Industry, Section I (Exhibit CHN-258); see Exhibit JE-30, p. 13; C.E. Semler, "Refractories", p. 1471 (Exhibit CHN-257); see also China's second written submission, para. 133.

⁵⁰² China's first written submission, para. 449-450, referring to the Report by China on Refractory Bauxite, p. 22 (Exhibit CHN-10). China notes the complainants' description of steel as "essential to everyday life", "an indispensable material in almost every product we use today", "a universal building material", "an ideal material to help meet [the] growing need" for new housing units in developing countries, "critical in the energy sector", and "a vital material for transport systems". China's first written submission, para. 450, referring to Exhibit JE-30, pp. 15 to 17; Report by China on Refractory Bauxite, p. 24, table 5 (Exhibit CHN-10). See also World Bank, Global Economic Prospects: Commodities at the Crossroads 2009, p. 69 (Exhibit CHN-260);

7.314 In addition, China argues that refractory-grade bauxite is essential due to the fact that its use in the steel industry contributes to the development of China and "contributes to the creation of considerable economic activity in the manufacturing and construction sectors."⁵⁰³ China argues that its effective development requires a stable supply of the basic raw materials, including refractory-grade bauxite, needed to ensure production. Development gains, it argues⁵⁰⁴, are due in part to the conscious choice to develop value-added trade, diversify production and exports, and promote a higher value-added domestic industry.⁵⁰⁵ China submits that its iron and steel industry itself now employs over 3 million people⁵⁰⁶ and the total contribution of refractory-grade bauxite to the value chain encompassing the immediate sales value of the product represents "half of China's [gross domestic product]".⁵⁰⁷ China further highlights the contribution of refractory-grade bauxite to education, healthcare, infrastructure, technological progress, and scientific research in China.⁵⁰⁸

7.315 Finally, China argues that refractory-grade bauxite should be considered essential due to its "unique chemical and physical properties"⁵⁰⁹, and due to the fact that cost-effective substitutes are not "readily available".⁵¹⁰ China refers to a report by the European Commission, stating "[r]efractory [b]auxite cannot be substituted, as the mineral composition creates specific properties which cannot be reached with other raw materials".⁵¹¹ In addition, China argues that its bauxite reserves "are principally of high quality refractory-grade bauxite", while the majority of deposits in the rest of the world are "metallurgical-grade" (containing "insufficient amounts of aluminium oxide ('Al₂O₃'), along with unacceptably high levels of iron oxide ('Fe₂O₃')"). China argues that this form of bauxite is insufficient for use as a refractory-grade product, and thus is not a substitute.⁵¹² China considers the fact that demand for refractory-grade bauxite has been so strong in international markets over the previous 10 years supports the conclusion that viable substitutes are not realistically available.⁵¹³

7.316 The complainants argue that China has not explained why, in order to establish that refractory-grade bauxite is essential to a Member, that it is sufficient to demonstrate that the material

2009 Blueprint for the Adjustment and Revitalization of the Steel Industry, Section I (Exhibit CHN-258); Exhibits JE-19, JE-20, JE-30, and JE-35. Sinosteel Corporation, 2008 Sustainability Report, p. 27 (Exhibit CHN-261); Charity work of Bosai Group (Exhibit CHN-262); Ansteel – Sustainability (Exhibit CHN-263); Baosteel Group Corporation, 2008 Corporate Social Responsibility Report, pp. 14, 19 to 22 (Exhibit CHN-381); Exhibit JE-30, p. 12; Exhibit JE-30, pp. 12, 13.

⁵⁰³ China's second written submission, para. 134.

⁵⁰⁴ China's first written submission, para. 456-459, referring to the *Guidelines of the Eleventh Five-Year Plan for National Economic and Social Development*, p. 6 (Exhibit CHN-144); Exhibit JE-8, p. 13; Table 9.35; China Statistical Yearbook 2009 (Exhibit CHN-265).

⁵⁰⁵ Exhibit CHN-144: *Guidelines of the Eleventh Five-Year Plan for National Economic and Social Development*, p. 41; Exhibit JE-8, p. 17.

⁵⁰⁶ China's first written submission, para. 456, referring to Exhibit CHN-264: Table 13.2 China Statistical Yearbook 2009.

⁵⁰⁷ China's second written submission, para. 134.

⁵⁰⁸ China's second written submission, para. 136.

⁵⁰⁹ China's second written submission, para. 130.

⁵¹⁰ China's second written submission, para. 131.

⁵¹¹ China's first written submission, para. 448, referring to Report by China on Refractory Bauxite, p. 22 (Exhibit CHN-10); European Commission, DG Enterprise and Industry, Report of the Ad-Hoc Working Group on Defining Critical Raw Materials (June 2010), p. 20 (Exhibit CHN-126).

⁵¹² China's first written submission, para. 432, referring to Report by China on Refractory Bauxite, pp. 3-9, 32-33 (Exhibit CHN-10); description of the essential features of different forms of bauxite in Industrial Minerals & Rocks, p. 227 (Exhibit JE-23); European Commission, DG Enterprise and Industry, Report of the Ad-Hoc Working Group on Defining Critical Raw Materials (June 2010), Annex V, pp. 19 (Exhibit CHN-126); Exhibit JE-28, p. 10.8 (Table 7).

⁵¹³ China's opening oral statement at the second substantive meeting, para. 96; referring to Exhibit JE-165.

is indispensable for the production of iron and steel, or other products. They argue that this line of reasoning would appear to suggest that "any input into large-scale industrial operations would qualify as an essential product under Article XI:2(a)". They argue that China similarly does not explain why the "need to ensure a 'stable supply' of the basic inputs for manufacturing" would determine whether a product is essential to the exporting Member. Under this view, they argue, any country "seeking to grow a particular industry" could deem an input for that product to be an "essential product".⁵¹⁴

7.317 The United States and Mexico additionally assert that refractory-grade bauxite is not "essential" to China due to the availability of "a number of substitutes for [refractory-grade bauxite] in the production of refractories for steel production", as set out in Exhibit JE-165.⁵¹⁵

7.318 Finally, the complainants reject the methodology employed by the "criticality" assessments of the United States and the European Union as relevant to address the requirements of Article XI:2(a).⁵¹⁶

Whether a "critical shortage" of refractory-grade bauxite exists in China

7.319 China maintains that its export quota on refractory-grade bauxite forms part of a conservation plan aimed at extending the reserves of refractory-grade bauxite, but argues that the temporary application of those export restrictions is designed also to prevent and relieve the elements of the critical shortage caused by factors other than the products' availability.⁵¹⁷ China submits that the application of the export quota serves to relieve the critical shortage by reserving sufficient supply to satisfy domestic demand, and avoids a more pronounced critical shortage. Through determination of a quota fixed at approximately 40% of domestic production, China submits that its export quota on refractory-grade bauxite is "structured" to prevent or relieve the shortage.⁵¹⁸

7.320 China argues that a "critical shortage" is demonstrated in light of the importance in use of a particular product in light of its future supply, based on geological and physical availability, conservation and regulatory measures that affect extraction and processing, the development and use of technology, the availability of affordable substitutes, and domestic and international demand for refractory-grade bauxite.

7.321 China argues that the criticality assessments (see paragraph 7.311 above) are useful in assessing the criticality of a mineral, or a shortage. The more essential or important in use a product, China argues, and the greater the supply constraints, the more likely it is that a shortage will have critical implications for an economy.⁵¹⁹ China argues that studies by the United States National Resource Council and the European Union compare the importance in use and impact of supply restriction with the availability and supply risk, and take into account several factors, including geological, technical, environmental, social, economic, and political availability.⁵²⁰ China argues that

⁵¹⁴ Complainants' joint opening oral statement at the first substantive meeting, para. 134.

⁵¹⁵ United States' second written submission, paras. 221-228; Mexico's second written submission, paras. 226-233.

⁵¹⁶ Complainants' joint opening oral statement at the first substantive meeting, para. 132.

⁵¹⁷ China's second written submission, para. 141.

⁵¹⁸ China's second written submission, paras. 145-147.

⁵¹⁹ China's first written submission, paras. 462-463.

⁵²⁰ China's first written submission, para. 465; referring to U.S. NRC Critical Materials Study, pp. 6, 32, 33 (Exhibit CHN-77); China's first written submission, paras. 466; referring to European Commission, DG Enterprise and Industry, Report of the Ad-Hoc Working Group on Defining Critical Raw Materials (June 2010), pp. 14 to 21, 24 to 31 (Exhibit CHN-126).

its study (see paragraph 7.312 above) relies on similar factors in an assessment of the criticality of refractory-grade bauxite.⁵²¹

7.322 China maintains that refractory-grade bauxite is an exhaustible natural resource, the limited geological availability of which functions as a significant supply constraint.⁵²² It posits that its reserves of refractory-grade bauxite in 2009 were estimated at 38.8 million metric tonnes, but that that number "has displayed a declining trend in recent years".⁵²³ China submits that production of refractory-grade bauxite in China in 2009 was 2.4 million metric tonnes⁵²⁴, which at current reserve and production rates, suggests a 16-year reserve life for China's refractory-grade bauxite.⁵²⁵ In its view, the very short remaining life span of this essential and exhaustible natural resource demonstrates the occurrence or risk of a critical shortage.⁵²⁶

7.323 Moreover, China argues that refractory-grade bauxite cannot be substituted.⁵²⁷ China argues that a refractory product is selected "because of the specific combination of physical, chemical and thermal properties."⁵²⁸ These include the capacity of refractory-grade bauxite to tolerate high temperatures, its acidic chemical makeup, its high resistance to abrasion, and high reheat expansion.⁵²⁹ China dismisses substitutes identified by the complainants, including brown-fused alumina, Bayer route calcined alumina, white fused alumina, graphite, silicon carbide, and zirconium, as either "considerably more expensive" than refractory-grade bauxite⁵³⁰, or produced from material similarly subject to resource constraints.⁵³¹ China also submits that there is an associated cost involved with changing suppliers in the event of substituting a material.⁵³²

7.324 Apart from the risk of a physical shortage, China argues that other constraints disrupt the flow of refractory-grade bauxite through the value chain, and are relevant to the conclusion that a critical shortage of refractory-grade bauxite exists.⁵³³ China refers to conservation measures that China adopted to manage its raw materials in a sustainable manner, including extraction and production caps

⁵²¹ China's first written submission, para. 467; China's opening oral statement at the second substantive meeting, para. 151.

⁵²² China's first written submission, para. 469; referring to Exhibit JE-23, p. 242. See also Exhibit JE-23, p. 227: "premium-grade bauxite ores suitable for use in these special niche markets have, over time, been limited to a few principal sources, such as China and Guyana"; European Commission, DG Enterprise and Industry, Report of the Ad-Hoc Working Group on Defining Critical Raw Materials (June 2010), pp. 19 and 20 ("The major production of refractory grade bauxite takes place in China with a large number of producers.") (Exhibit CHN-126).

⁵²³ China's first written submission, para. 472; Report by China on Refractory Bauxite, p. 34 (Exhibit CHN-10).

⁵²⁴ Analysis and Recommendation Report on the 2010 Controlling Quota of Total Extraction Quantity of High-Alumina Bauxite and Fluorspar (Exhibit CHN-86); see also Report by China on Refractory Bauxite, p. 34 (Exhibit CHN-10).

⁵²⁵ Report by China on Refractory Bauxite, p. 34, (Exhibit CHN-10).

⁵²⁶ Exhibit CHN-79: China's Policy on Mineral Resources, p. 4.

⁵²⁷ China's first written submission, para. 471, referring to European Commission, DG Enterprise and Industry, Report of the Ad-Hoc Working Group on Defining Critical Raw Materials (June 2010), p. 20 (Exhibit CHN-126). See also Exhibit JE-136.

⁵²⁸ China's opening oral statement at the second substantive meeting, para. 134, Report by China on Refractory Bauxite, pp. 8, 30 (Exhibit CHN-10).

⁵²⁹ China's opening oral statement at the second substantive meeting, paras. 135-140.

⁵³⁰ China's opening oral statement at the second substantive meeting, paras. 143-144, 146.

⁵³¹ China's opening oral statement at the second substantive meeting, para. 143.

⁵³² China's opening oral statement at the second substantive meeting, para. 148.

⁵³³ China's first written submission, para. 475, referring to D. Shields and S. Sölar, "Debating the concept of resource scarcity: physical versus socioeconomic" (Exhibit CHN-274); Report by China on Refractory Bauxite, pp. 35 and 36 (Exhibit CHN-10).

for refractory-grade bauxite, that affect availability.⁵³⁴ For instance, China asserts that the total amount of refractory-grade bauxite that can be extracted in 2010 is limited to 4.5 million metric tonnes.⁵³⁵

7.325 China contends that it imposes a "stringent set of requirements" on mines wishing to extract refractory-grade bauxite, and on industries that process it, which have resulted in a critical shortage. These include the following: a licence requirement; waste and pollution controls; labour, health and safety requirements; entrance requirements relating to "scale, technology, energy conservation, reducing consumption and environmental protection, and eliminating backward production capacity"; environmental impact assessment; a mining rights user fee, a mineral resources tax; a compensation fee, and pollutant discharge fees.⁵³⁶ China states that it is in the process of closing unsafe or polluting mines, and encouraging consolidation in the industry.

7.326 China argues that significant barriers exist that have created a critical shortage of refractory-grade bauxite. China alleges that barriers include the availability and maintenance of infrastructure; considerable investments that are needed to enter the mineral extractive and processing sector⁵³⁷; and local or regional communities' acceptance of mining activity.⁵³⁸

7.327 Finally, China submits that export restrictions on ferrous scrap⁵³⁹, high domestic demand⁵⁴⁰ and international demand for refractory-grade bauxite⁵⁴¹, and the lack of available refractory-grade bauxite with refractory characteristics outside China, contribute to a critical shortage of bauxite.⁵⁴²

⁵³⁴ China's first written submission, para. 475, referring to *China's Policy on Mineral Resources* (Exhibit CHN-79) *Program of Action for Sustainable Development in China* (Exhibit CHN-82); *2010 Quota on Extraction of High-alumina Bauxite Ores and Fluorspar Ores* (Exhibit CHN-97); *2010 Quota of High-alumina refractory-grade bauxite and fluorspar, Preamble* (Exhibit CHN-98).

⁵³⁵ Exhibit CHN-97: *2010 Quota on Extraction of High-alumina Bauxite Ores and Fluorspar Ores, Article I*; *2010 Quota of High-alumina refractory-grade bauxite and fluorspar, Article I* (Exhibit CHN-98).

⁵³⁶ China's first written submission, paras. 480-482, fns. 713-723; Exhibits CHN-93; CHN-78; CHN-258; CHN-275; CHN-96; CHN-87; CHN-276; CHN-277; CHN-89; CHN-92; CHN-91; CHN-278; CHN-279; CHN-95.

⁵³⁷ China's first written submission, para. 483, referring to Report by China on Refractory Bauxite, p. 36 (Exhibit CHN-10); A. Burke, 'Battle of the bauxites' *Industrial Minerals* (July 2005), p. 32 (Exhibit CHN-280).

⁵³⁸ China's first written submission, para. 484, referring to World Bank and International Financial Corporation, *Large Mines and Local Communities: Forging Partnerships, Building Sustainability* (2002), pp. iv and v (Exhibit CHN-281); Report by China on Refractory Bauxite, p. 31 (Exhibit CHN-10).

⁵³⁹ China's first written submission, para. 485; China's response to Panel question No. 10 following the first substantive meeting, para. 50; China's second written submission, para. 141; European Commission, DG Enterprise and Industry, Report of the Ad-Hoc Working Group on Defining Critical Raw Materials (June 2010), including Annexes (Exhibit CHN-126); GATT, Multilateral Trade Negotiations, Inventory of Non-Tariff Measures – Addendum MTN/3B/1-5/Add.7 (18 May 1977), pp. 442.1, 525.1, 537.1, 537.2, 548.1, 614.1, 615.1, 615.2, 616.2, 616.7, and 618.1 (p. 2) (emphasis added) (Exhibit CHN-168); GATT Multilateral Trade Negotiations, Inventory of Non-Tariff Measures – Addendum MTN/3B/1-5/Add.9 (23 August 1977), pp. 406.1 (p. 2), 537.1, 549.1, 615.001, and 616.411 (Exhibit CHN-161); see also China's opening oral statement at the second substantive meeting, paras. 75, 99-109.

⁵⁴⁰ China's first written submission, para. 491; China's response to Panel question No. 10 following the first substantive meeting, para. 51; China's second written submission, para. 140; Report by China on Refractory Bauxite, p. 33 (Exhibit CHN-10); World Bank and International Financial Corporation, *Large Mines and Local Communities: Forging Partnerships, Building Sustainability* (2002) (Exhibit CHN-281); Assessment on Relevant Issues Regarding Continued Application of Export Quota Administration to Bauxite in 2010 (Exhibit CHN-283); see also China's opening oral statement at the second substantive meeting, paras. 75, 99-109.

⁵⁴¹ China's first written submission, para. 485; China's response to Panel question No. 10 following the first substantive meeting, paras. 53, 109; China's second written submission, para. 140; Report by China on

7.328 The complainants argue that China has not established the existence of a "critical shortage" of refractory-grade bauxite in China. The United States argues that China does not provide evidence of how these alleged supply constraints in fact limit the supply of refractory-grade bauxite. The United States argues that evidence, including production of refractory materials and steel and expansion of exports of these materials, suggests that supply constraints are not a factor and that a critical shortage does not exist.⁵⁴³

7.329 The United States additionally contests China's arguments that substitutes do not exist for refractory-grade bauxite. The United States argues that a wide variety of raw materials can be used as refractories in steel production; for instance, it identifies metallurgical-grade bauxite that undergoes the Bayer process; non-metallurgical grade bauxite; magnesia-carbon; alumina-graphite; and zirconia-graphite. The United States submits that these may even have longer useful lives than refractories made directly from refractory-grade bauxite, and offer a 0.45 per cent increase in the cost of producing steel.⁵⁴⁴

7.330 In addition, the United States argues that China's estimates of worldwide reserves of refractory-grade bauxite are "significantly understated". Based on production in 2003, the United States argues that reserves are actually 218 million tonnes, and not 39 million, as estimated by China.⁵⁴⁵ The United States argues that China's production capacity for non-metallurgical-grade bauxite suggests a much higher ratio of non-metallurgical-grade bauxite reserves to total bauxite reserves, suggesting that China's reserves of non-metallurgical-grade bauxite are set to last 91 years.⁵⁴⁶

7.331 The European Union argues that the limited life span of the reserves of a good does not, by itself, support a finding of "critical shortage" in the sense of Article XI:2(a). As noted above, it argues that the exhaustion of the natural reserves of a good is not a temporary shortage that can be relieved or prevented with temporal measures.

7.332 In addition, the European Union argues that production caps imposed by China to address the limited life span of the reserves of refractory grade bauxite cannot set off a temporal shortage that can be relieved or prevented with temporal measures, as required by Article XI:2(a). Instead, it argues, production caps are part of the broader problem created by the exhaustibility of a good.⁵⁴⁷

Refractory Bauxite, pp. 5 (Exhibit CHN-10); Analysis and Recommendation Report on the 2010 Controlling Quota of Total Extraction Quantity of High-Alumina Bauxite and Fluorspar, issued by the Department of Minerals Exploitation Administration of the Ministry of Land and Resources on 24 March 2010 (Exhibit CHN-86); GATT Multilateral Trade Negotiations, Inventory of Non-Tariff Measures – Addendum MTN/3B/1-5/Add.9 (23 August 1977) (Exhibit CHN-161); GATT, Multilateral Trade Negotiations, Inventory of Non-Tariff Measures – Addendum MTN/3B/1-5/Add.7 (18 May 1977) (Exhibit CHN-168); Assessment on Relevant Issues Regarding Continued Application of Export Quota Administration to Bauxite in 2010 (Exhibit CHN-283); see also China's opening oral statement at the second substantive meeting, paras. 75, 99-109.

⁵⁴² China's first written submission, para. 486; China's response to Panel question No. 10 following the first substantive meeting, para. 109; China's second written submission, para. 140; Report by China on Refractory Bauxite, p. 10 (Exhibit CHN-10). A. Burke, 'Battle of the bauxites' *Industrial Minerals* (July 2005), p. 32 (Exhibit CHN-280); *Industrial Minerals*, 'Guyana's bauxite boost' *Industrial Minerals* (21 September 1999) (Exhibit CHN-482); see also China's opening oral statement at the second substantive meeting, paras. 75, 99-109.

⁵⁴³ United States' second written submission, para. 239, referring to Exhibit JE-165, p. 26, figure 12.

⁵⁴⁴ United States' second written submission, paras. 221-228, referring to Bauxite Report, pp. 3-31 (Exhibit JE-165).

⁵⁴⁵ Exhibit JE-165, p. 23.

⁵⁴⁶ United States' second written submission, paras. 235, 237, Exhibit JE-165, p. 23.

⁵⁴⁷ European Union's second written submission, paras. 208-209.

7.333 Finally, the European Union argues that potential technological and social risks and environmental and other regulations referred to by China do not show that China lacks the technology to produce refractory-grade bauxite, or that there has been social unrest as alleged by China that has reduced the production of the good. Nor does the European Union consider there is evidence that any type of shortage results from the Chinese mining companies' compliance with China's regulatory framework.⁵⁴⁸

7.334 For the above reasons, the complainants argue that China has failed to establish the existence of a critical shortage of refractory-grade bauxite such that it is entitled to take measures pursuant to Article XI:2(a). The complainants also argue that China's reliance on "criticality assessments" by the United States and the European Union does not address the specific requirements of Article XI:2(a), but "analyze certain products and their role in the economies of the United States and the European Union". They argue that China provides no evidence that these assessments set out "standard criteria" for whether a product is "essential" within the meaning of Article XI:2(a).⁵⁴⁹

Whether the export quota applied to bauxite is applied on a temporary basis

7.335 China argues that the export quota applied to refractory-grade bauxite is applied on a temporary basis. As demonstrated by the fact that MOFCOM determines the quota on an annual basis through publication of the *Export License Catalogue*, and because China publishes biannually notices announcing the specific bidding rules for each batch of bauxite.⁵⁵⁰ China considers that the application of an export quota on an annual basis ensures that the period of application is "firmly bounded", and enables the exporting Member to set out the reasons that "warrant the renewed application of the export restriction".⁵⁵¹

7.336 In addition, China submits a methodology paper by MOFCOM (Exhibit CHN-283) explaining the factors informing the decision to impose an export quota in 2010, and the amount of exports to be authorized under the quota (930,000 metric tonnes).⁵⁵² China considers therefore that its measures are temporarily applied for the duration needed to achieve the goals set out in Article XI:2(a). China claims to find support for this approach in examples of the application of prohibitions and restrictions maintained by the United States and the European Union.⁵⁵³

7.337 The complainants maintain that China has failed to demonstrate that its export quota on refractory-grade bauxite is "temporarily applied". The United States notes that there is no evidence that the export quota is applied only so long as necessary to prevent or relieve a critical shortage. Thus, the complainants consider the quota is not appropriately limited in time.⁵⁵⁴

⁵⁴⁸ European Union's second written submission, para. 210.

⁵⁴⁹ Complainants' joint opening oral statement at the first substantive meeting, para. 137; United States' second written submission, para. 217; Mexico's second written submission, para. 222.

⁵⁵⁰ China's first written submission, paras. 490-491, referring to *2010 Export Licensing Catalogue* (Exhibit CHN-7); *2010 Export Quota* (Exhibit CHN-8); *2010 First-Batch Export Quota Bidding of Bauxite* (Exhibit CHN-284).

⁵⁵¹ China's opening oral statement at the second substantive meeting, paras. 78-79.

⁵⁵² China's first written submission, para. 491, referring to *Assessment on Relevant Issues Regarding Continued Application of Export Quota Administration to Bauxite in 2010* (Exhibit CHN-283).

⁵⁵³ China's first written submission, para. 492.

⁵⁵⁴ Complainants' joint opening oral statement at the first substantive meeting, para. 147; United States' second written submission, para. 241; Mexico's second written submission, para. 246.

(ii) *The Panel's assessment of the situation in China*

7.338 China has identified a range of quantitative and qualitative factors, including what it describes as "geological, technical, environmental, social, economic, and political factors", in seeking to demonstrate that the export quota that it applies to refractory-grade bauxite is temporarily applied to prevent or relieve a critical shortage of an essential product to China, and accordingly, its export quota is justified pursuant to Article XI:2(a).

7.339 The Panel recalls that Article XI:2(a) permits the application of temporary restrictions or prohibitions on a limited basis to address "critical shortages" of "essential products". The Panel found that a product may be "essential" within the meaning of Article XI:2(a) when it is "important" or "necessary" or "indispensable" to a particular Member. This may include a product that is an "input" to an important product or industry, taking into consideration the particular circumstances faced by that Member. In addition, the Panel found that the term "critical shortage" in Article XI:2(a) refers to those situations or events that are "of decisive importance" or "grave", or rise to the level of a "crisis" or catastrophe that may be relieved or prevented through the application of measures on a temporary, and not an indefinite or permanent, basis.

7.340 On the basis of evidence submitted by China, the Panel is persuaded that refractory-grade bauxite is currently "essential" to China, as that term is used in Article XI:2(a). In particular, China has presented evidence that demonstrates the importance of the use of refractory-grade bauxite as an intermediate product in the production of iron and steel (in the sense that bauxite is used in the manufacture of kilns, which are themselves used in the production of steel, for instance⁵⁵⁵), as well as other important products to China's domestic and export markets. As China explains, and the complainants do not dispute, China is the leading producer of steel in the world by a significant margin. China submits it produces more than three times that of the next largest steel producing country, and represents more than one third of worldwide steel production; this is also not contested.⁵⁵⁶ China's steel industry is a primary user of refractory-grade bauxite; in fact, the complainants recognize that 70% of refractory-grade bauxite is consumed by China's iron and steel industries.⁵⁵⁷ In addition, it is not disputed that iron and steel are themselves important products in the manufacturing and construction industries, two fundamental sectors that drive China's industry and development. Moreover, China's steel industry represents a significant source of employment.⁵⁵⁸

7.341 In coming to this conclusion, the Panel was mindful of the parties' arguments on the question of substitutability of refractory-grade bauxite. The complainants initially asserted that China's allegations on the essentialness of refractory-grade bauxite, and whether a "critical shortage" exists, are undermined by the fact that readily available and reasonably available substitutes exist. The complainants identify several substitutes. In response in its oral statement at the second substantive meeting of the parties, China explained that these materials should not be considered as substitutes, either because of the cost to purchase them⁵⁵⁹, or due to constraints on their availability.⁵⁶⁰

⁵⁵⁵ See Report by China on Refractory Bauxite, pp. 6, 7 (Exhibit CHN-10).

⁵⁵⁶ Report by China on Refractory Bauxite, p. 21, Table 5 (Exhibit CHN-10); 2009 Blueprint for the Adjustment and Revitalization of the Steel Industry, Section I (Exhibit CHN-258); see Exhibit JE-30, p. 13; C.E. Semler, "Refractories", p. 1471 (Exhibit CHN-257).

⁵⁵⁷ See Exhibit JE-165, p. 9.

⁵⁵⁸ China's first written submission, para. 456, referring to Exhibit CHN-264: Table 13.2 China Statistical Yearbook 2009.

⁵⁵⁹ China's opening oral statement at the second substantive meeting, paras. 143-144, 146, discussing Bayer-route calcined alumina, white fused alumina, graphite, silicon carbide and zirconium).

⁵⁶⁰ China's opening oral statement at the second substantive meeting, para. 143, discussing brown-fused alumina.

7.342 The complainants did not respond to these points. However, in Exhibit JE-165, the complainants acknowledged higher costs in choosing alternatives to refractory-grade bauxite⁵⁶¹, albeit at levels lower than those claimed by China. The complainants submit that in any event increased prices of alternative materials are offset by the increased lifespan or performance of those alternatives.

7.343 In the Panel's view, data submitted by both parties demonstrate the complexity in determining the availability of a substitute. Both parties agree that price would factor into a decision (including the cost of switching to a substitute). The properties of the materials as well as the particular application of that material would also factor into an assessment of substitutability.

7.344 Even assuming conditions arose that would reduce the cost of substituting refractory-grade bauxite for an alternative, this would not persuade the Panel to alter its conclusion that refractory-grade bauxite is an "essential" product to China. The inherent complexity in assessing substitutability reveals that switching from one material to the next, and potentially, from one supplier to the next, is not an easy decision.⁵⁶² Regardless, given the evidence of its significant use in various sectors, it is foreseeable that refractory-grade bauxite would continue as an important intermediary product to the production of steel and would continue to serve as an important driver for the Chinese economy.

7.345 Before proceeding, the Panel expresses its view that the mere designation of a product as essential or the imposition of conservation-related restrictions imposed on extraction or processing should not be relevant to the assessment of whether a product is "essential" to a Member. A Member exercises its own discretion on whether to impose conditions that affect the availability of a product. The conservation-related measures presumably are put in place because they are necessary to protect an essential product; they should not in and of themselves support the conclusion that a product is in fact essential. Therefore, the Panel considers that these factors should not be taken into consideration. Moreover, the systemic implications of deciding "essentialness" based on either the presence or lack of regulatory measures is problematic; it would allow a Member to manufacture "essentialness" when none exists. The Panel wishes to make clear that it is not in any way suggesting that this is the case here.

7.346 The Panel does not consider China's application of the measure to be "temporarily applied" within the meaning of Article XI:2(a) to justify its imposition under that provision as a measure to either prevent or relieve a "critical shortage".

7.347 The Panel recalls that a "shortage" refers to a deficiency in the quantity of goods. The product's importance in use, though relevant in an assessment of whether a product is "essential" to a Member, and perhaps indicative of future demand for a product, does not inform whether a shortage currently exists. China argues that the "supply" of refractory-grade bauxite is affected by the following: (i) the remaining reserve lifespan of refractory-grade bauxite; (ii) lack of availability of refractory-grade bauxite in China and abroad; (iii) lack of cost-affordable substitutes for refractory-

⁵⁶¹ In his "Report on Refractory Bauxite", Dr. Eugene Thiers states generally: "Some refractory products have a higher costs, but offering [sic] superior performance and a longer useful life" (p.28). Dr. Thiers specifically compares the cost of refractory bauxite on 20 September 2010 (which he contends costs between \$405/metric tonne to \$535/metric tonne) with the price of brown-fused alumina on that date (which he contends to cost between \$620/metric tonne and \$630/metric tonne). He estimates, assuming the lowest price for refractory bauxite and the highest price for brown fused alumina, that it would cost Chinese refractory producers \$270 million, or 0.0006% of China's gross domestic product. He estimates an increase in production cost to Chinese steel producers of 0.45% (pp. 35-36). China's response to Dr Thiers' assertions are reflected in paragraphs 143 to 147 of China's oral statement at the second substantive meeting of the Panel.

⁵⁶² See China's opening statement at the second substantive meeting, para. 148, referring to European Commission Directorate-General for Trade, *Raw materials policy 2009 annual report*, p. 11 (Exhibit CHN-511).

grade bauxite; (iv) restriction arising from other barriers, including conservation, licence, health, safety, environmental and other regulatory measures; (v) fees and taxes; (vi) investment barriers; and (vii) resistance to mining activities at local and community levels.

7.348 China has had an export quota in place on exports of bauxite classifiable under HS No. 2508.3000 dating back to at least 2000.⁵⁶³ China's estimation of a 16-year reserve for bauxite suggests that China intends to maintain its measure in place until the exhaustion of remaining reserves (in keeping with its contention that it needs to restrain consumption), or until new technology or conditions lessen demand for refractory-grade bauxite. In line with this, China has explained that its export quota on refractory-grade bauxite forms part of a conservation plan aimed at extending the reserves of refractory-grade bauxite, which is applied temporarily to relieve the critical shortage caused by factors other than the product's availability.⁵⁶⁴

7.349 The Panel explained above that if Article XI:2(a) were interpreted to permit the long-term application of conservation measures, Article XX(g) would lose its meaning. Moreover, the Panel observed that the permissibility of the mention of imposing long-term measures related to conservation purposes under Article XX(g) is tempered by the requirement to impose measures in conjunction with restrictions on domestic consumption or production, and the additional requirements of the chapeau to Article XX. Article XI:2(a), by contrast, does not require a balancing between domestic interests and that of other Members. Article XI:2(a) instead imposes different restraints: that measures be applied "temporarily" when addressing a domestic crisis or critical matter.

7.350 The Panel does not consider that China's restriction on exports of refractory-grade bauxite, which has already been in place for at least a decade with no indication of when it will be withdrawn and every indication that it will remain in place until the reserves have been depleted, can by any definition be considered to be "temporarily applied" to address a critical shortage within the meaning of Article XI:2(a). On this basis, the Panel concludes that China cannot justify its export quota pursuant to Article XI:2(a).

7.351 The Panel cannot agree with China that it currently faces a "critical shortage" of refractory-grade bauxite in the sense of Article XI:2(a). Even if the Panel were to accept China's claim of a 16-year remaining reserve lifespan for refractory-grade bauxite, in the Panel's view, this would not demonstrate a situation "of decisive importance" or one that is "grave", rising to the level of a "crisis". As noted above, measures under Article XI:2(a) are to be "temporarily applied" to address a "critical shortage"; a measure destined to be in place permanently – i.e., for the full 16 years until its object has disappeared – seems to suggest it is addressing something other than a "critical shortage", as that term is used in Article XI:2(a). Moreover, while China has submitted evidence of the vital nature of bauxite to its economy, it is not clear to the Panel that lifespan reserve estimates could not change due to advances in reserve detection or extraction techniques, or that additional capacity could not come online within the ensuing 16-years that would alleviate or eliminate China's concerns about availability of refractory-grade bauxite over the long term. Moreover, the complainants dispute the accuracy of China's estimate, instead alleging that refractory-grade bauxite has a remaining lifespan of 91 years.⁵⁶⁵ China contests the complainants' estimation of a 91-year remaining lifespan.⁵⁶⁶

⁵⁶³ China provided evidence of an export quota on Customs Commodity Code 2508.3000, containing refractory-grade bauxite, in place since 2006: see China's response to Panel question No. 5 following the first substantive meeting, para 27; Exhibit CHN-440. The complainants submit evidence of an export quota in place of products in this Customs Commodity Code since 2000: see Exhibit JE-165, referring to *The Economics of Bauxite & Alumina*, p. 359 (8th ed. 2008).

⁵⁶⁴ China's second written submission, para. 141.

⁵⁶⁵ United States' second written submission, paras. 235, 237, Exhibit JE-165, p. 23.

⁵⁶⁶ China's opening oral statement at the second substantive meeting, paras. 116-124.

7.352 The Panel rejects the argument that regulatory environmental or conservation-related restrictions imposed by China on the extraction or processing of a product in China should be taken into consideration when assessing whether a "critical shortage" of a product exists. These include the imposition of production caps, or licence, health, safety, environmental and other regulatory measures, and fees and taxes. As discussed in paragraph 7.345 above in respect of the essentialness of a product, accepting this view would be problematic, as it would allow a Member to claim the existence of a critical shortage when objectively none exists. In addition, China has not provided specific evidence that there are barriers to investment or that local or regional communities' disapproval has disrupted the availability of refractory-grade bauxite.⁵⁶⁷

7.353 For the foregoing reasons, the Panel concludes that China has failed to demonstrate that the export quota applied to refractory-grade bauxite is justified pursuant to Article XI:2(a) of the GATT 1994.

(c) Summary

7.354 Article XI:2(a) permits the application of restrictions or prohibitions "temporarily" to address "critical shortages" of "essential products". The Panel concluded that a product may be "essential" within the meaning of Article XI:2(a) when it is "important" or "necessary" or "indispensable" to a particular Member. This may include a product that is an input to an important product or industry. The determination of whether a particular product is "essential" to a Member must take into consideration the particular circumstances faced by that Member at the time in which a Member seeks to justify a restriction or prohibition under Article XI:2(a). The Panel concluded that the term "critical shortage" in Article XI:2(a) refers to situations or events that are grave or provoking crises and which can be relieved or prevented through the application of measures on a "temporary", and not an indefinite or permanent, basis.

7.355 Bearing these conclusions in mind, the Panel concludes that refractory-grade bauxite is "essential" to China. However, the Panel finds that China has not demonstrated that its export quota on refractory-grade bauxite is "temporarily applied" within the meaning of Article XI:2(a) to either prevent or relieve a "critical shortage".

2. Whether the export duties and export quotas applied to refractory-grade bauxite and fluorspar are justified pursuant to Article XX(g) of the GATT 1994

7.356 China's defence of its export restrictions on refractory-grade bauxite and fluorspar is based on Article XX(g). China's argument is that refractory-grade bauxite and fluorspar are exhaustible natural resources; they are scarce, are not easily substitutable, and thus need to be managed and protected. China also insisted that nothing should interfere with their sovereignty over such natural resources.⁵⁶⁸

⁵⁶⁷ China has referred generally to investments that are needed to operate a mineral extractive and processing center, and resistance to mining that may arise at the local, regional or national levels; however, the evidence is general in nature: see China's first written submission, paras. 483-484; Report by China on Refractory Bauxite, p. 36 (Exhibit CHN-10); World Bank and International Financial Corporation, *Large Mines and Local Communities: Forging Partnerships, Building Sustainability* (2002), pp. iv and v (Exhibit CHN-281).

⁵⁶⁸ China's first written submission, para. 126. See also GATT Multilateral Trade Negotiations, Group "Framework", *Statement by the Delegation of India* MTN/FR/W/23 (6 April 1979). Other WTO Members, such as Mexico and the European Union, have also stressed the importance of the principle of permanent sovereignty over natural resources. Also Exhibit CHN-50: GATT Trade Negotiations Committee, *Proceedings of the Session Held in the International Labour Office, Geneva, 11 and 12 April 1979* MTN/P/5 (9 July 1979), pp. 83-84; Exhibit CHN-53: Protocol for the Accession of Mexico to the General Agreement on Tariffs and Trade L/6036 (14 August 1986); Exhibit CHN-54: GATT, Negotiating Group on Natural Resource-Based Products, *Communication from the European Communities* MTN.GNG/NG.3/W/11 (12 February 1988), para. 7. Exhibit

Further, China referred to the need for developing countries to make optimum use of their resources for their development, as they deem appropriate, including the processing of their raw material. The complainants argue that the objective and operation of China's export regime cannot benefit from the flexibilities of Article XX and, moreover, that China cannot invoke Article XX(g) to justify export duties contrary to its Accession Protocol.⁵⁶⁹

7.357 As explained above, the Panel will now examine China's defence following the order of analysis used by China in its rebuttal. The Panel will discuss China's arguments and evidence relating to its export quota on refractory-grade bauxite and, when relevant and appropriate, it will also make reference to fluorspar.

7.358 The Panel will, first, discuss generally the interpretation of Article XX(g). The Panel will then turn to analyse whether the challenged export restrictions on refractory-grade bauxite and fluorspar may be justified under Article XX(g). In other words, the Panel will examine whether China's export restrictions on these two products *relate to the conservation* of an exhaustible natural resource and whether China's export measures are made *effective in conjunction with domestic restrictions on production or consumption*.

(a) Interpretation of Article XX(g) of the GATT 1994

7.359 A measure that is inconsistent with obligations in the GATT 1994 may nevertheless be justified under Article XX. As the Appellate Body stated in *US – Gasoline* and confirmed in *Brazil – Retreaded Tyres*, in order to be justified under Article XX, "... the measure at issue must not only come under one or another of the particular exceptions – paragraphs (a) to (j) – listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. The analysis is, in other words, two tiered: first, provisional justification by reason of characterization of the measure under [the sub-paragraph]; second, further appraisal of the same measure under the introductory clauses of Article XX".⁵⁷⁰

7.360 The various sub-paragraphs of Article XX lay out the manner in which a Member may adopt measures pursuing "legitimate state policies or interests".⁵⁷¹ Article XX(g) reads as follows:

"Subject to [requirements regarding non-discrimination and disguised restriction on trade] nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption".

7.361 Therefore, in order for a measure to be justified under Article XX(g), the measure at issue must: (i) "relate to the conservation of an exhaustible natural resource", and (ii) be "made effective in conjunction with restrictions on domestic production or consumption". The Panel turns now to consider the ordinary meaning of the words used in paragraph (g) in their context.

CHN-51: GATT Consultative Group of Eighteen, Thirteenth Meeting, *Export Restrictions and Charges – Note by the Secretariat* CG/18/W/43 (10 October 1980), p. 2.

⁵⁶⁹ See China's First written submission, paras 123-126; China's opening oral statement at the first substantive meeting, paras. 26-29.

⁵⁷⁰ Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996:I, 3, at p. 20.

⁵⁷¹ Appellate Body Report, *US – Gasoline*, p. 17, DSR 1996:I, 3, at p. 16.

(i) *"Relating to the conservation of exhaustible natural resources"*

7.362 The first legal benchmark for the consistency of a measure with Article XX(g) is that the measure "relates to the conservation of exhaustible natural resources".

7.363 In China's view, Article XX(g) includes within its scope the protection of *living* and *non-living* exhaustible natural resources, such as "raw materials".⁵⁷² This is not contested by the complainants. China contends further that the term "conservation" should be interpreted as the act of preserving and maintaining the existing state or number of something, in this case "natural resources" covered by Article XX(g).⁵⁷³ China argues that Article XX(g) protects its sovereign right to adopt a comprehensive and sustainable mineral conservation policy, taking into account China's social and economic development needs.⁵⁷⁴

7.364 For China, Article XX(g) must be interpreted in a manner that recognizes a WTO Member's "sovereign rights over their own natural resources." China claims that these rights must be exercised in the interests of a Member's own social and economic development⁵⁷⁵, as well as in light of the objective of sustainable development as stated in the Preamble to the WTO Agreement. China posits that sustainable development requires that economic development and conservation be aligned through the effective management of scarce resources, as the term "conservation" refers to the management of a limited supply of exhaustible natural resources over time. China considers that its export restraints "relate to conservation" because they are part and parcel of China's measures that manage the limited supply of refractory-grade bauxite and fluorspar, which are exhaustible natural resources.⁵⁷⁶

7.365 The complainants argue that China presents as "context" for the meaning of the term "conservation" issues that have absolutely no relevance to the correct interpretation of Article XX(g).⁵⁷⁷ According to the complainants, the WTO Preamble cannot be used to exempt a WTO Member from complying with the terms of Article XX(g) so as to be able to discriminate in favour of its own domestic users of raw materials against users in any other WTO Member. The European Union recalls that the WTO Preamble calls for the optimal use of the world's resources, and expresses the desire of WTO Members to contribute to the objectives of the WTO by entering into reciprocal and mutually advantageous arrangements directed at the substantial reduction of tariffs and other barriers to trade.⁵⁷⁸

7.366 The United States and Mexico argue that China is incorrect to argue that context confers on the word "conservation" the meaning that a Member's sovereign rights over its natural resources can be exercised in the interests of a Member's own social and economic development. Article XX(g) does not permit WTO Members to deviate from WTO rules in order to promote and realize their own self-interested economic goals.⁵⁷⁹

7.367 The complainants also dispute China's interpretation of the principle of sovereignty over natural resources. They argue that this principle is not at issue in this dispute. In their opinion,

⁵⁷² China's first written submission, para. 101.

⁵⁷³ China's first written submission, para. 107.

⁵⁷⁴ China's first written submission, para. 97.

⁵⁷⁵ China's first written submission, paras. 120-130.

⁵⁷⁶ China's second written submission, paras. 184-194.

⁵⁷⁷ European Union's second written submission, para. 240.

⁵⁷⁸ European Union's second written submission, para. 241; United States' opening oral statement at the second substantive meeting, para 72.

⁵⁷⁹ United States' second written submission, paras. 117-118; Mexico's second written submission, paras. 121-122.

Article XX(g) does not call into question this sovereign right of all WTO Members. Under Article XX(g), what is at issue is whether a Member has satisfied the conditions of that provision when it maintains an otherwise GATT-inconsistent measure affecting trade in its natural resources.⁵⁸⁰

7.368 Finally, the United States and Mexico submit that China's attempt to incorporate into the term "conservation" the notion of exercising rights over natural resources "in the interests of a Member's own social and economic development" seeks to change Article XX(g) into an exception based on a WTO Member's desire to create opportunities for growth for its downstream processing industries. For these complainants, to the extent that the interests of a Member's downstream industry might form the basis for an exception to the GATT 1994 prohibition on export restraints imposed on industrial input materials, Article XX (i) could be invoked so long as certain conditions were respected.⁵⁸¹ However, China does not invoke Article XX (i) as a justification for its trade-restrictive measures.⁵⁸²

7.369 In sum, the Panel observes that although the parties agree that the products (raw materials) covered by the present dispute are exhaustible natural resources, they disagree as to whether the challenged export restrictions "relate" to a "conservation" programme. The Panel will move now to an interpretation of those terms.

"Relate to conservation"

7.370 The Appellate Body in *US – Gasoline* ruled that a measure was "relate[d] to" conservation if there was a substantial relationship between the export measures and conservation, and "that a measure must be '*primarily aimed at*' the conservation of exhaustible natural resources in order to fall within the scope of Article XX(g)".⁵⁸³ It further added that a measure that is "merely incidentally or inadvertently" aimed at conservation cannot meet the requirement of "relating to" in Article XX(g).⁵⁸⁴ It noted that the phrase "primarily aimed at" was "not designed as a simple litmus test for inclusion or exclusion from Article XX(g)".⁵⁸⁵ In *US – Shrimp*, the Appellate Body accepted that sub-paragraph (g) referred to measures "primarily aimed at" conservation;⁵⁸⁶ it also described this relationship as "a close and genuine relationship of ends and means"⁵⁸⁷ that requires an examination of the relationship between the general structure and design of a measure and the policy goal it purports to serve.⁵⁸⁸ The Appellate Body has explained that:

"Article XX (g) requires that the measure sought to be justified be one which "relat[es] to" the conservation of exhaustible natural resources. In making this determination, the treaty interpreter essentially looks into the relationship between the measure at stake and the legitimate policy of conserving exhaustible natural resources".⁵⁸⁹

7.371 The Panel will, therefore, examine and analyse the relationship between, on the one hand, the 930,000 metric tonnes quota on refractory-grade bauxite, and, on the other hand, 15% export duty on

⁵⁸⁰ European Union's second written submission, paras. 242, 245; United States' second written submission, para. 119; Mexico's second written submission, para. 123.

⁵⁸¹ United States' second written submission, para. 121; Mexico's second written submission, para. 125.

⁵⁸² United States' second written submission, para. 125; Mexico's second written submission, para. 129.

⁵⁸³ Appellate Body Report, *US – Gasoline*, p. 18, DSR 1996:I, 3, at p. 17 (emphasis added).

⁵⁸⁴ Appellate Body Report, *US – Gasoline*, p. 19, DSR 1996:I, 3, at p. 18.

⁵⁸⁵ Appellate Body Report, *US – Gasoline*, p. 19, DSR 1996:I, 3, at p. 17.

⁵⁸⁶ Appellate Body Report, *US – Shrimp*, para. 136.

⁵⁸⁷ Appellate Body Report, *US – Shrimp*, para. 136.

⁵⁸⁸ Appellate Body Report, *US – Shrimp*, para. 137.

⁵⁸⁹ Appellate Body Report, *US – Shrimp*, para. 135.

fluorspar and the goal on which China claims its measures are based – the *conservation* of refractory-grade bauxite and fluorspar.

"Conservation"

7.372 The dictionary definition of the noun "conservation" is "the action of keeping from harm, decay, loss or waste; careful preservation. The preservation of existing conditions.... The preservation of the environment, esp. of natural resources".⁵⁹⁰ The verb "conserve" is defined as "Keep from harm, decay, or loss esp. with view to later use; preserve with care. Maintain (energy etc.) unchanged in total quantity according to a conservation law".⁵⁹¹ The noun "preservation" is defined as "The action or an act of preserving or protecting something; the fact of being preserved".⁵⁹² To "preserve", is to "Keep from harm, injury; take care of, protect...keep from decay; maintain (a state of things)".⁵⁹³ In sum, these dictionary definitions define "conservation" as the act of preserving and maintaining the existing state of something, in this case "natural resources" covered by Article XX(g).⁵⁹⁴

7.373 Having considered the ordinary meaning of the relevant terms of Article XX(g), we turn to their context. Pursuant to Article 31(2) of the *Vienna Convention*, which makes clear that the context of a treaty includes its "text, including its preamble and annexes", the Preamble to the WTO Agreement forms part of the context of Article XX(g). The Preamble's role as relevant context for interpreting Article XX(g) was confirmed by the Appellate Body in *US – Shrimp*, where it stated that the Preamble gives "colour, texture, and shading to [the] interpretation of the agreements annexed to the *WTO Agreement*, in this case, the GATT 1994".⁵⁹⁵

7.374 The Preamble recognizes that WTO Members' trade relations should:

"...[allow] for the optimal use of the world's resources in accordance with the *objective of sustainable development*, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at *different levels of economic development*".⁵⁹⁶

⁵⁹⁰ *Shorter Oxford English Dictionary*, 5th edn., L. Brown (ed.) (Oxford University Press, 2002), Vol. 1, p. 492.

⁵⁹¹ *Shorter Oxford English Dictionary*, 5th edn., L. Brown (ed.) (Oxford University Press, 2002), Vol. 1, p. 493.

⁵⁹² *Shorter Oxford English Dictionary*, 5th edn., L. Brown (ed.) (Oxford University Press, 2002), Vol. 2, p. 2333.

⁵⁹³ *Shorter Oxford English Dictionary*, 5th edn., L. Brown (ed.) (Oxford University Press, 2002), Vol. 2, p. 2333.

⁵⁹⁴ Other definitions of the term "conservation" are reflected in international agreements and conventions which tend to define the term "conservation" in light of the scope of the agreement or in relation to other obligations, meaning the act of preserving and maintaining the existing state of something in this case "natural resources". For instance, the Convention on Biological Diversity defines the "conservation of biological diversity" as "the *in situ* conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings...". The Preamble to the 1940 Western Hemisphere Convention expressed an intention "to protect representatives of all species and genera of their native flora and fauna...over areas extensive enough to assure them from becoming extinct through any agency within man's control". Further, the parties to the Association of South East Asian Nations (ASEAN) Agreement aimed to "ensur[e] the survival and promoting the conservation of all species under their jurisdiction and control". The 1979 Bonn Convention defines "conservation status" as "the sum of influences acting on the migratory species that may affect its long term distribution and abundance".

⁵⁹⁵ Appellate Body Report, *US – Shrimp*, para. 153.

⁵⁹⁶ WTO Agreement, Preamble (emphasis added).

7.375 Thus, a proper reading of Article XX(g) in the context of the GATT 1994 should take into account the challenge of using and managing resources in a sustainable manner that ensures the protection and conservation of the environment while promoting economic development. As the Appellate Body explained, to do so may require "a comprehensive policy comprising a multiplicity of interacting measures".⁵⁹⁷

7.376 Pursuing multi-faceted objectives, usually involves making policy choices and prioritization; the chosen policy depends on, *inter alia*, the choice of particular economic policy objectives (e.g., employment; income; tax etc.); social policy objectives (e.g., education; health; etc.); and, environmental policy objectives (e.g., conservation; pollution reduction; waste management; recycling; biodiversity preservation). These different policy objectives cannot be viewed in isolation; they are related facets of an integrated whole. Moreover, the "interacting measures"⁵⁹⁸ chosen by a Member will reflect and integrate these related policy goals. In choosing appropriate conservation measures, "WTO Members have a large measure of autonomy to determine their own policies", provided that they respect the requirements of, *inter alia*, Article XX(g).⁵⁹⁹

7.377 In our view, the Panel must take into account in interpreting Article XX(g) principles of general international law applicable to WTO Members.⁶⁰⁰ Article 31(3)(c) of the *Vienna Convention* provides that in interpreting a treaty, there shall be taken into account together with the context "any relevant rules of international law applicable in the relations between the parties".

7.378 One of the fundamental principles of international law is the principle of state sovereignty, denoting the equality of all states in competence and independence over their own territories and encompassing the right to make laws applicable within their own territories without intrusion from other sovereign states. Independent decisions can be taken with regard to matters including the choice of political, economic and social systems. The principle of state sovereignty is also exercised whenever states choose to enter into an international agreement with other sovereign states.

7.379 This was first established by the Permanent Court of International Justice (PCIJ) in the case of the *S.S Wimbledon* (1923), where it confirmed that "the right of entering into international engagements is an attribute of State sovereignty".⁶⁰¹ This principle was further elaborated in the PCIJ's advisory opinion on the *Exchange of Greek and Turkish Populations* (1925).⁶⁰² We find especially instructive for our purposes the PCIJ's consideration of the principle in the case on *Jurisdiction of the European Danube Commission between Galatz and Braila* (1927), where the Court stated that "restrictions on the exercise of sovereign rights accepted by treaty by the State concerned cannot be considered as an infringement of sovereignty".⁶⁰³

7.380 An important element of the principle of state sovereignty is the principle of sovereignty over natural resources, recognized as a principle of international law⁶⁰⁴, and allowing states to "freely use and exploit their natural wealth and resources wherever deemed desirable by them for their own

⁵⁹⁷ Appellate Body Report, *Brazil – Retreaded Tyres*, para.151.

⁵⁹⁸ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

⁵⁹⁹ Appellate Body Report, *US – Gasoline*, p. 30, DSR 1996:I, 3, at p. 28.

⁶⁰⁰ Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.67.

⁶⁰¹ PCIJ, *S.S Wimbledon*, p.25.

⁶⁰² [1925] *Publ. PCIJ*, Series B, no 10, p. 21.

⁶⁰³ *Jurisdiction of the European Danube Commission between Galatz and Braila*, [1927] *Publ. PCIJ*, Series B, no 14, p. 36.

⁶⁰⁴ Resolution 1803 (XVII), *Permanent Sovereignty Over Natural Resources* (14 December 1962) (adopted by 87 votes to 2, 12 abstentions).

progress and economic development".⁶⁰⁵ The principle of sovereignty over natural resources is embodied in a number of international agreements, including in the Preamble of the *Convention on Biological Diversity*, which "[reaffirms] that States have sovereign rights over their biological resources".⁶⁰⁶

7.381 In the Panel's view, consistently with Article 31(3)(c) of the *Vienna Convention*, our interpretation of Article XX(g) should "take into account" the principle of sovereignty over natural resources. The principle of sovereignty over natural resources affords Members the opportunity to use their natural resources to promote their own development while regulating the use of these resources to ensure sustainable development. Conservation and economic development are not necessarily mutually exclusive policy goals; they can operate in harmony. So too can such policy goals operate in harmony with WTO obligations, for Members must exercise their sovereignty over natural resources consistently with their WTO obligations. In the Panel's view, Article XX(g) has been interpreted and applied in a manner that respects WTO Members' sovereign rights over their own natural resources.⁶⁰⁷

7.382 The Panel observes that the ability to enter into international agreements – such as the WTO Agreement – is a quintessential example of the exercise of sovereignty. In joining the WTO, China

⁶⁰⁵ U.N. G.A. Resolution 626 (VII), *Right to Exploit Freely Natural Wealth and Resources* (21 December 1952).

⁶⁰⁶ *The Convention on Biological Diversity*, done at Rio de Janeiro, 5 June 1992, 1760 UNTS 79; 31 International Legal Materials.

⁶⁰⁷ Recall for instance, that during the Tokyo Round discussions on the adoption of the *Understanding Regarding Export Restrictions and Charges*, GATT contracting parties discussed the importance of the sovereignty of States over their natural resources. See GATT Multilateral Trade Negotiations, Group "Framework", MTN/FR/W/23. The GATT and the WTO dispute settlement systems have dealt with several disputes concerned with natural resources; see for instance; *US – Shrimp (Viet Nam)*(DS404); *US – Tuna II (Mexico)* (DS381); *US – Customs Bond Directive (DS345 and DS343)*; *EC – Salmon (Norway)*(DS337); *US – Shrimp (Ecuador)*(DS335); *Japan – Quotas on Laver*(DS323); *US – Softwood Lumber VI (DS277)*; *US – Softwood Lumber V (DS264)*; *US – Softwood Lumber IV (DS257)*; *EC – Tariff Preferences (DS246)*; *US – Softwood Lumber III (DS236)*; *EC – Sardines (DS231)*; *Chile – Swordfish (DS193)*; *Argentina – Hides and Leather (DS155)*; *EC – Asbestos (DS135)*; *US – Shrimp (DS58)*; *Brazil – Desiccated Coconut (DS22)*; *Australia – Salmon (DS18)*; *EC – Scallops (Peru and Chile) (DS12 and 14)*; *EC – Scallops (Canada) (DS7)*; *US – Gasoline (DS2 and 4)*; non-established panels, *EC – Measures Prohibiting the Importation and Marketing of Seal Products (Norway)*(DS401); *EC – Measures Prohibiting the Importation and Marketing of Seal Products (Canada) (DS400)*; *EC – Certain Measures Prohibiting the Importation and Marketing of Seal Products (Canada) (DS369)*; *EC – Definitive Safeguard Measure on Salmon (Norway) (DS328)*; *EC – Definitive Safeguard Measure on Salmon (Chile) (DS326)*; *US – Provisional Anti-Dumping Measures on Shrimp from Thailand (Thailand) (DS324)*; *India – Anti-Dumping Measures on Certain Products from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (DS318)*; *US – Reviews of Countervailing Duty on Softwood Lumber from Canada (DS311)*; *Mexico – Certain Pricing Measures for Customs Valuation and Other Purposes (DS298)*; *India – Import Restrictions Maintained Under the Export and Import Policy 2002-2007*(DS279); *US – Provisional Anti-Dumping Measure on Imports of Certain Softwood Lumber from Canada (DS247)*; *EC – Generalized System of Preferences (DS242)*; *US – Anti-Dumping Duties on Silicon Metal from Brazil (DS239)*; *EC – Measures Affecting Soluble Coffee (DS209)*; *Egypt – Import Prohibition on Canned Tuna with Soybean Oil (DS205)*; *Nicaragua – Measures Affecting Imports from Honduras and Colombia (DS201)*; *Brazil – Measures on Minimum Import Prices (DS197)*; *EC – Measures Affecting Differential and Favourable Treatment of Coffee (DS154)*; *India – Measures Affecting Customs Duties (DS150)*; *EC – Measures Affecting Imports of Wood of Conifers from Canada (DS137)*; *India – Measures Affecting Export of Certain Commodities (DS120)*; *Pakistan – Export Measures Affecting Hides and Skins (DS107)*; *Pakistan – Export Measures Affecting Hides and Skins (DS107)*; *US – Countervailing Duty Investigation of Imports of Salmon from Chile (DS97)*; *US – Import Prohibition of Certain Shrimp and Shrimp Products (DS61)*; *Korea – Measures concerning Bottled Water (DS20)*; *Malaysia – Prohibition of Imports of Polyethylene and Polypropylene (DS1)*.

obtained significant commercial and institutional benefits, including with respect to its natural resources. It also committed to abide by WTO rights and obligations.

7.383 Exercising its sovereignty over its own natural resources while respecting the requirements of Article XX(g) that China committed to respect, is an efficient way for China to pursue its own social and economic development. These considerations support the view that "a comprehensive policy comprising a multiplicity of interacting measures" is an appropriate policy to conserve natural resources.⁶⁰⁸

7.384 The Panel refers now, as part of the immediate context of Article XX(g), to the provisions of paragraph (i) of Article XX, which deal with situations where the exports of domestic materials can be restricted to assist the affected domestic industry. Even in such a situation where a Member is explicitly protecting its downstream industry, Article XX(i) ensures consideration of the interests of foreign producers.

7.385 Article XX(i) provides an exception for measures:

"involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; *Provided* that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination".

7.386 Article XX(i) provides explicitly that any export restrictions on domestic materials cannot be imposed to increase the protection of the domestic industry. Hence the restrictions remain subject to the core GATT principles of non-discrimination. In the Panel's view, Article XX(g), which provides an exception with respect to "conservation", cannot be interpreted in such a way as to contradict the provisions of Article XX(i), i.e., to allow a Member, with respect to raw materials, to do indirectly what paragraph (i) prohibits directly. In other words, WTO Members cannot rely on Article XX(g) to excuse export restrictions adopted in aid of economic development if they operate to increase protection of the domestic industry.

(ii) *"if such measures are made effective in conjunction with restrictions on domestic production or consumption"*

7.387 Having reviewed how the requirements of Article XX(g) can be interpreted harmoniously with the international law principle of State sovereignty over its natural resources, the Panel continues its interpretation of the terms of Article XX(g), i.e., that such challenged measures are "made effective in conjunction with restrictions on domestic production or consumption".

7.388 China acknowledges that Article XX(g) requires that the challenged measures be "made effective in conjunction with restrictions on domestic production or consumption". China recalls that the jurisprudence has established that this phrase implies a degree of "*even-handedness*", but this does not mean that actions must affect foreigners and domestic actors in an identical manner.⁶⁰⁹ China claims that pursuant to the principle of sovereignty over natural resources, resource-endowed countries, including developing countries, can manage the supply and use of those resources through conservation-related measures that foster the sustainable development of their domestic populations.

⁶⁰⁸ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

⁶⁰⁹ China's first written submission, paras. 149-150.

7.389 According to China, provided that restrictions are imposed on domestic supply, Article XX(g) does not oblige resource-endowed countries to ensure that the economic development of other user-countries benefits equally or identically from the exploitation of the resources of resource-endowed countries.⁶¹⁰ For China, all parties understand the phrase "made effective in conjunction with domestic restrictions on production or consumption" to mean that identical treatment of foreign and domestic actors is not required. It adds that (i) the Appellate Body has recognized that no particular distribution of the burden is required; and (ii) Article XXXVI:5 and its *Ad Note* confirm that the burden on domestic and foreign supply need not be identical because developing countries may pursue economic diversification through development of domestic industries to process primary products. China fundamentally disagrees with any suggestion by the European Union that Article XX(g) implies that a conservation scheme cannot impose a lesser burden on domestic users than on foreign users. After all, says China, the WTO Agreement is not a commodity-sharing agreement.⁶¹¹

7.390 The European Union agrees that Article XX(g) does not necessarily require that domestic and foreign users of Chinese raw materials are to be treated in an identical manner, but it does require them to be treated in an even-handed or an equitable manner.⁶¹² The European Union believes that Article XX(j) of the GATT 1994 provides useful context for interpreting the "*even-handedness*" requirement of Article XX(g).⁶¹³ Article XX(j) affirms the principle of equitable access that is reflected in the requirement in Article XX(g) that a measure that relates to conservation must be "*made effective in conjunction with restrictions on domestic production or consumption*".⁶¹⁴

7.391 Likewise, the United States and Mexico maintain that under Article XX(g), "made effective in conjunction with restrictions on domestic production or consumption" requires that the challenged measure at issue be operative, in force or effective in combination with operative, in force, or effective actions or facts that confine or fix definitely the permitted extent, amount, duration, etc. of domestic production or consumption.⁶¹⁵ Furthermore, the United States and Mexico argue that the interpretation of "*even-handedness*" advanced by China is incorrect. They contend that the Appellate Body's ruling in *US – Gasoline*, which referred to the boundaries of the even-handed requirement, held that a measure would not meet the requirements of the "*even-handedness*" if it were at the end of the spectrum where only foreign interests were being negatively affected and domestic interests suffered no negative impact.⁶¹⁶

7.392 The complainants insist that the Appellate Body's reasoning in *US – Gasoline* does not stand for the proposition that China suggests, i.e., that Article XX(g) permits a Member to impose a measure that puts at an advantage its own domestic interests at the expense of the interests of other Members, as long as the measure imposes some level of restriction on domestic supply that is greater than nothing.⁶¹⁷

Restrictions on domestic production or consumption

7.393 The Panel recalls that a WTO-inconsistent measure may be justified pursuant to Article XX(g) if the respondent whose measure is being challenged can demonstrate that its measure is made effective in conjunction with restrictions on domestic production or consumption.

⁶¹⁰ China's first written submission, para. 153.

⁶¹¹ China's second written submission, paras. 195-219.

⁶¹² European Union's second written submission, para. 252.

⁶¹³ European Union's second written submission, para. 253.

⁶¹⁴ European Union's second written submission, para. 254.

⁶¹⁵ United States' second written submission, para. 131; Mexico's second written submission, para. 135.

⁶¹⁶ United States' second written submission, paras. 134-136; Mexico's second written submission, paras. 138- 140.

⁶¹⁷ United States' second written submission, para. 137; Mexico's second written submission, para. 141.

7.394 The term "restriction" is defined as: "A thing which restricts someone or something, a limitation on action, a limiting condition or regulation" and as "[t]he action or fact of limiting or restricting someone or something," specifically "[d]eliberate limitation of industrial output"⁶¹⁸ the action or fact of confining or binding the extent, amount, duration, etc. of permitted⁶¹⁹ - in the case of Article XX(g) - domestic production or consumption.⁶²⁰ The Panel considers that the ordinary meaning of "restriction" is that which has a limiting effect.

Effective in conjunction with

7.395 The GATT Panel in *Canada – Herring and Salmon* interpreted the meaning of the term "effective in conjunction with":

"The Panel, similarly, considered that the term 'in conjunction with' in Article XX (g) had to be interpreted in a way that ensures that the scope of possible actions under that provision corresponds to the purpose for which it was included in the General Agreement. A trade measure could therefore in the view of the Panel only be considered to be made effective 'in conjunction with' production restrictions *if it was primarily aimed at rendering effective these restrictions*".⁶²¹

7.396 The ordinary meaning of the term "*made effective*" was clarified in *US – Gasoline* where the Appellate Body said the phrase means that the challenged measure is "operative", "in force", or has "come into effect".⁶²² In the same appeal, the Appellate Body addressed the meaning of the entire clause:

"Put in a slightly different manner, we believe that the clause 'if such measures are made effective in conjunction with restrictions on domestic products or consumption' is appropriately read as a requirement that the measures concerned impose restrictions, not just in respect of imported [products], but also with respect to domestic [products]".⁶²³

7.397 Therefore, in our view, restrictions on domestic production or consumption must not only be applied jointly with the challenged export restrictions but, in addition, the purpose of those export restrictions must be to ensure the effectiveness of those domestic restrictions.⁶²⁴

7.398 In the Panel's view, Article XX(g), in requiring the domestic restrictions to be made effective in conjunction with the (challenged) export restriction, is requiring that both the export restrictions and the related domestic restrictions operate at the same time. This view is supported by the ordinary meaning of the term in conjunction with, which is "the act or an instance of conjoining: the state of being conjoined; occurrence together in time or space".⁶²⁵ The requirement that export and domestic restrictions occur together is consistent with the requirement that the export restriction be *primarily*

⁶¹⁸ *Shorter Oxford English Dictionary*, 1st edn., L. Brown (ed.) (Oxford University Press, 1993), Vol. 2, p. 2569.

⁶¹⁹ *Shorter Oxford English Dictionary*, 1st edn., L. Brown (ed.) (Oxford University Press, 1993), Vol. 2, p. 2569.

⁶²⁰ The Panel also referred to the definition of "restriction" in its determination of GATT Article XI to mean "...'limiting' or have a 'limiting effect' ...". See, e.g., para. 7.206 above.

⁶²¹ GATT Panel Report, *Canada – Herring and Salmon*, para. 4.6.

⁶²² Appellate Body Report, *US – Gasoline*, p. 20, DSR 1996:I, 3, at p. 19.

⁶²³ Appellate Body Report, *US – Gasoline*, p. 20, DSR 1996:I, 3, at p. 19.

⁶²⁴ GATT Panel Report, *Canada – Herring and Salmon*, para. 4.6.

⁶²⁵ Webster's New Encyclopaedic Dictionary.

aimed at rendering effective the domestic restriction.⁶²⁶ Thus it is important for us to have regard to the timeframe for China's restrictions on domestic production or consumption.

7.399 China argues that the provisions of Article XXXVI:5 of the GATT 1994 can be used as legal context in the interpretation of Article XX(g). For China GATT Article XXXVI:5 confirms that it is entitled to use and conserve its natural resources for itself with a view to diversifying its *own* economy.⁶²⁷ Supporting its steel industry will help China to diversify because the growth of the steel industry will stimulate the development of the infrastructure sector, which, in turn, will spur China's overall economic development, industrialization and diversification.⁶²⁸ The goal would mean that the export restrictions would be WTO-legitimate under GATT Article XX(g).

7.400 The Panel has a certain difficulty in seeing how a reference to the right to diversification set out in Article XXXVI:5 can assist it in its interpretation of Article XX(g). Even assuming that China has properly identified an interpretative ambiguity in Article XX(g), and that Article XXXVI:5 includes a right to economic diversification – which we are not suggesting it does – we cannot agree with China that such a right could undermine or even contradict the terms of paragraph (g) that require even-handed domestic restrictions on production or consumption, as discussed below.

7.401 In any event, the Panel is of the view that China's claim that its incentives to the steel industry will foster China's diversification through the development of its infrastructure is not substantiated with evidence. The Panel notes that export restrictions on refractory-grade bauxite and fluorspar support mainly the aluminium and steel industries. The Panel finds it hard to see how China will improve diversification by supporting further development of these sectors, where China is already a global leader.⁶²⁹ Moreover, if, as China claims, better infrastructure would enhance diversification, the Panel is left wondering how supporting the steel and aluminium industry (already well developed) will improve the quality of China's infrastructure.

Requirement of even-handedness

7.402 The Appellate Body emphasized that the term "if such measures are made effective in conjunction with restrictions on domestic production or consumption" imposes "a requirement of *even-handedness* in the imposition of restrictions ... upon the production or consumption of exhaustible natural resources".⁶³⁰

"There is, of course, no textual basis for requiring identical treatment of domestic and imported products. Indeed, where there is identity of treatment - constituting real, not

⁶²⁶ GATT Panel Report, *Canada – Herring and Salmon*, para. 4.6.

⁶²⁷ China's first opening oral statement, para. 24.

⁶²⁸ China's response to Panel question No. 34 following the second substantive meeting, paras. 157-159.

⁶²⁹ The Report on Refractory Bauxite at p. 21 (Exhibit CHN-10) indicates that "China in 2009 produced 568 million tonnes of steel [...] [which amounts to] six and a half times more steel than the world's second largest steel producer (Japan)". The same Report, at p. 22, shows that in the last decade "China's steel production grew at an average rate of 19% a year. By comparison, production in the rest of the world did not grow at all over the period, with the result that by 2009 China was producing almost half of the world's steel". The Report on Fluorspar at p. 18 (Exhibit CHN-9) indicates that "China in 2009 produced 12.85 million tonnes of aluminium [...] [which amounts to] four times more than the world's second largest aluminium producer (Russia)". The same Report, at p. 19, shows that in the last decade "China's aluminium production grew at an average rate of 20% a year. By comparison, production in the rest of the world grew at 2% a year". See also United States' comments on China's responses to the Panel questions after the second substantive meeting, paras. 120 and 121.

⁶³⁰ Appellate Body Report, *US – Gasoline*, p. 20-21, DSR 1996:I, 3, at p. 19.

merely formal, equality of treatment - it is difficult to see how inconsistency...would have arisen in the first place. On the other hand, if *no* restrictions on domestically produced like products are imposed at all, and all limitations are placed upon imported products *alone*, the measure cannot be accepted as primarily or even substantially designed for implementing conservationist goals. The measure would simply be naked discrimination for protecting locally-produced goods".⁶³¹ [emphasis added]

7.403 China argues that "Article XXXVI:5 and its *Ad Note* confirm that Article XX(g) does not require identity between the restrictions on domestic and foreign supply of natural resources"⁶³² and "recognizes[s] the objective of achieving economic diversification of developing country economies through the development of industries to process primary products".⁶³³ In particular, China argues that export restrictions are needed to support its economy and to enable it to diversify. In other words, a proportionately higher burden on foreigners is justified.

7.404 The Panel agrees with China that, in interpreting and applying Article XX(g) in relation to non-renewable resources, the treaty interpreter may take into account the international law principle of sovereignty over natural resources, to the extent relevant to the case at hand. The Panel also agrees that resource-endowed countries are entitled to manage the supply and use of those resources through conservation-related measures that foster the sustainable development of their domestic economies consistently with general international law and WTO law. As long as even-handed restrictions are imposed on domestic supply, Article XX(g) does not oblige resource-endowed countries to ensure that the economic development of other user-countries benefits identically from the exploitation of the resources of the endowed countries.

7.405 The Panel is of the view that China's right to economic development and its sovereignty over its natural resources are not in conflict with China's rights and obligations as a WTO Member. When China chose to join the WTO in full exercise of its sovereignty, China made the concurrent decision that its sovereign rights over its natural resources would thereafter be exercised within the parameters of the WTO provisions, including those of Article XX(g). At that time, China was aware of the terms of Article XX, as interpreted by the Appellate Body in its *Gasoline* and *Shrimp* reports, in particular with respect to the requirement that restrictions for which Article XX(g) is invoked could be justified only if they are made effective in conjunction with restrictions on domestic production or consumption. China's Accession Protocol does not reveal any contrary understanding on the part of China or any WTO Members.

7.406 This is, in fact, the very essence of the conservation objective set forth in Article XX(g): if a WTO Member is not taking steps to manage the supply of natural resources domestically, it is not entitled to seek the cover of Article XX(g) for the measures it claims are helping to conserve the resource for future generations.

7.407 Finally, the Panel recalls the findings in *Canada – Herring and Salmon*⁶³⁴ which related to a prohibition of exports of unprocessed herring and salmon by Canada. In *US – Gasoline*, the Appellate Body referred to an earlier GATT dispute and captured the essence of paragraph (g) of Article XX:

"This prohibition effectively constituted a ban on purchases of certain unprocessed fish by foreign processors and consumers while imposing no corresponding ban on

⁶³¹ Appellate Body Report, *US – Gasoline*, p. 21, DSR 1996:I, 3, at p. 19.

⁶³² China's second written submission, para. 203.

⁶³³ China's second written submission, para. 203.

⁶³⁴ GATT Panel Report, *Canada – Herring and Salmon*, para. 5.1.

purchase of unprocessed fish by domestic processors and consumers. The prohibitions appeared to be designed to protect domestic processors by giving them exclusive access to fresh fish and at the same time denying such raw material to foreign processors. The Panel concluded that these export prohibitions were not justified by Article XX(g)".⁶³⁵

7.408 In sum, paragraph (g) of Article XX can justify GATT-inconsistent trade measures if such measures along with parallel domestic restrictions aimed at the conservation of natural resources and are primarily aimed at rendering effective parallel domestic restrictions operating for the conservation of natural resources. *A contrario*, Article XX(g) cannot be invoked for GATT-inconsistent measures whose goal or effects is to insulate domestic producers from foreign competition in the name of conservation.

7.409 Having addressed the interpretation of Article XX(g), the Panel will now proceed to examine China's export restrictions on refractory-grade bauxite and fluorspar to determine whether they can be justified pursuant to Article XX(g).

7.410 Before examining the relevant evidence and argumentation of the parties with respect to refractory-grade bauxite and fluorspar, the Panel recalls that it is the Member invoking Article XX that bears the burden of proof.⁶³⁶ Finally, examining a justification under Article XX, as in this dispute, requires the Panel to assess much evidence (including expert evidence). In that context, the Panel enjoys a broad margin of discretion - as the trier of the facts - in assessing the value of the evidence and the weight to be ascribed to that evidence.⁶³⁷ At the same time, the Panel must respect the standard of review set out in Article 11 of the DSU.

(b) Whether export quotas applied to refractory-grade bauxite and export duties applied to fluorspar (met-spar and acid-spar) are justified pursuant to Article XX(g) of the GATT 1994

7.411 China's defence to justify its export restrictions on refractory-grade bauxite and fluorspar is based on the argument that these raw materials are exhaustible natural resources that need to be managed and conserved. For China, refractory-grade bauxite and fluorspar are essential for its sustainable development, as they are a key input in the production of steel and aluminium. Given that China's reserves of these resources are limited (at the 2009 rate of extraction, China estimates a lifespan of 4.5 years for its fluorspar reserves, and 16 years for its refractory-grade bauxite reserves)⁶³⁸, China has adopted a variety of measures in order to manage the supply and use of refractory-grade bauxite and fluorspar over time. These measures ensure that these resources provide social and economic benefits over a longer period than would otherwise be the case. China contends that export restrictions on these raw materials are an integral part of China's conservation strategy.

⁶³⁵ Appellate Body Report, *US – Gasoline*, footnote 42.

⁶³⁶ Appellate Body Report, *US – Gasoline*, pp. 22-23, DSR 1996:I, 3, at p. 21.

⁶³⁷ Appellate Body Report, *US – Wheat Gluten*, para. 151. If it is clear that panels have exclusive jurisdiction over the evaluation of factual and expert evidence, "precisely how much and precisely what kind of evidence will be required to establish such a presumption will necessarily vary from measure to measure, provision to provision, and case to case" (Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, 323, at p. 335) as "[the Appellate Body] cannot second-guess the Panel in appreciating either the evidentiary value of ... studies or the consequences, if any, of alleged defects in [the evidence]". (Appellate Body Report, *Korea – Alcoholic Beverages*, *supra*, footnote 58, para. 161). There are, however, no criteria or specific standards concerning the credibility and weight that the Panel should ascribe to the different elements of evidence. Criteria such as "balance of probabilities" or "preponderance of evidence" were rejected in favour of panels' discretion, a discretion that must nonetheless respect the provisions of Article 11 of the DSU for an "objective" assessment of the facts and the law.

⁶³⁸ Exhibits CHN-86, JE-166.

Without these measures, China argues, the burden of China's supply limitations would be borne unduly by China's domestic users, which would undermine China's development.⁶³⁹

7.412 According to the complainants, the export restrictions on refractory-grade bauxite and fluorspar cannot be justified under Article XX(g). First, the complainants maintain that there is a "complete lack of any relationship" between the export restrictions on the materials and the goal of their conservation. Rather, they claim there is a close and genuine relationship between the export restrictions and China's economic goals.⁶⁴⁰ In support of this claim, the complainants adduce evidence that while restricting exports of the raw materials, China does not restrict exports of the downstream products produced using the raw materials as inputs.⁶⁴¹ For the complainants this is clear evidence that China's concern is not conservation.

7.413 Second, the complainants maintain that China has not satisfied its burden of proving that the export restrictions on refractory-grade bauxite and fluorspar are made effective in conjunction with restrictions on domestic production or consumption. They point out that most of the domestic measures China refers to in the course of arguing that it respects the requirements of Article XX(g) have been introduced during the course of these proceedings, and they do not actually limit domestic production or consumption of the materials at issue.

7.414 Third, even if China has proved its measures are made effective in conjunction with domestic restrictions, albeit put in place during the Panel process, China would still not have shown that it satisfies the requirement of even-handedness necessary pursuant to Article XX(g). This is because, in the complainants view, "[i]n order for its measure to be even-handed [...] it seems as though China would need to counter-balance the impact of the export duty on foreign users with some measures that similarly affect domestic users of fluorspar without imposing a 'double' burden on foreign users".⁶⁴² Finally, the complainants assert that China's export duty on fluorspar does not satisfy the requirements of the *chapeau* of Article XX.

7.415 In order for the Panel to determine whether China can justify its export quota on refractory-grade bauxite and its export duties on fluorspar pursuant to GATT Article XX(g), the Panel will need to analyse, first, whether export restrictions on refractory-grade bauxite and fluorspar "relate to the conservation" of an exhaustible natural resource. Secondly, we must consider whether China's export measures "are made effective in conjunction with domestic restrictions on production or consumption".

(i) *Whether China's its export quota on refractory-grade bauxite and export duty on fluorspar relate to the conservation of an exhaustible natural resource*

7.416 To begin, the Panel must determine whether China's export quota on refractory-grade bauxite and export duty on fluorspar "relate to conservation". Thus we must establish "whether there is a close and genuine relationship of ends and means" between the goal of conservation of refractory-grade bauxite and fluorspar, and the means presented by the applicable export duty and export quota.⁶⁴³

⁶³⁹ China's first written submission, para. 188.

⁶⁴⁰ United States' second written submission, paras. 141 and 251; Mexico's second written submission, paras. 145 and 256.

⁶⁴¹ United States' second written submission, para. 142 and 253; Mexico's second written submission, paras. 146 and 258. See also Exhibits JE-164, pp.11-13 (for fluorspar) and JE-165, pp. 24-27 (for refractory grade bauxite).

⁶⁴² United States' second written submission, para. 161; Mexico's second written submission, para. 165.

⁶⁴³ Appellate Body Report, *US – Shrimp*, para. 135.

7.417 Specifically, the export restrictions that China seeks to justify pursuant to GATT Article XX(g) are:

- (a) the portion⁶⁴⁴ of an export quota of 930,000 metric tonnes on Bauxite in its subcategories of "Aluminium ores and concentrates" (HS 2606.0000) and Refractory Clay (HS 2508.3000) that applies to "refractory grade bauxite" or "high alumina clay" which represents a sub-category of refractory Clay (HS 2508.3000)⁶⁴⁵; and
- (b) a temporary export duty of 15% on different categories of Fluorspar, including: fluorspar containing by weight \leq 97% calcium fluoride, also referred to as "Met-spar" (HS 2529.2100), and fluorspar containing, by weight $>$ 97% calcium fluoride, also referred to as "Acid-spar" (HS 2529.2200).

7.418 To determine whether a challenged export restriction relates to conservation, a panel should examine the text of the measure itself, its design and architecture, and its context. First, the Panel observes that the measure imposing the export duty on fluorspar does not refer to the goal of conservation⁶⁴⁶; the measure imposing an export quota on refractory-grade bauxite does not refer to the relationship between the export quota and the goal of conservation.⁶⁴⁷

7.419 In its first written submission, with a view to supporting its claim that its export restrictions on refractory-grade bauxite and fluorspar are justified pursuant to Article XX(g), China submits that it has adopted a "comprehensive set of measures relating to the conservation of fluorspar"⁶⁴⁸ and a "comprehensive set of measures relating to the conservation of bauxite".⁶⁴⁹ It continues by referring to its 2001 "*Mineral Resources Policy*".⁶⁵⁰ In a document entitled "*China's Policy on Mineral Resources Information Office of the State Council of December 2003*" which refers to fluorspar explicitly, China *inter alia* commits to "formulate a unified policy on the import and export of mineral products in accordance with the WTO rules and [China's] commitments in its accession to the WTO".⁶⁵¹ We note, however, that this policy document refers for the most part to the economic and development gains that China can make through the exploitation of its mineral resources. The Panel cannot find, nor has China pointed to, measures relating to the conservation of refractory-grade bauxite and fluorspar in the evidence China submitted relating to what it terms its "mineral policy".

7.420 To support its claim that the export quota on refractory-grade bauxite is justified pursuant to Article XX(g), China lists 13 measures which, according to China, are relevant for its conservation programme on refractory-grade bauxite. There are equivalent measures in most cases relating to fluorspar. Nine of those measures were enacted before 2009, and the others in 2010, i.e. after the

⁶⁴⁴ China submits that such portion (or refractory bauxite) represents approximately 75% of bauxite exports under code 2508.3999. China's opening oral statement at the second substantive meeting, para. 92. See also exhibits CHN-513: table customs data refractory grade bauxite, and calculations.

⁶⁴⁵ The specific Chinese measure which sets the 2009 export quotas for bauxite is the "*Ministry of Commerce Announcement Regarding 2009 Agricultural and Industrial Products Export Quota Amounts (Announcement No. 83 of 2008)*" (Exhibit JE-79). (Exhibit JE-181). China refers to this subset of bauxite as "refractory bauxite" and submits that complainants have also used this term (Exhibits CHN-10; CHN-96; China's responses of 13 September 2001, paras 32 to 36; China's second written submission, paras 84-93; China's opening oral statement at the second substantive meeting, paras. 84 to 93); see also discussion in paras. 7.244 and 7.245 above.

⁶⁴⁶ Exhibit JE-21.

⁶⁴⁷ Exhibit JE-79.

⁶⁴⁸ China's first written submission, para. 156.

⁶⁴⁹ China's first written submission, para. 526.

⁶⁵⁰ China's first written submission, para. 157-158.

⁶⁵¹ Exhibit CHN-79, p.11; see also Exhibit CHN-80.

Panel's establishment. China asserts that all those measures confirm that its export restrictions on refractory-grade bauxite and fluorspar are an integral part of its conservation programmes within the meaning of Article XX(g).

7.421 The pre-2009 measures invoked by China for refractory-grade bauxite and fluorspar are the same, they are the following:

- (a) *Mineral Resources Law*⁶⁵² of 1986;
- (b) *Environmental Protection Law*⁶⁵³ of 1989;
- (c) *Provisional Regulations on Resource Tax*⁶⁵⁴ of 1994 and *Detailed Rules for the Implementation of the Provisional Regulations on Resource Tax*⁶⁵⁵ of 1994;
- (d) *Administration of Collection of the Mineral Resources Compensation Fees*⁶⁵⁶ of 1997;
- (e) *Administration of Registration of Mining of Mineral Resources*⁶⁵⁷ of 1998 ;
- (f) *National Mineral Resources Plan*⁶⁵⁸ of 2001;
- (g) *Notice of Opinions of Authorities on the Integration of Exploitation of Mineral Resources*⁶⁵⁹ of 2006; and
- (h) *National Mineral Resources Plan (2008-2015)*.⁶⁶⁰

7.422 The *National Mineral Resources Plan (2008-2015)* (item (h) above) describes China's conservation policy in the area of minerals including fluorspar: one of the policy tools mentioned is the restriction of extraction: "Restrict the extraction of such minerals as barite, fluorspar, graphite, magnesite, talc and rich phosphorite".⁶⁶¹ However, there is no discussion of a specific "conservation policy" for fluorspar or refractory-grade bauxite. Moreover, although the *National Mineral Resources Plan (2008-2015)* makes reference to fluorspar⁶⁶², and explicitly refers to the objectives of extraction restrictions of this mineral, it is a programmatic document that speaks of future restrictions, but does not refer to current restrictions. It makes no reference at all to refractory-grade bauxite.

7.423 The *Notice of Opinions of Authorities on the Integration of Exploitation of Mineral Resources* (item (g) above) does not specifically refer refractory-grade bauxite or to fluorspar; essentially it provides guidelines to promote the restructuring of the mining sector, with the goal of promoting the efficiency of resource extraction.⁶⁶³

⁶⁵² Exhibit CHN-78.

⁶⁵³ Exhibit CHN-88.

⁶⁵⁴ Exhibit CHN-89.

⁶⁵⁵ Exhibit CHN-91.

⁶⁵⁶ Exhibit CHN-92.

⁶⁵⁷ Exhibit CHN-93.

⁶⁵⁸ Exhibits CHN-94, JE-17.

⁶⁵⁹ Exhibit CHN-95.

⁶⁶⁰ Exhibit CHN-80.

⁶⁶¹ Exhibit CHN-80.

⁶⁶² Exhibit CHN-80, pp. 7-8.

⁶⁶³ Exhibit CHN-95.

7.424 The *Administration of Registration of Mining of Mineral Resources* (item (e) above) provides for monitoring and enforcement of compliance with licensing requirements by mining enterprises and does not refer specifically to refractory-grade bauxite or fluorspar.⁶⁶⁴ The *National Mineral Resources Plan* of 2001 (item (f) above) sets forth China's policy objectives for the use of mineral resources (emphasizing the importance of efficient use of resources), but, as the *Mineral Resources Law* of 1986 (item (a) above), does not refer to refractory-grade bauxite or fluorspar conservation programmes.⁶⁶⁵ The *Environmental Protection Law* (item (b) above) provides guidelines to foster environmental protection and to introduce environmental standards.⁶⁶⁶

7.425 In its first written submission, China submits excerpts from the *2009 Further Adjust of Import and Export Tariffs*⁶⁶⁷, which China describes as evidence that China's export restrictions on refractory-grade bauxite and fluorspar were always linked to the goal of conservation. The United States and Mexico take issue with the excerpts and cite the document more expansively:

"In order to *effectively bring into play the tariff policy's economic leverage, promote the adjustment of economic structure and the change of economic development mode*, further increase the import of advanced technologies, equipments and key parts and components, *fulfil the need of domestic economic and social development, promote resource saving and environmental protection*, and to improve people's standard of living, the State will implement relatively low interim import tariff rates on over 670 types of commodities next year . . .".⁶⁶⁸

7.426 The first part of the text identifies economic and development considerations, while the latter part refers to sustainable development considerations. The document also discusses more generally the lowering of import duty rates on products such as coal, fuel oil, epoxide resin, chassis of heavy wreckers, and automatic bobbin winders, with a view to "effectively bring into play the tariff policy's economic leverage, promote the adjustment of economic structure and the change of economic development mode". The Panel has not been able to see how this document confirms that China's export quota on refractory-grade bauxite and export duties on fluorspar were put in place as part of a comprehensive conservation programme relevant specifically to refractory-grade bauxite and fluorspar.

7.427 China also argues that export restrictions *contribute to its stated objective of conservation* of the natural resources at issue because by reducing foreign demand for the resource, they will reduce domestic production and, hence, the extraction of the resource.⁶⁶⁹ Furthermore, the use of export restrictions is said to be required because the use of domestic restrictions on production without export restraints would undermine China's sustainable development.⁶⁷⁰

7.428 The Panel has some difficulties with China's designed position. It seems to us that a policy of restricting 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.

⁶⁶⁴ Exhibit CHN-93.

⁶⁶⁵ Exhibit CHN-94, JE-17.

⁶⁶⁶ Regarding the measures introducing the resources tax and the compensation fee, see paras. 7.442-7.447 below. For the 2010 measures, see paras. 7.448-7.458 below.

⁶⁶⁷ Exhibit CHN-100.

⁶⁶⁸ Exhibit CHN-100, para. 3 (emphasis added).

⁶⁶⁹ China's first written submission, paras. 156, 164 and 187.

⁶⁷⁰ China's first written submission, paras. 187-188 and 520-521.

7.429 In light of the evidence submitted to the Panel, it is clear that there is a substantial increase in the domestic consumption of fluorspar and refractory-grade bauxite, while exports do not appear to have grown at the same pace. For example, "[f]rom 2000 to 2009, Chinese consumption of fluorspar reflected growth of approximately 124%".⁶⁷¹ Starting from 2007, China's annual refractory-grade bauxite (ores) and fluorspar extraction steadily increases, with fluorspar's extraction registering an increment of 60% from 2008 to 2009.⁶⁷² Moreover, for example "[i]n 2008, although far less fluorspar was exported from China in its raw material form than in 2000, more fluorspar in total was exported from China than in 2000 due to the substantial increase in exports of downstream products containing fluorspar".⁶⁷³ For the Panel, this evidence does not support China's claim that it has put in place a comprehensive plan to conserve refractory-grade bauxite and fluorspar given that domestic extraction has in fact increased.

7.430 The Panel is also concerned with the possibility that export restrictions may have long-term negative effects on conservation due to the increased demand from the downstream sector. An export restriction on an exhaustible natural resource, by reducing the domestic price of the materials, works in effect as a subsidy⁶⁷⁴ to the downstream sector⁶⁷⁵, with the likely result that the downstream sector will demand over time more of these resources than it would have absent the export restriction. This could offset the reduction in extraction determined by the export restriction.

7.431 China argues that the extraction and production caps that it has in place impede this effect. However, given that these caps are set at levels above the current level of extraction and production of these materials, the Panel has difficulty with this proposition.⁶⁷⁶

7.432 The Panel also observes that there is no clear link between the way the duty and the quota are set and any conservation objective. China does not provide any evidence or argument to justify the use of an export duty on fluorspar, as opposed to a quota on refractory-grade bauxite. To justify the use of an export quota in the case of refractory-grade bauxite, China argues that a quota serves to ensure constraint in case of a sudden increase of foreign demand. However, China has not provided any evidence to suggest anything other than a stable demand for refractory-grade bauxite. China also claims that "[a]t the 2009 rate of extraction, *only four and a half years of China's [fluorspar] reserves remain*".⁶⁷⁷ However, in its response to the Panel's questions, China could not provide an explanation

⁶⁷¹ Market Research on Fluorspar and Selected Fluorochemicals, October 2010, p. 9 and p. 34 (Exhibit JE-164).

⁶⁷² Exhibits CHN-83 (for fluorspar ores extraction data) and CHN-369 (for bauxite ores extraction data).

⁶⁷³ United States' second written submission, paras. 142-143; Mexico's second written submission, paras. 146-147. The United States and Mexico identify a similar trend in the downstream sector's exports of refractory grade bauxite (United States' second written submission, paras. 252 and 254; Mexico's second written submission, paras. 257 and 259).

⁶⁷⁴ The use of the term "subsidy" herewith does not implicate a legal conclusion under the WTO Agreement on Subsidies and Countervailing Duties.

⁶⁷⁵ Piermartini, R. (2004). 'The Role of Export Taxes in the Field of Primary Commodities'. World Trade Organization, Geneva, Switzerland. See also Gomez-Sabaini JC (1990) "The role of export taxes" in Tanzi, Vito, Ed (1990) Fiscal policy in Open developing economies. International Monetary Fund, Washington DC. Devarajan, S, Go D., Schiff M, and Suthiwart-Narueput S., "The Whys and the Why nots of Export taxation, World Bank Policy Research Working papers No 1684 (1996).

⁶⁷⁶ United States' second written submission, para. 172; Mexico's second written submission, para. 176; United States' opening oral statement at the second substantive meeting, paras. 79-82; United States' responses to Panel question Nos. 20 and 31 following the second substantive meeting, paras. 14-44 (question No. 20) and para. 76 (question No. 31).

⁶⁷⁷ China's first written submission, para. 165 (emphasis in original).

as to what impact a 15% duty on fluorspar will have on its lifespan. Nor could China explain how this extended lifespan for fluorspar would address its sustainable development concerns.⁶⁷⁸

7.433 Moreover, the Panel notes that China does not make the argument that the 15% export duty on fluorspar has the effect of extending in any meaningful way the lifespan of fluorspar reserves. In fact, China argues that it is the caps on mining and production that restrict the supply of fluorspar, while the export restraints only "manag[e] the resulting supply" of refractory-grade bauxite and fluorspar.⁶⁷⁹ According to China itself, if it maintained only extraction and processing caps without export restraints, it would be "compelled to share [its] resources according to nothing more than the demands of foreign markets".⁶⁸⁰ In other words, China acknowledges that it prefers not to use only extraction and processing caps; rather it imposes an export restriction.

7.434 For the Panel, measures that increase the costs of refractory-grade bauxite and fluorspar to foreign consumers but decrease their costs to domestic users are difficult to reconcile with the goal of conserving refractory-grade bauxite and fluorspar.

7.435 In light of the above, the Panel concludes that China has not met its burden of proving that its export quota on refractory-grade bauxite and its export duty on fluorspar "relate to the conservation" of refractory-grade bauxite and fluorspar. The Panel will nevertheless continue its examination of the challenged measures to determine whether the export quota on refractory-grade bauxite and the export duty on fluorspar "are made effective in conjunction with restrictions on domestic production or consumption".⁶⁸¹

(ii) *Whether China's quota on refractory-grade bauxite and its export duty on fluorspar are made effective in conjunction with restrictions on domestic production or consumption*

7.436 In reviewing the parties' arguments whether China's export restrictions on refractory-grade bauxite and fluorspar satisfy the Article XX(g) requirement that they are made effective in conjunction with restrictions on domestic production or consumption, the Panel will consider, first, the 2009 export measures. Notwithstanding its decision to limit its terms of reference to the 2009 measures, the Panel will nonetheless examine the domestic measures applied in 2010 and referred to by China as evidence that domestic restrictions on consumption and production are being introduced.

Are the domestic measures invoked by China restrictive on domestic production or consumption?

7.437 As noted earlier, China invokes and refers the Panel to 13 measures that, according to China, "restrict[] or burden[] the current exploitation, production, and use of its own fluorspar [refractory grade bauxite]".⁶⁸² The Panel acknowledges that to the extent these measures increase the costs of production, they have the potential to reduce extraction. However, the Panel must examine whether those measures actually restrict or limit domestic production or consumption.

7.438 The pre-2009 measures referred to by China to justify its export quota on refractory-grade bauxite, are the following:

⁶⁷⁸ China's responses to Panel question Nos. 17-18 following the second substantive meeting, paras. 47-56.

⁶⁷⁹ China's responses to Panel question Nos. 17-18 following the second substantive meeting, para. 48. China makes a similar argument with respect to refractory grade bauxite (China's first written submission, para. 520).

⁶⁸⁰ China's responses to Panel question Nos. 17-18 following the second substantive meeting, para. 49.

⁶⁸¹ The Panel does so in order to ensure prompt settlement of the dispute.

⁶⁸² China's first written submission para. 168 (for fluorspar) and 502 (for refractory grade bauxite).

- (a) *Mineral Resources Law*⁶⁸³ of 1986;
- (b) *Environmental Protection Law*⁶⁸⁴ of 1989;
- (c) *Provisional Regulations on Resource Tax*⁶⁸⁵ of 1994 and *Detailed Rules for Implementation of the Provisional Regulations on Resource Tax*⁶⁸⁶ of 1994;
- (d) *Administration of Collection of the Mineral Resources Compensation Fees*⁶⁸⁷ of 1997;
- (e) *Administration of Registration of Mining of Mineral Resources*⁶⁸⁸ of 1998;
- (f) *National Mineral Resources Plan*⁶⁸⁹ of 2001;
- (g) *Notice of Opinions of Authorities on the Integration of Exploitation of Mineral Resource*⁶⁹⁰ of 2006;
- (h) *National Mineral Resources Plan (2008-2015)*.⁶⁹¹

7.439 For fluorspar, the pre-2009 measures invoked by China are the same as those listed above.

7.440 China claims that "these measures [...] restrict[...] or burden[...] the current exploitation, production and use of its own refractory-grade bauxite and fluorspar".⁶⁹² However, five of these measures do not specifically refer to refractory-grade bauxite or fluorspar. Among the above listed measures, there are no specific provisions actually setting restrictions on domestic production or consumption of refractory-grade bauxite or fluorspar. As previously observed⁶⁹³, the *Administration of Registration of Mining of Mineral Resources* (item (e) above) provides for monitoring and enforcement of compliance with licensing requirements by mining enterprises. There is no reference to "restrictions" or other forms of "limitations" in the *National Mineral Resources Plan* of 2001 (item (f) above). The *National Mineral Resources Plan (2008-2015)* (item (h) above) refers explicitly to refractory-grade bauxite and fluorspar⁶⁹⁴ and to the objective of setting extraction restrictions on these minerals, but speaks only of eventual or future restrictions, and does not refer to restrictions that are currently in effect.

7.441 The *Environmental Protection Law* (item (b) above) provides guidelines to foster environmental protection and to introduce environmental standards; but here again, China has not been able to direct the Panel to any provision relating to domestic restrictions and export restrictions *primarily aimed at rendering effective these [domestic] restrictions*.⁶⁹⁵

⁶⁸³ Exhibit CHN-78.

⁶⁸⁴ Exhibit CHN-88.

⁶⁸⁵ Exhibit CHN-89.

⁶⁸⁶ Exhibit CHN-91.

⁶⁸⁷ Exhibit CHN-92.

⁶⁸⁸ Exhibit CHN-93.

⁶⁸⁹ Exhibits CHN-94, JE-17.

⁶⁹⁰ Exhibit CHN-95.

⁶⁹¹ Exhibit CHN-80.

⁶⁹² China's first written submission, para. 168 (for fluorspar) and 502 (for refractory grade bauxite).

⁶⁹³ See para. 7.424.

⁶⁹⁴ Exhibit CHN-80, pp. 7-8.

⁶⁹⁵ GATT Panel Report, *Canada Herring and Salmon*, para. 4.6.

7.442 Two of the eight measures do address aspects relating specifically to the production of refractory-grade bauxite or fluorspar.

7.443 China appears to impose a resource tax on entities exploiting mineral products through the *Provisional Regulations on Resource Tax*⁶⁹⁶ and the *Rules for the Implementation of Regulations on Resource Tax*.⁶⁹⁷

7.444 According to China, "[t]he objective of the mineral resources tax [...] is to increase extraction costs and, hence, prices of the mineral".⁶⁹⁸ The Panel observes that the initial level of the tax appears to be very low; in 2009 and through the first half of 2010, the tax on refractory-grade bauxite or fluorspar was set at 3 RMB per metric ton (approximately 0.45 USD per metric ton)⁶⁹⁹, or about 0.1% of refractory-grade bauxite or fluorspar prices in China in the same period.⁷⁰⁰ As of 1 June 2010, for both refractory-grade bauxite and fluorspar⁷⁰¹, the tax was raised to 1% of their respective prices.⁷⁰²

7.445 China has not demonstrated that its 1% tax rate operates as an effective restriction on extraction.

7.446 China also subjects the extraction of refractory-grade bauxite or fluorspar ores to a compensation fee, which was introduced by the *Administration of Collection of the Mineral Resources Compensation Fees* (as amended in 1997).⁷⁰³ The Compensation Fee is calculated as follows:

Compensation Fee = sales income × compensation rate × coefficient of mining recovery rate.

7.447 The compensation rate for refractory-grade bauxite and fluorspar is set at 2%. However, the coefficient of mining recovery rate, calculated as the ratio of the approved mining recovery rate (specified in the mining licence issued by the competent State department) over actual mining recovery rate (determined by the extraction efficiency of the mining company), can be a number below or above 1. For example, if the approved mining recovery rate is set at 0.9 and the actual mining recovery rate is 0.95, the coefficient of mining recovery rate is equal to 0.947. In this example, the incidence of the compensation fee (that is, the rate at which sales income is taxed) is 1.894% (which results from the multiplication of the 2% compensation rate by 0.947, the coefficient of mining recovery).⁷⁰⁴ In other words, mining companies may reduce the incidence of the fee below the 2% compensation rate by increasing their actual mining recovery rate. The Panel understands that China did not set any range of values for the coefficient of mining recovery rate. Therefore, the Panel is of

⁶⁹⁶ Exhibit CHN-89.

⁶⁹⁷ Exhibit CHN-91.

⁶⁹⁸ China's first written submissions, para. 172.

⁶⁹⁹ Exhibit CHN-91, Appendix 1.

⁷⁰⁰ In the first half of 2010, China's export price of fluorspar amounted to about 340 USD per metric tonne (Exhibit JE-180). The Panel does not have before it evidence on the 2009 domestic price of fluorspar, although it has the 2009 acid-grade fluorspar export price, which amounted to 460 USD per metric tonne (Exhibit JE-164, p. 39). In 2009 and in the first half of 2010, the domestic price of refractory grade bauxite ranged from 470 to 535 USD per metric tonne (Exhibits JE-165, p. 20 and JE-180, p.1).

⁷⁰¹ Exhibit CHN-90.

⁷⁰² The increased tax amounts to 20 RMB per metric tonne (about 3 USD per metric tonne), which in the second half of 2010 represents about 1% of China's price for fluorspar (amounting to about 360 USD per metric tonne) and about 1% of its price for refractory-grade bauxite, (ranging from 495 to 535 USD per metric tonne). See Exhibit JE-180 for prices of fluorspar and refractory-grade bauxite in 2010.

⁷⁰³ Exhibit CHN-92.

⁷⁰⁴ The Panel used the values considered by China in its response to Panel question No. 32 following the second substantive meeting.

the view that potentially, the incidence of the compensation fee may become so low that it is unlikely to limit mineral production. In general, we believe that China has not demonstrated that the compensation fee operates as an effective restriction on extraction or production.

7.448 In 2010, China introduced the following measures for refractory-grade bauxite:

- (a) *2010 Measures to Control the Extraction and Production of Refractory-grade Bauxite and Fluorspar*⁷⁰⁵;
- (b) *2010 Public Notice on Refractory-Grade Bauxite (High Alumina Bauxite) Industry Entrance Standards*⁷⁰⁶;
- (c) *2010 Circular on Passing Down the 2010 Controlling Quota on Total Extraction Quantity of High-alumina Bauxite Ores and Fluorspar Ores*⁷⁰⁷;
- (d) *2010 Circular on Passing Down the Controlling Quota of the 2010 Total Production Quantity of High-Alumina Refractory-Grade Bauxite and Fluorspar*⁷⁰⁸;
- (e) *2010 Catalogue of Goods Subject to Export Licensing Administration*⁷⁰⁹, and *Notice on Announcement of the 2010 Export Quota Amounts for Agricultural and Industrial Products*.⁷¹⁰

7.449 China invokes the same 2010 measures with respect to fluorspar, except for the following changes: the *2010 Export Licensing Catalogue*⁷¹¹ and the *2010 Export Quota Amounts*⁷¹² are not invoked for fluorspar, for which instead the *2010 Tariff Implementation Plan*⁷¹³ is invoked. Moreover, in the case of fluorspar, the *2010 Public Notice on Refractory-Grade Bauxite Standards*⁷¹⁴ is replaced by the *2010 Public Notice on Fluorspar Standards*.⁷¹⁵

7.450 The Panel has reviewed the 2010 measures and has concluded that they are not effective in restricting production or consumption of refractory-grade bauxite or fluorspar. In fact, the *2010 Public Notice on Refractory-Grade Bauxite Standards*⁷¹⁶ (and its equivalent for fluorspar) sets forth entrance requirements but does not refer to restrictions of extraction or production of the raw materials at issue.

7.451 The *2010 Measures to Control the Extraction and Production of Refractory-grade Bauxite and Fluorspar*⁷¹⁷ refers to extraction and production caps introduced on the raw and processed forms of both refractory-grade bauxite or fluorspar but does not appear to be effective in restricting production, as explained in the following paragraphs.

⁷⁰⁵ Exhibits CHN-87, JE-167.

⁷⁰⁶ Exhibit CHN-96.

⁷⁰⁷ Exhibits CHN-97, JE-168.

⁷⁰⁸ Exhibits CHN-98, JE-169.

⁷⁰⁹ Exhibit CHN-7.

⁷¹⁰ Exhibit CHN-8.

⁷¹¹ Exhibit CHN-7.

⁷¹² Exhibit CHN-8.

⁷¹³ Exhibit CHN-5.

⁷¹⁴ Exhibit CHN-275.

⁷¹⁵ Exhibit CHN-96.

⁷¹⁶ Exhibit CHN-275.

⁷¹⁷ Exhibits, CHN-87, JE-167.

7.452 The Panel observes that the extraction cap of 11 million metric tonnes of fluorspar ores imposed by the *2010 Quota on Extraction of High-alumina Bauxite Ores and Fluorspar Ores*⁷¹⁸ exceeds the total 2009 extraction of 9.4 million metric tonnes of fluorspar ores.⁷¹⁹ This mining cap is also well above the pre-2009 fluorspar extraction levels, which never exceeded 5.89 million metric tonnes.⁷²⁰ The Panel also takes note that China's 2010 extraction cap on high alumina clay of 4.5 million metric tonnes is above the 2009 actual extraction of high alumina clay, amounting to 2.4 million metric tonnes.⁷²¹

7.453 Similarly, the *2010 Quota of High-alumina refractory-Grade Bauxite and Fluorspar*⁷²² set a production cap of 4.71 million metric tonnes for fluorspar blocks (metallurgical grade fluorspar) and 2.44 million metric tonnes for fluorspar powder (acid grade fluorspar). Data on fluorspar production for the years 2008 and 2009 suggest that these caps are not likely to limit production. In fact, in 2008 and 2009 China produced 1.3 and 1.2 million metric tonnes of metallurgical grade fluorspar, respectively, and both figures are well below the 2010 cap of 4.71 million metric tonnes. Similarly, in 2008 and 2009 China produced 1.9 and 1.8 million metric tonnes of acid grade fluorspar, respectively, both figures again well below the 2.44 million metric tonnes cap.⁷²³ The 2010 Circular cited above also sets a production cap for calcined high alumina clay amounting to 4 million metric tonnes. China did not provide data on actual 2009 production of this material. However, the United States calculated an approximate 2009 production amount, based on certain data and assumptions, and concludes that the production caps are not effective in limiting production of calcined alumina clay.⁷²⁴ China did not contest the United States' figures.

7.454 When challenged on the effectiveness of those 2010 restrictions, China argues that it was not China's intent to reduce the level of permitted extraction with the 2010 target numbers.⁷²⁵ Rather, the "Ministry of Land and Resources decided to grant a transition period" and "[i]t is foreseen that the level of permitted extraction will be reduced year by year".⁷²⁶ Thus according to China, the "restrictions on domestic production" are not intended to effect restrictions currently, but only in the future.⁷²⁷ For the complainants, China's assertion that the affect of its domestic restrictions will not occur now but only in the future is a clear indication that these are not measures taken "in conjunction" with the export quotas currently imposed by China on refractory-grade bauxite.

⁷¹⁸ Exhibits CHN-97, JE-168.

⁷¹⁹ Exhibits CHN-86, JE-166.

⁷²⁰ China's response to Panel question No. 20 following the second substantive meeting, para. 71; United States' comments on China's response to Panel question No. 20 following the second substantive meeting, para. 68.

⁷²¹ Exhibits CHN-86, JE-166.

⁷²² Exhibits CHN-98, JE-169.

⁷²³ Exhibits CHN-9 (figure 4) for 2008 data, and JE-164 (Table 7, p. 34) for 2009 data. See also the United States' response to Panel question No. 20 following the second substantive meeting, para 31.

⁷²⁴ In particular, assuming that in 2009 2.4 million metric tonnes of alumina clay ores were actually mined in China (Exhibits CHN-86, JE-166) and that it takes between 2 and 1.5 metric tonnes of alumina clay ores to produce 1 metric tonne of calcined alumina clay (Exhibits JE-177 p.4 and CHN-10, pp.5-6), the United States estimates that China's 2009 actual production of calcined high alumina clay ranged from 1.2 to 1.6 million metric tonnes, which is well below the 2010 production cap of 4 million metric tonnes (United States' response to Panel question No. 20 following the second substantive meeting, paras. 32-34).

⁷²⁵ As China states at paras. 245-246 of its opening oral statement at the second substantive meeting: "Mexico and the United States also allege that the extraction caps for fluorspar and refractory bauxite are 'not set with the intention of binding or limiting the amount of' production of fluorspar and refractory bauxite, based on a comparison of the level of the 2010 cap with the quantity extracted in 2009. This mischaracterizes China's intent."

⁷²⁶ China's opening oral statement at the second substantive meeting, para. 246 (emphasis added).

⁷²⁷ China's opening oral statement at the second substantive meeting, para. 247.

7.455 As noted earlier, the Panel is of the view that Article XX(g) requires that domestic restrictions be operated concurrently with the trade measures at issue (export duty or quota). It is also necessary to ensure that export restrictions be *primarily aimed at rendering effective these [domestic] restrictions*. To benefit from the justification permitted under paragraph (g), a Member cannot seek to rely on a future or potential domestic restriction; nor will measures enacted concurrently but which only have effect or are foreseen to have effect only in the future respect the Article XX(g) criteria, for they must not only exist concurrently; they must operate concurrently.

7.456 The Panel notes that China has maintained export restrictions on refractory-grade bauxite and fluorspar for many years.⁷²⁸ In 2009 the complainants initiated WTO dispute settlement proceedings against a number of China's export restrictions. In the context of these proceedings, China sought to defend its export restrictions citing conservation objectives. During this period, China increased its export restrictions and at the same time introduced caps on production, which provide domestic producers and consumers with a "transition period" before eventual measures are applied to effect restrictions in the future. So, even if the Panel were to extend its review to include relevant 2010 measures, the domestic restrictions set by those 2010 measures are still set above the actual production rates and are thus not effective in limiting production or extraction. The Panel is not persuaded that these facts support China's claim that its export restrictions are part of a comprehensive conservation programme and is thereby entitled to justify its export restrictions under Article XX(g).

7.457 The Panel recalls that China introduced "transitional" caps on domestic production only in its 2010 *Measures to Control the Extraction and Production of Refractory-grade Bauxite and Fluorspar*.⁷²⁹ The Preamble of the State Council Circular: "In recent years, some enterprises have been over-exploiting, producing and processing refractory-grade bauxite and fluorspar, leading to the rapid reduction in the reserve of resources and severe environmental pollution". Hence China had recognized the absence of control over its domestic production "in the recent years". Yet China introduced domestic restrictions only in 2010, deciding "to offer [...] mining enterprises, refractory materials industry and the related downstream industries an appropriate transitional period, and to ensure stable adjustment and transition of the downstream industries during this process".⁷³⁰ China also asserts that "the level of permitted extractions will be reduced year by year".⁷³¹ The Panel understands that, as a result of the 2010 measures, China's domestic supply is not actually being restricted, but will only potentially be restricted in the future.⁷³² It is difficult for the Panel to conclude on this basis that China's export policy at issue is *primarily aimed at conservation*.

7.458 In the Panel's view, China has not demonstrated that its export restrictions on refractory-grade bauxite and fluorspar are made effective in conjunction with restrictions on domestic production or consumption because the restrictions in place on 21 December 2009 are not intended to be - nor are they - enforcing a reduction on domestic production or consumption. The introduction in 2010 of caps on mining and production might in the future permit China's challenged measures to be justified under Article XX(g). For now, however, China has not satisfied its burden of proving that its export restrictions were made effective *in conjunction* with restrictions on domestic production or consumption.

⁷²⁸ Exhibits JE-164 p.7 for fluorspar, and JE-165 p.14 for refractory-grade bauxite.

⁷²⁹ Exhibits CHN-87, JE-167.

⁷³⁰ Exhibits CHN-86, pp.3-4, JE-166. See also China's opening oral statement at the second substantive meeting, para 246.

⁷³¹ China's opening oral statement at the second substantive meeting, para. 246.

⁷³² United States' comments on China's response to Panel question No. 20 following the second substantive meeting, para. 75.

7.459 The Panel will nevertheless continue its examination of the challenged measures to determine whether those domestic restrictions are "even-handed" with export restrictions, as required by Article XX(g).

Are the export restrictions even-handed?

7.460 The complainants argue that even if one, or some, of the domestic measures that China has put in place could be considered to limit (at least potentially) the amount of minerals produced, China would still not have demonstrated that it is entitled to justify its measures under Article XX(g) because the domestic measures are not "even-handed" with export restrictions. This is so, they argue, because the export quota on refractory-grade bauxite and the export duty on fluorspar only affect users located outside of China, while the domestic regulations and taxes apply to domestic and foreigners. They argue that the export duties and export quotas are thus an added burden on the foreign users. Specifically, China imposes on foreign producers a burden that is not even-handed because it is not imposed on Chinese domestic users of refractory-grade bauxite or fluorspar.⁷³³

7.461 China submits that "even-handed" does not mean "identical" and that paragraph (g) should be interpreted to allow China to pursue its goal of economic development. China also claims that "[w]ithout China's export restrictions, the burden of China's supply limitations would be borne unduly by China's domestic users, which would undermine China's development".⁷³⁴

7.462 The Panel recalls the Appellate Body's explanation in *US – Gasoline* that "[t]he clause [Article XX(g)] 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".⁷³⁵ The Appellate Body did not address what relative treatment of domestic and foreign interests was required in order to qualify as "even-handed". But it did say that if there is no restriction on domestic production or consumption, the export restrictions cannot be said to be even-handed.⁷³⁶

7.463 China submits, in particular, that its "export restrictions on refractory-grade bauxite and fluorspar, in conjunction with its production restrictions, burden domestic consumption as well as foreign trade".⁷³⁷ China has not persuaded the Panel that this is the case. Assuming that a production cap limits the production of fluorspar to 100 units annually, and there is an export quota of 40 units for that product, China asserts that the combination of these two policies limits the quantity that can be consumed domestically to 60 units annually.⁷³⁸ However, 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.

7.464 Therefore, domestic consumption is limited by a production cap only when the domestic demand is greater than the quantity available to the domestic economy through the application of the production and the export caps. The Panel has no information that the China's cap system ensures that this is always the case. Therefore, the mere existence of a production restriction does not automatically imply even-handedness between the export restriction and the domestic restriction.

⁷³³ See United States' second written submission, paras 146-162 and 258-275; Mexico's second written submission paras. 150-166 and 263-280; European Unions' second written submission paras. 290-298 and 326-341.

⁷³⁴ China's first written submission, para. 188.

⁷³⁵ Appellate Body Report, *US – Gasoline*, p. 21, DSR 1996:I, 3, at p. 19.

⁷³⁶ Appellate Body Report, *US – Gasoline*, p. 21, DSR 1996:I, 3, at p. 19.

⁷³⁷ China's second written submission, para. 200.

⁷³⁸ China's second written submission, para. 202.

7.465 Since a domestic restriction on production affects both domestic and foreign users of the resources, the Panel is of the view that China has not demonstrated that its regime for refractory-grade bauxite and fluorspar will not lead to an uneven-handed imposition on foreigners. Although there is no textual basis requiring identical treatment under Article XX(g), it is difficult to see how - if *no* similar or parallel restrictions are imposed at all on domestic users or on domestic consumption and all limitations are placed upon the foreign consumers *alone* - the export restrictions can be considered even-handed.⁷³⁹ Nor would they appear to be *primarily aimed at* or even *substantially designed for* implementing conservationist goals; on the contrary "the measure would simply be naked discrimination locally [interests]".⁷⁴⁰ In order to show even-handedness, China 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. In our view China has not met this burden.

7.466 In sum, the Panel is of the view that China has not demonstrated that its 2009 export restrictions were made effective or have since been made effective in conjunction with domestic restrictions designed to limit production or consumption in the present. Furthermore, the Panel is of the view that China has not demonstrated that its domestic measures aimed at restricting production or consumption impose at present an even-handed burden on foreign and domestic consumers. Finally, although our conclusions are with respect to the 2009 measures only, the Panel noted that the 2010 measures establish a framework for the imposition of restrictions on domestic consumption or production. However, they do not effectively constrain the current levels of consumption or production. While it appears that substantive progress is being made with regard to the introduction of restrictions on domestic production or consumption, it is not yet sufficient to meet the requirements of Article XX(g).

(c) Summary

7.467 The Panel finds that China's export quota on refractory-grade bauxite is inconsistent with Article XI of the GATT 1994 and China has not demonstrated that its export quota on refractory-grade bauxite is justified pursuant to Article XX(g) of the GATT 1994.

7.468 The Panel finds that China's export duties on fluorspar are inconsistent with Article 11.3 of China's Accession Protocol and cannot be justified by Article XX of the GATT 1994; the Panel finds *arguendo* that even assuming that Article XX of the GATT 1994 was available to justify export duties in violation of China's Accession Protocol, China has not demonstrated that its export duties on fluorspar are justified pursuant to Article XX(g) of the GATT 1994.

7.469 As we have now reviewed China's export restrictions on refractory-grade bauxite and fluorspar and concluded that they cannot be justified under Article XX(g) of the GATT 1994, we do not need to examine whether their application is consistent with the provisions of the chapeau of Article XX of the GATT 1994. This is because when a measure does not meet the requirements of any sub-paragraph of Article XX, it cannot be justified pursuant to Article XX of the GATT 1994.

⁷³⁹ Appellate Body Report, *US – Gasoline*, p. 21, DSR 1996:I, 3, at p. 19.

⁷⁴⁰ Appellate Body Report, *US – Gasoline*, p. 21, DSR 1996:I, 3, at p. 19.

3. Whether the export duties and export quotas applied to "scrap" products (magnesium scrap, manganese scrap and zinc scrap) and on EPRs (coke, magnesium metal, manganese metal and silicon carbide) are justified pursuant to Article XX(b) of the GATT 1994

7.470 China invokes Article XX(b) of the GATT 1994 to justify certain export duties and export quotas it maintains on certain raw materials. China asserts that these export restrictions are necessary to protect the health of its domestic population, since they reduce the pollution emitted when the raw materials are extracted or produced.⁷⁴¹ China divides the products for which it asserts an Article XX(b) defence into two categories and argues a separate defence under Article XX(b) for each category. In its first written submission, China begins by defending its export duties on so-called "scrap" products (magnesium scrap, manganese scrap, and zinc scrap) – i.e., inputs for secondary production/recycled materials – pursuant to Article XX(b). It then proceeds to justify its export duties on so-called "metals" or "energy-intensive, highly polluting, resource-based products" ("EPR products"), which for the purposes of this dispute are coke, magnesium metal, manganese metal -i.e., primary production. China deals finally with its export quotas on other EPRs (coke and silicon carbide) and also defend them under Article XX(b) of the GATT 1994.

7.471 In essence, China argues that the production of magnesium metal, manganese metal, and zinc from scrap (i.e., secondary production) is less environmentally harmful than the production of the EPRs (i.e., primary production). According to China, the export *duties* on scrap products are necessary to ensure a steady supply of scrap products to the recycling industry, thereby facilitating a shift from primary production (polluting) to secondary production (much less polluting).⁷⁴² As for the export *duties* on EPR products, China contends that they will lead to a reduction in the production of these raw materials, thus reducing the pollution they cause. Finally, China defends its export *quotas* on silicon carbide and coke (also EPRs) under Article XX(b). Overall, China argues that all the export restrictions are part of a comprehensive environmental framework of measures put in place to reduce pollution to protect the health of the Chinese population. According to China, Article XX(b) allows for the types of export duties and export quotas that it imposes in respect of these products.⁷⁴³

7.472 In its second written submission, China reformats the way it presents its defences and addresses its restrictions on EPRs first before dealing with its restrictions on scrap products. In its argumentation, China groups together its responses to claims against its export duties and export quotas insofar as they relate to EPR products: these include export *duties* on coke, manganese metal, and magnesium metals and export *quotas* on coke and silicon carbide. Thereafter, China addresses its export restrictions on scrap products: these include export duties on forms of zinc, manganese and magnesium, which China calls the "non-ferrous metal scrap products" (hereafter called "scrap products"). The Panel will consider China's defences under Article XX(b) in that order, recalling that it is only analysing *arguendo* China's defence with respect to its export duties on EPRs and on scrap products.

7.473 The Panel will discuss first the legal interpretation of Article XX(b). Second, we will consider the export restrictions mentioned above and determine whether they are "necessary" to protect the health of the Chinese people. In that context, the Panel will assess the qualitative and quantitative argumentation and evidence put forward by China to justify its export restrictions on EPR and on scrap products, taking into account the complainants' claims and arguments.

⁷⁴¹ China's first written submission, paras. 200, 285 and China's second written submission, paras. 233, 253.

⁷⁴² China's first written submission, paras. 316-17.

⁷⁴³ China's first written submission, paras. 197-201.

(a) Interpretation of Article XX(b) of the GATT 1994

7.474 According to China, Article XX(b) enshrines the inherent right of WTO Members to regulate for the purpose of protecting human, animal or plant life or health. In particular, Article XX(b) requires that the respondent's measure be "necessary" to achieve the stated objective. China posits that assessing the "necessity" of a measure requires a panel to engage in a process of weighing and balancing a series of factors concerning, in particular: (i) the (relative) importance of the interests or values at stake; (ii) the extent of the contribution of the measure to the achievement of its objective; and, (iii) the trade restrictiveness of the measure.⁷⁴⁴

7.475 For China, a measure can contribute to the stated objective in two different ways. The measure can: (i) bring about a material contribution to the achievement of its objective; and, (ii) be apt to produce a material contribution to the objective pursued, even if the contribution is not "immediately observable". China cites the Appellate Body Report in *Brazil – Retreaded Tyres*⁷⁴⁵ where the Appellate Body stated that a panel may consider that certain complex public health or environmental problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures. With respect to such complex problems, a "necessary" measure could contribute, in the short or long term, to one of the objectives protected under Article XX(b) as part of a policy framework comprising different measures, resulting in possible synergies between those measures.⁷⁴⁶

7.476 According to the complainants, to establish a defence under Article XX(b), China must demonstrate that the export duties at issue are "necessary to protect human, animal or plant life or health." To show that a measure is for the "protection of" health, the responding party must show that (i) there is a risk to human, animal, or plant life or health; and (ii) the underlying objective of the measure is to reduce the risk.⁷⁴⁷ Furthermore, the complainants argue that in order to satisfy the meaning of "necessary" by showing that a measure is "apt to produce a material contribution to the achievement of its objective," the responding Member must provide evidence of the relationship between the policy tool and the objective.⁷⁴⁸

7.477 The complainants add that it is not sufficient to simply assert that the measure at issue will bring about a particular result in the future. Instead, there must be evidence that the measure can bring about a material contribution to the Member's stated objective.⁷⁴⁹ A Panel should also assess whether or not the contribution that a measure makes, or that a measure is apt to make, is a "material" one. The Appellate Body has defined a material contribution as one which is "not merely marginal or insignificant". This means that a measure needs to contribute in a significant (or non-marginal) way to the achievement of its objective, which in the case of Article XX(b) is the "protection of human, animal, or plant life or health". Finally, the complainants suggest that in line with the Appellate Body Report in *Brazil – Retreaded Tyres*, a panel should take into account WTO-consistent, reasonably

⁷⁴⁴ China's first written submission, paras. 203 and 209.

⁷⁴⁵ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

⁷⁴⁶ China's first written submission, paras. 215 and 220.

⁷⁴⁷ European Union's second written submission, para. 344; United States second written submission, para. 45; Mexico's second written submission, para. 49.

⁷⁴⁸ European Union's second written submission, paras. 353, and 354; United States' second written submission, para. 47; Mexico's second written submission, para. 51.

⁷⁴⁹ European Union's second written submission para. 355; United States' second written submission, para. 47; Mexico's second written submission, para. 51.

available alternative measures in deciding whether Article XX(b) is available to justify a WTO-inconsistent measure.⁷⁵⁰

- (i) *Whether the measure falls within the range of policies designed to protect human, animal or plant life or health*

7.478 For a measure to be justified under Article XX(b), the measure must be "necessary to protect human, animal or plant life or health" and also must comply with the chapeau of Article XX.

7.479 Thus a panel must, first, determine whether the challenged measure falls within the range of policies designed to protect human, animal or plant life or health.⁷⁵¹ Panels and the Appellate Body have examined both the design and structure of a challenged measure to decide whether its objective is the protection of life and health, generally showing a degree of deference to Members' policies designed to "protect human, animal or plant life or health". A broad range of policies have been recognized as protecting human, animal, and plant life or health, such as the reduction of air pollution resulting from the consumption of gasoline⁷⁵²; and the reduction of the risks arising from the accumulation of waste tyres.⁷⁵³ Panels and the Appellate Body are, however, not entitled to question a Members' chosen *level* of protection.⁷⁵⁴ WTO Members enjoy "the right to determine the level of protection of health that they consider appropriate in a given situation".⁷⁵⁵

7.480 A panel must thereafter ensure that a measure is "necessary" to fulfil the invoked policy objective. Article XX(b) requires that a Member's measure is "necessary" to achieve the objective it pursues. The degree of necessity envisioned was examined by the Appellate Body in *Korea – Various Measures on Beef*, where it concluded that a "necessary" measure is, in a continuum, located significantly closer to the pole of "indispensable" than to the opposite pole of simply "making a contribution to".⁷⁵⁶ The Appellate Body further elaborated that an assessment of necessity involves "a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports."⁷⁵⁷

7.481 More recently in *Brazil – Retreaded Tyres*, the Appellate Body reiterated its view that "[i]n order to determine whether a measure is 'necessary' within the meaning of Article XX(b) of the GATT 1994, a panel must consider the relevant factors, particularly the importance of the interests or

⁷⁵⁰ European Union's second written submission, para. 356; United States' second written submission, para. 46; Mexico's second written submission, para. 49.

⁷⁵¹ For instance the Panel in *EC – Tariff Preferences* also clearly set out the requirements of Article XX (b) of the GATT. "Following this jurisprudence, the Panel considers that, in order to determine whether the Drug Arrangements are justified under Article XX(b), the Panel needs to examine: (i) whether the policy reflected in the measure falls within the range of policies designed to achieve the objective of or, put differently, whether the policy objective is for the purpose of, 'protect[ing] human ... life or health'. In other words, whether the measure is one designed to achieve that health policy objective;....". Panel Report, *EC – Tariff Preferences*, para. 7.199.

⁷⁵² Panel Report, *US – Gasoline*, para. 6.21.

⁷⁵³ Panel Report, *Brazil – Retreaded Tyres*, paras. 7.108 and 7.115.

⁷⁵⁴ Appellate Body Report, *EC – Asbestos*, para. 168; Appellate Body Report, *Brazil – Retreaded Tyres*, para. 140.

⁷⁵⁵ Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 140 and 210; see also Appellate Body Report, *EC – Asbestos*, para. 168; Appellate Body Report, *US – Gasoline*, p. 30, DSR 1996:I, 3, at p. 28.

⁷⁵⁶ Appellate Body Report, *Korea – Various Measures on Beef*, para. 161.

⁷⁵⁷ Appellate Body Report, *Korea – Various Measures on Beef*, para. 164; see also, e.g., Panel Report, *EC – Tariff Preferences*, paras. 7.209 and 7.213; Appellate Body Report, *Brazil – Retreaded Tyres*, para. 141; Appellate Body Report, *China – Publications and Audiovisual Products*, para. 239.

values at stake, the extent of the contribution to the achievement of the measure's objective, and its trade restrictiveness."⁷⁵⁸ It concluded that a measure contributes to the achievement of the objective "when there is a genuine relationship of ends and means between the objective pursued and the measure at issue"⁷⁵⁹ and that a measure is necessary if it is "apt to make a material contribution to the achievement of its objective".⁷⁶⁰

(ii) *The importance of the interests or values at issue*

7.482 The Appellate Body recognized that "[t]he more vital or important [the] common interests or values" behind the policies pursued, "the easier it would be to accept as 'necessary' a measure designed as an enforcement instrument".⁷⁶¹ Applied to Article XX(b), the Appellate Body has stated that "few interests are more 'vital' and 'important' than protecting human beings from health risks, and that protecting the environment is no less important".⁷⁶²

7.483 The Panel recalls that China invokes Article XX(b) in order to justify measures it says are necessary to protect the environment and the health of the Chinese population. The complainants contest China's contention as to the objective of its export restrictions. For the complainants, the real objectives of the measures, many of which have been in place for years, is economic: to provide inexpensive raw materials for its downstream industry.

(iii) *The contribution of the measure to the objective pursued*

7.484 The Appellate Body Report in *Brazil – Retreaded Tyres* distinguished between two types of contributions: the measure that "brings about" a material contribution to the achievement of its objective; and the measure that "is apt to produce" a material contribution to the objective pursued.⁷⁶³ In *China – Audiovisual Products*, the Appellate Body emphasized again that "the greater the contribution a measure makes to the objective pursued, the more likely it is to be characterized as 'necessary'".⁷⁶⁴

7.485 It is also accepted that a measure could be considered "necessary" even if the contribution of the measure "is not immediately observable".⁷⁶⁵ As noted above the Appellate Body observed that "certain complex public health or environmental problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures".⁷⁶⁶ As noted by the Appellate Body, with respect to such complex problems, the Appellate Body does not preclude the possibility that a "necessary" measure could contribute to one of the objectives protected under Article XX(b) as part of a policy framework comprising different measures, resulting in possible synergies between those measures.⁷⁶⁷ The Appellate Body in *Brazil – Retreaded Tyres* confirmed that "in the short-term, it may prove difficult to isolate the contribution to public health or environmental objectives of one

⁷⁵⁸ Appellate Body Report, *Brazil – Retreaded Tyres*, para 178.

⁷⁵⁹ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 145.

⁷⁶⁰ Appellate Body Report, *Brazil – Retreaded Tyres*, para 150, 151.

⁷⁶¹ Appellate Body Report, *Korea – Various Measures on Beef*, para. 162; Appellate Body Report, *EC – Asbestos*, para. 172.

⁷⁶² Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 144 and 179.

⁷⁶³ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

⁷⁶⁴ Appellate Body Report, *China – Publications and Audiovisual Products*, para. 251; Appellate Body Report, *Korea – Various Measures on Beef*, para. 163.

⁷⁶⁵ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

⁷⁶⁶ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

⁷⁶⁷ See Appellate Body Report, *Brazil – Retreaded Tyres*, para. 172.

specific measure from those attributable to the other measures that are part of the same comprehensive policy".⁷⁶⁸

7.486 Finally, it is important also to remember that the contribution of the measure can be demonstrated quantitatively and/or qualitatively:

"Such a demonstration can of course be made by resorting to *evidence or data, pertaining to the past or the present*, that establish that the import ban at issue *makes a material contribution* to the protection of public health or environmental objectives pursued. This is not, however, the only type of demonstration that could establish such a contribution... ...[A] demonstration could consist of quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence."⁷⁶⁹ (emphasis added)

(iv) *The trade restrictiveness of the measure*

7.487 In examining the trade restrictiveness of a measure, the Appellate Body in *Korea - Various Measures on Beef* considered the measure's effect "on international commerce".⁷⁷⁰ Essentially, "[t]he less restrictive the effects of the measure, the more likely it is to be characterized as 'necessary'".⁷⁷¹ In the event of a very restrictive measure, the respondent Member must demonstrate that:

"[t]he measure is carefully designed so that the other elements to be taken into account in weighing and balancing the factors relevant to an assessment of the "necessity" of the measure will "outweigh" such restrictive effect."⁷⁷²

7.488 This is consistent with the understanding that an inquiry into the necessity of a measure is a holistic process.

(v) *Availability of WTO-consistent or less trade restrictive alternative measures*

7.489 Finally, if the analysis described above yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the challenged measure with possible alternatives suggested by the complainants.⁷⁷³ The *US - Gambling* and *Brazil - Retreaded Tyres* reports established how the burden of proof would be allocated in establishing whether a reasonably available alternative exists. As the Appellate Body indicated in *US - Gambling*⁷⁷⁴, while the responding Member must show that a measure is necessary, it does not have to "show, in the first instance, that there are *no* reasonably available alternatives to achieve its objectives."

7.490 Alternative measures must be WTO-consistent while providing an equivalent contribution to the achievement of the objective pursued through the challenged measure.⁷⁷⁵ Nevertheless, the mere existence of an alternative measure is not sufficient to prove that the disputed measure is not "necessary". Citing *US - Gasoline*, the Appellate Body in *Brazil - Retreaded Tyres* confirmed that a proposed alternative must preserve "for the responding Member its right to achieve its desired level of

⁷⁶⁸ Appellate Body Report, *Brazil - Retreaded Tyres*, para. 151.

⁷⁶⁹ Appellate Body Report, *Brazil - Retreaded Tyres*, para. 151.

⁷⁷⁰ Appellate Body Report, *Korea - Various Measures on Beef*, para. 163, footnote 105.

⁷⁷¹ Appellate Body Report, *China - Publications and Audiovisual Products*, para. 310.

⁷⁷² Appellate Body Report, *China - Publications and Audiovisual Products*, para. 310.

⁷⁷³ Appellate Body Reports, *US - Gambling*, para. 311.

⁷⁷⁴ Appellate Body Reports, *US - Gambling*, para. 309 and *Brazil - Retreaded Tyres*, para. 156.

⁷⁷⁵ Appellate Body Report, *Brazil - Retreaded Tyres*, para. 156; Appellate Body Report, *US - Gambling*, para. 307; Appellate Body Report, *Korea - Various Measures on Beef*, para. 166.

protection with respect to the objective pursued".⁷⁷⁶ Moreover, such alternative cannot be "merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties".⁷⁷⁷ If the complaining Member has put forward a possible alternative measure, the responding Member may seek to show that the proposed measure does not allow it to achieve the level of protection it has chosen and, therefore, is not a genuine alternative that is, in fact, "reasonably available".⁷⁷⁸

7.491 Also relevant in a panel's assessment of available alternatives is the capacity of the challenged Member "to implement remedial measures that would be particularly costly, or would require advanced technologies".⁷⁷⁹

7.492 In sum, we understand that a panel cannot reject an environmental protection measure, or a public health measure, by pointing to a WTO-consistent or less trade-restrictive alternative, unless that alternative is both practically and financially feasible for the Member seeking to justify a WTO-inconsistent measure under Article XX(b) and provides an equivalent contribution to the achievement of the objective pursued.⁷⁸⁰

7.493 Having reviewed the panel and Appellate Body case law on the interpretation of Article XX(b), we now proceed to determine whether China's export restrictions on EPRs can be justified pursuant to GATT Article XX(b).

(b) Export restrictions on EPRs⁷⁸¹

7.494 As noted earlier, China divides the products for which it asserts an Article XX(b) defence into two categories and asserts separate but related defences for each category.⁷⁸² China contends that its export duties and quotas on magnesium metal and manganese metal, coke and silicon carbide are justified under Article XX(b) on the grounds that production of these EPRs (i.e., primary production) is environmentally harmful. The export restrictions on these products, according to China, will lead to a reduction of production of these metals (because of the reduced demand for them outside China) and therefore a reduction of the pollution associated with their production.⁷⁸³ China also argues that its export duties on magnesium scrap, manganese scrap, and zinc scrap (used as inputs in secondary production/recycling) are justified under Article XX(b) and that secondary production should be favoured over EPRs because it is more environmentally friendly than the highly polluting production of EPRs. The export duties on scrap are necessary to ensure a steady supply of scrap and thereby facilitate a shift from primary production to secondary production.⁷⁸⁴ According to China, its system will reduce the production of EPRs and stimulate the production of the more environmentally friendly products.

⁷⁷⁶ Appellate Body Report, *US – Gambling*, para. 308.

⁷⁷⁷ Appellate Body Report, *US – Gambling*, para. 308.

⁷⁷⁸ Appellate Body Reports, *Brazil – Retreaded Tyres*, para. 156 and *US – Gambling*, para. 311.

⁷⁷⁹ Appellate Body Reports, *Brazil – Retreaded Tyres*, para. 171 citing, at the end of the quotation, *US – Gambling*, para. 308.

⁷⁸⁰ Appellate Body Reports, *Brazil – Retreaded Tyres*, para. 156. The Panel notes that even the Appellate Body has referred to less-trade restrictive and WTO-consistent alternatives interchangeably in its discussions of the appropriate type of alternatives to be considered in the context of an Article XX necessity test.

⁷⁸¹ Export duties on manganese metal, magnesium metal and coke and export quotas on coke and silicon carbide.

⁷⁸² China's first written submission, para. 197.

⁷⁸³ China's first written submission, paras. 257-59.

⁷⁸⁴ China's first written submission, paras. 316-17.

7.495 In undertaking our Article XX(b) analysis, we must, examine whether the policy reflected in the measures at issue falls within the range of policies designed to achieve the objective of protecting human life or health, or, put differently, whether the policy objective is for the purpose of "protect[ing] human ... life or health."

7.496 However, before the Panel examines the measures imposing the export restrictions at issue, we wish to make two points. First, we note that China maintains several export restrictions for which it chose not to invoke any justification.⁷⁸⁵ When the Panel asked China to explain why it was invoking the Article XX justification for some export restrictions but not for other similar restrictions on similar products, China responded it "offered justifications for its export quotas and export duties where it believes that its arguments and evidence demonstrate that the measures satisfy the terms of the particular provisions". It added that "China is not required to justify each measure alleged to be WTO-inconsistent".⁷⁸⁶ China did not explain the relationship between the invocation of its broad societal environmental and health concerns and other export restrictions for which it is not attempting to offer any (environmental-health) justification.

7.497 The second point is that, although we have divided our findings along the argumentation followed by China in its second written submission- that is, we deal with restrictions, first, on EPRs, and second, on scrap products - we note that several of those restrictions (export duties or export quotas on different products) are found together in a single measure. We propose to review those "compound" measures only once and thereby avoid repetitive findings. Thus, in the following section we review all measures imposing export restrictions on EPRs and on scrap products. We will follow a similar approach for our analysis of measures proposed as alternatives to China's export restrictions. Indeed, given that China asserts that its measures on scrap and EPRs are part of a comprehensive environmental framework whose goal is to replace EPRs by an increased use of scrap alternatives, examining the measures together seems highly appropriate.

(i) *Whether the objectives of the measures are the protection of health and the environment*

7.498 China claims that its export restrictions on EPRs are justified as they will reduce pollution caused by the production of the restricted exports and lead to better health for the Chinese population. China points to a number of laws and regulations as well as policy statements that it says provide evidence that those export restrictions are part of a comprehensive environmental protection framework whose objectives are pollution reduction for the protection of health of the Chinese population, energy conservation, and transformation into a "circular economy" or "recycle economy".⁷⁸⁷

7.499 The complainants challenge China's declared goal; they submit that China's export restrictions are not designed to address the health risks associated with environmental pollution. Rather, they argue, China's invocation of environmental and health concerns is merely a *post hoc* rationalization developed solely for purposes of this dispute. For the complainants, China's export restrictions are designed to promote increased production of high value-added downstream products that use the raw materials at issue in this dispute as inputs. The export restrictions serve to lower the price for these inputs in China and thereby facilitate the production of downstream products. For them, this fact is confirmed by the dramatic growth in China's exports of steel and aluminium.⁷⁸⁸ They argue that China

⁷⁸⁵ See para. 7.237 above.

⁷⁸⁶ China's response to the Panel question No. 12 following the second substantive meeting, para. 35.

⁷⁸⁷ China's first written submission, paras. 224-227.

⁷⁸⁸ United States' second written submission para. 36. Mexico's second written submission, para. 39.

cannot present any environmental justification for discriminating against industrial users located outside of China in favour of industrial users within China.⁷⁸⁹

7.500 The Panel recalls that when assessing a measure pursuant to Article XX(b), its first enquiry should be whether China's export restrictions fall within the range of policies designed to protect human, animal or plant life or health. This determination should be done in light of the design and nature of the challenged measures. The Panel turns now to review the measures imposing the restrictions at issue, as well as all laws and regulations submitted by China as evidence that the goal of those export restrictions is, and has always been, the reduction of pollution and the protection of the health of its population.

7.501 The Panel observes, first, that the measures imposing the export restrictions at issue in this dispute⁷⁹⁰ do not make any mention of environmental or health concerns.

7.502 In its first written submission, China claims that "[t]he export duties on the EPR products are an integral part of China's comprehensive environmental policy aimed at reducing the health risks related to the production of these products".⁷⁹¹ It then states that they "are taken in implementation of the Eleventh Five-Year Plan for Environmental Protection (2006-2010)".⁷⁹² The Panel reviewed this Eleventh Five-Year Plan for Environmental Protection (2006-2010) and found no reference to the measures challenged in this dispute. There is no mention that export duties or export quotas on raw materials would or could have the objective of reducing pollution caused by their production with a view to improving the health of China's population. Nor does the Plan refer to export restrictions more generally. The only passage that mentions the objective of environmental protection and resources is the following:

"Environmental protection requirements will be taken into account when introducing or reforming resource tax, consumption tax and import & export tax. China will explore the establishment of environmental taxation system and employ tax lever to facilitate the development of a resource saving and environment-friendly society".⁷⁹³

7.503 In our view, there appears to be no connection between the challenged measures and the *Eleventh Five-Year Plan for Environmental Protection (2006-2010)*, and it is not clear from the evidence before us that they were taken "in implementation of" that Plan.

7.504 In its second written submission, China adds references to what it considers contemporaneous evidence (laws adopted between 2005 and 2010) showing that China has always, and explicitly, linked its export restrictions to the objective of controlling pollution and of reducing the risk to human, animal, and plant life and health occurring in connection with the production of the EPR products at issue. It maintains that its export measures play a key role in its comprehensive environmental framework to reduce pollution.⁷⁹⁴ China refers the Panel to a Circular on the Measures to Control the Export of EPR products explaining the environmental problems said to be created and exacerbated by the high level of exports of EPR products.⁷⁹⁵ The Circular states:

⁷⁸⁹ Complainants' joint opening oral statement at the first substantive meeting, paras. 11-13, 97-98.

⁷⁹⁰ See para. 2.4 above.

⁷⁹¹ China's first written submission, para. 308.

⁷⁹² *Eleventh Five-Year Plan for Environmental Protection (2006-2010)* (Exhibit CHN-123). China's first written submission, para. 312.

⁷⁹³ *Ibid.*

⁷⁹⁴ China's second written submission, para. 233.

⁷⁹⁵ China's second written submission, para. 234.

"The *massive export* of high-energy-consumption, high-pollution and resource based products overloaded upon the exterior conditions as energy, resources, environment, and transport, and *had side effect upon the sound and steady operation of our national economy* ... [The] control of the export of high-energy-consumption, high-pollution and resource-based products was utterly necessary for the [...] reduction of environmental pollution, freeing the economic development from the limitation by resource and alleviating the tense relations among coal, electricity and oil".⁷⁹⁶

7.505 The Panel notes in this context the *Circular on the Measures to Control the Export of EPR products*. In its first written submission China indicates that export quotas on coke and silicon carbide were initially imposed in the context of anti-dumping measures taken by the United States and the European Union on these two products.⁷⁹⁷ China does not contest this fact but contends that the continued application of export quotas on the two products was deemed necessary as the environmental situation increasingly worsened.⁷⁹⁸ In the excerpts quoted above, reference is made to the environment, but it also refers to energy, transport, the economy and economic development. In this sense, this evidence can be said to support the complainants' position that the objective of the measures is economic development, not environmental and health protection. There is no reference to the need, or a plan, to put in place export quotas or export duties on any of the products concerned in this dispute. Secondly, the Panel observes that Articles I and II of the *Circular on the Measures to Control the Export of EPR products* state that the export of high-energy-consumption, high-pollution and resource-based products have burdened the environment, but no explicit link is made between the export measures and the objective of reducing pollution resulting from the production of EPR products. China has not demonstrated through this *Circular on the Measures to Control the Export of EPR products* that the export measures placed on EPR or scrap products relate to or otherwise form part of a plan whose objective is to contribute to the reduction of pollution caused by the production of these products.

7.506 China further contends that an explicit link between the application of export restrictions and environmental objectives was made in the 2006 and 2007 announcements of the application of export tariffs to EPR products⁷⁹⁹, and reaffirmed in 2008 in the context of announcing the *2009 Further Adjust of Import and Export Tariffs*.⁸⁰⁰ In these announcements, China clarifies that these export duties "are targeted at high energy-consumption commodities, high-pollution commodities and resource-based commodities"⁸⁰¹, without referring to the effect levying export duties will have in achieving a reduction in pollution during production of EPR products. For us, the link between applying export restrictions and achieving environmental objectives is far from explicit. Moreover, it is unclear how the measures at issue significantly limit the production of EPR goods, and, therefore, achieve the environmental objective. It is also unclear how the export measures at issue serve to conserve commodities.

7.507 China also submits, as support for its contention that the export restrictions form part of a comprehensive environmental policy, both the *Eleventh Five-Year Plan for Environmental Protection (2006-2010)*, which states "environmental protection requirements will be taken into account when

⁷⁹⁶ Exhibit CHN-444: *Circular on the Measures to Control the Export of EPR products*, Article I and II (emphasis added) and CHN-366 *EU Anti-Dumping Orders*.

⁷⁹⁷ Exhibit CHN-366: *EU Anti-dumping Orders*.

⁷⁹⁸ China's second written submission, p.77, footnote 300.

⁷⁹⁹ China's second written submission, paras 236-238, pp. 77-78. See, Exhibit CHN-452: *2006 Adjust of Interim Tariff Rates of Certain Import and Export Commodities*.

⁸⁰⁰ Exhibit CHN-100: *2009 Further Adjust of Import and Export Tariffs*.

⁸⁰¹ China's second written submission, para. 236, pp. 77-78.

introducing or reforming... export tax,"⁸⁰² and the *Guidelines of the Eleventh Five-Year Plan for National Economic and Social Development*, mandating a "[strict] [execution]... [of] environmental protection standards and control [of] high-energy consumption, high pollution and resource products".⁸⁰³ This principle is further reaffirmed in the *2007 Plan for Energy Conservation and Pollutant Discharge Reduction*⁸⁰⁴ and the 2008 and 2009 *Work Arrangement for Energy Conservation and Pollutant Discharge Reduction*.⁸⁰⁵ The Panel does not dispute that these statements, like other evidence discussed above reflect China's concern with regard to pollution caused by EPR products. However, the Panel still needs persuasive evidence of a connection between environmental protection standards and export restrictions. Nor is there evidence that export restrictions are to be put in place as part of a comprehensive programme or at least a stated objective to ensure "environmental protection".

7.508 China submits additional measures to seek to illustrate its claim that the export restrictions form part of a comprehensive environmental framework addressing the overall environmental objective of reducing pollution resulting from the production of EPR products and the consequent risks to human, animal, and plant life and health.⁸⁰⁶ China identifies the *Energy Conservation Law* and the *2007 Plan for Energy Conservation and Pollutant Discharge Reduction* as two documents which outline the environmental purpose of China's export measures. The Panel notes that the *Energy Conservation Law* states that "the State uses tax and other policies to...control the export of highly energy-consuming and serious-pollution products".⁸⁰⁷ This does not shed light on any environmental purpose of the measures in question; rather we learn that exports will be controlled. The reference to serious pollution is descriptive of the products affected by the restrictions, but there is no explanation of how such measures operate together with export restriction policies on raw materials to reduce pollution caused by their production.

7.509 China also submits a number of other measures, including the *Law on the Prevention and Control of Water Pollution*⁸⁰⁸, which the Panel does not find directly related to its assessment of the contribution of the specific export measures at issue to the objective of reducing pollution and protecting the environment for the health of the Chinese population.⁸⁰⁹

⁸⁰² Exhibit CHN-123: *Eleventh Five-Year Plan for Environmental Protection (2006-2010)*, Section V(IV), Article 2, paras. 1-2, pp. 19-20.

⁸⁰³ Exhibit CHN-144: *Guidelines of the Eleventh Five-Year Plan for National Economic and Social Development*, Part 9, Chapter 35, Section I, p.41.

⁸⁰⁴ Exhibit CHN-145: *2007 Plan for Energy Conservation and Pollutant Discharge Reduction*.

⁸⁰⁵ Exhibit: CHN-287: *2008 Arrangement for Energy Conservation and Pollutant Discharge Reduction* and Exhibit CHN-288: *2009 Arrangement for Energy Conservation and Pollutant Discharge Reduction*.

⁸⁰⁶ China's second written submission, para. 242.

⁸⁰⁷ Exhibit CHN-272: *Energy Conservation Law*, Article 36.

⁸⁰⁸ Exhibit CHN-269.

⁸⁰⁹ The Panel also notes China's argument that the *Circular of the State Council on Approving and Forwarding Implementation Plans and Measures for Statistic, Monitoring and Examination on Energy Conservation and Pollutant Discharge Reduction* "[includes] measures to improve enforcement of, and compliance with, environmental regulations..." (China's second written submission, para 245, p.80). However, in the Panel's opinion this Circular does not explain the contribution of the export restrictions to the objective of protecting the environment. Energy-intensive industries can be monitored for the purpose of applying various other measures not limited to export restrictions. The Panel applies the same reasoning to the *Circular of the Ministry of Environmental Protection on Further Strengthening the Checks on Clean Production of Key Enterprises* which subjects polluting industries to compulsory clean production examinations by the government; and to the *Law of the PRC on Environmental Impact Assessments*, the *Circular of the Ministry of Environmental Protection on Further Strengthening the Checks on Clean Production of Key Enterprises* and the *Law of the PRC on Promoting Clean Production*. These various laws can be applied independent of applying export restrictions.

7.510 The Panel also takes note of the revised *Coking Industry Entrance Rules*⁸¹⁰, the *Law on the Promotion of Recycle Economy*⁸¹¹, the *Policies and Actions for Addressing Climate Change*⁸¹², the *2008 Arrangement for Energy Conservation and Pollutant Discharge Reduction*⁸¹³, the *Adjustment and Revitalization Plan for Non-Ferrous Industry*⁸¹⁴, the *Guidance for Enhancing the Management of Raw Materials Industries*⁸¹⁵, the *Law on Renewable Energies*⁸¹⁶, and the *2009 Arrangement for Energy Conservation and Pollutant Discharge Reduction*⁸¹⁷, all of which contain language stressing the importance of controlling the export of "highly energy-consuming, highly polluting and resource-intensive" products without indicating whether and how controlling the exports will contribute to a decrease in pollution as part of a comprehensive environmental framework. China further submits the *Announcement of Publishing the Catalogue of High-Energy Consumption Electromechanical Equipment*⁸¹⁸ and the *Circular on Strengthening the Elimination of Outdated Capacity*⁸¹⁹ to encourage the reduction of pollution in energy-intensive industries.⁸²⁰ The first one, for example, provides that China will speed up elimination of outdated production capacity and outdated high-energy-consumption equipment.

7.511 In the Panel's view, all of these measures are evidence of China's considerable efforts to regulate in the interest of protecting the environment. The breadth of China's measures touching on environmental (and other) matters is impressive. However, commendable as China's efforts might be, we do not discern in this array of measures a comprehensive framework aimed at addressing environmental protection and health. More importantly, we do not find evidence that the export measures at issue in this dispute form part of any such framework. This is not to say that Members can only succeed in justifying their measures under Article XX(b) by producing one or more instruments stating explicitly that a challenged measure has been put in place because it is necessary to protect human, animal or plant life or health, or that such instrument details the manner in which its objective will be achieved. However, in our view, a Member must do more than simply produce a list of measures referring, *inter alia*, to environmental protection and polluting products. It must be able to show how these instruments fulfil the objective it claims to address.

7.512 Thus the Panel concludes that neither the measures implementing the export restrictions, nor the contemporaneous laws and regulations, convey in their texts that the export restrictions are contributing to, or form part of, a comprehensive programme for the fulfilment of its stated environmental objective. The documents submitted by China, either on their own or taken together do not sufficiently indicate that the export restrictions seek to reduce pollution resulting from the production of EPR products.

7.513 As we have mentioned, the Panel finds that numerous measures brought forth show the extent of China's concern for the need to promote energy conservation. The multiple measures submitted by

⁸¹⁰ Exhibit CHN-192.

⁸¹¹ Exhibit CHN-101.

⁸¹² Exhibit CHN-420.

⁸¹³ Exhibit CHN-287.

⁸¹⁴ Exhibits JE-13, CHN-99.

⁸¹⁵ Exhibit JE-10.

⁸¹⁶ Exhibit CHN-273.

⁸¹⁷ Exhibit CHN-288.

⁸¹⁸ Exhibit CHN-478.

⁸¹⁹ Exhibit CHN-479.

⁸²⁰ In this regard, the Panel also takes note of the *Law on the Prevention and Control of Environmental Pollution by Solid Wastes* (Exhibit CHN-270), the *Regulations on the Administration of the Charging and Use of Pollutant Discharge Fee* (Exhibit CHN-279), the *Measures for the Administration of the Rates for Pollutant Discharge Fees* (Exhibit CHN-278), the *Environmental Protection Law of the PRC*, the *Law of the PRC on the Prevention and Control of Atmospheric Pollution* (CHN-268) and the *Mineral Resources Law* (CHN-78).

China reaffirm China's insistence on using export restrictions to limit the export of what it calls in this dispute the "EPR products". However, this collection of documents only seems to constitute a policy-goal declaration, but does not set out how such environmental goals might be implemented. And finally, it makes no mention of specific domestic measures on production or conservation, and how these might figure in attaining the policy objectives.

7.514 Some of the evidence submitted by the complainants seems to indicate that, contrary to China's assertions, the export duties at issue bear a direct relationship to the economic goal of moving the products in question up the value chain.⁸²¹ For instance, in response to a Panel question, which asks why China prefers export restraints over production restrictions for purposes of environmental protection, China states:

"[T]he imposition of export restrictions will allow China to develop its economy in the future The reason for this is that export restraints encourage the domestic consumption of these basic materials in the domestic economy. Consumption of the basic materials at issue by downstream industries (such as the steel, aluminium, and chemical industries, and those industries further processing steel, aluminium and chemicals into), and the consequent additional production and export of higher value-added products, will help the entire Chinese economy grow faster and, in the longer run, move towards a more sophisticated production bundle, away from heavy reliance on natural resource, labor-intensive, highly polluting manufacturing. This move towards higher-tech, low-polluting, high value-added industries, in turn, will increase growth opportunities for the Chinese economy, generating positive spillovers beyond those to firms directly participating in these markets".⁸²²

7.515 The Panel wishes to note its concern at the systemic implications of China's arguments under Article XX(b), as this provision could then be interpreted to allow the use of export restrictions on any polluting products on the ground that export restrictions reduce the production of these products and thus pollution. Furthermore, China's argument, if accepted, could then be interpreted to allow such restrictions on any raw materials simply because they help increase growth, and, in turn, eventually reduce pollution. Hence, the requirement is crucial under Article XX that only those export restrictions that bring about a material contribution to the environmental policy goal are accepted as WTO-consistent.

7.516 The Panel finds, therefore, that China was unable to substantiate its claim that its export restrictions on EPRs or scrap products are part of a comprehensive programme maintained in order to reduce pollution resulting from the production of EPRs.

7.517 The Panel will proceed now to examine whether the imposition of export restrictions is apt to materially contribute to the reduction of pollution caused by the extraction of those raw materials and consequently the improvement of the health of the Chinese population, within the meaning of Article XX(b).

⁸²¹ Exhibit JE-158, p.5. The United States and Mexico also suggest that "The export duties serve to lower the price for these inputs in China and thereby facilitate the production of downstream products. Numerous statements in high-level Chinese documents and statements made in the course of this dispute confirm this fact. This fact is also confirmed by the dramatic growth in China's exports of steel and aluminium" and they refer to Magnesium Key Facts at Tables 20 and 21, p. 19-20 (Exhibit JE-152). The complainants also argue that the term EPRs is not used in any of the documents submitted by China, suggesting that it was created for the purpose of this dispute, but was not considered in the context of China's environmental policies.

⁸²² China's comments on the complainants' response to the Panel's question No. 43 following the first substantive meeting (Exhibit CHN-442), para. 19.

(ii) *Whether the measures contribute materially to the goal of protecting the health of the Chinese population*

7.518 The Panel's understanding of the Appellate Body's decision in *Brazil – Retreaded Tyres* is that whether or not the export restrictions on EPRs can be considered necessary for the protection of the health of the Chinese people depends on whether such measures are *apt to contribute materially* to the realization of China's declared objective of reducing pollution caused by the production of EPRs. China interprets the Appellate Body's ruling in *Brazil – Retreaded Tyres* as suggesting that the "contribution" of trade restrictions for the purposes of Article XX(b) should be assessed both currently and in the future.

7.519 China asserts that the export restrictions at issue are *currently* making a material contribution to the objective of reducing the health risks associated with the pollution generated by the production of coke, magnesium metal, manganese metal and silicon carbide. This is because, under normal economic conditions, export restrictions reduce the demand for exports and, in turn, this decreases domestic production. In support of this claim, China adduces two empirical studies.⁸²³ One study estimates the effect of an export duty on manganese metal and magnesium metal and of an export quota on silicon carbide, using a simulation model of demand and supply.⁸²⁴ The other study uses a regression analysis model to estimate the effects of the imposition by China of an export duty and a quota on coke.⁸²⁵ The results of the simulations indicate that the elimination of the export duty of 10% on magnesium metal would result in an average increase in domestic production by 1.65%; elimination of the export duty of 20% on manganese metal would imply an increase in production by 4.28%; and elimination of the export quota of 0.216 million metric tonnes on silicon carbide would increase production by 3.55%.⁸²⁶

7.520 The results of the regression analysis on coke indicate that eliminating the 40% export duty on coke would increase domestic production of coke by 2.2%.⁸²⁷ China asserts that the export duty is the actual "biting" constraint on the exports of coke;⁸²⁸ in these circumstances, the effect of the export quota is to limit exports only in the event of a large increase in the foreign demand for coke.⁸²⁹

⁸²³ Exhibits CHN-124 and CHN-147.

⁸²⁴ In Exhibit CHN-124, the impact of an export tax on quantities produced (consumed) is determined using the domestic supply (demand) price elasticities. The domestic supply (demand) elasticity is defined as the percentage change in production (consumption) associated with a 1% change in China's domestic prices (prices Chinese producers receive when they sell at home). Therefore the percentage change in production (consumption) following the elimination of the duty is obtained by multiplying China's supply (demand) elasticity by the percentage change in the prices. To determine the impact of an export quota on the quantity produced (consumed) domestically, the 'export tax equivalent' of the quota (i.e., the tax that would result in the same level of exports as determined by the quota) is calculated as the price differential between domestic and export prices. Then, the impact of the export quota on the quantities produced (consumed) domestically is estimated using the simulation model just described for the tax.

⁸²⁵ Exhibit CHN-147. Regression analysis is performed by associating (observational) data to a statistical relationship, which expresses a certain dependent variable as a function of other (independent) variables, plus an error term. This relationship can be specified in many different ways. We refer to different specifications with the expression "regression models". The aim of estimating a regression model is to understand the effect of the change of a certain independent variable on the dependent one, while the other independent variables (included in the right hand side of the model) are held fixed.

⁸²⁶ China's first written submission, para. 319 (for magnesium metal and manganese metal) and para. 550 (for silicon carbide).

⁸²⁷ Initially, China reported effects of 6.6% of domestic production (Exhibit CHN-147). This estimate was subsequently corrected by China in Exhibit CHN-519, para. 106.

⁸²⁸ As previously explained (see paras 7.226-7.228). China imposes both an export duty and an export quota on coke. In a situation like the one of China where two export restrictions are imposed, only one

7.521 China also asserts that export restrictions on EPR products are apt to contribute to its stated health objective in the *medium and long term*. In the medium term, China argues, export duties on EPRs will reinforce domestic environmental rules and regulations through their selection effect, that is, by forcing small-scale inefficient firms out of the market to the advantage of large-scale, efficient and less-polluting producers.⁸³⁰ In the long term, posits China, export restrictions will help the Chinese economy shift its production towards more sophisticated, higher value added goods, and away from low-value added basic materials. This, in turn, will lead to increased growth. Increased growth will lead to higher income per capita, which, in turn, will increase Chinese preferences for a cleaner environment and demand for higher environmental regulations. This will "creat[e] a virtuous circle of development and environmental protection".⁸³¹

7.522 However, the complainants claim that China's real goal for maintaining the export restrictions at issue is not the reduction of pollution caused by the extraction of EPRs, but to ensure that domestic users have preferential access to the raw materials compared to their foreign counterparts.⁸³² The complainants also contend that export duties are not an efficient policy response to achieve an environmental goal and there are less trade-distorting measures that can be used as alternatives.⁸³³ They further argue that China's estimates of the effects of export restrictions on EPR production are not reliable and that China's claimed short-, medium- and long-term positive effects of the measures at issue on the environment are not supported by evidence. Moreover, the complainants maintain that the various components of the architecture of China's (declared) policies on EPRs (and scrap) are inherently contradictory and incoherent, and, as such, have not and will not contribute to China's declared objective of reducing pollution resulting from the production of EPRs.⁸³⁴ Therefore, the complainants ask the Panel to determine that China has not satisfied its burden to prove that export restrictions on EPR products contribute to China's stated environmental objective.

7.523 The Panel recalls that China bears the burden to prove that its export restrictions *bring about or are apt to contribute to the realisation of the policy goal* permitted by Article XX(b) and that "[t]his demonstration could consist of quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence".⁸³⁵ China has put forward both a quantitative and qualitative argumentation to support its claim that its export restrictions (export duties and export quotas) are apt to contribute to its goal of reducing pollution resulting from the extraction of various raw materials with a view to improving the health of the Chinese population. We turn now to consider the qualitative and quantitative elements of the evidence submitted to the Panel.

7.524 Although we will proceed to examine below China's measures on EPRs, the Panel understands that China's measures on EPRs are not to be considered in "isolation"; this is clear from China's qualitative and quantitative argumentation. China claims to have a comprehensive policy that

restriction will actually "bite", i.e. will be effectively active in limiting exports. Which of the two restrictions has an actual effect on production (consumption) is a purely empirical question.

⁸²⁹ China estimates an impact of 5.07% from the export quota on the production of coke had the quota on coke been the effective limitation ("biting constraint") to coke production (Annex 1 Exhibit CHN-147).

⁸³⁰ China's first written submission, paras. 329-336. See also China's response to Panel question No. 30 following the second substantive meeting, para. 142.

⁸³¹ China's response to Panel question No 39 following the second substantive meeting, para. 264 and China's second written submission, para 252.

⁸³² United States' first written submission, paras. 29-31; Mexico's first written submission, paras. 29-34. Complainants' joint opening oral statement at the first substantive meeting, paras.11-13, 97-98.

⁸³³ Exhibit JE-158, pp.3-6.

⁸³⁴ United States' second written submission, paras. 62-64; Mexico's second written submission, paras. 65-67. See also Exhibit JE-158, pp. 7-9.

⁸³⁵ Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

includes measures on EPRs and measures on scrap which operate together and at the same time. Indeed, in the context of its argumentation on EPRs, China also refers to its measures on scrap products. China argues that the use of scrap products (recycled) is much less energy-intensive and polluting than the use of EPRs. All parties also seem to agree with this statement in principle (and indeed China cites European Commission documents on the benefits of the recycling industry⁸³⁶), but the complainants, as discussed below, submit that, contrary to its allegation, China is not pursuing seriously enough the development of its recycling sectors. The complainants are of the view that China's measures are not fundamentally about the reduction of pollution and the protection of health; rather, their main purpose is to generate reduced-price raw materials for its downstream steel industry.⁸³⁷

Whether China has discharged its burden of proof that export restrictions on EPR products are currently making a material contribution to the stated objective

7.525 China's defence under Article XX(b) is based on its contention that export restrictions on coke, manganese and magnesium metal, and silicon carbide are making a material contribution to a reduction in health risks associated with primary production of these metals. They argue that export restrictions will result in decreased levels of production of these products. China submits that there is a serious health risk related to the production of EPRs, and that reducing their production would reduce pollution, which would lead to a reduction in the related health-risks.⁸³⁸ China argues that the export restrictions on EPRs will limit the production of such polluting EPRs.

7.526 The Panel recognizes that China's qualitative argument relies on the standard economic theory of the effects of an export restriction: an export restriction on polluting raw materials, by reducing foreign demand for the good on which it is imposed, shifts supply of the good to the domestic market, thus putting downward pressure on the domestic price of the product. The reduction of the domestic price of the good will decrease production and this, in turn, will lower pollution. The Panel also observes that parties agree on the general principle that when analysed in "isolation" (that is, for a single market and a single policy measure), standard economics predicts that an export restriction will reduce domestic production. However, as discussed below, the Panel has reservations on the validity of conducting an analysis of the effects of an export restriction on a product in a specific sector in "isolation". It is important to consider the export restrictions imposed on products in other related sectors at the same time.

7.527 Moreover, the Panel has concerns regarding China's estimations of the size of the effects. As noted earlier, China has used two alternative methodologies to assess the impact of export restrictions on EPR products on their production. Specifically, to determine the impact of its export restrictions on manganese metal, magnesium metal, and silicon carbide, China uses a simulation model, whereas for its export restrictions on coke, it uses an econometric regression model. The Panel understands that simulations provide estimates as to what the effects of the removal of a duty would be on the basis of a demand and supply model of the market at issue, whereas regressions measure what the effect of a trade policy measure (in place for a certain time period) has been.

7.528 Although we are satisfied with the methodologies used by China in making its case, the Panel has a number of concerns with respect to the reliability of the results of the studies put forward by China.

⁸³⁶ China's first written submission para. 250.

⁸³⁷ United States' second written submission, paras. 82-83; Mexico's second written submission, paras. 86-87; European Union's second written submission, paras. 398-408.

⁸³⁸ China's first written submission, paras. 285, 316, and 317.

7.529 First, the Panel is concerned about the quality of the data used for the analysis of the impact of export restrictions on manganese metal, magnesium metal and silicon carbide. China's estimates of the effects of an export duty on manganese and magnesium metal and of an export quota on silicon carbide assume that the domestic supply and demand elasticities (that measure the degree of responsiveness of supply and demand to price changes, respectively) for these products are the same as those it estimates for coke.⁸³⁹ Logic suggests that demand elasticities usually would be different for different products. Moreover, the Panel understands that standard economic theory provides that supply and demand elasticities are generally specific to the product at issue in that they are determined by production technologies and by the degree of substitutability of the raw material for other inputs. China has not established that production technologies for the raw materials at issue and the degree with which firms in the downstream sector can substitute these raw materials with other inputs are the same across products. For this reason, we are not persuaded that we can use estimates for coke also when considering the markets of other raw materials.

7.530 The Panel is aware that China justifies the use of coke elasticities for the other materials by providing evidence that, when considering imports *from all sources*, average import demand elasticities for the raw materials at issue in this dispute do not significantly differ across products.⁸⁴⁰ However, the Panel notes that data on import demand elasticities for imports *from China* appear to change significantly across products - ranging from -2.14 for magnesium metal to -6.19 for manganese metal and -10.01 for magnesium scrap.⁸⁴¹ In light of this evidence, the Panel questions the use of coke elasticities to proxy elasticities of other raw materials.

7.531 The Panel understands that any quantitative estimation of the comparative effects of an export restriction on the EPRs at issue is highly speculative given the lack of adequate data. Estimates based on incorrect data or incorrect estimation procedures are of course not reliable.

7.532 Turning to the regression estimates of the impact of export restrictions on coke, the Panel is struck here by a number of methodological issues. In particular, the Panel notes that China's results could be inaccurate because they are obtained estimating a regression model which includes inappropriate control variables.⁸⁴² The Panel also observes that China's estimates are produced using periodic data. In order to be correctly estimated, a model using periodic data requires specific

⁸³⁹ Exhibit CHN-124.

⁸⁴⁰ Using estimates from Kee, Nicita and Olarreaga (2008)'s study, China calculated the average import demand elasticities *across all* importers and averages across *non-producing* countries (Exhibit CHN-519, Table 3.1).

⁸⁴¹ Exhibit CHN-519, table 3.2.

⁸⁴² In order to determine the impact that the export restrictions on coke have on domestic production, China uses the "Ordinary Least Square" technique, whereby production is explained by the level of the tax, the quota, and a "control variable". The importance of introducing a "control variable" in the regression is to avoid attributing to the export duty (or quota) effects that have been caused by changes in other variables (the effect this attribution would have is referred to by economists as the "omitted variable bias"). For a control variable to be apposite, it must be something that is independent of the matter being analysed - in this case the export restrictions. The variables China uses, though, could well be affected by the very export restraints being examined. Indeed, in the production equation China uses the following control variables: consumption in Exhibit CHN-147; and dummy variables for each year as well as a variable indicating the production of metallurgic coal in Exhibit CHN-519. Both consumption of coke and production of metallurgic coal (a key input in coke production) are likely to be affected by the export restraints, and therefore, in the view of the Panel, are not proper control variables.

methodologies, which, however, have not been considered by China.⁸⁴³ The Panel has a further concern with regard to the specification of the estimated regression model.⁸⁴⁴

7.533 Second, even assuming that the evidence submitted by China to support its statement that its export restrictions on EPR products are *currently* making a material contribution was reliable, the Panel is unconvinced that China has satisfied its burden of proof that the export restrictions in place make a "material" contribution because China's analysis does not account for important upstream-downstream interactions. In particular, given the vertical structure of the metals industries at issue, one would expect that China's analysis of the effects of export restrictions on pollution would account for the pollution that may be generated by additional production in the downstream sector (following the imposition of the export duties and quotas on the EPR products). It is the understanding of the Panel that economic analysis indicates that, under normal conditions, an export restriction imposed upstream acts as an incentive to downstream production. In the case at issue, therefore, an export duty (or quota) on raw materials reduces the price of key inputs, and therefore should be expected to provide an incentive to production by the downstream sector. China's evidence does not take this into account.

7.534 China asserts that it has not included in its calculations additional downstream pollution because it believes that to be relatively minor compared to what is caused by upstream production of the raw materials. China supports this claim with an expert statement that the upstream production of EPR goods is the most polluting stage of the production process and that the pollution generated by the downstream sector is minor.⁸⁴⁵ China has also presented data on the level of pollution generated per metric tonne by the production of the raw materials at issue and by steel and iron production.⁸⁴⁶ The evidence provided by China supports the claim that the pollution generated per metric tonne of the different materials is significantly higher for EPR products than for steel and iron. However, the information is not sufficiently helpful to us, because we do not know how many metric tonnes of iron or steel are produced using one metric tonne of a certain EPR product. The Panel notes that an export restriction not only reduces the production of EPR, but it also makes available additional units of EPR as consumption by the domestic downstream industry. Therefore, in order to assess whether the export restrictions on EPRs reduce pollution, the Panel would need information not only on the reduction of pollution generated by the lower level of EPR production (which China provides in its first written submission), but also on the increased pollution generated by the amount of steel and iron that are produced using the additional units of EPR available as domestic consumption. However, the latter piece of information is not available to us.

7.535 China also argues that increased domestic supply of manganese and magnesium metal will not increase the *quantity*, but merely change the *quality* of the aluminium and steel that is produced

⁸⁴³ The data used for the analysis are monthly data. An issue frequently associated with using such periodic data is that the regression's errors are serially correlated, i.e. regression "error terms" from different time periods are correlated. If serial correlation is not taken into account in the estimation, results could be misleading. China's estimations do not correct for serial correlation of the error terms.

⁸⁴⁴ When both an export quota and an export duty are imposed, it will be only one of the two that reduces exports and has an impact on domestic production (the duty will be the biting constraint when it is sufficiently restrictive in relation to the quota, so that the quota does not "bite"). In other words, a change in the duty has an impact on production only if the duty is the biting constraint. In depicting the effect of the duty or the quota, therefore, a function should be used which allows the restrictive effect of either the duty or the quota to go from a positive value to zero when the other instrument becomes biting. In Exhibit CHN-519, however, China does not use this approach.

⁸⁴⁵ Exhibit CHN-481.

⁸⁴⁶ China's response to the Panel question No. 26 following the second substantive meeting, paras. 120-126.

from it. Therefore, one cannot assume an increase in pollution generated by the downstream sector.⁸⁴⁷ However, China has not provided evidence in support of this argument. China claims that, because of the increased availability of manganese and magnesium, producers of aluminium and steel will use relatively more manganese and magnesium than other inputs in the production of the alloy. However, it seems to us that substitution across inputs does not exclude the possibility of an increase in quantity. Indeed, it has to be expected that when the price of one of the production inputs changes, firms (in downstream sectors) may substitute away from the relatively more expensive inputs toward the cheaper ones. By so doing, firms reduce their production costs and may, in turn, increase production, leading to greater pollution.

7.536 Proceeding with our analysis of China's evidence on material contribution, the Panel believes that in industries where vertical linkages are important, such as the metals industries at issue, the test for material contribution to the stated objective *must account for those policies that may offset the alleged effect of the policy in place*. In the absence of this requirement, it would be possible for the combination of two or several policies to nullify each other's effect on pollution, while serving only the achievement of other objectives (such as the development of the downstream sector). In the specific case at issue, China does not contest it imposes export restrictions on manganese ore (used as input in the primary production of manganese metal).⁸⁴⁸ In principle, such a measure reduces the domestic price of ores in China, and therefore represent an incentive to produce EPR metals. As such, the export restrictions on ores may potentially offset the production-reducing effects of export restrictions on metals (EPRs), and, consequently, their alleged positive effects on the environment. China acknowledges that its analysis omits this offset consideration. However, China argues to be mainly an importer, as opposed to an exporter, of ores. On the basis of this argument, China concludes that, as a practical matter, the price of ores is not affected by its export measures on ores, which means no offset will occur. However, we do not find the evidence sufficient to support this conclusion.⁸⁴⁹

7.537 China also argues that a quantification of the effects of an export restriction on a raw material that takes into account upstream and downstream linkages as well as policies adopted at the various stages of the production chain would make the analysis of such effects more complex.⁸⁵⁰ This is probably true. However, if a government is concerned with the reduction of pollution arising from an industry with an important vertical structure, it seems to us that it would need to take downstream-upstream linkages into account in order to evaluate the effectiveness of its policy. Furthermore, the Panel recognizes that it may be impossible to take the effects of all policies applied to each stage of production into account, but an analysis of the material contribution to a stated objective should take into account at least those policies whose effects may counter in some respects the stated objective (such as export duties on ores in the case at issue).

7.538 In sum, the Panel is not persuaded by the evidence provided by China in support of its claim that its export restrictions on EPR products *currently* make a material contribution to the objective pursued. The quality of the data used for the analysis and the shortcomings of the estimation methods, as we have explained, give us pause. Furthermore, even assuming that the quantitative analysis is reliable, the Panel is of the view that given the importance of the vertical structure of the metals industry, China's economic analysis should have taken into account the effects that export restrictions

⁸⁴⁷ China's second written submission, para. 298.

⁸⁴⁸ China's response to Panel question No. 28 following the second substantive meeting, paras. 133-134.

⁸⁴⁹ The data on the import to export ratio are not sufficient to prove that export restrictions do not affect the domestic price of ores. This is because the low volume of exports of ore could be due to the export restrictions in place.

⁸⁵⁰ China's second written submission, paras. 294-303.

have on pollution through the upstream and downstream sectoral linkages, and the impact of measures that counter that of the export restrictions. It may be that it is possible to prove a material contribution with additional or different evidence, but what we have before us does not provide enough for us to conclude that the export restrictions currently provide a material contribution.

Whether China has discharged its burden of proving that export restrictions on EPRs are apt to make a material contribution to the stated objective in the future

7.539 China argues that there are additional medium term gains due to the "selection effect". The "selection effect" is said to occur in a situation where lower prices reduce profit margins, thus forcing producers to make efforts to become more cost efficient. Since "more efficient producers are likely to be those producers that employ environmentally friendlier production methods"⁸⁵¹, such as energy-saving technologies, China asserts that medium-term pollution, on average, will tend to decrease. In support of this claim, China submits empirical studies that find a correlation between firms' efficiency and the intensity of pollution generation.⁸⁵²

7.540 The Panel has not been persuaded by these arguments about alleged medium-term gains resulting from export restrictions on EPRs. A standard economic assumption is that firms minimize costs at all levels of prices. In contrast, the "selection" argument relies on the existence of inefficiencies (so called x-inefficiencies). As pointed out by the complainants, "the idea does not form part of the corpus of modern economic thought about firm behaviour".⁸⁵³

7.541 China also argues that export restrictions are apt to make a material contribution in the long run because export restrictions on EPR products "will help China, as a developing country, to reach its long-term environmental goals by facilitating China's economic growth which, in turn, leads to substantial environmental protection". China's line of argument is founded on two interdependent assumptions: (i) export restrictions on upstream metal products and raw materials will promote faster growth in China; and (ii) greater national income will be associated with environmental gains.

7.542 The Panel considers these arguments next.

Whether export restrictions on raw materials necessarily promote higher growth

7.543 China claims that there is a strong link between export restrictions and economic growth. China's line of argument is that its export restrictions on raw materials help China to move away from an economy based on raw materials toward an economy based on higher value-added, more sophisticated sectors, and that this, in turn, will promote growth of the Chinese economy. China supports this claim on the basis of a study concluding in favour of the existence of so-called "export sophistication externalities".⁸⁵⁴ This evidence suggests that "if countries consume, rather than export, raw and basic materials and make efforts to produce and export 'sophisticated' bundles of goods, they can achieve higher growth".⁸⁵⁵

⁸⁵¹ China's first written submission, para 334.

⁸⁵² Exhibit CHN-442.

⁸⁵³ United States' comments on China's response to Panel question No. 30 following the second substantive meeting (Exhibit JE-185, p. 3).

⁸⁵⁴ Exhibit CHN-266: Hausmann, R., Hwang, J., and Rodrik, D. (2007). "What you export matters", *Journal of Economic Growth* 12: 1-25.

⁸⁵⁵ China's comments on the complainants' response to Panel question No. 22 following the second substantive meeting, para 87.

7.544 According to China, its export restrictions on raw materials, together with its export restrictions on steel and aluminium (the immediate downstream sector), provide it with the means to exploit the externalities required to foster growth.⁸⁵⁶

7.545 Setting aside any consideration of whether the findings of the study submitted as evidence by China actually reflect a causal link from "export sophistication" to economic growth⁸⁵⁷, the Panel agrees with all parties that the correct policy implication of the considered study is that any policy should be designed so as to benefit entrepreneurs who engage in new activities and not to benefit followers.⁸⁵⁸ However, China's export restrictions on raw materials do not distinguish between innovators and emulators. Therefore, China's export restrictions do not conform to the type of good policies suggested by the study it submitted and thus cannot find support in that analysis.

7.546 China defends the imposition of export restrictions as a "less burdensome alternative to 'discovery' subsidies"⁸⁵⁹ on the grounds that: (i) it would be legally difficult to define the terms innovator and emulator; (ii) the costs related to disbursements in connection with a discovery subsidy would be excessively high, especially for a developing country; (iii) it is politically easier to remove export restrictions than terminate a subsidy; and (iv) export restrictions allow countries to address simultaneously environmental and consumption externalities. In this context, China argues that *temporary* export restrictions may help target innovators rather than emulators, as the export restrictions could be removed after innovators have entered the market. However, China's export measures do not appear to be set according to this approach.

7.547 Moreover, we believe that even assuming that export restrictions could help generate the required discovery externalities and generate growth in the metal industries, this does not prove that there is a link between export restrictions in raw materials and *aggregate* growth in China, which is required according to China's theory to improve environmental protection. While, as acknowledged by China⁸⁶⁰, the finding that "what you export matters" may not rise to the level of a general economic "principle", a generally accepted concept is that support to one sector shifts resources away from other sectors; whether this shift increases or reduces aggregate growth depends on the growth potential of the various sectors.

7.548 In any event, the argument that moving away from exporting unsophisticated products toward exporting high value-added products increases growth supports the provision of incentives to innovators generally, and not only to those in the EPR sectors. Indeed, the fact that EPR products are important inputs in industries that are central to the Chinese economy does not imply that the consumption of these goods necessarily generates positive side effects, nor that China's aggregate growth would necessarily increase by supporting these sectors.

⁸⁵⁶ Exhibit No. CHN-519, paras. 45-52.

⁸⁵⁷ The Panel acknowledges that the complainants contest the validity of Hausmann *et al.* (2007) conclusion that what you export matters and argue that the authors of the study ascribe causation to a correlation. The complainants argue that the correlation may be spurious, as there might be other factors such as the quality of institutions that may affect simultaneously the composition of a country's export basket and its prospects for fast growth (Exhibit JE-178, p. 4). However, the complainants do not provide evidence in support of this position. We observe that study submitted by China is published in a peer reviewed journal and a number of subsequent studies have supported the causal interpretation of this study.

⁸⁵⁸ Exhibit JE-178, p.5.

⁸⁵⁹ China's comments on the complainants response to Panel question No. 22 following the second substantive meeting, para 97.

⁸⁶⁰ China's comments on the complainants' response to Panel question No. 22 following the second substantive meeting, para. 91.

7.549 The Panel understands that, as a matter of economic theory, export restrictions on EPR products will shift resources into the downstream industries that produce metal alloys and away from other sectors in China. China does not address the well-recognized possibility⁸⁶¹ that the sectors from which resources are shifted away may be characterized by higher information spillovers and higher technology transfers than the metal industry, and may thereby contribute to aggregate growth more than would a larger metal industry. In this situation, an incentive for consumption of EPR products may actually slow down aggregate economic growth, compared to a situation, absent any intervention, where relatively more resources flow to sectors with a higher growth potential. Furthermore, these other sectors may even be less polluting than the metal industry.

7.550 Given the above, the Panel finds that China's claim that export restrictions on the EPRs at issue will necessarily foster China's economic growth is not substantiated by sufficient evidence.

Whether the EKC holds for China and the products at issue

7.551 We now turn to analyse the second step in China's argument about the long-term benefits of export restrictions on EPR products, namely that there is a strong link between higher growth and environmental benefits. China argues that "[e]conomic growth, if supported by the adequate regulatory framework, can then be translated into long-term environmental protection".⁸⁶² China argues that this relationship is supported by the empirical evidence of the so-called "Environmental Kuznets Curve" (EKC).⁸⁶³ This is an empirical correlation between income per capita and environmental degradation whereby, while at relatively low levels of income pollution increases with income, beyond a certain income level, pollution declines. Reasons for this relationship are hypothesized to include income-driven changes in: (i) the composition of production and/or consumption that moves away from natural resources goods; (ii) the preference for environmental quality; (iii) the development of institutions introducing the proper regulatory measures to address environmental problems; and/or (iv) the arising economies of scale associated with pollution abatement technologies.

7.552 Parties agree that in general the EKC does not imply a causal relationship from economic growth to environmental quality.⁸⁶⁴ A higher level of wealth can strengthen public demand for a cleaner environment, but unless the government responds with policies that enhance environmental protection, the improvements are unlikely to come.⁸⁶⁵ China argues that, even if this is not done automatically, higher levels of income make the link between economic development and environmental protection more likely, and China contends that it has provided evidence of an EKC in China for some of the pollutants at issue in this dispute.⁸⁶⁶

7.553 For the Panel, even if growth makes environmental protection statistically more likely, this does not prove that export restrictions are necessary for environmental gains. For example, to the extent that a higher income per capita generates citizens' preferences for a better quality of

⁸⁶¹ See Grossman, G.M. and Helpman (1991), Innovation and Growth in the Global Economy, MIT Press.

⁸⁶² China's comments on the complainants' response to Panel question No. 22 following the second substantive meeting, para. 87.

⁸⁶³ Exhibit CHN-442.

⁸⁶⁴ Exhibit JE-158, and China's comments to the United States' response to the Panel question No. 22 following the second substantive meeting, para. 62.

⁸⁶⁵ Grossman, Gene M. and Kruger, A.K. (1995). "Economic Growth and the Environment", Quarterly Journal of Economics, pp. 353-377.

⁸⁶⁶ China's comments on the complainants' response to Panel question No. question 22 following the second substantive meeting, paras. 62-66.

environment, income redistribution policies may serve the environmental objective just as well as it is claimed that export restrictions do.

7.554 Finally, the Panel is mindful of the potential systemic consequences of accepting China's argument about the long-term benefits of any export restrictions as instruments to promote sophisticated exports thereby favouring environmental protection. If accepted as justifying WTO-inconsistent measures, this would support the use of export restrictions under Article XX(b) for any raw material. The Panel is not aware of any support for such an interpretation of Article XX(b).

(iii) *Trade restrictiveness of the measure*

7.555 Finally, in the balancing exercise that we must perform to assess whether the challenged export restrictions are "necessary" under Article XX(b), we are called upon to take into account the restrictiveness of the challenged measure, keeping in mind that "[t]he less restrictive the effects of the measure, the more likely it is to be characterized as 'necessary'".⁸⁶⁷

7.556 The complainants assert that China's export measures "severely distort the conditions of competition in the global market place".⁸⁶⁸

7.557 China responds that the complainants do not provide any evidence in support of their claim, except to rely on the assumption that China's actions affect the world price of the products at issue. In particular, China bases its defence on the following points. First, "the raw materials needed to make EPR products are some of the most abundant in the world"⁸⁶⁹ and this is inconsistent with the complainants' argument that China controls and manipulates world market supply and world prices for EPR products. Second, there are factors other than the Chinese export restrictions that can explain the fall in Chinese exports of these products. These include high anti-dumping duties imposed by the complainants on some of these products, the general commodity price increase that the world has experienced in the period between 2005 and 2008, and the stringent environmental regulations imposed by the United States and the European Union on the domestic production of the EPR products at issue. Third, the impact of China's export restrictions is much softer than a ban on such exports. Finally, even assuming, *arguendo*, that China's export restraints have an impact on prices, one should expect that, in the long run, the effect on trade will vanish. This is because the higher world prices induced by China's export restrictions will lead worldwide investments into new production of EPR products. Eventually, as more players enter the market, world prices will go down.

7.558 The Panel acknowledges that the measures in place (export quotas and export duties) are less restrictive than full "bans" would be (except for zinc). However, the Panel is also of the view that China's arguments do not confirm that the measures are not restrictive. First, the impact of an export restriction on the world market does not depend on the global availability of the raw natural resources to manufacture EPR products, but on a country's export market share in the EPR market. In this respect, the evidence before the Panel appears to show that China's share of global exports in some of these products is quite significant (43.5% for coke, 74.2% for magnesium containing $\geq 99.8\%$ by weight of magnesium, 57.9% for magnesium containing $< 99.8\%$ by weight of magnesium, and 74.2% of manganese).⁸⁷⁰ Thus China's export restrictions, even if modest, can have an important impact worldwide.

⁸⁶⁷ Appellate Body Report, *China – Publications and Audiovisual Products*, para. 310.

⁸⁶⁸ Complainants' opening oral statement, para 6.

⁸⁶⁹ China's second written submission, para. 258.

⁸⁷⁰ European Union's responses to Panel question No. 46 following the first substantive meeting, para. 51.

7.559 Second, China's argument that the impact of its export restrictions is much lower than the effect of the United States' and the European Union's anti-dumping duties on some of these products is based on a mere comparison between export tax rates and anti-dumping duty rates.

7.560 The Panel understands that from an economic perspective this comparison does not provide much guidance on the actual effects on domestic prices and on trade of the respective measures. A static comparison of the effects of an import tax and an export quota under the standard assumption of perfect competition suggests the following. First, anti-dumping duties are firm-specific. Therefore, their effect depends on the amount of trade effected by the firms in question. Second, the impact of anti-dumping duties on domestic prices depends on whether the *importing* country is "small" or "large".⁸⁷¹ If it is a large importer, domestic prices will increase by less than the duty rate. In contrast, the impact of an export restriction on global export prices depends on the size of the *exporting* country. Export restrictions will influence world export prices only if the country imposing them sells a large share of the world's exports of the material on which the restrictions are imposed. Third, the impact of an import restriction on trade depends on the importing country's domestic demand and supply conditions. The impact of an export restriction on trade depends on the exporting country's domestic demand and supply conditions. Thus a simple comparison of anti-dumping duty rates and export duty rates is not sufficient to guarantee that the measures in place are not highly restrictive.

7.561 As far as the long-term effects of export restrictions are concerned, China's argument is that these measures are not too trade restrictive in the long term because the high world market prices will provide an incentive to new producers to enter the market. As a consequence of this entry, China argues, world prices will return to their initial level.⁸⁷²

7.562 Although this is theoretically possible, given that higher world prices could make it profitable to start EPR production, it is important to take into account that long-term effects do not counterbalance short-term effects. In other words, the fact that in the long run the trade-restrictive effects of a measure may vanish does not imply that the short-term costs associated with the measure are not highly restrictive.

7.563 The Panel recalls that, except for zinc, China does not maintain any full bans on exports. We also observe that, in absolute terms, the level of the export duties is relatively low and the quotas are also relatively open (with some of them not having been filled in 2009). But, as noted, the impact of an export restriction depends on the size of the *exporting* country. In that context, the Panel recalls that the assessment under Article XX(b) is a holistic one.⁸⁷³ This takes the Panel to the last step of the test under GATT Article XX(b).

(iv) *Availability of WTO-consistent or less trade-restrictive alternative measures*

7.564 Following the direction from the Appellate Body in *Brazil – Retreaded Tyres*, if an analysis under Article XX(b) yields a preliminary conclusion that the measures at issue are necessary, "this result must be confirmed by comparing the challenged measures with their possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective pursued".⁸⁷⁴

⁸⁷¹ In economics a country is "small" in the market of a certain product if it cannot affect the world price of that product. It is "large", if it can.

⁸⁷² China's second written submission, paras. 269-276.

⁸⁷³ Appellate Body Report *Brazil – Retreaded Tyres*, para. 182.

⁸⁷⁴ Appellate Body Report, *Brazil – Retreaded Tyr*, para. 156.

7.565 We have not yet reached a decision whether the export restrictions at issue are necessary within the meaning of Article XX(b). Nevertheless, the Panel finds it useful to review the arguments and evidence submitted by the parties with regard to the availability of WTO-consistent alternatives; therefore we will proceed to examine the allegations *arguendo*. The complainants put forward a list of possible WTO-consistent alternatives to China's WTO-inconsistent export restrictions. China responded that all such alternatives are already in place in China in the context of its comprehensive environmental framework. The Panel will determine whether those measures are available to China and whether they would allow China to maintain the same level of protection it argues its export restrictions provide.⁸⁷⁵

7.566 The complainants submit six types of alternative measures which, they argue, are WTO-consistent and more efficient to ensure the reduction of pollution as well as the protection of the health of the Chinese people. The complainants point to (i) investment in more environmentally friendly technologies; (ii) further encouragement and promotion of recycling of consumer goods⁸⁷⁶; (iii) increasing environmental standards⁸⁷⁷; (iv) investing in "infrastructure necessary to facilitate recycling scrap"⁸⁷⁸; (v) stimulating greater local demand for scrap material without discouraging local supply⁸⁷⁹; and (vi) introducing production restrictions or pollution controls on primary production.⁸⁸⁰

7.567 In response to the alternatives put forth by the complainants, China argues that all the alternative measures suggested by the complainants are already in place in China. It contends that its export restrictions *complement* a number of existing measures which form part of a comprehensive environmental framework aimed at minimizing environmental and health effects created in the production of EPR products and through the recycling of relevant scrap products. In its Annex 39-1, China groups these non-export restriction related measures according to the six categories of less trade-restrictive alternatives proposed by the complainants with a view to illustrating that it has already implemented these (alternative) measures. China further submits Annex 39-2 outlining the manner through which it alleges a number of these measures contribute to controlling pollution generation related to the production of EPR products. It further submits Annex 39-3, which it argues includes evidence of the implementation and effectiveness of the various measures. Finally, China submits Annex 14-1 detailing a number of measures that apply to steel and aluminium producers.

7.568 The Panel notes, first, that if China argues that alternative measures suggested by the complainants are already in place in China, China would seem to have conceded that such alternatives are (already) "available". In fact, what China seems to argue is that if it maintains its export restrictions together with (alternative) domestic regulations of the type suggested by the complainants (which according to China are already operating) China would achieve more environmental protection. The Panel will come back to this point after reviewing the parties' arguments on suggested alternatives. Our order of analysis will follow the approach used by the parties, organised in terms of the six categories of proposed alternative measures. As mentioned earlier, the Panel will address proposed alternative measures to both restrictions on EPRs and on scrap products.

⁸⁷⁵ WTO Appellate Body Report, *Brazil – Retreaded Tyres*, para. 171 citing, at the end of the quotation, *US – Gambling*, para. 308.

⁸⁷⁶ European Union's second written submission, para. 396.

⁸⁷⁷ European Union's second written submission, para. 400.

⁸⁷⁸ United States' second written submission, para. 68. Mexico's second written submission, para. 71.

⁸⁷⁹ Exhibit JE-158, p. 6.

⁸⁸⁰ United States' second written submission, para. 37. Mexico's second written submission, para. 40.

Investment in more environmentally friendly technologies

7.569 China submits a number of measures with a view to demonstrating that it has already put in place measures to encourage investment in environmentally friendly technologies, and hence such measures could not serve as an alternative to restrictions on EPRs.⁸⁸¹ The Panel has studied the measures submitted and concludes that they do not provide proof that China has in fact implemented measures encouraging investment in environmentally friendly technologies. The *Law on the Prevention and Control of Atmospheric Pollution*⁸⁸² states in Article 8: "[the] State adopts economic and technological policies...", and in Article 26: "[the] State adopts economic and technical policies...". Article 9 of the same measure states that "[the] State encourages and supports the scientific and technological research into the prevention and control of atmospheric pollution...". The same language is reiterated in the *Law on Promoting Clean Production*⁸⁸³, the *Law on the Prevention and Control of Environmental Pollution by Solid Wastes*⁸⁸⁴, and the *Law on the Prevention and Control of Water Pollution*.⁸⁸⁵ While these measures include general statements about adopting general policies and encouraging research, we could not find, nor did China point to, how such measures would encourage or effect investment in environmentally friendly technologies. In addition, China does not provide any evidence that it is currently applying domestic measures of this type.

7.570 Moreover, it is not clear whether the domestic measures invoked by China are even obligatory. In the *Law on Promoting Clean Production*⁸⁸⁶, China identifies Article 33 as evidence that various activities relating to research, demonstration and training projects of clean production will be incorporated under special funds for technological progress. Nevertheless, according to Article 29, "...enterprises may...enter into agreements with the competent administrative departments ... for further saving resources and reducing the emission of pollutants."⁸⁸⁷ The language is clearly permissive and conveys no sense that there is an obligation to do anything in particular. The *Law on the Prevention and Control of Environmental Pollution by Solid Wastes*⁸⁸⁸ includes equally aspirational language such as, "Enterprises and public institutions shall rationally select and use raw materials, energies and other resources, and adopt advanced production techniques and equipments, so as to reduce the discharge and harm of industrial solid wastes"⁸⁸⁹ and "[a] mining enterprise shall adopt scientific mining methods...".⁸⁹⁰ The same language is reiterated in the *Law on the Promotion of Recycle Economy*.⁸⁹¹ China does not put forward any evidence of domestic measures that enforce recycling, nor does it suggest whether and why existing processes could not be improved or intensified to serve as an alternative to its export restrictions.

7.571 China further submits *Opinions of the State Council on Further Accelerating the Recycle Economy*⁸⁹² and the *2007 Plan for Energy Conservation and Pollutant Discharge Reduction*⁸⁹³, which

⁸⁸¹ The Panel notes a number of similar laws submitted by China: *Law on the Prevention and Control of Atmospheric Pollution* (Exhibit CHN-268t), the *Law on Promoting Clean Production* (Exhibit CHN-271), the *Law on the Prevention and Control of Environmental Pollution by Solid Wastes* (Exhibit CHN-270), and *Opinions of the State Council on Further Accelerating the Recycle Economy* (CHN-523).

⁸⁸² Exhibit CHN-268.

⁸⁸³ Exhibit CHN-271, Arts. 6 and 14.

⁸⁸⁴ Exhibit CHN-270, Art. 6

⁸⁸⁵ Exhibit CHN-269, Art. 6.

⁸⁸⁶ Exhibit CHN-271.

⁸⁸⁷ Exhibit CHN-271, Art. 29.

⁸⁸⁸ Exhibit CHN-270.

⁸⁸⁹ Exhibit CHN-270, Art. 31.

⁸⁹⁰ Exhibit CHN-270, Art 36.

⁸⁹¹ Exhibit CHN-101, Arts. 42 and 44.

⁸⁹² Exhibit CHN-523.

⁸⁹³ Exhibit CHN-145.

outline a number of goals without specifying measures taken to implement them. In the *Opinions of the State Council on Further Accelerating the Recycle Economy* it is stated that, "We shall make efforts to establish..."⁸⁹⁴, while the *2007 Plan for Energy Conservation and Pollutant Discharge Reduction* lists a number of goals including "Accelerate Research and Development of Technologies..."⁸⁹⁵ and "Accelerate Industrialization Demonstration..."⁸⁹⁶. Similar goals also form part of the *2008 Arrangement for Energy Conservation and Pollutant Discharge Reduction*⁸⁹⁷, which also lacks evidence of specific standards or policies to implement these goals.

7.572 The Panel does not understand how the invocation of the measures referred to above confirms that China cannot implement, as an alternative to its export restrictions, measures using improved technology to reduce the level of pollution caused by the extraction of EPRs. On this evidence, China appears to be advocating broad policies and actions in that regard, but with no specificities.

Recycling of consumer goods

7.573 China identifies a number of measures already in place that it claims target recycling of consumer goods.⁸⁹⁸ The Panel agrees that recycling policies and measures are in place in China and are thus "available". As with the measures examined above, the Panel finds these measures equally vague with regard to specific policies having been implemented and applied as well as their impact in achieving their stated purpose. Moreover, the Panel has not been provided with evidence that China does not have additional recycling capacity, or that any unused recycling capacity could not be used in lieu of export restrictions. The *2007 Plan for Energy Conservation and Pollutant Discharge Reduction*, similar to the previous measures, only lists goals without complementary binding policies. The *2007 Plan for Energy Conservation and Pollutant Discharge Reduction* uses language such as "...organize to prepare circular economy promotion plans..."⁸⁹⁹; it also mandates cities to "establish and improve the garbage collection system..."⁹⁰⁰ without citing any mandatory provisions to require the establishment of these systems. The same language is also used in the *2008 Arrangement for Energy Conservation and Pollutant Discharge Reduction*⁹⁰¹ which, like the *2007 Plan for Energy Conservation and Pollutant Discharge Reduction*, does not indicate whether any of these plans have actually been enforced or applied. The *2009 Arrangement for Energy Conservation and Pollutant Discharge Reduction* also contains unquantifiable language such as "Forcefully develop circular economy" and "Work well on implementation of the Circular Economy Promotion Law..."⁹⁰², without mentioning whether the *Law* is actually in force or operational. China does not submit any evidence or argument as to why such regulatory potential could not be used instead of export restrictions.

7.574 China also submits the *Law on the Promotion of Recycle Economy*, which sets out the procedures that must be followed in recycling waste electric apparatuses and a variety of electronic products.⁹⁰³ We observe first that these products fall outside the scope of the dispute. Moreover, for the Panel this proves that China has expertise in areas of recycling that could be further utilised to replace the use of export restrictions.

⁸⁹⁴ Exhibit CHN-523, Art. 1(3).

⁸⁹⁵ Exhibit CHN-145, Section V(17).

⁸⁹⁶ Exhibit CHN-145, Section V(18). See also Section V (19) and (21).

⁸⁹⁷ Exhibit CHN-287, Section VI.

⁸⁹⁸ China's response to Panel question No. 19 following the second substantive meeting, Annex 19-1.

⁸⁹⁹ Exhibit CHN-145, Section IV(12).

⁹⁰⁰ Exhibit CHN-145, Section IV(15). See also Section IV(28).

⁹⁰¹ Exhibit CHN-287, Section VII.

⁹⁰² Exhibit CHN-288, Section VI.

⁹⁰³ Exhibit CHN-101, Arts. 38-41.

Increasing environmental standards

7.575 China submits that it has also already implemented a number of measures to increase environmental standards. The *Law on Environmental Impact Assessments* sets out the procedural aspects of conducting impact assessments.⁹⁰⁴ However the environmental standards against which these assessments are conducted are not mentioned, nor whether producers of the EPR products have in fact been subject to any of these standards. The *Circular on Strengthening and Regulating the Administration of New Projects*⁹⁰⁵ provides requirements applicable to new projects, but otherwise does not include any environmental standards. Further, the *Environmental Protection Law*⁹⁰⁶ indicates that "the environmental protection administrative department of the State Council shall formulate national environment quality standards..."⁹⁰⁷, without providing evidence whether these standards have in fact been formulated.⁹⁰⁸

7.576 The Panel takes note of the *Coking Industry Entrance Rules*, which apply only to new coking facilities but do not address environmental standards in existing facilities. Furthermore, no link is made between the application of the *Entrance Rules* and reducing the environmental impact of the EPR products in this dispute. China also submits the *Law of the People's Republic of China on Promoting Clean Production* but does not provide any evidence or arguments on whether the measure has been implemented. China does not argue with respect to any of the legal instruments cited above why their use could not be expanded or improved so as to reduce pollution caused by the extraction of EPRs, thereby obviating the need to continue imposing export restrictions.

7.577 China further submits a number of measures through which it argues its environmental standards have been enforced, including (i) charging pollutant discharge fees⁹⁰⁹; (ii) monitoring systems and on-site inspection powers of local governments⁹¹⁰; (iii) implementing financial penalties⁹¹¹; (iv) ordering the suspension or shutting down of an operation⁹¹²; and (v) sanctioning by

⁹⁰⁴ Exhibit CHN-276, Arts. 2, 17, 22 and 25-28.

⁹⁰⁵ Exhibit CHN-469.

⁹⁰⁶ Exhibit CHN-88.

⁹⁰⁷ Exhibit CHN-88, Arts. 9 and 10.

⁹⁰⁸ The same reasoning applies to the *Law on the Prevention and Control of Atmospheric Pollution* (Exhibit CHN-268, Arts. 7, 13, 15); the *Law on the Prevention and Control of Environmental Pollution by Solid Wastes* (Exhibit CHN-270, Art.11); the *Law on the Prevention and Control of Water Pollution* (Exhibit CHN-269, Arts. 11-13).

⁹⁰⁹ Exhibit CHN-484, *Pollutant Discharge Standards*; Exhibit CHN-279, *Regulations for the Administration of the Pollutant Discharge Fees*, Arts. 2, 6, 7; and Exhibit CHN-278, *Measures for the Administration of the Rates for Pollutant Discharge Fees*, Art. 3 (1)-(3) and Appendix.

⁹¹⁰ Exhibit CHN-268, *Law on the Prevention and Control of Atmospheric Pollution*, Art. 21; Exhibit CHN-271, *Law on Promoting Clean Production*, Arts. 12 and 15; Exhibit CHN-467, *Circular on Implementation Plans and Measures regarding Energy Conservation and Pollutant Discharge Reduction*, Arts. 1 and 8; Exhibit CHN – 269, *Law on the Prevention and Control of Water Pollution*, Arts. 23 and 25-27; and Exhibit CHN-475, *Circular on Further Strengthening the Checks on Clean Production of Key Enterprises*, Arts.1 and 3.

⁹¹¹ Exhibit CHN-268, *Law on the Prevention and Control of Atmospheric Pollution*, Arts. 47, 48 and 52; Exhibit CHN-271, *Law on Promoting Clean Production*, Art.40; Exhibit CHN-279, *Regulations for the Administration of the Pollutant Discharge Fees*, Art. 21; Exhibit CHN-270, *Law on the Prevention and Control of Environmental Pollution by Solid Wastes*, Arts. 68-70; Exhibit CHN-269 *Law on the Prevention and Control of Water Pollution*, Arts. 70-74.

⁹¹² Exhibit CHN-268, *Law on the Prevention and Control of Atmospheric Pollution*, Arts. 47 and 51; Exhibit CHN-279, *Regulations for the Administration of the Pollutant Discharge Fees*, Art. 21; and Exhibit CHN-467, *Circular on Implementation Plans and Measures regarding Energy Conservation and Pollutant Discharge Reduction*.

public disclosure.⁹¹³ China submitted evidence of the impact of a number of its environmental regulations on the production of EPR products and associated pollution levels.⁹¹⁴ The new articles presented as evidence, however, do not establish a conclusive link between the enacted measures and the desired outcome, especially since the majority of these measures were only recently enacted. It is difficult for the Panel to assess the potential effectiveness of a number of these measures in achieving the desired objectives, for the majority of them are so new as to remain untested. They do not include, for example, applicable standards, fee assessments, or enforcement procedures, evidence and consequences of inspections, or evidence of the establishment of the necessary environmental pollution control systems. The Panel also finds that a number of the measures have no relationship to the products at issue in this dispute. More importantly, as with other proposed alternative measures, China does not submit any explanation why its existing environmental standards could not be made more stringent or otherwise adapted to address adequately the pollution problem caused by the production of EPRs.

Investing in infrastructure necessary to facilitate recycling of scrap

7.578 China refers to a number of measures it claims are aimed at investing in infrastructure necessary to facilitate recycling of scrap.⁹¹⁵ However, similar to other measures analysed above, there is no evidence before us confirming that these measures have been applied or of the consequences of such application. Moreover, China does not submit any evidence or argumentation as to whether its scrap recycling capacity is used to its full potential or whether it could be further expanded so as to replace the use of EPRs.

Stimulating greater local demand for scrap without discouraging local supply

7.579 China submits one measure seeking to demonstrate that it has stimulated local demand for scrap, namely the 2008 *Law on the Promotion of Recycle Economy*, which includes provisions indicating that "the State shall offer tax preferences to industrial activities promoting the development of recycle economy..."⁹¹⁶ and that "...the State...shall bring the independent innovation research...of the key scientific and technological task force projects of recycle economy into the ...scientific and technological development plans...and allocate financial resources to support implementation thereof..."⁹¹⁷ First, the Panel notes that China does not submit any evidence that this measure has been implemented and if it has, with what results. Second, the existence of this measure suggests that not only is this type of alternative available to China, but also that China is putting in place incentives for industrial recycling that can replace the use of export restrictions.

Introduction of production restrictions or pollution controls

7.580 China further submits a number of measures seeking to demonstrate that it has already put in place measures to restrict production and control pollution.⁹¹⁸ In addition to the *Energy Conservation*

⁹¹³ Exhibit CHN-475, *Circular on Further Strengthening the Checks on Clean Production of Key Enterprises*, Art. 5 (2).

⁹¹⁴ Annex 39-3.

⁹¹⁵ Exhibit CHN-101, *Law on the Promotion of Recycle Economy*, Art. 46; Exhibit CHN-525, *Guiding Opinions on Strengthening the Recycling for Regenerated Resources*, Arts. I(I), I(II) II(II) and II(III); Exhibit CHN-526, *Circular on Trial Works on the Construction of Recycling System for Regenerated Resources*, Arts. III(II) and (III); Exhibit CHN-527, *Circular of Second Batch of Trial Works on the Construction of Recycling System for Regenerated Resources*, Art. II; and Exhibit CHN-478, *Announcement of Publishing the Catalogue of High-Energy Consumption Electromechanical Equipment*, Arts. 1 and 2.

⁹¹⁶ Exhibit CHN-101, *Law on the Promotion of Recycle Economy*, Art. 44.

⁹¹⁷ Exhibit CHN-101, *Law on the Promotion of Recycle Economy*, Art. 43. See also Art. 46.

⁹¹⁸ See Annex 14 to China's response to Panel question following the second substantive meeting.

*Law*⁹¹⁹, which does not include any specifics on how the relevant provisions are implemented or enforced, China also submits evidence of Energy Consumption caps on coke⁹²⁰, magnesium⁹²¹, zinc smelting⁹²², and ferro-alloys⁹²³, which also do not shed light on the direct impact of implementing these caps on the reduction of EPR-related pollution. Moreover, China does not submit any evidence that such measures, or their improved versions, could not replace export restrictions in reducing pollution caused by EPRs.

7.581 China also submits Annex 39-2 as evidence that China's domestic environmental measures extend to the EPR products at issue.⁹²⁴ The Panel does not dispute that the scope of a number of these measures includes the products at issue in this dispute. However, the Panel cannot discern how, as applied, these measures affect the pollution created in relation to production of EPR products. We observe that a number of these measures are merely "guidelines" or "plans"; there is no evidence of specific mandatory policies. The lack of environmental standards coupled with the lack of evidence of implementation procedures and outcomes, creates an incomplete picture of the extent of the impact of China's domestic environmental measures on the EPR products at issue. Moreover, China does not submit any evidence as to why such environmental measures could not be as effective as China claims its export restrictions are.

7.582 China further submits Annex 14-1, which includes an overview of a number of environmental measures that apply to the steel and aluminium industries.⁹²⁵ China argues that in connection with the

⁹¹⁹ Exhibit CHN-272, *Energy Conservation Law*, Art. 16.

⁹²⁰ Exhibit CHN-470, *Energy Consumption Caps and Coke*.

⁹²¹ Exhibit CHN-471, *Energy Consumption Caps on Magnesium*.

⁹²² Exhibit CHN-472, *Energy Consumption Caps on Zinc-smelting*.

⁹²³ Exhibit CHN-473, *Energy Consumption Caps on Ferro- alloys*.

⁹²⁴ China's response to Panel question No. 39 following the second substantive meeting. Exhibit CHN-268, *Law on the Prevention and Control of Atmospheric Pollution*, Arts. 1, 5, 6 and 13; Exhibit CHN-271, *Law on Promoting Clean Production*, Arts. 1 and 3; Exhibit CHN-276, *Law on Environmental Impact Assessments*, Arts. 1, 3 and 16; Exhibit CHN-278, *Measures for the Administration of the Rates for Pollutant Discharge Fees* Art. 2, Exhibit CHN-279, *Regulations for the Administration of the Pollutant Discharge Fees*, Art.2; Exhibit CHN-270, *Law on the Prevention and Control of Environmental Pollution by Solid Wastes*, Arts. 1, 5 and 11; Exhibit CHN-523, *Opinions of the State Council on Further Accelerating the Recycle Economy*, Arts. II.5 and II.6; Exhibit CHN-525, *Guiding Opinions on Strengthening the Recycling for Regenerated Resources*, Art. I(I); Exhibit CHN-526, *Circular on Trial Works on the Construction of Recycling System for Regenerated Resources*, Para.2 of Introduction and Arts. II. I and II.2; Exhibit CHN-145, *2007 Plan for Energy Conservation and Pollutant Discharge Reduction*, Art. II (3); Exhibit CHN-272, *Energy Conservation Law*, Art.52; Exhibit CHN-467, *Circular on Implementation Plans and Measures regarding Energy Conservation and Pollutant Discharge Reduction*, Article I.2 of the Implementation Plan for Statistical Indicator System of Energy Consumption caps per Unit of GDP; Exhibit CHN-469, *Circular on Strengthening and Regulating the Administration of New Projects*; Exhibit CHN-472, *Energy Consumption Caps Zinc Smelting*, Arts. 4.1 and 4.2; Exhibits CHN-470/CHN-471/CHN-473, *Energy Consumption Caps on Coke / Magnesium / Ferro-alloys* CHN-470, Arts. 4.1 and 4.2; CHN-471, Arts. 4.1 and 4.2; and CHN-472, Arts. 4.1 and 4.2; Exhibit CHN-101, *Law on the Promotion of Recycle Economy*, Arts. 29 to 41; Exhibit CHN-192, *Coking Industry Entrance Rules*, General Introduction; Exhibit CHN-269, *Law on the Prevention and Control of Water Pollution*, Arts. 1, 2, 10, 12 and 13; Exhibit CHN-287, *2008 Arrangement for Energy Conservation and Pollutant Discharge Reduction*, Arts. II, III, V, VII and VIII; Exhibit CHN-475, *Circular on Further Strengthening the Checks on Clean Production of Key Enterprises*, para. 1.3; Exhibit CHN-484, *Pollutant Discharge Standards*; Exhibit CHN-288, *2009 Arrangement for Energy Conservation and Pollutant Discharge Reduction*, Arts. IV, VI and VIII; Exhibit CHN-527, *Circular of Second Batch of Trial Works on the Construction of Recycling System for Regenerated Resources*, Arts. I and II; Exhibit CHN-528, *Circular on the Application for the Construction of Recycling System*, Arts. I(I) and II(I); Exhibit CHN-446, *2010 List of Enterprises Subject to Elimination of Outdated Capacity in Industry Sector* and Exhibit CHN-479, *Circular on Strengthening the Elimination of Outdated Capacity*, Art. II.2.

⁹²⁵ China's response to Panel question No. 19 following the second substantive meeting.

four EPR products for which it invokes a defence under Article XX (b) (coke, unwrought magnesium, unwrought manganese, and silicon carbide), it has put in place an array of environmental measures regulating the steel and aluminium industries with the aim of setting emission levels; air, water and solid waste pollution standards; energy conservation measures, including energy quotas; measures to control the expansion of the steel and aluminium industries; policies to eliminate outdated capacities and production technologies; measures to promote recycling and the development of a "recycling economy"; measures to promote green technologies and investment; as well as trade instruments.⁹²⁶

7.583 The Panel is impressed by the breadth and the depth of China's environmental actions and the regulatory potential in the light of the various stated policy goals. For the Panel, this confirms the complainants' contention that China has the regulatory framework that puts in place high environmental standards (which, as noted by China at the beginning of the dispute, the United States and the European Communities did a few years ago) that could be used to obviate the need for export restrictions. The Panel is not informed of any specific operational standards that these measures⁹²⁷ put in place, nor of any specific procedural requirements and implementation processes. A number of the measures also do not concern or do not specifically mention the EPR or scrap products at issue in this dispute, while others only express the intention to apply export restrictions on certain products. In the Panel's view, these are additional examples of measures that have the potential to serve as an alternative to China's export restrictions on EPRs. Finally, the Panel has before it a number of other

⁹²⁶ China's response to Panel question No. 14 following the second substantive meeting.

⁹²⁷ Exhibit CHN-268, *Law on the Prevention and Control of Atmospheric Pollution*, Art.5; Exhibit CHN-271: *Law on Promoting Clean Production*, Art.3; Exhibit CHN-276: *Law on Environmental Impact Assessments*, Arts. 3 and 7-9; Exhibit CHN-278, *Measures for the Administration of the Rates for Pollutant Discharge Fees*, Art.2; Exhibit CHN-279: *Regulations for the Administration of the Pollutant Discharge Fees*, Art.2; Exhibit CHN-270, *Law on the Prevention and Control of Environmental Pollution by Solid Wastes*, Art.5; Exhibit CHN-444, *Circular on the Measures to Control the Export of EPR products*, Arts. I, II(II), III(IV); Exhibit JE-18, *Development Policies for the Iron and Steel Industry*, Art. 30, para.3; Exhibit CHN-523, *Opinions of the State Council on Further Accelerating the Recycle Economy*, Art. II (6); Exhibit CHN-525, *Guiding Opinions on Strengthening the Recycling for Regenerated Resources*, Art. I(II); Exhibit CHN-123, *Eleventh Five-Year Plan for Environmental Protection (2006-2010)*, Arts. III(I), para. 1; III(III), para.3; IV(II), para.2; V(II) and V(II), para.1; Exhibit CHN-144, *Guidelines of the Eleventh Five-Year Plan for National Economic and Social Development*, Chapter 13, Section 1; Chapter 19, Section 2; Chapter 22, Section 1 (special column 10); Section 5, Chapter 24; Section 2 and Chapter 22, Section 5 (special column 11); Exhibit CHN-452, *2006 Adjust of Interim Tariff Rates of Certain Import and Export Commodities*, para. 3; Exhibit CHN-526, *Circular on Trial Works on the Construction of Recycling System for Regenerated Resources*, Arts. II(2) and II(3); Exhibit CHN-145, *2007 Plan for Energy Conservation and Pollutant Discharge Reduction*, Arts. I, para. 2; II, para.4; III, para.8; IV, para.12; V, para.18; VII para. 32 and Annex; Exhibit CHN-146, *Further Adjust of Import and Export Tariffs of 2008*, para.3; Exhibit CHN-272, *Energy Conservation Law*, Arts. 7, 9, 30, 52 and 66; Exhibit CHN-467, *Circular on Implementation Plans and Measures regarding Energy Conservation and Pollutant Discharge Reduction*, Arts. I.2 and II.2 of the *Implementation Plan for Statistical Indicator System of Energy Consumption caps per Unit of GDP*, pp. 2 and 4; Exhibit CHN-453, *2007 Adjust of Tariff Rates from June 1 to Control the Export of High-Energy Consumption Products*, para.1; Exhibit CHN-469, *Circular on Strengthening and Regulating the Administration of New Projects*, Art. I; Exhibit CHN-100, *2009 Further Adjust of Import and Export Tariffs*, para.3; Exhibit CHN-101, *Law on the Promotion of Recycle Economy*, Art. 16; Exhibit CHN-192: *Coking Industry Entrance Rules*, Arts. I, para.2 and II, para.1; Exhibit CHN-269, *Law on the Prevention and Control of Water Pollution*, Art. 10; Exhibit CHN-287, *2008 Arrangement for Energy Conservation and Pollutant Discharge Reduction*, Arts. III, V, VII, XI; Exhibit CHN-420, *Policies and Actions for Addressing Climate Change*, Art. IV and pp. 8-10; Exhibit CHN-475, *Circular on Further Strengthening the Checks on Clean Production of Key Enterprises*, Art 1.3; Exhibit CHN-99, *Adjustment and Revitalization Plan for Non- Ferrous Industry*, Arts. 1, 2.3.3 and 3.2; Exhibit CHN-288, *2009 Arrangement for Energy Conservation and Pollutant Discharge Reduction*, Arts. III and VII; Exhibit JE-10, *Guidance for Enhancing the Management of Raw Materials Industries*, para.6; Exhibit CHN-446, *2010 List of Enterprises Subject to Elimination of Outdated Capacity in Industry Sector*, and Exhibit CHN-479, *Circular on Strengthening the Elimination of Outdated Capacity*, Art. II.2.

documents that simply identify goals rather than specific standards and that do not provide evidence as to whether any policies were implemented to seek to achieve these goals. The Panel finds it difficult to assess to what extent these measures have affected the steel and aluminium producers, and whether and how they have contributed to the reduction of EPR pollution. Nor is there evidence why these standards could not be used to replace the use of export restrictions.

7.584 China seems, therefore, to have a regulatory framework to put in place the alternative measures suggested by the complainants. China claims, however, that export restrictions are "also" necessary, and seeks to justify its use of a combination of export restrictions and other domestic measures on the basis that export restrictions provide additional benefits compared to those resulting from reliance on environmental regulations alone. In other words, according to China, export restraints complement the alternative measures identified by the complainants.⁹²⁸

7.585 China asserts that these additional benefits provided by the combined use of export restraints and other domestic measures include short, medium, and long term positive effects. Regarding the short term benefits, China claims that its export restraints on EPRs effect an immediate pollution reduction, and that this is important because the environmental measures in place cannot fully address the environmental damage caused by EPR production.⁹²⁹ In this regard, China points out that without export restrictions EPR export prices would be too low with respect to the social cost of production of EPRs (as they would not take into account the environmental costs). Since environmental regulations alone are not sufficient to fully eliminate the environmental damage from EPR production, export restrictions are necessary. Thus by increasing the world price for EPRs, China encourages producers to internalize the environmental costs associated with EPR production.⁹³⁰

7.586 The difficulty with China's contention is that export restrictions generally do not internalize the social environmental costs⁹³¹ of EPRs' production in the domestic economy. This is because export restrictions reduce the domestic price of EPRs and therefore they stimulate, instead of reducing, further consumption of polluting EPR products.⁹³² Indeed, the Panel understands that all parties agree that, in general, export restrictions are not an efficient policy to address environmental externalities when these derive from domestic production rather than exports or imports. This is because generally the pollution generated by the production of the goods consumed domestically is not less than that of the goods consumed abroad. So the issue is the production itself and not the fact that it is traded.⁹³³

⁹²⁸ China's response to Panel question No. 39, following the second substantive meeting, paras 43-62.

⁹²⁹ With respect to the medium and long-term complementary effects of export restrictions invoked by China, the Panel notes that China made the same arguments in the context of its demonstration of the contribution of its export restrictions to its environmental goals. The Panel refers to paras. 7.539-7.554 above.

⁹³⁰ China's response to Panel question No. 39 following the second substantive meeting, para. 252.

⁹³¹ The social environmental costs are the costs of polluting the environment while producing EPRs.

⁹³² See also United States' comments on China's response to Panel questions No. 39 following the second substantive meeting, para. 144.

⁹³³ China argues that there are positive spillovers associated with the consumption of EPRs, and that in the presence of such consumption spillovers, export restraints are "also part of the most efficient policy set". The Panel understands that this means that a policy-maker can decide to couple an export restriction with another domestic policy tool (a production tax or a consumption subsidy) in order to achieve the optimal export, production and consumption quantities. The rationale for choosing this option, according to China, is that export measures are cost effective compared to other policies (China's comments on the complainants' response to Panel question No. 22 following the second substantive meeting, para. 77). However, the Panel is of the view that China did not provide sufficient evidence that the adoption of policies that tax pollution at the source is too costly for China.

7.587 Finally, the Panel notes that China's overall argument seems to be that the use of WTO-inconsistent export restrictions on EPRs (notwithstanding that several regulations of the type suggested by the complainants as alternatives are already operating in China) provides benefits additional to those which WTO-consistent alternatives alone can offer.

7.588 In the Panel's view, China's interpretation of Article XX(b) would seem to expand substantially the scope of the exception provision, so as to allow quantitative export restrictions. However, the Panel is not asked to discuss the appropriateness of the WTO rules at issue in the present dispute. We are mandated to determine whether China has demonstrated that its WTO-inconsistent export restrictions can be justified as an exceptional measure necessary for the reduction of pollution and for the protection of the health of the Chinese population. It will only be able to do so if it can establish that available WTO-consistent alternatives cannot provide the level of protection that it chooses to employ. This it has not done.

7.589 Finally, the Panel returns to the complainants' suggestion that "[s]ince China's stated concerns with life and health relate to the pollution associated with primary production, [...] [it could adopt] more stringent pollution controls on the primary production of the metals".⁹³⁴ China has declined to do so, arguing that "the presence of administrative, monitoring, and enforcement costs renders *impossible* [...] [the adoption of policies] that tax activities at the pollution source [...]".⁹³⁵ In the Panel's view, this does not constitute an adequate explanation as to why WTO-consistent production caps or taxes are not reasonably available to China to replace the use of its WTO-inconsistent export restrictions.

7.590 The Panel concludes that China has not been able to justify why less trade restrictive and WTO-consistent alternatives available, as identified by the complainants and acknowledged to exist by China, cannot be used in lieu of applying export restrictions. It is not a question of imposing more "onerous production-limiting environmental measures"⁹³⁶, but of enhancing and implementing existing environmental measures, as well as establishing new ones where none exists, that have a direct impact on pollution relating to the production of EPR products.

(v) *Conclusions on the necessity of the measure for EPRs*

7.591 For the reasons discussed above, the Panel finds that China has not demonstrated that its export restrictions on EPRs, in particular its export duties on manganese metal, magnesium metal and coke, and its export quotas on coke and on silicon carbide, are justified pursuant to Article XX(b).

(c) Whether export duties applied to zinc scrap, magnesium scrap and manganese scrap are justified pursuant to Article XX(b) of the GATT 1994

7.592 China seeks to justify its export restrictions on scrap on the basis of their alleged contribution to the objective of protecting human, animal or plant life or health. According to China, the production from crude ores (i.e. primary production) of magnesium, manganese and zinc presents important health risks⁹³⁷ due to high levels of pollution and energy intensity connected with that production. In contrast, the production of these metals using recycled scrap, or so-called "secondary production", is significantly less polluting and more energy efficient, thereby reducing risks related to non-ferrous metal production using crude ores.⁹³⁸ Export duties on scrap are necessary to bring about

⁹³⁴ European Union's second written submission, para. 395. See also: United States' second written submission, para. 102; Mexico's second written submission, para. 106.

⁹³⁵ China's comments on the complainants' response to Panel question No. 22, following the second substantive meeting, para. 83 (emphasis added). See also Exhibit CHN-519, paras. 34-40.

⁹³⁶ China's response to Panel question No. 39, following the second substantive meeting, para. 265.

⁹³⁷ Identified in Annex B of China's first written submission.

⁹³⁸ China's first written submission, paras. 230, and 248.

a shift from primary production to secondary production, because they guarantee a stable supply of scrap which is necessary for the development of the secondary industry.

7.593 As with export restrictions on EPRs, the complainants argue that China's goal is not health-related but its economic development.

7.594 As with the export restrictions on EPRs, the Panel needs to assess whether China has met its burden of proving that these export restrictions are "necessary" to protect the health of the Chinese people. As discussed earlier, the necessity test calls for a balancing of the importance of (i) the value at issue, (ii) the choice of the measure and (iii) its contribution to the realization of the policy goal versus the restrictiveness of such an export restriction in the light of the availability of effective alternative measures.

7.595 The Panel is of the view that it does not need to review the stated goals of the export restrictions on scrap products; we have already reviewed them in the context of our consideration of export restrictions on EPRs. Nor do we need to discuss the importance of the values invoked by China in order to seek to justify its WTO-inconsistent export restrictions. As with export restrictions on EPRs, China invokes values of the highest importance: the reduction of pollution and the protection of health. All parties agree that these values are important, but the complainants' fundamental point is that the real objective of China's export restrictions on scrap is not the reduction of pollution caused by the use of EPRs, but rather the provision of low price raw material to its downstream industry to further stimulate its economic development. As we said above, this is not a justification factored into Article XX(b).

7.596 We examine, hereafter, China's argument that its export restrictions on scrap products contribute to the realization of China's goal to reduce pollution created by the use of EPRs.

(i) *Contribution of the measure*

7.597 China asserts that the non-ferrous metal scrap products currently make a material contribution, and are apt to contribute to the reduction of health risks related to metal production by (i) in the short-term, reducing the level of pollution and energy intensity involved in the production from crude ores of magnesium metal, manganese metal, and zinc; and, (ii) in the medium- to long-term, contributing to the development and use of recycling technologies, and thus, a more sustainable secondary production of non-ferrous metals.⁹³⁹

Whether China has discharged its burden of proof that export duties are *currently* making a material contribution to the stated objective

7.598 China's main premise is that an "X" level of export duties on scrap will lead to a "Y" level of pollution saved. This is because export restrictions reduce the price for secondary production relative to primary production of the metal, thus fostering the consumption of secondary production. Since according to China secondary production is less polluting than primary production, for a given amount of downstream production there will be a reduced level of pollution.⁹⁴⁰

7.599 In support of its claim that export restrictions on non-ferrous metal scrap currently make a material contribution to the reduction of pollution, China submits the results of a simulation study based on a model of demand and supply. On the basis of this model, China first estimates the impact of an export restriction on the consumption of scrap. In particular, China estimates that the export

⁹³⁹ China's first written submission, paras. 263- 282.

⁹⁴⁰ China's first written submission, paras. 263- 282.

duty of 10% on magnesium scrap increases domestic consumption of scrap by 1.92%; the export duty of 20% on manganese scrap increases its domestic consumption by 5.07%; and the 10% export duty on zinc scrap increases domestic consumption by 0.63%.⁹⁴¹ China estimates the impact of this increased availability of scrap on the reduction of pollution, relying on the following assumptions: (i) all scrap is recycled (that is, a 100% scrap recovery rate, or equivalently 1 tonne of scrap of each scrap product produces roughly 1 tonne of the secondary metal); (ii) secondary production is a perfect substitute for primary production, so that 1 tonne of secondary production can be used in place of 1 of tonne primary production; and that (iii) scrap consumption in 2009 is 10% of primary production (or equivalently that secondary production is 10% of primary production).⁹⁴²

7.600 The Panel has not been convinced by the analysis submitted by China for a number of reasons. First, China's quantitative analysis of the current effect of export duties on scrap on their consumption suffers from a number of technical weaknesses. The model used by China to estimate the effects of export restrictions on domestic consumption of scrap is the same as the one China uses for estimating the impact of restrictions on the production of EPR products. Therefore, many of the issues discussed above with respect to metals also apply to scrap. Most importantly, the Panel recalls its view that the quality of the data used for the analysis seriously undermines the reliability of the results. In this regard, the Panel recalls that the sensitivity analysis submitted by the complainants (whose results are reported in Table A, Exhibit JE-185) shows that the estimated size of the effects of export restraints depends crucially on the numerical values of the parameters.⁹⁴³

7.601 Second, the assumptions China made in calculating the pollution savings resulting from increased consumption of scrap (namely, 10% rate of secondary production and 100% scrap recovery rate) are not supported by evidence. In particular, China presents no evidence on the magnitude of secondary production in China. In the case of manganese, the evidence before the Panel supports the view that secondary production of manganese metal from manganese scrap is very limited at best (and thus the assumption that all scrap goes into secondary production of the metal appears incorrect). Indeed as noted by China's expert, "manganese scrap is almost always used and reused in alloy form; it is rarely recovered as manganese metal".⁹⁴⁴ Therefore, the Panel is unable to place much store in the results of these calculations.

7.602 Third, China addresses the issue of the pollution associated with the production of EPRs in isolation and does not take into account the pollution that would result from increased downstream production. The economic study put forward with a view to justifying export duties on scrap⁹⁴⁵ does not consider the upstream-downstream linkages and the interaction between export duties on scrap and on metals. To the extent that an export restriction on scrap may foster the development of downstream sectors, China's estimations of pollution reduction do not take into account the additional pollution generated by the downstream industries. China claims that the pollution generated by the downstream sector is minor compared to the reduced pollution that will result from the substitution

⁹⁴¹ China's first written submission, para. 269.

⁹⁴² Exhibits CHN-124 and CHN-147.

⁹⁴³ This is particularly true for scraps where the share of domestic production that is domestically consumed is based on data for primary metal rather than scraps.

⁹⁴⁴ See Exhibit CHN-11, footnote 25, p.5. The complainants provided argumentation and evidence aiming to show that secondary production of manganese metal is not feasible and did not occur in United States' opening oral statement at the first substantive meeting, para.106; United States' second written submission, para. 55; United States' opening oral statement at the second substantive meeting, paras. 55-56; United States comments on China's response to Panel question No 27 following the second substantive meeting. China provided argumentation and evidence aiming to rebut the United States' claim in China's response to the Panel question No. 27 following the second substantive meeting, paras.131 and 132; China's second written submission, paras. 340 and 341; Exhibit CHN-481 p.5; Exhibit CHN- 486.

⁹⁴⁵ Exhibit CHN-124.

between primary and secondary production of the metals at issue. However, as discussed above for export restrictions on EPR products⁹⁴⁶, the Panel finds that the evidence submitted by China that shows the pollution by metric tonne of various products does not permit an evaluation of the pollution generated by the amount of downstream production using the additional units of scrap available for domestic consumption as a result of the export duties on these materials. Consequently, it is not possible to reach a determination on the net effects on pollution of export duties on scrap.

7.603 Fourth, the Panel believes that the assessment of the contribution that a measure currently makes to the stated objective should not be done in isolation. We consider that the imposition of an export restriction on manganese ores, by providing an incentive to primary production, may potentially counterbalance the alleged effect of export restrictions on secondary production (from scrap products), thus undermining China's objective. The Panel is aware of China's claim that, in practice, export restrictions on manganese ores and zinc ores do not affect their domestic price because these products are largely imported, as opposed to exported, by China.⁹⁴⁷ However, the Panel notes that on this basis one should also not expect any effect of export restrictions on two categories of zinc scrap (zinc waste and scrap, "7902.0000" and zinc ash and residues "2620.1900"), as the data provided in Exhibit CHN-289 show with respect to these two products significantly higher figures for imports than for exports. Yet, China claims that the domestic price of these zinc scrap products has been affected by the imposition of export restrictions on those products. Furthermore, as discussed above, the low export to import ratio may simply be the outcome of the export restrictions themselves.

7.604 In light of the above, the Panel is of the view that China has not proved that the export measures it has in place on scrap are *currently* making a material contribution to the pollution reducing objective. Indeed China even asserts that at present the effect of export duties on scrap products is at best modest.⁹⁴⁸ Such contribution, if any, cannot be material, at least, in the present.

Whether China has discharged its burden of proof that export duties are *apt to* make a material contribution in the future to the stated objective

7.605 China argues that its export duties on metal scrap products are "apt to" make a material contribution in the future to the objective recognized under Article XX(b) as these measures are necessary for the development of the recycling industry. In particular, China asserts that "to achieve its objective of successful substitution of secondary production for primary production, it must control and manage its limited scrap resources".⁹⁴⁹ "The export duties will safeguard stable and predictable markets for scrap"⁹⁵⁰, thus allowing the development of China's recycling industry.

7.606 To justify the use of export restrictions on scrap, China identifies high foreign demand for scrap and the unstable foreign supply thereof as two factors that frustrate China's long-term objective of substituting secondary for primary production. However, there is no evidence before the Panel that supports China's claim that foreign demand for scrap is a cause of the low level of development in China of the recycling industry for magnesium, manganese and zinc metals. Furthermore, China does not explain how, given its low level of exports of scrap, the imposition of an export restriction would help guarantee a critical mass of scrap resources and help develop the recycling industry.⁹⁵¹

⁹⁴⁶ See para. 7.534 above.

⁹⁴⁷ China's response to Panel question No. 49 following the first substantive meeting, para. 247.

⁹⁴⁸ China's response to Panel question No. 36 following the second substantive meeting, para. 164.

⁹⁴⁹ China's first written submission, para. 265.

⁹⁵⁰ China's first written submission, para. 282.

⁹⁵¹ United States' comments on China's response to Panel question No. 36 following the second substantive meeting, paras. 127-130.

7.607 With respect to the supposed international supply constraints on the supply of scrap, the Panel also stresses the negative effect that a reduction of the domestic price for scrap may have on the incentive to collect scrap. China argues that various other measures that it has in place to foster the development of domestic scrap supply channels "countervail any downward pressure on metal scrap prices".⁹⁵² However, China does not substantiate this claim with any evidence.

7.608 Another effect of export restrictions on scrap is that by reducing the domestic price of secondary production they will help to develop the downstream sector. This has two implications for the case at issue. First, as discussed above⁹⁵³, China does not take into account the pollution generated by the downstream sector. Second, to the extent that export duties favour the expansion of the downstream sector, the demand for raw materials increases, including more polluting primary production. China's calculations of the effects of an export duty on scrap on pollution do not take these indirect effects into account.

7.609 Given the above, the Panel considers that the evidence provided by China is not sufficient to demonstrate that its export restrictions on scrap are apt to contribute to the stated objective.

(ii) *Availability of WTO-consistent or less trade restrictive alternative measures*

7.610 The Panel understands that there are a number of measures that could promote more effectively the supply of scrap and the development of secondary production. For example, China itself recognises the role that measures such as the introduction of a labelling requirement, incentive schemes, research grants, and low import tariffs for secondary inputs, have had in developed countries on the development of a secondary industry.⁹⁵⁴ We have reviewed in paragraphs 7.564-7.590 above China's arguments and evidence regarding alternative measures suggested by the complainants, many of which concern the recycling industry and the ongoing change in China's economy towards a more recycle-friendly economy. Importantly, China recognizes that a major impediment to the development of the recycling sector in China is the lack of recycling infrastructure; but the recycling sector is expected to be transforming rapidly or at least China states that it has put in place measures aimed at promoting "the rapid growth of domestic recycling and reprocessing industries".⁹⁵⁵ From the evidence put forward and the arguments of the parties, the Panel is of the view that there are recycling infrastructure measures that China is in the process of setting up to facilitate the development of scrap supply.⁹⁵⁶

7.611 The Panel finds that China has not demonstrated that its export duties on manganese, magnesium and zinc scrap products are justified pursuant to Article XX(b).

(d) *Conclusions on the necessity of the measure pursuant to Article XX(b) of the GATT 1994*

7.612 For the reasons mentioned above, the Panel finds that even assuming *arguendo* that it could invoke Article XX(b) of the GATT 1994 to justify its export duties contrary to its Accession Protocol, China has not demonstrated that its export duties on zinc scrap, magnesium scrap and manganese scrap are justified pursuant to Article XX(b).

⁹⁵² China's response to Panel question No. 37 following the second substantive meeting, para. 192.

⁹⁵³ See para. 7.602 above.

⁹⁵⁴ China's first written submission, para. 278.

⁹⁵⁵ China's response to Panel question No. 36 following the second substantive meeting, para. 164.

⁹⁵⁶ United States' second written submission, para 68; Mexico's second written submission, para 71.

4. Summary of the Panel's findings on China's invocation of Articles XI:2(a), XX(b) and XX(g) of the GATT 1994

7.613 The Panel recalls that China's export quota on bauxite is inconsistent with Article XI:1 of the GATT 1994. The Panel finds that China has not demonstrated that its export quota applicable to refractory-grade bauxite is temporarily applied within the meaning of Article XI:2(a) to either prevent or relieve a critical shortage. The Panel further finds that China has not demonstrated that its export quota applicable on refractory-grade bauxite relates to the conservation of exhaustible natural resources and was made effective in conjunction with restrictions on domestic production or consumption pursuant to Article XX(g) of the GATT 1994.

7.614 The Panel recalls that China's export duties on fluorspar is inconsistent with Paragraph 11.3 of China's Accession Protocol. The Panel finds *arguendo* that even assuming that Article XX(g) of the GATT 1994 were available to justify export duties in violation of China's Accession Protocol, China has not demonstrated that its export duties on fluorspar relate to the conservation of exhaustible natural resources and were made effective in conjunction with restrictions on domestic production or consumption pursuant to Article XX(g) of the GATT 1994.

7.615 The Panel recalls that China's export quotas on coke, silicon carbide are inconsistent with Article XI:1 of the GATT 1994 and China has not demonstrated that they are necessary within the meaning of Article XX(b) of the GATT 1994.

7.616 The Panel recalls that China's export duties on EPRs and scrap products are inconsistent with Paragraph 11.3 of China's Accession Protocol. The Panel finds *arguendo* that even assuming that Article XX(b) of the GATT 1994 were available to justify export duties in violation of China's Accession Protocol, China has not demonstrated that its export duties on EPRs and scrap products are necessary within the meaning of Article XX(b) of the GATT 1994.

7.617 In light of these findings under Articles XX(g) and XX(b), the Panel concludes that it is not necessary to examine whether the application of the export quotas and export duties is consistent with the provisions of the chapeau of Article XX. This is because when a measure does not meet the requirements of any sub-paragraphs of Article XX of the GATT 1994, it cannot be justified pursuant to Article XX of the GATT 1994.

5. Whether China's export quotas on certain forms of bauxite, coke, fluorspar, silicon carbide and zinc are inconsistent with Paragraph 1.2 of China's Accession Protocol and Paragraphs 162 and 165 of China's Working Party Report

7.618 The complainants argue that since China's export quotas on bauxite, coke, fluorspar, manganese, silicon carbide are inconsistent with GATT Article XI, the same quotas are necessarily inconsistent with paragraph 1.2 of China's Accession Protocol and Paragraphs 162 and 165 of China's Working Party Report. The complainants therefore request the Panel to find that China quotas are also inconsistent with China's obligations under its Accession Protocol.

7.619 To the extent the Panel finds China's export quotas are inconsistent with Article XI:1, China requests that the Panel exercise judicial economy with respect to claims under Paragraphs 162 and 165 of its Working Party Report. China considers the complainants' claims under these provisions are duplicative to those under Article XI:1. It therefore requests the Panel to exercise judicial economy with respect to these claims.⁹⁵⁷

⁹⁵⁷ China's first written submission, para. 344.

7.620 The Panel notes that Paragraph 1.2 of China's Accession Protocol provides:

"The WTO Agreement to which China accedes shall be the WTO Agreement as rectified, amended or otherwise modified by such legal instruments as may have entered into force before the date of accession. This Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement."

7.621 Thus, China's Accession Protocol is an "integral part of the WTO Agreement" and therefore contains enforceable commitments including those "commitments referred to in paragraph 342 of the Working Party Report".⁹⁵⁸ Therefore, China must comply with the commitments undertaken in the Working Party Report and listed in paragraph 342 of the Working Party Report. Paragraph 342 of the Working Party Report includes the "commitments given by China in relation to certain specific matters which are reproduced" in paragraphs 162 and 165 of the Working Party Report.

7.622 Paragraph 162 of the Working Party Report provides that:

"...China confirmed that China would abide by WTO rules in respect of non-automatic export licensing and export restrictions. The Foreign Trade Law would also be brought into conformity with GATT requirements. Moreover, export restrictions and licensing would only be applied, after the date of accession, in those cases where this was justified by GATT provisions..."

7.623 Paragraph 165 of the Working Party Report provides that:

"...China confirmed that upon accession, remaining non-automatic 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 Draft Protocol..."

7.624 The Panel concluded in paragraph 7.224 au-dessus that China's export quotas on bauxite, fluorspar, silicon carbide, coke and zinc are inconsistent with these commitments. China did not offer any justification for its 2009 quotas on fluorspar and on zinc. The Panel further concluded that export quotas on coke and silicon carbide are not justified pursuant to Article XX(b) of the GATT 1994, and the export quota on bauxite is not justified pursuant to Article XI:2(a) or Article XX(g) of the GATT 1994. In light of these findings, China has not eliminated the export quotas on those raw materials "upon accession" to the WTO.

7.625 The Panel recalls that China requested the Panel to exercise judicial economy in respect of the complainants' additional claims under Paragraphs 162 and 165 of China's Working Party Report. The Appellate Body has stated that panels are not obliged to address all legal claims raised by parties, explaining that "[n]othing in [Article 11 of the DSU]⁹⁵⁹ or in previous GATT practice *requires* a panel to examine *all* legal claims made by the complaining party."⁹⁶⁰ The Appellate Body later explained that "a panel has to address those claims on which a finding is necessary in order to enable the DSB to

⁹⁵⁸ China's Accession Protocol (Exhibit JE-2).

⁹⁵⁹ Article 11 of the DSU provides, in relevant part: "...a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."

⁹⁶⁰ Appellate Body Report, *US – Wool Shirts and Blouses*, p. 18, DSR 1997:I, 323, at p. 339; DSR 1997:I, at pages 339-340 citing inter alia, *EEC – Import Restrictions*, BISD 30S/129, para. 33; *Canada – FIRA*, BISD 30S/140, para. 5.16; *US – Sugar Quota*, BISD 31S/67, paras. 4.5-4.6; *Japan – Semi-Conductors*, BISD 35S/116, para. 122; and *US – MFN Footwear*, BISD 39S/128, para. 6.18.

make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings "in order to ensure effective resolution of the disputes to the benefits of Members."⁹⁶¹

7.626 The Panel does not consider that making findings in relation to this claim would assist the DSB in making recommendations. Paragraph 162 provides that China will abide by the WTO rules with respect to export restrictions and will only impose export restrictions when justified by GATT provisions. Since the Panel reached the conclusion above that the same export restrictions were inconsistent with GATT Article XI and not justified pursuant to GATT Article XI:2(a) or Article XX(b) or XX(g), the Panel considers that further findings under China's Accession Protocol and Working Party Report on this matter would not be necessary to resolve the dispute. Therefore, the Panel does not make findings in this regard.

E. EXPORT QUOTA ALLOCATION AND ADMINISTRATION

7.627 In addition to their claims concerning the imposition of export quotas to bauxite, coke, fluorspar, silicon carbide and zinc⁹⁶², the complainants further challenge particular aspects of China's allocation and administration of export quotas.

7.628 The complainants submit that requirements to demonstrate prior export performance and fulfil a minimum capital requirement to obtain a quota allocation for bauxite, coke, fluorspar and silicon carbide are inconsistent with China's Accession Protocol and China's Working Party Report in various respects. The United States and Mexico argue that these requirements are inconsistent with Paragraphs 1.2 and 5.1 of China's Accession Protocol, in combination with Paragraphs 83 and 84 of China's Working Party Report. The European Union argues that these requirements are inconsistent with Paragraphs 1.2 and 5.1 of China's Accession Protocol, read in combination with Paragraph 83(a), 83(b), 83(d) and 84(a) of China's Working Party Report. Separately, the European Union argues that this prior export performance requirement "is more likely to result in the exclusion of foreign enterprises and individuals from the right to export" and is therefore also inconsistent with paragraph 5.2 of China's Accession Protocol, in combination with Paragraphs 84(a) and 84(b) of China's Working Party Report.

7.629 In addition, the complainants submit that China's administration of its export quotas is inconsistent with Article X:3(a) of the GATT 1994. Under this provision, the United States and Mexico argue that China's administration of its export quotas through the involvement of the CCCMC is inconsistent with Article X:3(a). The European Union challenge China's allocation of quotas directly through the assessment of quota applicants' operation/business management capacity.

7.630 In addition, the European Union argues that China's failure to publish the total amount and procedure for the allocation of zinc export quotas in 2009 and 2010 is inconsistent with Article X:1 of the GATT 1994.

7.631 Finally, the United States and Mexico argue that China's allocation of quotas on bauxite, fluorspar and silicon carbide based on the bid-winning price is inconsistent with Article VIII:1(a) of the GATT 1994 and Paragraph 11.3 of China's Accession Protocol.

7.632 Should the Panel find that the quota measures are inconsistent with the covered agreements, and not justified by Articles XX(g) or XX(b) of the GATT 1994, China requests the Panel to exercise

⁹⁶¹ Appellate Body Report, *Australia – Salmon*, para. 223.

⁹⁶² The specific forms of the raw materials subject to complainants' claims are identified in Exhibit JE-6 and in para. 2.2 of the Descriptive Part of these Reports.

judicial economy with respect to claims regarding quota administration,. China submits that findings in these circumstances would serve no additional purpose to find that the quota administration rules, including those relating to allocation through bidding, are WTO-inconsistent.⁹⁶³

7.633 In the event the Panel were to consider these claims, China requests the Panel to reject them. China argues that requirements to demonstrate prior export performance and fulfil a minimum capital requirement are permitted under the GATT 1994 and do not improperly restrict the trading rights of enterprises, which would result in any inconsistency in respect of its Accession Protocol or Paragraphs 83 or 84 of its Working Party Report. In respect of the claim of the United States and Mexico under Article X:3(a), China argues that no conflict exists in the involvement of the CCCMC that would amount to partial administration of its export quotas. In respect of the European Union's claim, China asserts that the European Union has failed to provide any evidence that the requirement to demonstrate operation/business management capacity runs afoul of the requirements of Article X:3(a). In respect of the European Union's claim under GATT Article X:1, China acknowledges that it did not set a quota amount for zinc in 2009 and therefore asserts no need to have published a quota amount, in its defence. Moreover, China argues that it had complied with Article X:1 by publishing that "zinc could only be exported if China decided to decided to open a quota amount".⁹⁶⁴ Finally, China argues that the bid-winning price is not a fee or charge "on or in connection with exportation" within the meaning of Article VIII:1(a), nor is it a tax or charge "applied to exports" within the meaning of Paragraph 11.3 of China's Accession Protocol.

7.634 The Panel recalls that it determined above⁹⁶⁵ that China's export quotas imposed on bauxite, coke, fluorspar and silicon carbide, and a prohibition on the export of zinc in 2009 are inconsistent with Article XI:1 of the GATT 1994, and quotas on bauxite, fluorspar, silicon carbide and coke are not justified pursuant to Articles XX(b) or XX(g) of the GATT 1994.

7.635 The Panel additionally recalls that panels are not obliged to address all legal claims raised by parties.⁹⁶⁶ As noted, the Appellate Body explained that "a panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings "in order to ensure effective resolution of the disputes to the benefits of Members."⁹⁶⁷

7.636 The Panel bears in mind its statement in paragraph 7.664 that "the obligations relating to allocations of quotas (Article[] X ...) are distinct from and additional to those relating to Article XI and GATT possible justifications. Even in situations where a quota is justified pursuant to Article XX, the allocation and administration of a quota must comply with Article[] X ... ". Consequently, the Panel considers that in the event that China were in any instance to impose a quota that was justified pursuant to Article XX, it would be relevant for the parties to know whether the aspects of China's system of quota administration at issue in this dispute comply with the relevant provisions of GATT Article X.

⁹⁶³ China's first written submission, paras. 568-569.

⁹⁶⁴ China's response to Panel question No. 8, following the first substantive meeting para. 37; China's opening oral statement at the second substantive meeting, para. 298.

⁹⁶⁵ See Sections VII.C and VII.D above.

⁹⁶⁶ See para. 7.625 above; see also Appellate Body Report, *US – Wool Shirts and Blouses*, pp. 18-19, DSR 1997:I, 323, at pp. 339-340 citing *inter alia*, *EEC – Import Restrictions*, BISD 30S/129, para. 33; *Canada – FIRA*, BISD 30S/140, para. 5.16; *US – Sugar Quota*, BISD 31S/67, paras. 4.5-4.6; *Japan – Semi-Conductors*, BISD 35S/116, para. 122; and *US – MFN Footwear*, BISD 39S/128, para. 6.18.

⁹⁶⁷ Appellate Body Report, *Australia – Salmon*, para. 223.

7.637 Accordingly, the Panel will consider the complainants' claims under China's Accession Protocol and Working Party Report, and under Articles VIII:1(a), X:1 and X:3(a) of the GATT 1994 below.

1. Whether requirements to demonstrate prior export performance and a minimum capital requirement to obtain a quota allocation contravenes Paragraphs 1.2, 5.1 and 5.2 of China's Accession Protocol, read in combination with Paragraphs 83 and 84 of China's Working Party Report

7.638 The complainants submit that requirements to demonstrate prior export performance and fulfil a minimum capital requirement to obtain a quota allocation for bauxite, coke, fluorspar and silicon carbide are inconsistent with China's Accession Protocol and China's Working Party Report in various respects. The complainants submit that China expressly undertook in its Accession Protocol and Working Party Report to eliminate these specific requirements.

7.639 The United States and Mexico argue that these requirements as they pertain to bauxite, coke, fluorspar and silicon carbide are inconsistent with Paragraphs 1.2 and 5.1 of China's Accession Protocol, in combination with Paragraphs 83 and 84 of China's Working Party Report.⁹⁶⁸

7.640 The European Union argues that China's prior export performance requirement is inconsistent with Paragraphs 1.2 and 5.1 of China's Accession Protocol, read in combination with Paragraph 83(a) and 83(d) of China's Working Party Report. Separately, the European Union argues that this prior export performance requirement "is more likely to result in the exclusion of foreign enterprises and individuals from the right to export" and is therefore also inconsistent with paragraph 5.2 of China's Accession Protocol, in combination with Paragraphs 84(a) and 84(b) of China's Working Party Report. The European Union argues that China's certain minimum capital requirement for the right to export coke, bauxite, silicon carbide and fluorspar is inconsistent with Paragraphs 1.2 and 5.1 of China's Accession Protocol, in combination with Paragraphs 83(b), 83(d) and 84(a) of China's Working Party Report.

7.641 China requests the Panel to reject the complainants' claims, including for failure by the complainants to "present the problem clearly" with respect to claims under China's Accession Protocol and Working Party Report.⁹⁶⁹ China also criticizes the European Union's identification of the relevant measures at issue in respect of its claims.⁹⁷⁰ Lastly, China notes that measures identified by the complainants in respect of their claims have expired. China submits that the *2009 Coke Export Quota Application Procedures* has been replaced by a 2010 version, which contains similar requirements.⁹⁷¹ In addition, China submits that the *2001 Export Quota Bidding Measures*⁹⁷² and *Export Quota Bidding Implementation Rules*⁹⁷³ have now expired, and have been replaced by the *2010 Second-Batch Bidding Qualifications and Review for Export Quotas*.⁹⁷⁴ China submits that, the *2009 Second Round Export Quota Bidding Announcement*⁹⁷⁵ was replaced by the *2010 First-Batch Bidding*

⁹⁶⁸ United States' first written submission, paras. 283, 289; Mexico's first written submission paras. 286 and 292.

⁹⁶⁹ China's first written submission, para. 613.

⁹⁷⁰ China's first written submission, paras. 614, 618.

⁹⁷¹ China's first written submission, paras. 615, 620.

⁹⁷² Exhibits JE-77, CHN-304.

⁹⁷³ Exhibits JE-78, CHN-305.

⁹⁷⁴ Exhibit CHN- 307; China's first written submission, para. 616.

⁹⁷⁵ Exhibits CHN-310, JE-91.

*Qualifications for Export Quotas of Industrial Products*⁹⁷⁶, which was in turn replaced by the *2010 Second-Batch Bidding Qualifications and Review for Export Quotas*.⁹⁷⁷

7.642 The Panel recalls its finding from its 1 October 2010 ruling⁹⁷⁸ that the complainants' Panel Requests (in their "Section III") set out sufficient connections between the challenged measures and certain violations attributed to such measures. The Panel believes that differences in the scope of the claims presented by the United States, Mexico and the European Union do not necessarily affect the connection between the identified measures and the claimed violations. The Panel also recalls that in paragraph 7.33 *au-dessus* it decided – in light of the complainants' decision to narrow down their claim so as to exclude any challenge of any 2010 measure – that it would make findings only in respect of China's 2009 measures. Finally, contrary to China's claim, the Panel was able to identify measures referred to by the European Union in its first written submission, with respect to its trading rights claims.⁹⁷⁹

7.643 Therefore, the Panel will consider the complainants' claims together below where relevant, or otherwise, separately. The Panel begins with the relevant provisions of China's Accession Protocol.

(a) China's "trading rights" commitments

7.644 Paragraph 5.1 of China's Accession Protocol provides:

"Without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement...within three years after accession all enterprises in China shall have the right to trade in all goods...Such right to trade shall be the right to...export goods..."

7.645 Paragraph 5.2 of China's Accession Protocol:

"Except as otherwise provided for in the Protocol, all foreign individuals and enterprises, including those not invested or registered in China, shall be accorded treatment no less favourable than that accorded to enterprises in China with respect to the right to trade."

7.646 Paragraph 1.2 of China's Accession Protocol provides:

"The WTO Agreement to which China accedes shall be the WTO Agreement as rectified, amended or otherwise modified by such legal instruments as may have entered into force before the date of accession. This Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement."

7.647 Therefore, China must comply with the commitments undertaken in its Working Party Report and listed in paragraph 342 of its Working Party Report. Paragraph 342 of China's Working Party Report includes the "commitments given by China in relation to certain specific matters which are reproduced" in paragraphs 83 and 84 of China's Working Party Report.

7.648 Paragraph 83(a) of the Working Party Report provides:

⁹⁷⁶ Exhibit CHN-311.

⁹⁷⁷ Exhibit CHN- 307. See: China's first written submission, para. 616.

⁹⁷⁸ See paragraphs 1.10 to 1.13 above; Annex F to these Reports.

⁹⁷⁹ See, in particular footnotes 224-228, 229-231 of the European Union's first written submission.

"... upon accession, China would eliminate for both Chinese and foreign-invested enterprises any export performance...and prior experience requirements such as in...exporting, as criteria for obtaining or maintaining the right to ... export."

7.649 Paragraph 83(b) of the Working Party Report provides:

"In order to accelerate this approval process and increase the availability of trading rights, the representative of China confirmed that China would reduce the minimum registered capital requirement (which applied only to wholly Chinese-invested enterprises) to obtain trading rights to RMB 5,000,000 for year one, RMB 3,000,000 for year two, RMB 1,000,000 for year three and would eliminate the examination and approval system at the end of the phase-in period for trading rights."

7.650 Paragraph 83(d) of the Working Party Report provides:

... within three years after accession, all enterprises in China would be granted the right to trade ...

7.651 Paragraph 84(a) of the Working Party Report provides:

"... China would eliminate its system of examination and approval of trading rights within three years from accession. At that time, China would permit all enterprises in China and foreign enterprises and individuals...of other WTO Members to export...all goods (except for the share of products listed in Annex 2a to the Draft Protocol reserved for importation and exportation by state trading enterprises) ..."

7.652 Paragraph 84(b) of the Working Party Report provides:

"With respect to the grant of trading rights to foreign enterprises and individuals ... China confirmed that such rights would be granted in a non-discriminatory and non-discretionary way ... [A]ny requirements for obtaining trading rights would be for customs and fiscal purposes only and would not constitute a barrier to trade ..."

7.653 In *China – Publications and Audiovisual Products*, the Appellate Body addressed the meaning of China's right to regulate trade under Article 5.1 of China's Accession Protocol. The Appellate Body described the "right to regulate" as "an inherent power enjoyed by a Member's government, rather than a right bestowed by international treaties such as the WTO Agreement".⁹⁸⁰ The Appellate Body explained further that the phrase "right to regulate trade in a manner consistent with the WTO Agreement" referred both to "rights that the covered agreements affirmatively recognize as accruing to WTO Members, namely, the power of Members to take specific types of regulatory measures in respect of trade in goods when those measures satisfy prescribed WTO disciplines and meet specified criteria", as well as "certain rights to take regulatory action that derogates from obligations under the WTO Agreement—that is, to relevant exceptions".⁹⁸¹ Finally, the Appellate Body explained that the "obligations assumed by China in respect of trading rights, which relate to traders" is "closely intertwined" with "obligations imposed on all WTO Members in respect of their regulation of trade in goods", including those under Article XI of the GATT 1994.⁹⁸²

⁹⁸⁰ Appellate Body Report, *China – Publications and Audiovisual Products*, para. 222.

⁹⁸¹ Appellate Body Report, *China – Publications and Audiovisual Products*, para. 223.

⁹⁸² Appellate Body Report, *China – Publications and Audiovisual Products*, para. 226.

7.654 The Appellate Body in *China – Publications and Audiovisual Products* also took note of the Panel's findings in that dispute that paragraphs 83(d) and 84(a) of China's Working Party Report "confirm China's obligation to grant the right to trade", and paragraph 84(b) of China's Working Party Report "contains an obligation to grant in a nondiscretionary manner the right to trade to foreign enterprises and individuals."⁹⁸³

7.655 Paragraphs 83(a) and 83(b) of China's Working Party Report provide additional specific restrictions on China's right to regulate trade. In particular, Paragraph 83(a) directs China to eliminate prior import and export performance requirements for both Chinese and foreign-invested enterprises. Paragraph 83(b) directs China to eliminate any "examination and approval system" within three years of accession, including specifically the elimination of minimum registered capital requirements.

7.656 Finally, the Panel notes that the transition period following China's accession ended on 11 December 2004. None of the raw materials at issue in this dispute are included in Annex 2A or 2B.⁹⁸⁴ Thus, the commitments undertaken in these provisions are applicable to all materials in this dispute. The Panel will now consider the complainants' claims relating to coke, which China allocates quotas directly, and, bauxite, fluorspar and silicon carbide, which China allocates quotas through a bidding system.

- (b) Whether China's prior export performance and minimum registered capital requirements are inconsistent with Paragraphs 1.2 and 5.1 of China's Accession Protocol, read in combination with Paragraphs 83 and 84 of China's Working Party Report.

7.657 The complainants submit that China requires exporters to satisfy certain prior export performance and minimum registered capital criteria in order to receive an allocation of a quota for bauxite, coke, fluorspar and silicon carbide in order to be able to export under the quota. By virtue of the fact that enterprises that fail to meet these requirements are not permitted to export, the complainants claim that exporters are not granted the trading right to export these raw materials, in contravention of commitments undertaken in China's Accession Protocol.

7.658 The complainants submit that, under the *2009 Coke Export Quota Application Procedure*⁹⁸⁵, Chinese enterprises must demonstrate that they have exported the requisite amount ("certain level of volumes" or "export scale") of coke in the previous three-year period.⁹⁸⁶ In addition, the complainants submit that trading companies must have a registered capital of at least RMB 50 million under the *2009 Second Batch Coke Export Quota*⁹⁸⁷ or be prohibited to export under the quota for that year.⁹⁸⁸ The complainants submit that these requirements are also applicable to foreign-invested companies under the *2009 First Batch Coke Export Quotas for FIEs*⁹⁸⁹ and *2009 Second Batch Coke Export Quotas for FIEs*⁹⁹⁰, allocating the coke export quota to such companies.⁹⁹¹

⁹⁸³ Appellate Body Report, *China – Publications and Audiovisual Products*, para.167; see also Panel Report, *China – Publications and Audiovisual Products*, paras. 7.249-7.252, 7.260-7.266, 7.285-7.299, 7.313-314, 7.318-324.

⁹⁸⁴ China's Accession Protocol, WT/L/432, Annex 2A2, 2B, pp. 20, 30 (Exhibit JE-2).

⁹⁸⁵ Exhibits CHN-308, JE-85.

⁹⁸⁶ United States' first written submission, para. 279; European Union's first written submission, para. 222; Mexico's first written submission para. 282; United States' second written submission, para. 346; Mexico's second written submission, para. 349.

⁹⁸⁷ Exhibits CHN-338, JE-81.

⁹⁸⁸ United States' first written submission, para. 279-280; European Union's first written submission, para. 236; Mexico's first written submission para. 282-283.

⁹⁸⁹ Exhibit JE-82.

⁹⁹⁰ Exhibit JE-83.

7.659 The complainants additionally submit that, through the *Export Quota Bidding Measures*⁹⁹² and *Export Quota Bidding Implementation Rules*⁹⁹³, China requires exporters of bauxite, fluorspar and silicon carbide to satisfy certain prior export performance and minimum registered capital in order to receive an allocation of a quota through bidding.⁹⁹⁴ They argue that foreign-invested companies are also subject to prior export "experience" requirements and minimum capital requirements under the 2009 *First Round Export Quota Bidding Announcement*⁹⁹⁵ and 2009 *Second Round Export Quota Bidding Announcement*.⁹⁹⁶

7.660 The European Union argues that the prior export performance requirement also has the effect of denying new applicants the possibility to export.⁹⁹⁷

7.661 The United States and Mexico consider that China's prior export performance and minimum registered capital requirements are inconsistent with Paragraphs 1.2 and 5.1 of China's Accession Protocol, read in combination with Paragraphs 83 and 84 of China's Working Party Report. The European Union considers China's prior export performance requirements are inconsistent with Paragraph 5.1 of China's Accession Protocol, read in combination with Paragraphs 83(a) and (d) of China's Working Party Report.⁹⁹⁸ The European Union considers China's minimum capital requirement is inconsistent with Paragraphs 5.1 and 1.2 of China's Accession Protocol and Paragraphs 83(b), 83(d) and 84(a) of China's Working Party Report.

7.662 China acknowledges that enterprises seeking to qualify to receive a share of the coke quota, or participate in the allocation of the quota through bidding must satisfy minimum export performance and minimum capital requirements.⁹⁹⁹ However, it submits that these requirements do not improperly restrict the trading rights of enterprises. China argues that Paragraph 5.1 of China's Accession Protocol and Paragraphs 83 and 84 of China's Working Party Report "confirm[] that 'China's obligation to grant the right to trade cannot impair China's power to impose WTO-consistent import licensing, TBT and SPS measures'"¹⁰⁰⁰ It submits that these provisions "recognize China's inherent power to adopt measures to regulate trade in a WTO-consistent manner." In other words, China argues that these provisions "recognize China's right to impose a WTO-consistent quota ... and to administer that quota consistently with the WTO covered agreements."¹⁰⁰¹

7.663 China contends that it has demonstrated its quotas to be WTO-consistent. China argues generally that quotas may be WTO-consistent so long as they are administered consistent with Articles X:3(a) and XIII of the GATT 1994.¹⁰⁰² China contends that a Member has authority to rely upon past trading performance in allocating export quotas, referring to Article 3.5(j) of the Import

⁹⁹¹ United States' first written submission, para. 281; Mexico's first written submission, para. 284.

⁹⁹² *Export Quota Bidding Measures*, CHN-304, Exhibit JE-77.

⁹⁹³ Articles 11, 6(I) (CHN-305, Exhibit JE-78).

⁹⁹⁴ United States' first written submission, paras. 285-286; European Union's first written submission, para. 221; Mexico's first written submission, paras. 288-289; United States' second written submission, para. 347; Mexico's second written submission, para. 350.

⁹⁹⁵ Article III(II)iii, III(II)v, III(II)vi (Exhibits JE-90, CHN-309).

⁹⁹⁶ Article III.2(3), III.2(6) (Exhibits JE-91, CHN-310). United States' first written submission, para. 286; European Union's first written submission, paras. 222, 236; Mexico's first written submission para. 289.

⁹⁹⁷ European Union's first written submission, paras. 224-225.

⁹⁹⁸ European Union's first written submission, paras. 226-227.

⁹⁹⁹ China's first written submission, para. 622.

¹⁰⁰⁰ China's first written submission, para. 624.

¹⁰⁰¹ China's first written submission, para. 625; see also China's second written submission, paras. 404-405.

¹⁰⁰² China's first written submission, paras. 627-628.

Licensing Agreement in support of this position.¹⁰⁰³ China submits that the export performance and minimum capital requirements under challenge are such "eligibility criteria" for the WTO-consistent allocation of export quotas. Therefore, in China's view, it has not acted inconsistently with its obligations under its Accession Protocol as informed by its Working Party Report. To the extent the Panel finds that China's export quotas on bauxite, coke, fluorspar and silicon carbide are WTO-consistent, China requests the Panel to reject the complainants' claims.

7.664 The obligations relating to allocation and administration of quotas (Articles X and XIII) are distinct from and additional to those relating to Article XI and GATT possible justifications. Even in situations where a quota is justified pursuant to Article XX, the allocation and administration of a quota must comply with Articles X and XIII and, in the case of quotas on importation, with the WTO Import Licensing Agreement.

7.665 Regardless, as explained above¹⁰⁰⁴, Paragraphs 83 and 84 of China's Working Party Report includes further commitments granted by China. Pursuant to Paragraph 5.1 of China's Accession Protocol and Paragraphs 83 and 84 of China's Working Party Report, all enterprises in China – Chinese and foreign enterprises alike – are to be granted the right to export almost all products¹⁰⁰⁵ from China, following a transition period that concluded on 11 December 2004. Paragraph 1.2 also states that China's Accession Protocol, including Paragraphs 83 and 84 of China's Working Party Report, shall be an "integral part of the WTO Agreement." In the Panel's view, the regulation of "rights that the covered agreements affirmatively recognize as accruing to WTO Members" must be understood in light of the obligations as defined through China's Accession Protocol (and relevant provisions of its Working Party Report). China expressly committed through these provisions to eliminate any "examination and approval system" following 11 December 2004, including eliminating "export performance" and "prior experience requirements" and minimum registered capital requirements.

7.666 Specifically, Paragraph 83(a) directs China to eliminate any "export performance" and "prior experience requirements". Paragraph 83(b) directs China to reduce the minimum registered capital requirements gradually, eliminating its "examination and approval system" at the end of 11 December 2004. Paragraph 83(d) confirms that enterprises would be granted the "right to trade". Paragraph 84(a) requires China to permit "all enterprises in China and foreign enterprises and individuals...of other WTO Members to export...all goods". In addition, Paragraph 84(b) "confirms" that these rights would be granted in a non-discriminatory and non-discretionary way.

7.667 Therefore, the Panel is unable to agree with China that the "prior export performance" requirement and "minimum registered capital" requirements, challenged by the complainants, are automatically WTO-consistent in the case of China's allocation of export quotas, because China's exports allegedly respect the provisions of GATT Articles X:3(a), XIII of the GATT 1994 or any provision of the Import Licensing Agreement. Such a conclusion would run contrary to the particular requirements set forth at the time of China's accession.

7.668 As discussed in detail in paragraphs 7.182-7.195 au-dessus, the relevant measures identified by the complainants, require on their face that exporting companies (including either "production" or "trading" companies) for coke, bauxite, fluorspar and silicon carbide, supplied an amount for export

¹⁰⁰³ China's first written submission, para. 630; China's second written submission, para. 406.

¹⁰⁰⁴ See paragraphs 7.653-7.655 above.

¹⁰⁰⁵ As noted above, goods in Annex 2a of China's Accession Protocol are exempted from the commitments of Paragraph 5.1. However, none of the raw materials at issue in this dispute fall under Annex 2a.

or exported an average annual volume to qualify for a 2009 export quota.¹⁰⁰⁶ In addition, the relevant measures identified by the complainants impose particular minimum registered capital requirements on applicants to export.¹⁰⁰⁷ The Panel understands these requirements to amount to a form of examination and approval based on prior export performance and minimum registered capital requirements that China committed to eliminate in Paragraphs 83(a), 83(b) and 83(d) of China's Working Party Report. The elimination of these requirements are further required by Paragraphs 84(a) and 84(b).

7.669 For the foregoing reasons, the Panel concludes that China's prior export performance and minimum registered capital requirements imposed on coke pursuant to the *2009 Coke Export Quota Application Procedure*¹⁰⁰⁸, *2009 Second Batch Coke Export Quota*¹⁰⁰⁹, *2009 First Batch Coke Export Quotas for FIEs*¹⁰¹⁰, and *2009 Second Batch Coke Export Quotas for FIEs*¹⁰¹¹ are inconsistent with Paragraphs 1.2 and 5.1 of China's Accession Protocol, read in combination with Paragraphs 83(a), 83(b) and 83(d); and Paragraphs 84(a) and 84(b) of China's Working Party Report.

7.670 In addition, the Panel concludes that China's prior export performance and minimum registered capital requirements imposed on bauxite, fluorspar and silicon carbide pursuant to the *Export Quota Bidding Measures*¹⁰¹², *Export Quota Bidding Implementation Rules 2009 First Round Export Quota Bidding Announcement*¹⁰¹³, and *2009 Second Round Export Quota Bidding Announcement*¹⁰¹⁴ are inconsistent with Paragraphs 1.2 and 5.1 of China's Accession Protocol, read in combination with Paragraphs 83(a), 83(b) and 83(d); and Paragraphs 84(a) and 84(b) of China's Working Party Report.

(c) Whether China's prior export performance requirement is inconsistent with paragraph 5.2 of China's Accession Protocol and Paragraphs 84(a) and 84(b) of China's Working Party Report

7.671 The European Union further argues that China's prior export performance requirement discussed in paragraph 7.640 *au-dessus* is inconsistent with paragraph 5.2 of China's Accession Protocol and Paragraphs 84(a) and 84(b) of China's Working Party Report. The European Union submits that this requirement is "more likely to result in the exclusion of foreign enterprises and individuals from the right to export the relevant raw materials ... because foreign enterprises are more likely to be new applicants for export quotas than Chinese companies producing, or traditionally

¹⁰⁰⁶ *2009 Coke Export Quota Application Procedure*, Articles I(1)2 and I(2)2 (Exhibit JE-85, CHN-308); *2009 Second Batch Coke Export Quota*, p. 1 (Exhibit JE-81, CHN-338); *2009 First Batch Coke Export Quotas for FIEs* (Exhibit JE-82); *2009 Second Batch Coke Export Quotas for FIEs* (Exhibit JE-83); *Export Quota Bidding Measures*, Articles 12, 13 (Exhibits JE-77, CHN-304); *Export Quota Bidding Implementation Rules*, Articles 15-18 (Exhibits JE-78, CHN-305); *2009 First Round Export Quota Bidding Announcement*, Articles III(II)iii, III(II)v, III(II)vi (Exhibits JE-90, CHN-309); *2009 Second Round Export Quota Bidding Announcement*, Articles III.3, III.5, III.6 (Exhibits JE-91, CHN-310).

¹⁰⁰⁷ *2009 Coke Export Quota Application Procedure*, I(2)2 (Exhibits JE-85, CHN-308); *Export Quota Bidding Measures*, Articles 12, 13 (Exhibits JE-77, CHN-304); *Export Quota Bidding Implementation Rules*, Articles 15-18 (Exhibits JE-78, CHN-305); *2009 First Round Export Quota Bidding Announcement*, Articles III(II)iii, III(II)v, III(II)vi (Exhibits JE-90, CHN-309); *2009 Second Round Export Quota Bidding Announcement*, Articles III.3, III.5, III.6 (Exhibits JE-91, CHN-310).

¹⁰⁰⁸ Articles I(1)2 and I(2)2 (Exhibit JE-85, CHN-308).

¹⁰⁰⁹ Exhibits JE-81, CHN-338 p. 1.

¹⁰¹⁰ Exhibit JE-82.

¹⁰¹¹ Exhibit JE-83.

¹⁰¹² Articles 12, 13 (Exhibits JE-77, CHN-304).

¹⁰¹³ Articles III(II)iii, III(II)v, III(II)vi (Exhibit JE-90, CHN-309).

¹⁰¹⁴ Articles III.3, III.5, III.6 (Exhibit JE-91, CHN-310).

exporting, the [r]aw [m]aterials."¹⁰¹⁵ Because of this, the European Union argues that the prior export performance requirement "operates in a discretionary and potentially discriminatory way" against foreign enterprises that is contrary to obligations in Paragraph 5.2 of China's Accession Protocol and Paragraphs 84(a) and 84(b) of China's Working Party Report.

7.672 China argues that the European Union's has not presented "any evidence supporting its allegation of discrimination" or "any explanation of how the ... measures connected to the claim made under the provisions at issue".¹⁰¹⁶

7.673 The obligation in Paragraph 5.2 of China's Accession Protocol that "all foreign individuals and enterprises ... shall be accorded treatment no less favourable than that accorded to enterprises in China with respect to the right to trade." As explained above¹⁰¹⁷, Paragraph 84 of China's Working Party Report includes further commitments granted by China. Paragraph 84(a) requires China to permit "all enterprises in China and foreign enterprises and individuals...of other WTO Members to export...all goods", except for those listed in Annex 2A. In addition, Paragraph 84(b) "confirms" that these rights would be granted in a non-discriminatory and non-discretionary way.

7.674 As discussed in detail in Section VII.C.2(a)(ii) and VII.C.2(b)(i) au-dessus, the relevant measures identified by the European Union require on their face that exporting companies (including either "production" or "trading" companies) for coke, bauxite, fluorspar and silicon carbide, supplied an amount for export or exported an average annual volume to qualify for a 2009 export quota.¹⁰¹⁸

7.675 In the Panel's view, the measures do not expressly "operate[] to the detriment and exclusion of foreign enterprises from quota allocation."¹⁰¹⁹ Instead the past export performance requirement applies similarly to both Chinese enterprises and foreign ones. Accordingly, there is no basis on the face of the measures alone to operate in a discriminatory way against foreigners. In addition, the European Union asserts that the measures in practice operate in a discriminatory way to deny foreign enterprises participation in export quota allocation, stating that "foreign enterprises can never meet the conditions for participation to export quota allocation procedures."¹⁰²⁰ However, as China notes, the European Union has not submitted evidence beyond mere assertion that foreign enterprises have not been allocated export quotas in the past.¹⁰²¹

7.676 In the absence of evidence that foreign enterprises have not been allocated export quotas in the past, and thus would be excluded from receiving export quotas in the future, the Panel concludes that it has not basis to find the measures operate in a discriminatory manner. Under the measures,

¹⁰¹⁵ European Union's first written submission, para. 231; see also European Union's second written submission, para. 146.

¹⁰¹⁶ China's first written submission, para. 634; China's second written submission, para. 409.

¹⁰¹⁷ See paragraphs 7.646-7.647 above.

¹⁰¹⁸ 2009 *Coke Export Quota Application Procedure*, Articles I(1)2 and I(2)2 (Exhibits JE-85, CHN-308); 2009 *Second Batch Coke Export Quota*, at p. 1 (Exhibits JE-81, CHN-338); 2009 *First Batch Coke Export Quotas for FIEs* (Exhibit JE-82); 2009 *Second Batch Coke Export Quotas for FIEs* (Exhibit JE-83, No Chinese Exhibit); *Export Quota Bidding Measures*, Articles 12, 13 (Exhibit JE-77, CHN-304); *Export Quota Bidding Implementation Rules*, Articles 15-18 (Exhibit JE-78, CHN-305); 2009 *First Round Export Quota Bidding Announcement*, Articles III(II)iii, III(II)v, III(II)vi (Exhibits JE-90, CHN-309); 2009 *Second Round Export Quota Bidding Announcement*, Articles III.3, III.5, III.6 (Exhibits JE-91, CHN-310).

¹⁰¹⁹ European Union's second written submission, para. 146.

¹⁰²⁰ European Union's second written submission, para. 147.

¹⁰²¹ In this respect, the European Union requests China to provide a "list with the foreign enterprises that have been allocated a raw material export quota, before the initiation of the current dispute settlement proceedings". European Union's second written submission, para. 148.

both Chinese and foreign enterprises that did not export in prior years would appear to be treated the same.

7.677 Accordingly, the Panel concludes that China's prior export performance requirement imposed on coke pursuant to the *2009 Coke Export Quota Application Procedure*¹⁰²², *2009 Second Batch Coke Export Quota*¹⁰²³, *2009 First Batch Coke Export Quotas for FIEs*¹⁰²⁴, and *2009 Second Batch Coke Export Quotas for FIEs*¹⁰²⁵ is not necessarily discriminatory and thus not inconsistent with paragraph 5.2 of China's Accession Protocol and Paragraphs 84(a) and 84(b) of China's Working Party Report. Similarly, the Panel concludes that China's prior export performance requirement imposed on bauxite, fluorspar and silicon carbide pursuant to the *Export Quota Bidding Measures*¹⁰²⁶, *Export Quota Bidding Implementation Rules*¹⁰²⁷, *2009 First Round Export Quota Bidding Announcement*¹⁰²⁸, and *2009 Second Round Export Quota Bidding Announcement*¹⁰²⁹ is not necessarily discriminatory and thus is not inconsistent with paragraph 5.2 of China's Accession Protocol and Paragraphs 84(a) and 84(b) of China's Working Party Report.

(d) Summary

7.678 The Panel concluded above that China's prior export performance and minimum registered capital requirements are inconsistent with Paragraphs 1.2 and 5.1 of China's Accession Protocol, read in combination with Paragraphs 83(a), 83(b) and 83(d); and Paragraphs 84(a) and 84(b) of China's Working Party Report. The Panel concluded, however, that China's prior export performance requirement is not inconsistent with paragraph 5.2 of China's Accession Protocol, read in combination with Paragraphs 84(a) and 84(b) of China's Working Party Report.

2. Whether China's administration of its export quotas allocated directly through the assessment of quota applicants' operation/business management capacity is inconsistent with Article X:3(a) of the GATT 1994

7.679 According to the European Union, China's authorities have the power to refuse the grant of export quotas to enterprises which, in the Chinese authorities' view, do not possess "business management capacity". There is no definition of "business management capacity" in Chinese legislation. The European Union submits that this condition is vague and opaque and allows China's authorities discretion on whether to accept or refuse applications for export quotas. The European Union considers that this allows China to administer its export quota allocation system in a manner that is non-uniform, partial and unreasonable and hence inconsistent with Article X:3(a).

7.680 China states that the condition is properly translated as the "operation capacity" of the applicant and refers to the operational ability of the applicant to carry out the mechanics of an export transaction. There is nothing non-uniform, partial, or unreasonable about considering, among other objective factors, an applicant's ability to execute exports before allocating it part of the quota. Such a criterion ensures quota fill and avoids wasting the quota on applicants who cannot manage to export it.

¹⁰²² Articles I(1)2 and I(2)2 (Exhibits JE-85, CHN-308).

¹⁰²³ Exhibits JE-81, CHN-338 p. 1.

¹⁰²⁴ Exhibit JE-82

¹⁰²⁵ Exhibit JE-83.

¹⁰²⁶ Articles 12, 13 (Exhibits JE-77, CHN-304)

¹⁰²⁷ Articles 15-18 (Exhibits JE-78, CHN-305).

¹⁰²⁸ Articles III(II)iii, III(II)v, III(II)vi (Exhibits JE-90, CHN-309)

¹⁰²⁹ Articles III.3, III.5, III.6 (Exhibits JE-91, CHN-310).

7.681 China further submits that the European Union has failed to provide any evidence demonstrating that either the alleged absence of a definition of "operation capacity" or the criterion itself inherently leads to administration that is contrary to Article X:3(a). Asserting that a Member might take action that could potentially be WTO-inconsistent, depending on the specific but as-yet-unknown character of that action, is not sufficient to establish a violation. According to China, the Appellate Body in *EC – Selected Customs Matters* requires that a complainant challenging a measure under Article X:3(a) must demonstrate that the particular criterion will, if applied, "necessarily lead to" WTO-inconsistent administration.

7.682 In support of its position, the European Union refers to the panel report on *Argentina – Hides and Leather*. This panel found that what is required under Article X:3(a) is a showing that there is an inherent possibility, or an inherent danger that a certain prejudice to the interests of some category of traders, could result from the challenged measures. The European Union also asserts that the Appellate Body in *EC – Selected Customs Matters* does not require a complainant challenging a measure under Article X:3(a) to show that the elements of the defending party's "administration of laws" and regulations must "necessarily lead to" an administration which is non-uniform, partial or unreasonable, in order to establish a violation of Article X:3(a).

(a) The requirements of Article X:3(a)

7.683 The Panel will first explain its interpretation of the terms of Article X:3(a) taking into account the relevant jurisprudence.

7.684 Article X:3(a) states:

"Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article."¹⁰³⁰

7.685 The Appellate Body has stated that Article X:3 establishes certain minimum standards for transparency and procedural fairness in the administration of trade regulations.¹⁰³¹ The panel in *Argentina – Hides and Leather* noted that the obligations of uniformity, impartiality and reasonableness are legally independent and WTO Members are obliged to comply with all three requirements.¹⁰³² We agree. Consequently, should we find a violation of any of the three obligations, this would constitute a violation of the obligations under Article X:3(a).

7.686 The Panel will first consider the meaning of the term "administer" in the phrase "administer in a uniform, impartial and reasonable manner". It is important to define the scope of the term "administer" as this word is related to the type of claim that a complainant can bring under Article X:3(a) (for example whether a complainant can bring an "as applied" challenge concerning the application of laws, regulations, decisions and rulings in a particular case). Interpreting the meaning of the term "administer" also clarifies whether, for example, a challenge can be made in respect of the system of administration itself or whether a challenge can be made in respect of the substance of measures (an "as such" challenge).

¹⁰³⁰ Article X:1 states: "Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports ..."

¹⁰³¹ Appellate Body Report, *US – Shrimp*, para. 83.

¹⁰³² Panel Report, *Argentina – Hides and Leather*, para. 11.86.

(i) *The meaning of "administer" in Article X:3(a)*

7.687 Panels and the Appellate Body have established that the obligations under Article X:3(a) apply to the administration of the laws, regulations, decisions and rulings of the kind falling within the scope of Article X:1, but not to the substantive content of those laws and regulations.¹⁰³³

7.688 Subsequently, in *EC – Selected Customs Matters*, the Appellate Body clarified that a government's act of administration that is subject to the provisions of Article X:3(a) includes not only acts of administering the laws and regulations of the kind in Article X:1, but also legal instruments that regulate the application or implementation of such laws and regulations.¹⁰³⁴ This confirms the earlier finding of the panel in *Argentina – Hides and Leather* that "the relevant question [in challenging a measure under Article X] is whether the substance of such a measure is *administrative in nature* or, instead, involves substantive issues more properly dealt with under other provisions of the GATT 1994".¹⁰³⁵

7.689 In *EC – Selected Customs Matters*, the Appellate Body agreed with the panel in that case that "'administer' may include administrative processes", and that an administrative process could be viewed as "a series of steps, actions, or events that are taken or occur in relation to the making of an administrative decision." The Appellate Body concluded that as the term "administer" in Article X:3(a) refers to "putting into practical effect" or "applying" a legal instrument of the kind described in Article X:1, it is the *application* of a legal instrument of the kind described in Article X:1 that is required to be uniform under Article X:3(a), but *not the process* leading to administrative decisions, or the tools that might be used in the exercise of administration." Notwithstanding the foregoing, the Appellate Body stated that the "features of an administrative process" may nonetheless be relevant in the assessment of whether the legal instrument at issue has been uniformly applied or put into practical effect in a particular case.¹⁰³⁶

7.690 In the light of this, the Panel considers that the same can be said for an administrative process that consists of *one* step or *one* action or *one* event in relation to the taking of an administrative decision. In other words, an administrative "process" is not necessarily confined to a *series* of steps, actions or events. We find support for this view in the dictionary definition of the word "process": "process, *n.* *gen.* The action or fact of going on or being carried on ... a course of action, a procedure".¹⁰³⁷

7.691 The Panel now turns to consider the meaning of the terms "uniform", "impartial" and "reasonable" as they appear in Article X:3(a).

¹⁰³³ Appellate Body Reports on *EC – Bananas III*, para. 200; *EC – Poultry*, para. 115.

¹⁰³⁴ Appellate Body Report, *EC – Selected Customs Matters*, para. 200. The Appellate Body states, "[u]nder Article X:3(a), a distinction must be made between *the legal instrument being administered* and *the legal instrument that regulates* the application or implementation of that instrument. While the substantive content of the legal instrument being administered is *not* challengeable under Article X:3(a), we see no reason why a legal instrument that regulates the application or implementation of that instrument cannot be examined under Article X:3(a) if it is alleged to lead to a lack of uniform, impartial, or reasonable administration of that legal instrument".

¹⁰³⁵ Panel Report, *Argentina – Hides and Leather*, para. 11.70 (emphasis added).

¹⁰³⁶ Appellate Body Report, *EC – Selected Customs Matters*, para. 224-225.

¹⁰³⁷ (*Shorter Oxford English Dictionary*, 5th edn., L. Brown (ed.) (Oxford University Press, 2002), Vol. 2, p. 2354.

(ii) *The meaning of "uniform", "impartial" and "reasonable"*

7.692 In the context of defining the uniformity criterion, the panel in *Argentina – Hides and Leather* held that uniform treatment means that "every exporter should be able to expect treatment of the same kind, in the same manner, both over time and in different places and with respect to other persons... Uniform administration requires that Members ensure that their laws are applied consistently and predictably".¹⁰³⁸

7.693 The Panel notes that, read in the context of Article X:3(a), the word "uniform" means "[o]f one unchanging form, character, or kind; that is or stays the same in different places or circumstances, or at different times ... of the same form, character or kind as another or others; conforming to one standard, rule or pattern; alike similar."¹⁰³⁹ Applying this definition and the *Hides and Leather* approach to the facts at hand, exporter applicants should be able to expect treatment of the same kind, in the same manner, both over time and in different places in terms of how the operation capacity criterion is applied.

7.694 As concerns the impartiality requirement, read in the context of Article X:3(a), the word "impartial", means "not partial; not favouring one party or side more than another; unprejudiced, unbiased, fair".¹⁰⁴⁰ Consequently, impartial administration would appear to mean the application or implementation of the relevant laws and regulations in a fair, unbiased and unprejudiced manner.

7.695 The impartiality requirement was also considered in *Argentina – Hides and Leather*. The issue in dispute concerned the presence of a private party with conflicting commercial interests in the customs process. The panel in that case considered that the requirement of impartial administration was not merely a matter of the presence of a private party with conflicting commercial interests; rather, it was of the view that the consistency of the customs process with the impartiality requirement of Article X:3(a) would depend on what that private party is permitted to do.¹⁰⁴¹ That panel found that the answer to this question was related directly to the question of access to information as part of the product classification process. The panel held that whenever a party with a contrary commercial interest, but no relevant legal interest, is allowed to participate in the customs process, there is an inherent danger that the customs laws, regulations and rules will be applied in a partial manner so as to permit persons with adverse commercial interests to obtain confidential information to which they have no right.¹⁰⁴² The panel nevertheless considered that this situation could be remedied by adequate safeguards to prevent an inappropriate flow of one private person's confidential information to another as a result of the administration of the implemented customs law at issue.¹⁰⁴³

7.696 The Panel considers that, read in the context of Article X:3(a), the ordinary meaning of the word "*reasonable*", can be defined as "not irrational or absurd", "proportionate", "sensible", and "within the limits of reason, not greatly less or more than might be thought likely or appropriate".¹⁰⁴⁴ Applying this definition to the facts, reasonable administration could be considered to be administration that is equitable, appropriate for the circumstances and based on rationality.

¹⁰³⁸ Panel Report, *Argentina – Hides and Leather*, para. 11.83.

¹⁰³⁹ *Shorter Oxford English Dictionary*, 5th edn., L. Brown (ed.) (Oxford University Press, 2002), Vol. 2, p. 3444 (2002).

¹⁰⁴⁰ *Shorter Oxford English Dictionary*, 5th edn., L. Brown (ed.) (Oxford University Press, 2002), Vol. 1, p. 1325.

¹⁰⁴¹ Panel Report, *Argentina – Hides and Leather*, para. 11.99.

¹⁰⁴² Panel Report, *Argentina – Hides and Leather*, para. 11.100.

¹⁰⁴³ Panel Report, *Argentina – Hides and Leather*, para. 11.101.

¹⁰⁴⁴ *Shorter Oxford English Dictionary*, 5th edn., L. Brown (ed.) (Oxford University Press, 2002), Vol. 2, p. 2482 (2002).

7.697 The Panel will proceed with its analysis of Article X:3(a) bearing in mind these definitions of the terms "uniform", "impartial" and "reasonable".

(b) The meaning of Article X:3(a)

7.698 The appropriate legal meaning that the Panel should ascribe to Article X:3(a) in the light of the relevant jurisprudence has been the subject of extensive discussion between the parties, in particular between China and the European Union. The parties referred in particular to two dispute settlement reports in their submissions: the panel report in *Argentina – Hides and Leather* (which was not appealed) and the Appellate Body Report in *EC – Selected Customs Matters*.

7.699 In *Argentina – Hides and Leather*, the panel concluded with respect to the requirement of reasonable administration that "a process aimed at assuring the proper classification of products, but which inherently contains the possibility of revealing confidential business information, is .. unreasonable" and therefore inconsistent with Article X.3(a).¹⁰⁴⁵ As stated at paragraph 7.695 *au-dessus*, the same panel held with regard to the impartiality requirement that the involvement of parties with contrary commercial interests – in that case concerning an export transaction – meant that there was an "inherent danger that the Customs laws, regulations and rules will be applied in a partial manner so as to permit persons with adverse commercial interests to obtain confidential information to which they have no right".¹⁰⁴⁶

7.700 In *EC – Selected Customs Matters*, the Appellate Body found that the features of an administrative process may be relevant in the assessment of whether a legal instrument has been applied uniformly, but that a complainant "will have to show how and why those features necessarily lead to a lack of uniform, impartial, or reasonable administration of a legal instrument of the kind described in Article X:1."¹⁰⁴⁷ The Appellate Body also cautioned that a simple recitation of the characteristics of an administrative process would not suffice to sustain a claim.¹⁰⁴⁸

7.701 Although the parties seem to consider that the two reports present differing approaches because one speaks of an "inherent danger" while the other suggests a more definite requirement of "necessarily leads to", the Panel considers that the approach of the panel in *Argentina – Hides and Leather* and that of the Appellate Body in *EC – Selected Customs Matters* are similar. One of the dictionary definitions of *inherently* states "inherently: (adv) In an inherent manner; by inherence; in the way of, or in relation to, an inherent quality or attribute; intrinsically." The definition of *necessarily* in relevant part is as follows: "necessarily: Of necessity; in the nature of the case; intrinsically, inherently, inevitably."¹⁰⁴⁹ As can be seen from these definitions, the difference in these two words is not significant; there is a certain cross-over between them, with one of the definitions of "necessarily" being "inherently".

7.702 The Panel now turns to consider the issue of whether the challenged administration must lead to a particular result in order for a violation of one of the requirements of Article X:3(a) to be established. In *Argentina – Hides and Leather*, the challenged administration did not *necessarily* amount to a violation of Article X:3(a).¹⁰⁵⁰ In that dispute the measure at issue provided that representatives of a private party *could* be present at customs clearance, but this was not mandatory. Accordingly, the measure fell short of *necessarily* leading to a violation of Article X:3(a). The panel

¹⁰⁴⁵ Panel Report, *Argentina – Hides and Leather*, para. 11.94.

¹⁰⁴⁶ Panel Report, *Argentina – Hides and Leather*, para. 11.100.

¹⁰⁴⁷ Appellate Body Report, *EC – Selected Customs Matters*, para. 226.

¹⁰⁴⁸ Appellate Body Report, *EC – Selected Customs Matters*, para. 225.

¹⁰⁴⁹ *Oxford English Dictionary*, accessed online, 23 December 2010.

¹⁰⁵⁰ China's response to Panel question No. 50, following the second substantive meeting, para. 301.

considered that the existence of the right to be present along with certain corollary factors resulted in the inherent *possibility*, or an inherent *danger*, of administration inconsistent with Article X:3(a).

7.703 The panel's finding in *Argentina – Hides and Leather* does not suggest that the complaining party must show that the disputed administration would *certainly* cause prejudice to the complaining party. The Panel used the words "possibility" and "danger", which convey the notion that there is less than absolute certainty of a particular event occurring.

7.704 The Panel also recalls the following statement of the panel in *Argentina – Hides and Leather*:

"Article X:3(a) requires an examination of the real effect that a measure *might* have on traders operating in the commercial world. This, of course, does not require a showing of trade damage, as that is generally not a requirement with respect to violations of the GATT 1994. But it can involve an examination of whether there is a *possible* impact on the competitive situation due to alleged partiality, unreasonableness or lack of uniformity in the application of customs rules, regulations, decisions, etc."¹⁰⁵¹ (emphasis added)

7.705 As noted above at paragraph 7.689 *au-dessus*, the Appellate Body found in *EC – Selected Customs Matters* that the features or characteristics of an administrative process may constitute evidence of inconsistent administration and opined that:

"[W]e could conceive of cases where a panel might attach much weight to differences that exist at the level of the administrative processes, because it considers these differences to be so significant that they have caused, or are *likely* to cause, the non-uniform application of the legal instrument at issue."¹⁰⁵² (emphasis added)

7.706 The Appellate Body concluded in the paragraph that followed that in order to substantiate a claim of violation based on an administrative process, "a complainant will also have to show how and why the features of an administrative process necessarily lead to a lack of uniform, impartial or reasonable administration of a legal instrument of the kind described in Article X:1"¹⁰⁵³.

7.707 This Panel agrees with the panel in *Thailand – Cigarettes (Philippines)* that while the Appellate Body's analysis regarding the features of an administrative process was made in the context of the uniformity requirement, the subsequent concluding statement about what must be proved to substantiate a violation in respect of Article X:3(a) more generally by the Appellate Body in paragraph 226 tends to support the view that its analysis would also be applicable to the obligations of reasonableness and impartiality.¹⁰⁵⁴

7.708 In this light, the Panel concludes that, in respect of a challenge to an administrative process, the complaining party must show that the identified features of the challenged administration necessarily lead to an inconsistency with Article X:3(a) with respect to the administration of laws and regulations in a uniform, impartial and reasonable manner. As we see it, if the complaining party shows that the features of an administrative process pose a *very real risk* to the interests of the relevant parties, then it will have met this burden. In this context, we agree with the panel in *EC – Selected Customs Matters* when it stated that the aim of Article X:3(a) is to ensure that traders are treated fairly and consistently when seeking to import from or export to a particular WTO

¹⁰⁵¹ Panel Report, *Argentina – Hides and Leather*, para. 11.77.

¹⁰⁵² Appellate Body Report, *EC – Selected Customs Matters*, para. 225.

¹⁰⁵³ Appellate Body Report, *EC – Selected Customs Matters*, para. 226.

¹⁰⁵⁴ Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.872.

Member.¹⁰⁵⁵ The Panel considers that an interpretation of Article X:3(a) that requires a complainant to show that the features of the administrative process pose a very real risk of non-uniform, partial and unreasonable administration best accords with the due process connotations of Article X.

(c) The nature of the European Union's challenge

7.709 The Panel concludes based on the submissions and responses to questions that the European Union is challenging *as such* China's administration of its quota allocation rules. As for the specific type of *as such* challenge, the European Union states that it is challenging "the administration of the system and not the specific provisions of a legislative instrument."¹⁰⁵⁶ Furthermore, in response to a question from the Panel, the European Union states that it is not challenging the operation capacity criterion itself but its administration.¹⁰⁵⁷ The Panel understands the European Union to be challenging the features of an administrative process that govern the application of a legal instrument of the kind described in Article X:1.¹⁰⁵⁸ Specifically, the European Union challenges how the operation capacity criterion is *administered* by the Local Departments in charge of Foreign Trade. The European Union is claiming that China's authorities' administration of this criterion will, *as such*, lead to inconsistency with Article X:3(a).

7.710 The Panel observes that the European Union did not define precisely the nature of its claim under Article X:3(a). More specific reference to the language used by the Appellate Body in *EC – Selected Customs Matters* would have been helpful in understanding the precise nature of the European Union's challenge. The Panel also notes that from its first submission, China queried the nature of the European Union's claim in this regard.¹⁰⁵⁹

7.711 However, notwithstanding this lack of clarity on the part of the European Union, the Panel does not consider that China's ability to defend itself was in any way affected or prejudiced by the European Union's lack of specificity. In this respect, the Panel notes that China has in the course of its submissions referred to the *administration* of the operation capacity criterion. For example, China asserts:

"The European Union has provided no evidence demonstrating that the 'operation capacity' criterion for participation in direct quota allocation has been administered in a WTO-inconsistent manner, or that it will 'necessarily lead to' WTO-inconsistent administration. At most, the European Union has asserted that, if applied, the

¹⁰⁵⁵ Panel Report, *EC – Selected Customs Matters*, para. 7.108.

¹⁰⁵⁶ European Union's second written submission, para. 162.

¹⁰⁵⁷ European Union's response to Panel question No. 46 following the second substantive meeting para 51.

¹⁰⁵⁸ The European Union has not directly referred to its challenge being in respect of an administrative process. However the Panel has concluded that this is the nature of the European Union's challenge, given the arguments the European Union advanced in these proceedings as well as the fact that the European Union itself asserted that it was not challenging the operation capacity criterion *per se*.

¹⁰⁵⁹ The European Union at times seems to have merged two of the available ways that inconsistent administration can be challenged under Article X:3(a). In its opening oral statement at the second substantive meeting, the European Union asserts that "China has confused the Appellate Body's treatment of 'administrative processes' (i.e. the procedural structure) with the Appellate Body's treatment of a country's 'administration of laws and regulations' (i.e. the application of the laws and regulations)." In this statement, the European Union correctly draws a distinction between these two types of challenge. However, later in the same statement the European Union asserts that it "challenges China's '*administration*' of its export quota allocation system and export licensing system, i.e., the *application* by China of the relevant laws and regulations". In this statement the European Union appears to conflate an "as such" claim with an "as applied" claim. However, the European Union provided no evidence on the WTO-inconsistent *application* by China of the operation capacity criterion.

'operation capacity' criterion *might* be administered in a manner inconsistent with Article X:3(a)."¹⁰⁶⁰

7.712 Having established the type of Article X:3(a) challenge made by the European Union as well as what the complaining party must show to succeed in its claim, the Panel now turns to analyse the specific claim made by the European Union.

(d) Whether the operation capacity criterion applies to any of the products at issue

7.713 The European Union argues that China administers the quotas allocated directly for coke and zinc¹⁰⁶¹ in a non-uniform, partial, and unreasonable way because the relevant Chinese authorities allocate export quotas based on the applicant's alleged "business management capacity".

7.714 China submits that the European Union's claim is moot as the operation capacity requirement is not applied to any of the export quotas on the products at issue in these disputes.¹⁰⁶² China asserts that by virtue of Article 4(3) and the Appendix to the *Export Quota Administration Measures*, the direct allocation of the coke quota is not subject to these rules. Although China agrees that the quota for zinc is subject to direct allocation, it states that this quota has not been authorized in 2010. Consequently, according to China, Article 19 of the *Export Quota Administration Measures* does not apply.

7.715 The European Union notes first that the underlying legislation on which China's administration is based, namely, the *Export Quota Administration Measures*, is still in place. Second, it is very likely that China will again allocate export quotas for zinc, as it has done up to 2005 using the same criteria. The European Union also states that the list of raw materials for which export quotas are allocated directly has not been permanently defined. In that context, the European Union puts forward a scenario whereby, in the event that China's bidding system were found to be incompatible with the covered agreements, China could move raw materials from the category allocated through bidding to the category allocated by direct allocation. In such a case, says the European Union, the only way to achieve a positive solution to the dispute is for the Panel to make findings on whether China's administration of the system for the direct allocation of export quotas is consistent with the covered agreements.

7.716 In this context, China has in place a series of measures operating collectively that govern the administration of export quotas. The *Foreign Trade Law* confers the authority to restrict or prohibit the exportation of goods through export quotas¹⁰⁶³ and subjects those goods to an export quota

¹⁰⁶⁰ China's response to Panel question No. 50 following the second substantive meeting, para. 303. (Italics original, underlining added.). The Panel also notes that in its closing oral statement at the second substantive meeting, China stated: "The European Union's Article X:3(a) claims against the 'operation capacity' criterion in the context of quota administration, ... are of necessity [an] example[] of the second type of challenge – for the simple reason that the European Union has offered *no* evidence concerning any instances in which the 'operation capacity' criterion ... ha[a] been applied." Finally, in its first written submission, China referred to the possibility of the Panel considering that the European Union's claim involved a claim against an administrative process; see China's first written submission, paras. 649-651 and 661.

¹⁰⁶¹ The specific forms of the raw materials subject to the European Union's claims are identified by the complainants in Exhibit JE-6. The particular form of zinc concerned by the complainant's claims under Article X:1 and X:3(a) is zinc ores and concentrates.

¹⁰⁶² China's second written submission, para. 413.

¹⁰⁶³ *Foreign Trade Law*, Articles 2, 14, 16-17, 19 (Exhibits CHN-151, JE-72); *Regulation on Import and Export Administration*, Article 4 (Exhibits CHN-152, JE-73).

administration.¹⁰⁶⁴ The *Regulation on Import and Export Administration* regulates the administration of the export of goods.¹⁰⁶⁵ The *Export Quota Administration Measures* are formulated in accordance with¹⁰⁶⁶ the relevant provisions in these two measures.

7.717 As noted earlier, China maintains two systems for the administration of its export quotas: direct allocation or through a quota bidding system.¹⁰⁶⁷ The export quotas on coke and zinc are allocated "directly".¹⁰⁶⁸ The export quotas on bauxite, fluorspar, and silicon carbide are allocated through a bidding system.¹⁰⁶⁹

7.718 The *Export Quota Administration Measures* govern the direct allocation of quotas. Article 19 of these measures is the source of the "operation capacity" criterion.¹⁰⁷⁰ This provision states:

"When allocating the quotas, the MOFTEC and the Local Departments in charge of Foreign Trade shall take into full consideration the export performance, the quota utilization rate, the operation capacity, the production scale and the resources status, etc. of that commodity in relation to the applying enterprises or the applying regions in the past three (3) years."

7.719 The first issue for the Panel to determine is whether, as China alleges, the "operation capacity" requirement is not applied to any of the export quotas on products at issue in these disputes.¹⁰⁷¹ While acknowledging that the quota for zinc is subject to direct allocation, China states that this quota has not been authorized in 2010. The Panel notes first that the European Union has accepted that the direct allocation of coke is not subject to Article 19 of the *Export Quota Administration Measures*.¹⁰⁷² The Panel also notes that the quota for zinc has not been authorized since 2006. However, pursuant to Article I(i) of the 2009 *Export Licensing Catalogue* (the measure that was in force at the time of the Panel's establishment on 21 December 2009), exports of zinc are subject to a quota allocated directly.¹⁰⁷³ The Panel also notes that pursuant to the same provision in the 2010 List, zinc is also subject to a quota allocated directly.¹⁰⁷⁴

7.720 The Panel disagrees with China that the allocation of the zinc quota and the manner of its administration as provided in Article 19 of the *Export Quota Administration Measures* is moot. The 2009 (and 2010) List clearly lists zinc as one of the products for which an export licence is required. This fact suggests that China permits exports of zinc in principle. In addition, China has not given

¹⁰⁶⁴ *Regulation on Import and Export Administration*, Article 36 (Exhibits CHN-152, JE-73); *Export Quota Administration Measures*, Article 1 (Exhibits CHN-312, JE-76).

¹⁰⁶⁵ *Regulation on Import and Export Administration*, Article 1.

¹⁰⁶⁶ *Export Quota Administration Measures*, Article 1, (Exhibit CHN-312, JE-76).

¹⁰⁶⁷ *Regulation on Import and Export Administration*, Article 39 (Exhibit JE-73, CHN-152).

¹⁰⁶⁸ 2009 *Export Licensing Catalogue*, Article I(1) (Exhibit CHN-6, JE-22), see also Section VII.C.2(b) above.

¹⁰⁶⁹ *Ibid.*, Article I(2), see also VII.C.2(a) above.

¹⁰⁷⁰ The European Union referred in its first written submission to 'business management capacity'. In its first written submission, China asserted that a correct translation of this term was "operation capacity".¹⁰⁷⁰ Thereafter, in these proceedings, the European Union's referred to the "operation capacity" criterion. Consequently, in its analysis, the Panel will also refer to the "operation capacity" criterion. The Panel wishes to make clear that its examination of the administration of this criterion would be the same irrespective of whether the term is translated as "business management" or "operation capacity". This is because the Panel considers that the matter does not turn on the exact translation of the provision but rather on other issues raised by the European Union relevant to the administration of the criterion.

¹⁰⁷¹ China's second written submission, para. 413.

¹⁰⁷² European Union's second written submission, para. 150.

¹⁰⁷³ 2009 *Export Licensing Catalogue* (Exhibits CHN-6, JE-22).

¹⁰⁷⁴ 2010 *Export Licensing Catalogue* (CHN-7).

any indication in the course of these proceedings that Article 19 will be administered in a manner different from how it is being administered now. Consequently, the Panel agrees with the European Union that to secure a positive solution to the dispute, the Panel should make findings on whether Article 19 of the *Export Quota Administration Measures* is consistent with Article X:3(a).

7.721 The Panel concludes that, by virtue of the plain language of Article 19 set out above, the operation capacity criterion applies to the direct allocation of the export quota for zinc.

(i) *Non-uniform, partial and unreasonable administration of the operation capacity criterion*

7.722 The Panel understands the basis of the European Union's claim to be that, given the "operation capacity" criterion set out in Article 19 of its *Export Quota Administration Measures*, China administers the system of direct allocation of export quotas in a manner that is not consistent with Article X:3(a).¹⁰⁷⁵ Specifically, the European Union claims that because the administration of China's export quota "direct" allocation system includes a vague and opaque eligibility criterion, it is non-uniform, partial, and unreasonable and is, therefore, inconsistent with Article X:3(a).¹⁰⁷⁶

7.723 The European Union makes three claims in relation to the operation capacity criterion. With regard to the requirement of uniformity, the European Union asserts that no uniform rules exist (i) defining the notion of operation capacity; (ii) setting the standard against which the operation capacity of a particular applicant should be compared; or (iii) ensuring that this requirement is applied consistently in the same manner towards all applicants, all raw materials, all export destinations and all periods of time.¹⁰⁷⁷

7.724 In relation to the requirement of impartiality, the European Union argues that China administers the direct allocation of quotas in a manner that is partial due to a lack of safeguards preventing China's authorities from using this operation capacity criterion to administer the export quota allocation system to the disadvantage of certain applicants, or export destinations, and to the advantage of others.¹⁰⁷⁸

7.725 The European Union argues with respect to the requirement of reasonable administration that it is not reasonable to impose a requirement that "allows China's authorities to administer the export quota allocation system in an arbitrary, discretionary and potentially discriminatory manner".¹⁰⁷⁹

7.726 China defends the operation capacity criterion by explaining that an applicant's "operation capacity" is its capacity to undertake commodity exports, or in other words, it refers to the operational ability of the applicant to carry out the mechanics of an export transaction. According to China, there is nothing non-uniform, partial, or unreasonable about considering, among other objective factors, an applicant's ability to execute exports before allocating to it part of the quota.¹⁰⁸⁰

7.727 According to China, if a Member adopts a measure that its authorities can administer in a WTO-consistent manner, a panel cannot simply assume that the Member's authorities will administer the measure in a WTO-inconsistent manner. Thus, a measure does not violate Article X:3(a) simply because an authority has the discretion to interpret and/or apply the measure in a manner that might violate Article X:3(a). China asserts that the mere possibility (or danger) that the measure might be

¹⁰⁷⁵ *Export Quota Administration Measures* (Exhibits CHN-312, JE-76).

¹⁰⁷⁶ European Union's first written submission, paras. 238 to 245.

¹⁰⁷⁷ European Union's first written submission, para. 242.

¹⁰⁷⁸ European Union's first written submission, para. 243.

¹⁰⁷⁹ European Union's first written submission, para. 244.

¹⁰⁸⁰ China's first written submission, para. 643; China's opening oral statement at the second substantive meeting, para. 327.

administered in a manner that violates Article X:3(a) provides an insufficient evidentiary basis to conclude that the content of the administrative norm is WTO-inconsistent.¹⁰⁸¹ China also asserts that it "should be deemed to have acted in good faith in the performance" of its obligations under Article X:3(a).¹⁰⁸²

7.728 China refers to the statement of the Appellate Body that a claim under Article X:3(a) "must be supported by solid evidence", which "should reflect the gravity of the accusations inherent in [the] claims".¹⁰⁸³ China submits that a claim of inconsistent administration requires solid evidence of inconsistent administration, or in the least, a showing that an element of the administration is *inherently* inconsistent or *necessarily* leads to inconsistent administration.¹⁰⁸⁴

7.729 China also asserts that the European Union's focus on *one* of a series of criteria in Article 19 used to determine whether to allocate part of the quota to an enterprise is overly simplistic and does not offer a picture of China's overall administration of the eligibility criteria.¹⁰⁸⁵

7.730 To recall, Article X:3(a) states:

"Each [Member] shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article."

7.731 The "laws, regulations, decisions and rulings" described in paragraph 1 of Article X are as follows:

"Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any [Member], pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use."

7.732 In order to rule on the European Union's claim under Article X:3(a), the Panel must determine: (a) whether the operation capacity criterion in Article 19 of the *Export Quota Administration Measures* falls within the "laws, regulations, decisions and rulings of general application" of the kind described in Article X:1 of the GATT; and, if so, (b) whether China has not administered this provision in a uniform, impartial and reasonable manner.

7.733 With reference to the term "general application", as it appears in Article X:1, the panel in *EC – Selected Customs Matters* found that:

¹⁰⁸¹ China's response to Panel question No. 50, following the second substantive meeting, para. 297.

¹⁰⁸² China's first written submission, para. 663, referring to Panel Report, *Canada – Continued Suspension (Hormones)*, para. 7.317; see also Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 173; Appellate Body Report, *US – Shrimp*, para. 158; Appellate Body Report, *US – Section 211 Appropriations Act*, para. 259; Appellate Body Report, *EC – Sardines*, para. 278; Appellate Body Report, *US – Offset Act (Byrd Amendment)*, paras. 298 and 299.

¹⁰⁸³ China's first written submission, para. 663, referring to Appellate Body Report, *US – OCTG Sunset Reviews*, para. 217.

¹⁰⁸⁴ China's first written submission, paras. 650-652, 657, 658, 661-662, and 663; China's second written submission, paras. 417-419, 424-427; China's opening oral statement at the second substantive meeting, para. 332 and China's response to Panel question No. 50 following the second substantive meeting, paras. 302-304.

¹⁰⁸⁵ China's first written submission, para. 646.

"[L]aws, regulations, judicial decisions and administrative rulings of *general application*' described in Article X:1 of the GATT 1994 are laws, regulations, judicial decisions and administrative rulings that apply to a range of situations or cases, rather than being limited in their scope of application."¹⁰⁸⁶

7.734 In *US – Underwear*, the Appellate Body upheld the Panel's interpretation that an administrative order was of "general application" "to the extent that the restraint affects an unidentified number of economic operators, including domestic and foreign producers."¹⁰⁸⁷

7.735 Turning to the present case, Article 1 of the *Export Quota Administration Measures* states that the measures regulate the administration of export commodity quotas and that they have been formulated in accordance with China's *Foreign Trade Law* and China's *Regulation on Import and Export Administration*. Furthermore, the *Foreign Trade Law* delegates MOFCOM as the government agency responsible for the administration of China's export quotas.¹⁰⁸⁸ Article 3 of the *Export Quota Administration Measures* states that MOFTEC (currently MOFCOM) shall apply export quota administration to certain commodities subject to export restrictions, these commodities include zinc. Article 5 of the Measures provides that the measures apply "to the export of commodities subject to quota administration under all modes of trade."

7.736 The Panel concludes that the *Export Quota Administration Measures* including Article 19 fall within the scope of Article X:1. These measures are (a) laws or regulations, (b) of general application (c) made effective by China, and, (d) pertain to requirements on exports.

7.737 Article 19 of the *Export Quota Administration Measures* (quoted at paragraph 7.718 *au-dessus*) governs the allocation of the zinc quota. China has not denied that an applicant can be refused an allocation of the export quota for zinc solely on the basis of the operation capacity criterion. Moreover, in its explanation of the "operation capacity", China states that "if an applicant does not have the operational ability to engage in export trade, which implicates sophisticated financing questions often not present in domestic trade, there is little point in allocating it part of the export quota".¹⁰⁸⁹ As noted in paragraph 7.729 *au-dessus*, China claims that the European Union's focus on this one criterion is overly simplistic and observes that in *EC – Selected Customs Matters*, the Appellate Body criticised the panel in that case for having examined the operation of institutions and mechanisms in isolation and for not having considered how they were involved in the administration of European Communities' customs law. With that in mind, the Panel will examine how the operation capacity criterion operates in China's overall administration of the eligibility criteria.

7.738 China acknowledges that the inability of an applicant to comply with the operation capacity criterion can be a basis for that applicant's failure to receive the zinc quota.¹⁰⁹⁰ In other words, this criterion can trump all others. Therefore, this criterion, in and of itself, can be determinative in the allocation of export quotas and therefore is of some importance in China's system for the direct allocation of export quotas. Also of note is that China has not denied that there is no official definition of the term "operation capacity" or that there is no standard against which China's authorities will assess the operation capacity criterion. Certainly China has not chosen to proffer a definition; nor has it denied the lack of a standard to assist the assessment of the criterion.

¹⁰⁸⁶ Panel Report, *EC- Selected Customs Matters*, para. 7.116 (emphasis original).

¹⁰⁸⁷ Appellate Body Report, *US - Underwear*, p. 21, DSR 1997:I, 11, at p. 29, Panel Report, *US - Underwear*, DSR 1997:I, 31, para. 7.65.

¹⁰⁸⁸ *Foreign Trade Law*, Article 18 (Exhibits CHN-151, JE-72).

¹⁰⁸⁹ China's first written submission, para. 643.

¹⁰⁹⁰ *Ibid.*

7.739 China claims that it is entitled to the presumption that it will fulfil its obligations in good faith. We agree. Nonetheless, a WTO Member is free to challenge another Member's compliance with its WTO obligations without being taken to call into question another Member's good faith. This is reflected in Article 3.10 of the DSU which states that "the use of the dispute settlement procedures should not be intended or considered as contentious acts ...". When a Member does raise a challenge, it bears the burden of proof. Therefore, in this dispute, China's administration of Article 19 of the *Export Quota Administration Measures* is presumed to be WTO consistent and the European Union bears the burden of proving that China is acting inconsistently with its obligations under Article X:3(a).¹⁰⁹¹

7.740 As a preliminary matter, the Panel notes that ordinarily it would address the requirements of "uniformity", "impartiality" and "reasonableness" in the order they appear in the text of the Article. However, as the Panel has already observed, the three requirements are legally independent in that China's laws regulations and rules must administered so as to satisfy each of the three standards. In this case, the Panel considers that uniform administration or otherwise of the operation capacity criterion flows from a consideration of whether this criterion is reasonably administered. Consequently, the Panel will examine first whether China administers the quota for zinc in a reasonable manner.¹⁰⁹²

Reasonable administration

7.741 As stated above¹⁰⁹³, read in the context of Article X:3(a), the ordinary meaning of the word "reasonable", can be defined as "not irrational or absurd", "proportionate", "sensible", and "within the limits of reason, not greatly less or more than might be thought likely or appropriate".¹⁰⁹⁴ Applying this definition to the facts, reasonable administration of the operation capacity criterion by China's authorities could be considered to be administration that is equitable, appropriate for the circumstances and based on rationality.

7.742 The issue here is whether in the absence of any definition or standard, the operation capacity criterion will be implemented in a reasonable manner consistent with Article X:3(a).

7.743 In response to a question from the Panel, China indicated that there are 32 Local Departments in charge of Foreign Trade. According to Article 19, these 32 Local Departments administer the directly allocated zinc quota. These Local Departments are not provided with any guidelines or standards to assist them in applying this operation capacity criterion. Thus each Local Department will necessarily have to interpret the operation capacity criterion as it sees fit. In the Panel's view, this manner of administration of a determinative criterion for receipt of the zinc quota does not meet the standard of reasonable administration of export quotas that are directly allocated. It is not "fair", "equitable", "just", "legitimate" or "appropriate for the circumstances" that exporter applicants may well be subject to different interpretations of whether or not they have sufficient operation capacity to qualify for the zinc quota depending on where they are located. The Panel believes there is a very real risk that in the absence of any definition or standardization of an understanding of what "operation capacity" means that similar exporters in terms of size, experience, and other factors may be treated

¹⁰⁹¹ In *US – Continued Suspension* (para. 380) the Appellate Body held that: "[t]he European Communities should be presumed to have acted in good faith when adopting the implementing measures; however, this did not mean that the taking of such measure in itself establishes that the measure achieves substantive compliance."

¹⁰⁹² In this context, the Panel notes that the Panel in *Argentina – Hides and Leather* also decided to examine the requirement of reasonableness before the other requirements, see para. 11.86.

¹⁰⁹³ See para. 7.696 above.

¹⁰⁹⁴ *Shorter Oxford English Dictionary*, 5th edn., L. Brown (ed.) (Oxford University Press, 2002), Vol. 2, p. 2482.

differently depending on which of 32 dispersed local office deals with their application. Under such circumstances it could well be assumed that one exporter could well find its application rejected while another exporter of equal description would succeed.

7.744 In the Panel's view, a system of quota allocation where an undefined and vaguely worded criterion can trump all other criteria, yet is to be applied by 32 different regional offices constitutes the type of evidence to which the Appellate Body in *EC – Customs Matters* was referring when it stated "the features of an administrative process that govern the application of a legal instrument of the kind described in Article X:1 may constitute relevant evidence for establishing ... [unreasonable] administration of that legal instrument".¹⁰⁹⁵ In this case "the panel [has] attach[ed] much weight to differences that exist at the level of the administrative processes, because it considers these differences to be so significant that they have caused, or are likely to cause, the [unreasonable] application" of Article 19 of the *Export Quota Administration Measure*.¹⁰⁹⁶

7.745 In sum, the Panel thus finds that the lack of any definition, guidelines or standards in how the 32 Local Departments in charge of Foreign Trade should apply the potentially critical operation capacity criterion constitutes relevant evidence in establishing unreasonable administration of the operation capacity criterion. Moreover, the Panel is persuaded that the lack of any definition, guidelines or standards pose a very real risk that this criterion will be administered differently depending on which Local Department handles the quota application.

7.746 Consequently, the Panel concludes that the lack of any definition, guidelines or standards to guide how the operation capacity criterion should be applied poses a very real risk to the interests of relevant parties such that this necessarily leads to unreasonable administration inconsistently with Article X:3(a) of the GATT 1994.

Uniform administration

7.747 As noted above¹⁰⁹⁷, read in the context of Article X:3(a), the ordinary meaning of the word "uniform" means "[o]f one unchanging form, character, or kind; that is or stays the same in different places or circumstances, or at different times ... of the same form, character or kind as another or others; conforming to one standard, rule or pattern; alike similar."¹⁰⁹⁸ Applying this definition to the facts at hand, exporter applicants should be able to expect treatment of the same kind, in the same manner, both over time and in different places, in how the operation capacity criterion is applied to them. This interpretation of uniform treatment accords with that offered by the Panel in *Argentina – Hides and Leather*.¹⁰⁹⁹

7.748 The issue here is whether in the absence of any definition or standard, the operation capacity criterion will be implemented in a uniform manner consistent with Article X:3(a).

7.749 As discussed in paragraph 7.743 au-dessus, MOFCOM does not provide a definition, guidelines or standard to assist the 32 Local Departments in charge of Foreign Trade to apply the operation capacity criterion. Under these circumstances, it is likely that the criterion will be applied in many different ways across China. It is clear that there is a very real risk that this criterion will not

¹⁰⁹⁵ Appellate Body Report, *EC – Selected Customs Matters*, para. 225.

¹⁰⁹⁶ Appellate Body Report, *EC – Selected Customs Matters*, para. 225.

¹⁰⁹⁷ See paras. 7.692-7.693 above.

¹⁰⁹⁸ *Shorter Oxford English Dictionary*, 5th edn., L. Brown (ed.) (Oxford University Press, 2002),

Vol. 2, p. 3488.

¹⁰⁹⁹ See, for example, para. 11.83 in the Panel Report, *Argentina – Hides and Leather*.

be applied consistently in the same manner, both over time and in different places, in respect of all applicant exporters seeking the zinc quota.

7.750 The Panel considers that these features of the administrative process constitute evidence of administration that is not uniform. As was mentioned above in connection of its consideration of what is unreasonable administration, the Panel considers that this is the type of evidence to which the Appellate Body in *EC – Customs Matters* was referring when it stated "the features of an administrative process that govern the application of a legal instrument of the kind described in Article X:1 may constitute relevant evidence for establishing ... non-uniform administration of that legal instrument".¹¹⁰⁰ In these circumstances "the panel [has] attach[ed] much weight to differences that exist at the level of the administrative processes, because it considers these differences to be so significant that they have caused, or are likely to cause, the non-uniform application" of Article 19 of the *Export Quota Administration Measure*.¹¹⁰¹

7.751 The Panel thus finds that the lack of any definition, guidelines or standards in how the 32 Local Departments in charge of Foreign Trade should apply the potentially critical operation capacity criterion constitutes relevant evidence in establishing non-uniform administration of the operation capacity criterion. Moreover, the Panel is persuaded that the lack of any definition, guidelines or standards pose a very real risk that this criterion will be administered differently depending on which Local Department handles the quota application.

7.752 Consequently, the Panel concludes that the lack of any definition, guidelines or standards in how the operation capacity criterion should be applied poses a very real risk to the interests of relevant parties such that this necessarily leads to non-uniform administration inconsistently with Article X:3(a) of the GATT 1994.

Impartial administration

7.753 As mentioned at paragraph 7.695 au-dessus, read in the context of Article X:3(a), the ordinary meaning of the word "impartial", means "not partial; not favouring one party or side more than another; unprejudiced, unbiased, fair".¹¹⁰²

7.754 The issue here is whether in the absence of any definition or standard, the operation capacity criterion will be applied in an impartial manner consistent with Article X:3(a).

7.755 The Panel has not been convinced that the lack of any definition, guidelines or standards in how the 32 Local Departments should interpret the term "operation capacity" will pose a very real risk such that partial administration will necessarily result. While the Panel has found that the lack of definition, guidelines or standards necessarily leads to unreasonable and non-uniform administration, the Panel does not consider that this lack means that the Local Departments will apply the operation capacity criterion to favour some exporter applicants over others. In other words the Panel does not consider that this particular feature of the administrative process – the lack of definition of any guidelines, standards – "constitute[s] relevant evidence for establishing ... [partial] administration"¹¹⁰³ of the operation capacity criterion.

¹¹⁰⁰ Appellate Body Report, *EC – Selected Customs Matters*, para. 225.

¹¹⁰¹ Appellate Body Report, *EC – Selected Customs Matters*, para. 225.

¹¹⁰² *Shorter Oxford English Dictionary*, 5th edn., L. Brown (ed.) (Oxford University Press, 2002), Vol. 1, p. 1325.

¹¹⁰³ Appellate Body Report, *EC – Selected Customs Matters*, para. 225.

(ii) *Conclusion*

7.756 The Panel concludes that the lack of any definition, guidelines or standards in how the operation capacity criterion should be applied poses a very real risk to the interests of relevant parties such that this necessarily will result in unreasonable and non-uniform administration of this criterion inconsistently with Article X:3(a) of the GATT 1994.

3. Whether China's administration of its export quotas through the involvement of the CCCMC is inconsistent with Article X:3(a) of the GATT 1994

(a) The nature of the United States' and Mexico's challenges

7.757 Turning to consider the claims brought by the United States and Mexico, the Panel notes that these complainants have categorized their Article X:3(a) claims as *as such* challenges.¹¹⁰⁴ The United States and Mexico assert that they challenge the administration of the export quotas.¹¹⁰⁵ The question is whether the United States and Mexico are challenging the substantive content of a legal instrument that regulates the administration of a legal instrument of the kind described in Article X:1, or whether they are claiming a violation of Article X:3(a) based on an administrative process. In their submissions before the Panel, the United States and Mexico consistently challenged the involvement of the CCCMC in quota administration and its access to sensitive commercial information of the applicant enterprises. According to these complainants, this goes beyond what is necessary to confirm an applicant enterprise's conformity with the quota qualification requirements.¹¹⁰⁶

7.758 The Panel concludes that the United States and Mexico are raising a substantive challenge – an *as such* challenge – in respect of the features of the administrative processes that pertain to the application of a legal instrument of the kind described in Article X:1. In other words, the United States and Mexico claim that the administration of the export quotas will, *as such*, lead to inconsistency with Article X:3(a).

(b) Partial and unreasonable administration

7.759 The United States and Mexico make two claims concerning the involvement of the CCCMC in quota administration. First, according to these complainants, China empowers a private party – the CCCMC – to have direct involvement in the administration of the export quota on coke, which is allocated directly.¹¹⁰⁷ Second, they allege that the CCCMC is permitted direct involvement in the administration of the export quotas on bauxite, fluor spar, and silicon carbide, which are allocated through the bidding system.

7.760 As explained in Section VII.C.2 au-dessus, the CCCMC evaluates enterprises' applications to export under the quota and determines whether they satisfy the relevant eligibility criteria. According to the United States and Mexico, in the course of that process, the CCCMC obtains access to sensitive and confidential commercial information about the enterprises. Moreover, the United States and Mexico state that the information an exporter is required to share with the CCCMC in its application

¹¹⁰⁴ United States' response to Panel question No. 50 following the second substantive meeting, para. 109; Mexico refers to the United States' response.

¹¹⁰⁵ United States' first written submission, paras. 278-290; Mexico's first written submission, paras. 281-293.

¹¹⁰⁶ See, for example, United States' first written submission, para. 311; Mexico's first written submission, para. 314.

¹¹⁰⁷ United States' first written submission, paras. 292-303; Mexico's first written submission; paras. 295-306.

is not relevant to the stated objective for the CCCMC's involvement. According to these complainants, this amounts to unreasonable administration in contravention of Article X:3(a).¹¹⁰⁸

7.761 China requests the Panel to reject the United States' and Mexico's claims. First, China contends that it no longer subjects exports of fluorspar to a quota under 2010 export quota measures. Accordingly, it requests the Panel not to reach findings on fluorspar.¹¹⁰⁹ Second, China alleges that the United States and Mexico have offered an improper legal characterization of the facts. China states that MOFCOM delegates governmental authority in the administrative process leading to quota allocation, whether allocated directly or through bidding, to the CCCMC Secretariat, and not to the CCCMC membership; consequently, the CCCMC Secretariat, and not CCCMC members, are involved in the administrative process leading to quota allocation. China continues that no inherent conflict "averse to the interest of the exporter at issue and foreign buyers" exists because competing exporters and potential customers are not granted access to confidential commercial information.¹¹¹⁰ China asserts that each type of required information/documentation is pertinent to the verification of whether the applicant satisfies the eligibility criteria.¹¹¹¹ China also submits that even if the Panel were to find that the involvement of the CCCMC Secretariat presents an inherent risk of partial and unreasonable administration, effective safeguards in the form of a confidentiality agreement as well as sanctions are in place to prevent or remedy risks of conflict of interest described by the United States and Mexico.¹¹¹²

7.762 The United States and Mexico respond that the involvement of the CCCMC Secretariat does not cure the inherent conflict of interest presented in the CCCMC's involvement in quota administration because the CCCMC Secretariat conducts its work on behalf of an organization that represents the interests of the competitors and potential customers of exporters seeking an allotment under one of the export quotas at issue. Moreover, these complainants question the effectiveness of the confidentiality agreement that China claims serves as a safeguard to prevent the inappropriate flow of confidential and sensitive commercial information from an exporter to an entity representing interests adverse to that exporter.

7.763 As a preliminary matter, the Panel recalls its finding in paragraph 7.33 *au-dessus* that, in general, measures that were in force when the Panel was established on 21 December 2009 form the basis of its terms of reference.¹¹¹³ At the request of the complainants, the Panel will only assess the WTO consistency of the 2009 measures while taking note that the 2010 measures do not set a quota for fluorspar.

7.764 The Panel notes that the formal status of the CCCMC under Chinese law is that of a "foreign trade and economic social organization".¹¹¹⁴ The CCCMC was established by charter that, *inter alia*, describes the functions, membership, and organization of the CCCMC. The relevant charter for the purposes of this dispute is the *2001 CCCMC Charter*, as this was the charter in existence on 21 December 2009, the date of the Panel's establishment.¹¹¹⁵ The CCCMC's daily operations are

¹¹⁰⁸ United States' response to Panel question, para. 115 following the second substantive meeting, Mexico refers to the United States' response.

¹¹⁰⁹ China's first written submission, para. 667.

¹¹¹⁰ China's first written submission, para. 712.

¹¹¹¹ China's comments on the United States' and Mexico's responses to Panel question No. 55 following the second substantive meeting, paras. 201-210.

¹¹¹² China's first written submission, paras. 715-724.

¹¹¹³ The Panel observes, however, that its decision to assess the complainants' claims here does not foreclose the possibility of considering 2010 measures in other contexts.

¹¹¹⁴ *Measures for Administration of Trade Social Entities*, Articles 5 and 6 (Exhibits CHN-313, JE-101).

¹¹¹⁵ On the issue of the relevant charter, see paragraph 7.1017.

managed by a Secretariat, also called the Standing Administrative Organ of the CCCMC.¹¹¹⁶ There are over 4,000 members of the CCCMC comprising, among others, foreign trade companies, trade and manufacturing companies, joint venture companies, private enterprises and research institutes operating businesses in ferrous metals, non-ferrous metals, non-metallic minerals and products.

7.765 With regard to the direct allocation of the coke quota, China's Ministry of Commerce delegates to the CCCMC and the China Coking Industry Association the examination of the applicants' compliance with the requisite conditions. These conditions are set out in the 2009 Coke Export Application Procedures.¹¹¹⁷ The CCCMC sends its recommendation on the complying enterprises to the Ministry of Commerce. The Ministry of Commerce decides which companies are qualified for coke export quotas and publishes the list of those companies, on the basis of the compliance recommendations given by the CCCMC.

7.766 For the allocation of quotas through bidding, Article 6(6) of the *2001 CCCMC Charter* provides the CCCMC with the authority to assist MOFCOM's Bidding Committee in the organization of the quota bidding process. The Bidding Committee, the main administrative authority responsible for organizing the bidding process¹¹¹⁸, is assisted by the Bidding Office, which in turn is responsible for implementing individual auctions organized by the Bidding Committee.¹¹¹⁹ The Bidding Office consists of three persons: the CCCMC Vice-Chairman, the CCCMC Director of the Bidding Department, and the Vice-Director of the Coordination and Consulting Department of the China Association of Foreign-Invested Enterprises. The CCCMC Director of the Bidding Department is a member of the CCCMC Secretariat; the CCCMC Vice-Chairman is part of the management personnel of CCCMC, and is selected from the administrative staff of the CCCMC Secretariat.¹¹²⁰

7.767 In respect of the United States' and Mexico's claims, there are two types of procedures relevant for the allocation of quotas: direct allocation and allocation through bidding. As the allegations of inconsistent administration by the CCCMC are essentially the same for both types of procedure, the Panel will consider jointly the involvement of the CCCMC in quota allocation, whether through bidding or by direct allocation.

7.768 The Panel recalls that according to Article X:3(a), WTO Members are required to administer laws of the kind that fall under Article X:1 in a uniform, impartial and reasonable manner. Consequently, in order to analyse the United States and Mexico's claims under Article X:3(a), the Panel has to determine: (a) whether the measures establishing the export quotas for coke, bauxite, fluorspar, and silicon carbide are part of the "laws, regulations, decisions and rulings" of the kind described in Article X:1 of the GATT; and, if so, (b) whether China has not administered these measures in an impartial and reasonable manner, contrary to Article X:3(a).

7.769 We also recall our explanation of the term "general application" discussed in paragraphs 7.733-7.734 *au-dessus*, which we continue to bear in mind as we analyse the United States' and Mexico's claims.

7.770 As relevant to these claims, MOFCOM and Customs identified coke as a product subject to export quotas that are allocated directly, and bauxite, fluorspar, and silicon carbide, as products

¹¹¹⁶ In these Reports, for ease of use, the Panel will refer to the Standing Administrative Organ of the CCCMC as the Secretariat. The Panel also notes that this was the term commonly used by the parties.

¹¹¹⁷ *2009 Coke Export Quota Application Procedures* (Exhibits CHN-308, JE-85).

¹¹¹⁸ *Export Quota Bidding Implementation Rules* (Exhibits CHN-305, JE-78), Articles 2 and 3.

¹¹¹⁹ *Export Quota Bidding Measures*, Article 9, second para (Exhibits JE-77, CHN-304); *Export Quota Bidding Implementation Rules*, Article 5(I), (Exhibits CHN-305, JE-78).

¹¹²⁰ *Regulations for Personnel Management of Chambers of Commerce* (Exhibit CHN-315, JE-102), Article 14; *2001 CCCMC Charter* Article 29, (Exhibits CHN-16, JE-87).

subject to export quotas allocated through a bidding system.¹¹²¹ China also maintains measures setting out the quota amounts, and the general conditions governing the export quotas. These measures took effect on 1 January 2009 and were still in effect on 21 December 2009, the date of the Panel's establishment.

7.771 The United States submitted that the relevant measures are the following: *Foreign Trade Law* (Articles 2, 14-19, 34, 61, 63, 64); *Regulation on Import and Export Administration* (Articles 4, 35-41, 43, 44, 64-66); *2008 Export Licence Administration Measures*; *2009 Export Licensing Catalogue*; *2009 Graded Export Licensing Entities Catalogue*; *2008 Export Licensing Working Rules*; *2009 Export Quota Amounts*; *2009 Coke Export Quota Application Procedure*; *2009 First Batch Coke Export Quotas*; *2009 Second Batch Coke Export Quota*; *2009 First Batch Coke Export Quotas for FIEs*; *2009 Second Batch Coke Export Quotas for FIEs*; *2009 Coke Export Quota Application Procedure*; *1994 Export Quota Bidding Measures*; *Export Quota Bidding Implementation Rules*; *2009 First Round Export Quota Bidding Announcement*; *2009 Second Round Export Quota Bidding Announcement*; *2009 First Round Fluorspar Bidding Procedures*; *2009 First Round Bauxite Bidding Procedures*; *2009 First Round Silicon Carbide Bidding Procedures*; *2009 Announcement of Second Bidding Round for Talc and Silicon Carbide*; *2009 Second Round Silicon Carbide Bidding Procedures*; *1994 CCCMC Charter*; *2001 CCCMC Charter*.

7.772 These measures apply generally to the exportation of goods subject to export quotas. Moreover, the measures affect all enterprises wishing to export coke, bauxite, fluorspar, and silicon carbide under the quota. None of the measures at issue is limited to the treatment of particular companies or particular shipments. Furthermore, the export quotas restrict the exportation of coke, bauxite, fluorspar, and silicon carbide.

7.773 Thus, the Panel considers that these measures allegedly establishing the coke, bauxite, fluorspar, and silicon carbide export quotas are covered by the description contained in Article X:1. These measures are (a) laws or regulations, (b) of general application (c) made effective by China, and, (d) pertain to requirements on exports.

(i) *Impartial administration*

7.774 The Panel understands the basis of the United States' and Mexico's claims to be that there is an inherent conflict of interest presented by the CCCMC's involvement in quota administration. According to these complainants, this derives from the requirement that an individual exporter applicant must share its confidential and sensitive commercial information with an entity that represents the interests of its competitors and potential customers. The Panel takes note that the United States and Mexico do not question China's assertion that quota administration is handled by a secretariat within the CCCMC, but they nevertheless consider that that CCCMC Secretariat acts on behalf of the CCCMC itself.

7.775 The United States and Mexico's claims are based on a challenge to "[t]he features of an administrative process that govern the application of a legal instrument of the kind described in Article X:1" as relevant evidence for establishing inconsistent administration of that legal instrument.¹¹²² The Panel recalls that in respect of a challenge to an administrative process, the complaining party must show that the identified features of the challenged administration "necessarily lead" to an inconsistency with Article X:3(a) with respect to the administration of laws and regulations in a uniform, impartial and reasonable manner. The Panel recalls the Appellate Body's guidance in this respect: "a panel might attach much weight to differences that exist at the level of the

¹¹²¹ *2009 Export Licensing Catalogue* (Exhibits CHN-6, JE-22).

¹¹²² Appellate Body Report, *EC – Selected Customs Matters*, para. 225.

administrative processes, because it considers these differences to be so significant that they have caused, or are likely to cause, [inconsistent] application of the legal instrument at issue".¹¹²³ If the complaining party shows that the features of an administrative process pose a very real risk to the interests of the relevant parties, then it will have met its burden in proving a violation of Article X:3(a), that is non-uniform, unreasonable or partial administration.

7.776 Consequently, the issue for the Panel is whether these complainants have demonstrated that the features relating to the involvement of the CCCMC in the administration of export quotas pose a very real risk to the interests of relevant parties, such that this necessarily leads to partial administration of the export quotas inconsistently with Article X:3(a) of the GATT 1994.

7.777 We agree with the panel in *Argentina – Hides and Leather* that the question of whether or not an administrative process is partial or not is related, *inter alia*, to the question of access to confidential information, as well as to *what* the person who receives the confidential information is permitted to do with it. Applying this to the facts at hand, if a staff member of the CCCMC Secretariat who receives an applicant exporter's confidential commercial information is permitted to participate in, or in any way influence, the quota allocation process, partial administration may result, provided that person is also shown to have adverse commercial interests. The Panel also bears in mind that even if it were to find that persons with adverse commercial interests were allowed to participate in the quota allocation process, this might be remedied by adequate safeguards preventing the inappropriate flow of one person's confidential information to another. In the light of this, the Panel will first consider whether members of the CCCMC Secretariat do in fact participate in deciding which applicant exporters are awarded a part of the export quota. If the answer to this is in the affirmative, the Panel will then go on to consider whether the members of the CCCMC Secretariat are persons with adverse commercial interests. If that is so, the Panel will then consider whether adequate safeguards are in place to prevent the inappropriate flow of confidential information.

7.778 China maintains that the involvement of the CCCMC Secretariat in quota administration is purely administrative. For the coke quota allocation process, China confirms that by virtue of Article II of the *2010 Application Qualifications and Procedures for Export Quota of Coke*, the CCCMC may be asked to assist MOFCOM's Foreign Trade Department in verifying whether export enterprises have submitted all required materials, and, based thereon, in offering general recommendations on which enterprises submitted all materials and satisfy the qualification requirements.¹¹²⁴ According to China, within the CCCMC Secretariat, the Minerals & Metals Department is the sole administrative division charged with this verification competence.¹¹²⁵ Applications for export quotas are provided solely to CCCMC's Minerals & Metals Department and not to the membership of the CCCMC itself.¹¹²⁶

7.779 According to China, once the review and recommendation process has been completed by the Minerals & Metals Department, it is MOFCOM that conducts another final review, taking into account the recommendation from the Department, and decides how to allocate quota to the qualifying enterprises.¹¹²⁷ In response to a question posed by the Panel concerning the nature of the recommendation to MOFCOM, China asserted that the CCCMC Secretariat's recommendations

¹¹²³ Appellate Body Report, *EC – Selected Customs Matters*, para. 225.

¹¹²⁴ *2010 Application Qualifications and Procedures for Export Quota of Coke*, Article II. (Exhibit CHN-317). A similar requirement exists in the *2009 Coke Export Quota Application Procedures*, Article II (Exhibit CHN-308, JE-85).

¹¹²⁵ China's first written submission, para. 691.

¹¹²⁶ China's first written submission, para. 693.

¹¹²⁷ *2010 Application Qualifications and Procedures for Export Quota of Coke* Article II (Exhibit CHN-317). A similar requirement exists in the *2009 Coke Export Quota Application Procedures*, Article II, (Exhibits CHN-308, JE-85).

include all companies that the CCCMC Secretariat has verified meet the criteria for participation in the coke quota. China observed that the *2010 Application Qualifications and Procedures for Export Quota of Coke* confirms this. The Panel observes that the 2009 measure contains similar requirements.¹¹²⁸ China also submitted a letter confirming that the verification work is undertaken by the CCCMC Minerals & Metals Department.¹¹²⁹

7.780 In the Panel's view, the evidence demonstrates that the CCCMC Secretariat's Minerals & Metals Department is not involved in allocating the coke quota itself; its involvement is limited to assisting MOFCOM in verifying whether applicant exporting enterprises comply with the qualifying criteria that have been defined in the relevant measures, and in verifying that enterprises have properly complied with application requirements. The evidence on the record demonstrates that the CCCMC Secretariat's Minerals & Metals Department's role is purely of an administrative nature.

7.781 As regards the quotas awarded through a bidding process, the Panel notes that the *Export Quota Bidding Measures* provide that the Bidding Office *inter alia*: (i) re-examines whether all bidding enterprises comply with the qualification requirements for a particular bid; (ii) prints and issues bid-winning certificates; (iii) verifies whether payment of the bid-winning deposit and the bid-winning price has been received; (iv) publishes preliminary bid-winning results within a specific timeline; (v) reports to the Bidding Committee the preliminary bid-winning results; (vi) reports to the Bidding Committee the results of the collection of the bid-winning deposit within five working days of the end of the period for collection; and (vii) monitors the use of quotas.¹¹³⁰

7.782 Furthermore, the Panel also observes that successful bidding enterprises are determined according to procedures set down in Article 19 of the *Export Quota Bidding Measures*¹¹³¹ and the successful bid quantity is determined according to the procedures set out in Article 20(II) of the *Export Quota Bidding Measures*.¹¹³² As regards the determination of the successful bid price, Article 20(I) provides that in public bids, the successful bid price is the bidding price.¹¹³³

7.783 The Panel recalls that the specific claims of the United States and Mexico are based on the assertion that an individual exporter applicant must share its confidential and sensitive business information with an entity that represents the interests of its competitors and potential customers.¹¹³⁴ However, the Panel does not consider that the features of the administrative process in this case "have caused, or are likely to cause" partial administration of the export quotas.¹¹³⁵ Consequently, the complainants have not been able to demonstrate to the Panel's satisfaction that there is a very real risk to the interests of relevant parties that the Bidding Department, as a result of having access to an applicant exporter's confidential information, will necessarily act in a partial manner to favour certain applicants over others. The mere sharing of confidential information will not necessarily result in partial administration. This would be the case only if those persons who receive the confidential commercial information are able to use it in a manner that is contrary to the interests of those providing the information. The Panel is mindful of the involvement of certain personnel of the

¹¹²⁸ *2009 Coke Export Quota Application Procedures*, Article II, (Exhibits CHN-308, JE-85), third and fourth paras.

¹¹²⁹ Letter from the CCCMC Secretariat, dated 10 November 2010 (Exhibit CHN-530).

¹¹³⁰ *Export Quota Bidding Measures* (Exhibits CHN-304, JE-77); *Export Quota Bidding Implementation Rules* Article 5(VIII) (Exhibits CHN-305, JE-78).

¹¹³¹ Exhibits CHN-304, JE-77.

¹¹³² Exhibits CHN-304, JE-77.

¹¹³³ The Panel recalls from its description of the quota allocation system that bauxite, fluorspar, and silicon carbide are subject to public bidding.

¹¹³⁴ United States' second written submission, para. 359; Mexico's second written submission, para. 363.

¹¹³⁵ Appellate Body Report, *EC – Selected Customs Matters*, para. 225.

CCCMC in the management of the Bidding Office.¹¹³⁶ However, in the light of the foregoing description of the roles of the relevant departments of the CCCMC Secretariat in the administration of the quota allocation process, the Panel is of the view that the United States and Mexico have not shown that there is a very real risk that either the Metals & Minerals Department or the Bidding Department can exercise any discretion, partiality or bias in the administration of the coke, bauxite, fluorspar and silicon carbide quotas in a way that would allow persons involved in quota administration to favour one exporting company over another.

7.784 In fact the evidence shows that the discretion, as well as the decision on how much a quota applicant receives, falls to MOFCOM in the case of the coke quota, the government authority charged with this task. In the case of quotas allocated through a bidding process, successful enterprises, the successful bid quantities and the price are determined according to procedures set out in Articles 19 and 20 of the *Export Quota Bidding Measures*.¹¹³⁷ The United States and Mexico have not demonstrated that either the relevant departments of the CCCMC Secretariat, or the CCCMC itself, are involved in the actual allocation of the export quotas, or that, in the case of the CCCMC Secretariat, its role extends beyond the verification of qualifying criteria or certain clerical tasks in the case of quotas allocated through bidding.

7.785 As the Panel has concluded that members of the CCCMC Secretariat do not participate in deciding which applicant exporters are awarded a part of the export quota, the Panel does not need to consider whether the members of the CCCMC Secretariat are persons with adverse commercial interests or whether adequate safeguards are in place to prevent the inappropriate flow of confidential information.

7.786 The Panel is of the view that the United States and Mexico have not demonstrated that the features of the administrative process – namely the involvement of the CCCMC in the administration of export quotas – pose a very real risk to the interests of relevant parties such that this necessarily results in partial administration of the export quotas contrary to Article X:3(a).

7.787 Consequently, the Panel concludes that the administration of export quotas by the CCCMC, whether allocated directly or by bidding, does not amount to partial administration in a manner inconsistent with Article X:3(a) of the GATT 1994.

(ii) *Reasonable administration*

7.788 The Panel understands the United States' and Mexico's claims to be that the information an exporter is required to share with the CCCMC in applying to export under a quota is not relevant to the stated objective for sharing this information, that is administering allocations of the relevant quotas.¹¹³⁸ These complainants acknowledge that some of the information requested may be relevant to determining whether the applicant enterprises have the requisite prior export experience and registered capital requirements demanded of exporter applicants in certain of the measures at issue. However, by virtue of obtaining access to documents containing this information, representatives of the CCCMC would also gain access to other confidential information that bears no relevance to the

¹¹³⁶ See para. 7.766 above.

¹¹³⁷ Exhibits CHN-304, JE-77.

¹¹³⁸ United States' second written submission, para. 360; Mexico's second written submission, para. 364.

administration of the application process for export quotas.¹¹³⁹ Accordingly, having to provide this information to the CCCMC is unreasonable and results in a contravention of Article X:3(a).

7.789 Here too, the United States' and Mexico's claims are based on a challenge in relation to an administrative process. Consequently, the issue for the Panel here is whether these complainants have demonstrated that the features relating to the involvement of the CCCMC in the administration of export quotas pose a very real risk to the interests of relevant parties such that this necessarily leads to unreasonable administration of the export quotas inconsistently with Article X:3(a) of the GATT 1994.

7.790 We recall the panel's finding in *Argentina – Hides and Leather* that "a process aimed at assuring the proper classification of products, but which inherently contains the possibility of revealing confidential business information, is an unreasonable manner of administering the laws, regulations and rules identified in Article X:1 and therefore is inconsistent with Article X:3(a)."¹¹⁴⁰

7.791 The United States' and Mexico's specific complaints are that an exporter's past export invoices, balance sheet and income statement, information about its registered capital, sales revenue, net profits, and past import and export data, must be shared with the CCCMC in order for the CCCMC to process the exporter's application or to complete tasks related to maintaining the functioning of the export quota and export quota bidding regimes.¹¹⁴¹

7.792 Responding to each of these challenges, China explains with reference to its 2010 measure why the specific information is required and the legal basis for the requirement. However, the Panel recalls that the measures that were in force on 21 December 2009 (the date of the Panel's establishment) are the 2009 measures not the 2010 measures. Consequently, the Panel will refer to the relevant 2009 measure in conducting its analysis. China explains that (2010) requirement for an exporter to provide past export invoices, as supporting documentation for the volume of export and supply for export of coke¹¹⁴², allows verification of whether the exporter satisfies the minimum export performance requirement.¹¹⁴³ The Panel has verified that a similar requirement exists in the relevant measure at issue, the *2009 Application Qualifications and Application Procedures for Export Quota of Coke*.¹¹⁴⁴ China asserts that the business licence must be submitted as supporting documentation¹¹⁴⁵, showing that the coke quota applicant is lawfully registered and satisfies the business qualification requirement.¹¹⁴⁶ The Panel has verified that a requirement similar to the 2010 requirement exists in

¹¹³⁹ United States' first written submission, paras. 298, 311, and 370 and United States' second written submission, para. 363; Mexico's first written submission, para. 301, 314, and 373 and Mexico's second written submission, para. 367.

¹¹⁴⁰ Panel Report, *Argentina – Hides and Leather*, para. 11.94.

¹¹⁴¹ United States' first written submission, para. 364; Mexico's first written submission, para. 367.

¹¹⁴² *2010 Application Qualifications and Procedures for Export Quota of Coke*, Article I(I)3 and I(II)2. (Exhibit CHN-317).

¹¹⁴³ *2010 Application Qualifications and Procedures for Export Quota of Coke*, Article III(IV), (Exhibit CHN-317).

¹¹⁴⁴ *2009 Coke Export Quota Application Procedures*, Article I(1)3 and Article I(2)2 and Article III(5), (Exhibits CHN-308, JE-85).

¹¹⁴⁵ *2010 Application Qualifications and Procedures for Export Quota of Coke*, Article III(I) (Exhibit CHN-317).

¹¹⁴⁶ *2010 Application Qualifications and Procedures for Export Quota of Coke*, Articles I(1)1 and I(2)1 and Article III(1), (Exhibit CHN-317).

the relevant measure at issue, the *2009 Application Qualifications and Application Procedures for Export Quota of Coke*.¹¹⁴⁷

7.793 China explains that an audited balance sheet must be submitted as supporting documentation for the registered capital, paid-in capital, and other capital-related information¹¹⁴⁸ that must be completed in the quota application form for bauxite and silicon carbide, allowing verification of whether the exporter satisfies the minimum registered capital requirement.¹¹⁴⁹ The Panel has verified that a requirement similar to the 2010 requirement exists in the relevant measure at issue, the *2009 Second Round Bidding Invitation*.¹¹⁵⁰

7.794 Lastly, an income statement must be submitted as supporting documentation for the information regarding the total value of exports to be completed in the application form for bauxite and silicon carbide.¹¹⁵¹ Such information and documentation allows the authority to verify whether the exporter satisfies the minimum export performance requirement.¹¹⁵² The Panel has verified that a requirement similar to the 2010 requirement exists in the relevant measure at issue, the *2009 Second Round Bidding Invitation*.¹¹⁵³

7.795 In the light of these explanations by China, the Panel concludes that the required documents are relevant to the discharge of the task delegated to the CCCMC Secretariat to verify the eligibility of quota applicants. The United States and Mexico have not been able to rebut China's assertion that they are so required. Moreover, China asserts that it requires only information stipulated in the relevant measure. This suggests that other information in the document could be redacted should the enterprise not wish to share it.

7.796 Thus, the United States and Mexico have not demonstrated that the features relating to the involvement of the CCCMC in the administration of export quotas pose a very real risk to the interests of relevant parties such that this necessarily results in unreasonable administration of the export quotas inconsistently with Article X:3(a). Consequently, the Panel finds that the administration of export quotas by the CCCMC, whether allocated directly or by bidding, does not amount to unreasonable administration in a manner inconsistent with Article X:3(a) of the GATT 1994.

¹¹⁴⁷ *2009 Coke Export Quota Application Procedure*, Articles I(1)1 and I(2)1, (Exhibits CHN-308, JE-85).

¹¹⁴⁸ *2010 Second-Batch Bidding Qualifications and Review for Export Quotas*, Articles IV(I)3(1) (incl. Appendix 2) and IV(I)3(2)(A), (Exhibit CHN-307).

¹¹⁴⁹ *2010 Second-Batch Bidding Qualifications and Review for Export Quotas*, Articles III(II)3 and III(II)4 (Exhibit CHN-307).

¹¹⁵⁰ *2009 Second Round Export Quota Bidding Announcement*, Article IV(I)3, (including Appendix 2 in Exhibit CHN-310, JE-91), read in conjunction with 2009 First Round Export Quota Bidding Announcement, Article III(II) (Exhibits CHN-309, JE-90).

¹¹⁵¹ *2010 Second-Batch Bidding Qualifications and Review for Export Quotas*, Articles IV(I)3(1) (incl. Appendix 2) and IV(I)3(2)A, (Exhibit CHN-307).

¹¹⁵² *2010 Second-Batch Bidding Qualifications and Review for Export Quotas*, Articles III(II)3 and III(II)4, (Exhibit CHN-307).

¹¹⁵³ *2009 Second Round Export Quota Bidding Announcement*, Article (IV)(1)(3), (Exhibits CHN-310, JE-91).

(iii) *Conclusion*

7.797 In light of the above, the Panel finds that the administration of export quotas by the CCCMC, whether allocated directly or by bidding does not amount to partial or unreasonable administration in a manner inconsistent with Article X:3(a) of the GATT 1994.

4. Whether China's failure to publish the total amount and procedure for the allocation of zinc export quotas is inconsistent with Article X:1 of the GATT 1994

7.798 The European Union claims that China does not publish the total amount of export quota for zinc that it will allocate for a specific year. It also asserts that China does not publish any information regarding the conditions that interested enterprises should satisfy in order to be allocated a zinc export quota. The European Union continues that China does not publish any invitation for applications for an export quota by interested enterprises, or a list of the enterprises that have been allocated a zinc export quota. As a result, neither interested enterprises, nor other WTO Members, know how much zinc China will allow to be exported, when the allocation of the export quotas will take place, how and to whom applications are to be submitted, or which conditions applicants should satisfy.¹¹⁵⁴

7.799 China responds that pursuant to Article I(i) of the *2010 Export Licensing Catalogue*, exports of zinc ores are subject to a quota allocated directly.¹¹⁵⁵ China explained that MOFCOM has not authorized a 2010 quota for zinc.¹¹⁵⁶ In other words, China says that in 2010, MOFCOM did not make effective the quota on zinc by setting a particular quota amount available for exports. As a result, no zinc could be exported from China in 2010. Finally, China states that it "does not assert any defence in connection with this failure to set the quota amount for zinc ores in 2010". In 2009, there also appears to have been a prohibition on the export of zinc from China.¹¹⁵⁷

7.800 We recall that Article X:1 states in relevant part:

"Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to ... requirements, restrictions or prohibitions on ... exports shall be published promptly in such manner as to enable governments and traders to become acquainted with them..."

7.801 As set out above, WTO Members are required to publish promptly all laws, regulations, judicial decisions and administrative rulings in such a way as to enable governments and traders to become acquainted with them. The European Union is required to establish that China's failure to authorize a zinc quota for 2009 is a measure within the terms of Article X:1 that had been made effective, thereby requiring prompt publication so as to enable governments and traders to become acquainted with it.

7.802 As the Appellate Body said in *US – Corrosion-Resistant Steel Sunset Reviews*, "any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement".¹¹⁵⁸ The Panel considers that the decision by MOFCOM not to publish the zinc quota is a

¹¹⁵⁴ European Union's first written submission, para. 213.

¹¹⁵⁵ 2010 Export Licensing Catalogue Article I(i), (Exhibit CHN-7).

¹¹⁵⁶ Following the first substantive meeting, the European Union asked whether China could provide details of the legal instrument that announced that the zinc quota for 2009 and 2010 had been set at zero. In its response to that question, China referred the European Union (and the Panel) to para. 37 of its responses to questions. In this paragraph, China acknowledged that it had failed to set the quota amount for zinc for 2010. The Panel deduces from this response that China also failed to set the quota amount for zinc in 2009.

¹¹⁵⁷ China's response to Panel question No. 8 following the first substantive meeting para 37.

¹¹⁵⁸ Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Reviews*, para. 81.

measure of China for the purposes of WTO dispute settlement. China's *Foreign Trade Law* delegates MOFCOM as the government agency responsible for the administration of China's export quotas. Furthermore, MOFCOM is directed to determine the total amount of the annual export quota for each good subject to export quotas and to announce the total amount of the annual export quota for each product by 31 October of the preceding year.¹¹⁵⁹ Thus, this determination by MOFCOM of the quota amounts, including determining the zinc quota, is an act or omission attributable to China. Moreover, it is clear that the measure pertains to "requirements, restrictions, or prohibitions" on exports.

7.803 As to the requirement that it be a "law, regulation, judicial decision [or] administrative ruling of general application", the Panel notes the broad scope of this phrase and considers that it includes a wide range of measures that have the potential to affect trade and traders.¹¹⁶⁰ Consequently, the Panel concludes that the failure to set an export quota for zinc is a "law, regulation, judicial decision [or] administrative ruling" falling within the ambit of Article X:1.

7.804 The Panel considers further that MOFCOM's failure to set a quota amount is a "law, regulation, judicial decision [or] administrative ruling" of general application. It affects any enterprise wishing to export the zinc quota; hence it fulfils the "general application" criterion.

7.805 On the question of whether a measure had been made effective, the panel in *EC – IT Products* held that "the term 'made effective' under Article X:1 of the GATT 1994 also covers measures that were brought into effect, or made operative, in practice and is not limited to measures formally promulgated or that have formally 'entered into force'."¹¹⁶¹ The Panel considers that the failure to set a quota amount for zinc comes within the scope of this term. It is "law, regulation, judicial decision [or] administrative ruling" that has been made operative in that there has been no export of zinc.

7.806 Concerning the requirement to publish promptly the relevant measures, in this case, the omission to set a quota for zinc, the Panel observes that China has not denied that it has not published the quota, or lack thereof, for zinc. Additionally the failure to publish the quota has had a practical result as interested exporters did not know that effectively, they were unable to export zinc. The Panel considers that under its Article X:1 obligations, China should have published its decision not to make "effective the quota on zinc by setting a particular quota amount available for exports" in such a manner as to enable governments and traders to become acquainted with that decision.¹¹⁶²

7.807 Consequently, the Panel concludes that the failure by China to publish promptly MOFCOM's decision not to authorize an export quota for zinc in such manner as to enable governments and traders to become acquainted with it is inconsistent with Article X:1 of the GATT 1994.

5. Whether China's allocation of quotas on bauxite, fluorspar and silicon carbide based on the bid-winning price is inconsistent with Article VIII:1(a) of the GATT 1994 and Paragraph 11.3 of China's Accession Protocol

7.808 The United States and Mexico submit that China allocates export quotas on bauxite, fluorspar and silicon carbide¹¹⁶³ through a quota bidding process, under which enterprises seeking to export must pay a bid-winning price, equal to the bid price multiplied by the bid quantity, for the right to export under the quota. The United States and Mexico claim that the bid-winning price paid in

¹¹⁵⁹ *Regulation on Import and Export Administration*, Article 38 (Exhibits CHN-152, JE-73); *Export Quota Administration Measures*, Articles 9-11 (Exhibits CHN-312, JE-76).

¹¹⁶⁰ Panel Report, *EC – IT Products*, para. 7.1026.

¹¹⁶¹ Panel Report, *EC – IT Products*, para. 7.1048.

¹¹⁶² China's response to Panel question No. 8 following the first substantive meeting para 37.

¹¹⁶³ The specific forms of the raw materials subject to the United States' and Mexico's claims are identified in Exhibit JE-6 and para. 2.2 of the Descriptive Part to these Reports.

connection with such quota allocation constitutes a "fee" or "charge" "imposed ... on or in connection with ... exportation" that is not "limited in amount to the approximate cost of services rendered" and as such is inconsistent with Article VIII:1(a) of the GATT 1994.¹¹⁶⁴ In addition, the United States and Mexico submit that the bid-winning price constitutes a "tax[]" or "charge[]" applied to exports" within the meaning of Paragraph 11.3 of China's Accession Protocol. Because bauxite, fluorspar and silicon carbide are not listed in Annex 6 of China's Accession Protocol, they submit that the bid-winning price is also inconsistent with Paragraph 11.3 of China's Accession Protocol.

7.809 China requests the Panel to reject the complainants' claims concerning the bid-winning price. First, China contends that it no longer subjects exports of fluorspar to a quota under the *2010 Export Licensing List Notice*.¹¹⁶⁵ Accordingly, it requests the Panel not to reach findings on fluorspar. Second, China alleges in its second written submission that the United States and Mexico have abandoned their claim under Paragraph 11.3 and Annex 6 of China's Accession Protocol by failing to list this claim in response to a request by the Panel to identify all measures for which they are seeking recommendations.¹¹⁶⁶

7.810 Notwithstanding these issues, China argues that the bid-winning price is not a fee or charge "on or in connection with exportation" within the meaning of Article VIII:1(a)¹¹⁶⁷, nor is it a tax or charge "applied to exports" within the meaning of Paragraph 11.3 of China's Accession Protocol. China argues that the WTO covered agreements do not prohibit bidding, nor prescribe a particular methodology for quota allocation, but only require that a Member administer its quota allocation system consistently with Articles X and XIII.¹¹⁶⁸ China submits that the bid-winning price reflects what a bid winners is willing to pay for the right to export a particular quantity.¹¹⁶⁹ In addition, China submits that a bid-winning system is the least trade-distorting means of quota allocation.¹¹⁷⁰

7.811 As a preliminary matter, the Panel recalls its finding in paragraph 7.33 au-dessus that, in general, measures that were in force when the Panel was established on 21 December 2009 form the basis of its terms of reference.¹¹⁷¹ At the request of the complainants, the Panel will only assess the WTO consistency of the 2009 measures while taking note that the 2010 measures do not set a quota for fluorspar.

7.812 Second, as correctly pointed out by China, the United States and Mexico did not list their claim under Paragraph 11.3 of China's Accession Protocol as concerns quota allocation when responding to a request by the Panel to identify measures for which they are seeking recommendations.¹¹⁷² The United States and Mexico did, however, continue to argue their claim in the context of their own rebuttal submissions, suggesting that the omission of this claim in response to

¹¹⁶⁴ United States' first written submission, paras. 315-330; Mexico's first written submission, paras. 318-333.

¹¹⁶⁵ China's first written submission, para. 578.

¹¹⁶⁶ China's second written submission, paras. 397-399.

¹¹⁶⁷ China's first written submission, para. 577.

¹¹⁶⁸ China's first written submission, paras. 577, 594.

¹¹⁶⁹ China's first written submission, para. 598.

¹¹⁷⁰ China's first written submission, paras. 599-601; China's comments on the complainants' responses to Panel question No. 6 following the first substantive meeting, para. 54; WTO, Special Study Series, Market Access: Unfinished Business – Post Uruguay Round Inventory and Issues (Geneva, 2001), p. 55 (Exhibit CHN-303); China's Statement on Export Quota Auctions as Optimal Allocation Mechanisms (July 2010) (Exhibit CHN-306); US Department of Agriculture Publication, Economic Analysis of TRQ Administrative Methods (TB-1893), p. iv (Exhibit CHN-462).

¹¹⁷¹ The Panel observes, however, that its decision to assess the complainants' claims here does not foreclose the possibility of considering 2010 measures in other contexts.

¹¹⁷² Complainants' responses to Panel question No. 2 following the first substantive meeting.

a question from the Panel was an oversight. Moreover, the United States and Mexico identified the relevant measures and provision in their Panel Requests, and subsequently confirmed that they had not abandoned their claim in this regard.¹¹⁷³ The Panel considers that the United States and Mexico did not intend to abandon this particular claim, and will therefore consider it.

7.813 Accordingly, the Panel will first set out China's system of allocation for export quotas for bauxite, fluorspar and silicon carbide through a quota bidding process, and subsequently will assess the complainants' claims under Article VIII:1(a) of the GATT 1994 and Paragraph 11.3 of China's Accession Protocol.

(a) The allocation of export quotas through a quota bidding process

7.814 In 2009, China allocated quotas for fluorspar, bauxite and silicon carbide through a bidding system.¹¹⁷⁴ The Panel recalls its description in Section VII.C.2(b) above of how China awards a portion of the export quota as part of the bidding process in order to export.

(b) Whether China's allocation of quotas on bauxite, fluorspar and silicon carbide based on the bid-winning price is inconsistent with Article VIII:1(a) of the GATT 1994

Article VIII:1(a) of the GATT 1994 provides:

"All fees and charges of whatever character (other than import and export duties and other than taxes within the purview of Article III) imposed by contracting parties on or in connection with importation or exportation shall be limited in amount to the approximate cost of services rendered and shall not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes."

7.815 Article VIII:1(a) thus prohibits "all fees and charges of whatever character" (other than import and export duties, and taxes within the purview of Article III) that are "imposed on or in connection with exportation" and that are not "limited in amount to the approximate cost of that service rendered".¹¹⁷⁵ The Panel will first consider generally the meaning of these terms before considering whether the bid-winning price collected by China constitutes a "fee" or "charge" within the meaning of Article VIII:1(a).

7.816 Article 3.2 of the DSU directs panels to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". Articles 31, 32 and 33 of the *Vienna Convention* codify these customary rules.¹¹⁷⁶ Article 31 of the *Vienna Convention* states in particular that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The Panel is bound to "give meaning and effect to all terms of a treaty" and is

¹¹⁷³ Complainants' responses to Panel question No. 2 following the second substantive meeting.

¹¹⁷⁴ 2009 *First Round Fluorspar Bidding Procedures* (Exhibit JE-93); 2009 *First Round Bauxite Bidding Procedures* (Exhibit JE-94); 2009 *First Round Silicon Carbide Bidding Procedures* (Exhibit JE-95); *Quota Bidding Measures*, Article 14 (Exhibit JE-77).

¹¹⁷⁵ See GATT Panel Report, *US – Customs User Fee*, para. 69.

¹¹⁷⁶ Appellate Body Report, *US – Gasoline*, p. 17, DSR 1996:I, 3, at pp. 15-16; Appellate Body Report, *India – Patents (US)*, para. 45; and Appellate Body Report, *US – Shrimp*, para. 114.

not "free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."¹¹⁷⁷

(i) *The ordinary meaning of the terms "fees" or "charges" in Article VIII:1(a)*

7.817 The United States and Mexico submit that the scope of Article VIII:1(a) was "enlarged" during negotiations.¹¹⁷⁸ The United States and Mexico argue that the language "in connection with" supports the view that the notion of "fees" in Article VIII:1(a) is "broad".¹¹⁷⁹ They further submit that the meaning of "fees" is informed by Article VIII:4, which refers to "fees, charges, formalities, and requirements imposed by governmental authorities in connection with ... exportation".¹¹⁸⁰

7.818 China argues that Article VIII:1(a) does not apply a "residual general prohibition on all fees and charges".¹¹⁸¹ China considers that the text, broader context, negotiating history and surrounding circumstances demonstrate that the provision relates to fees and formalities in connection with the processing of customs entries applied at the border.¹¹⁸² China argues that the phrase "of whatever character" was added to clarify the distinction between "fees and charges" and "duties".¹¹⁸³ China argues that Article VIII applies to "fees, charges, formalities and requirements" specifically related to those items enumerated in Article VIII:4 that are "customs activities which the draftsmen meant when they referred to 'services' rendered".¹¹⁸⁴ China argues that this interpretation is supported by the reference to customs-related activities in Article VIII:3.¹¹⁸⁵ China finds further support for this interpretation in more recent discussions on Article VIII.¹¹⁸⁶

The meaning of the terms "fees" and "charges"

7.819 The Appellate Body has indicated that dictionaries may provide a "useful starting point" for the analysis of the "ordinary meaning" of a treaty term, although they are not necessarily dispositive.¹¹⁸⁷

7.820 The Panel observes that the term "fee" is defined as "a fixed charge" or "a sum paid or charged for a service"¹¹⁸⁸, or "[a] recompense for an official or professional service or a charge or

¹¹⁷⁷ Appellate Body Report, *US – Gasoline*, p. 23 DSR 1996:I, 3, at p. 21. See also Appellate Body Reports: *Japan – Alcoholic Beverages II*, p. 12, DSR 1996:I, 97, p. 106; *Canada – Dairy*, para. 133; and *US – Upland Cotton*, para. 549.

¹¹⁷⁸ United States' response to Panel question No. 6 following the first substantive meeting, para. 12; Mexico's response to Panel question No. 6 following the first substantive meeting.

¹¹⁷⁹ United States' response to Panel question No. 6 following the first substantive meeting, paras. 9-10; Mexico's response to Panel question No. 6 following the first substantive meeting.

¹¹⁸⁰ United States' first written submission, para. 319; Mexico's first written submission, para. 322.

¹¹⁸¹ China's first written submission, para. 579-580; China's second written submission, para. 386.

¹¹⁸² China's first written submission, paras. 586-588, referring to *International Convention Relating to the Simplification of Customs Formalities*, LNTS Volume 30 (1925), p. 372, done at Geneva on 3 November 1923, Preamble, (Exhibit CHN-291); *Suggested Charter for an International Trade Organization of the United Nations*, Department of State (September 1946), Articles 13.1 and 13.4, (Exhibit CHN-292); GATT Negotiating Group on Non-Tariff Measures, *Fees, Duties and Other Import Charges – Background Note by the Secretariat* MTN.GNG/NG2/W/28 (1 May 1989), para. 3 (Exhibit CHN-293).

¹¹⁸³ China's second written submission, para. 386.

¹¹⁸⁴ China's first written submission, paras. 581-582, referring to GATT Panel Report, *US – Customs User Fee*, para. 76.

¹¹⁸⁵ China's first written submission, para. 583.

¹¹⁸⁶ See China's first written submission, paras. 589-590 and fns. 877-879.

¹¹⁸⁷ Appellate Body Report, *EC – Chicken Cuts*, para. 175; Appellate Body Report, *US – Softwood Lumber IV*, para. 59; Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 248; Appellate Body Report, *US – Gambling*, para. 166.

emolument or compensation for a particular act or service".¹¹⁸⁹ Definitions of "charge" include "pecuniary burden, cost", "expense", or "[a] price required or demanded for service rendered or goods supplied".¹¹⁹⁰ These definitions in isolation do not provide the precise meaning of the terms as they appear in Article VIII:1(a). Accordingly, the Panel will proceed with its analysis following the approach codified in the *Vienna Convention*, considering the terms "fees" and "charges" in their broader context and the object and purpose of the WTO Agreement.

The terms "fees" and "charges" in the context of other terms in Article VIII and the WTO Agreement

7.821 The terms "fees" and "charges" are modified by the word "[a]ll", the phrase "of whatever character (other than import and export duties and other than taxes within the purview of Article III)" and by the phrase "imposed on or in connection with importation or exportation". It is clear that the terms "all" and "of whatever character" suggest a broad scope of coverage for the terms "fees" and "charges". The term "all" is defined as "the entire number of ... without exception" in conjunction with plural nouns.¹¹⁹¹ The term "whatever" is defined as "[a]nything that", and "[n]o matter what".¹¹⁹² The term "character" is defined as "a feature, trait, characteristic" or nature, sort, style".¹¹⁹³ The parenthetical specific exception referring to "other than import and export duties" further suggests that a broad scope should be attributed to "fees" and "charges". In sum, Article VIII:1(a) refers to *all* fees and charges of *whatever* character *except* duties or internal taxes of the kind under Article III of the GATT 1994.

7.822 We note that Article VIII is entitled "Fees and Formalities connected with Importation and Exportation." We also observe that the phrase "imposed on or in connection with importation or exportation" further informs the meaning of the terms "fees" and "charges". The term "impose" is defined as "put, apply, or bestow", "lay or inflict (a tax, duty, charge, obligation, etc.) (on or upon), esp. forcibly; compel compliance with".¹¹⁹⁴ The term "on" is defined as "[d]uring, or at some time during (a specified day or part of day); contemporaneously with (an occasion)", "in or at", "exactly at or just coming up to (a specified time), just before or after in time", "on the occasion of (an action)".¹¹⁹⁵ The term "connection" is defined *inter alia* as "[a] causal or logical relationship or association"¹¹⁹⁶, and "connect" as a transitive verb is defined as "associate in occurrence or action".¹¹⁹⁷

¹¹⁸⁸ *Merriam-Webster Online Dictionary*.

¹¹⁸⁹ *Black's Law Dictionary*, (Special Deluxe Fifth Edition), p. 553.

¹¹⁹⁰ *Shorter Oxford English Dictionary*, 5th edn., L. Brown (ed.) (Oxford University Press, 2002), Vol. 1, p. 382.

¹¹⁹¹ *Shorter Oxford English Dictionary*, 5th edn., L. Brown (ed.) (Oxford University Press, 2002), Vol 1, p. 54.

¹¹⁹² *Shorter Oxford English Dictionary*, 5th edn., L. Brown (ed.) (Oxford University Press, 2002), Vol. 2, p. 3618.

¹¹⁹³ *Shorter Oxford English Dictionary*, 5th edn., L. Brown (ed.) (Oxford University Press, 2002), Vol 1, p. 381.

¹¹⁹⁴ *Shorter Oxford English Dictionary*, 5th edn., L. Brown (ed.) (Oxford University Press, 2002), Vol 1, p. 1331.

¹¹⁹⁵ *Shorter Oxford English Dictionary*, 5th edn., L. Brown (ed.) (Oxford University Press, 2002), Vol. 2, p. 1996.

¹¹⁹⁶ *Shorter Oxford English Dictionary*, 5th edn., L. Brown (ed.) (Oxford University Press, 2002), Vol 1, p. 489.

¹¹⁹⁷ *Shorter Oxford English Dictionary*, 5th edn., L. Brown (ed.) (Oxford University Press, 2002), Vol 1, p. 489.

7.823 These terms indicate that Article VIII:1 refers to those fees or charges that are applied at the moment in time of exportation, or in association with exportation. The parties appear to agree that a broad temporal view is supported by the language "on or in connection with".¹¹⁹⁸

7.824 Beyond temporal connotations, the phrase "on or in connection with ... exportation" may also mean that fees or charges that are *associated* with exportation, or that are linked or logically related to exportation, would fall within the scope of Article VIII. China argues, however, that the "fee or charge" must be "imposed" by the government.¹¹⁹⁹

7.825 The meaning of "imposed on or in connection with" or associated with importation or exportation is further informed by the remaining text of Article VIII:1(a). In particular, Article VIII:1(a) provides that those fees or charges that fall within the scope of Article VIII:1(a) must be "limited in amount to the approximate cost of services rendered".

7.826 The term "service" is defined as "the action of serving, helping, or benefiting another; behaviour conducive to the welfare or advantage of another", "assistance or benefit provided to someone by a person or thing" or "the organized system of providing labour, equipment, etc., to meet a public need such as health or communications."¹²⁰⁰ In the Panel's view, the term "service" and the term "service rendered" do not in themselves provide guidance on the interpretation to be given "fees" or "charges" as used in Article VIII:1(a).

7.827 The Panel will therefore consider other available interpretative elements to inform its interpretation. In particular, we observe that the surrounding provisions (or context) in Article VIII emphasize formal, documentary and procedural requirements that may arise on or in connection with exportation. In this respect, Article VIII:1(c) reads: "[WTO Members] also recognize the need for minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements." Article VIII:3 reads: "No [WTO Member] shall impose substantial penalties for minor breaches of customs regulations or procedural requirements. In particular, no penalty in respect of any omission or mistake in customs documentation which is easily rectifiable and obviously made without fraudulent intent or gross negligence shall be greater than necessary to serve merely as a warning."

7.828 In addition, Article VIII:4 provides:

"The provisions of this Article shall extend to fees, charges, formalities and requirements imposed by governmental authorities in connection with importation and exportation, including those relating to:

- (a) consular transactions, such as consular invoices and certificates;

¹¹⁹⁸ For instance, referring to the Panel Report on *China – Auto Parts*, the complainants consider that the phrase "imposed on or in connection with" indicates a broader temporal scope than the exact moment of border crossing (complainants' response to Panel question No. 6). In discussing the distinction between an ordinary customs duty applied at the border and an internal charge, the panel in *China – Auto Parts* concluded that a "broad scope" was intended for the phrase "on or in connection with ...", arguing that otherwise, different GATT provisions would have only used the terms "on" or "on or in connection with ...", but not both phrases. (Panel Report, *China – Auto Parts*, para. 7.177). The Appellate Body did not dispute this conclusion, explaining that "the moment at which a charge is collected or paid is not determinative of whether it is an ordinary customs duty or an internal charge." (Appellate Body Report, *China – Auto Parts*, para. 158).

¹¹⁹⁹ China's closing oral statement at the second substantive meeting, para. 9.

¹²⁰⁰ *Shorter Oxford English Dictionary*, 5th edn., L. Brown (ed.) (Oxford University Press, 2002), Vol. 2, p. 2768.

- (b) quantitative restrictions;
- (c) licensing;
- (d) exchange control;
- (e) statistical services;
- (f) documents, documentation and certification;
- (g) analysis and inspection; and
- (h) quarantine, sanitation and fumigation."

7.829 Many of the activities listed in Article VIII:4 refer to customs-related activities that take place at the border, such as fulfilment of documentary requirements, certification and inspection services, as well as matters related to sanitary activities, statistical surveillance and exchange services.

7.830 The complainants put emphasis on the reference in Article VIII:4 to "quantitative restrictions" and "licensing" in making their point that all fees or charges connected to export restraints or licence fees are prohibited. We disagree. In the Panel's view, meaning must be given to the language "in connection with ... exportation" and thus, not each and every fee, charge, formality and requirement associated with quantitative restrictions or export licensing fall within the scope of Article VIII. By the very terms of Article VIII:4, only "fees, charges, formalities or requirements imposed ... in connection with ... exportation" are covered. The Panel observes that such fees or charges must be collected in exchange for a "service rendered", and approximate the cost of that "service", to fall within the scope of Article VIII:1(a). These conditions indicate that not all types of fees and charges are prohibited. In particular, those fees or charges that are not imposed in connection with importation or exportation, and, if they are imposed in connection with importation or exportation, those that approximate the cost of a service rendered would, not fall within the scope of Article VIII:1(a) regardless of their nature. In other words, "fees, charges, formalities and requirements" that relate to quantitative restrictions or licensing would not necessarily be prohibited. Accordingly, some, but not all, fees, charges, formalities or requirements that relate to quantitative restrictions or licensing could fall within the scope of Article VIII. As such, the Panel considers that its analysis must focus on whether a fee or charge is imposed on or in connection with exportation, and, if so, whether it approximates the cost of a service rendered.

7.831 The Panel notes that a quantitative restriction (quota, ban, licence requirement or other type of "restriction") may be WTO-inconsistent under Article XI:1 of the GATT 1994. Thus it seems appropriate to construe Article VIII as regulating something different from that addressed by GATT Article XI:1. The Panel understands Article VIII to address more narrowly those fees, charges, formalities and requirements – such as those relating to quantitative restrictions or licensing requirements – that are imposed on or in connection with importation or exportation.

7.832 Therefore, based on an assessment of the terms in Article VIII:1(a) and the context of Article VIII:4, the Panel concludes preliminarily that the meaning of "fees" or "charges" that fall within the scope of Article VIII is broad, including "all" fees or charges "of whatever character". However, not *all* fees or charges are covered. In the Panel's view, Article VIII, including both Article VIII:1(a) and Article VIII:4, is limited in application to those types of fees or charges imposed "on or in connection with importation or exportation". These typically include specific fees, charges, formalities or requirements, associated with customs-related documentation, certification and inspection, and statistical matters. This conclusion is consistent with that reached by the GATT panel

on *US – Customs User Fee*, namely that the drafters intended the term "services" to refer to "government activities closely enough connected to the processes of customs entry".¹²⁰¹

7.833 The Panel recalls that the provisions of a treaty should be interpreted in light of the object and purpose of the treaty being interpreted. The Panel noted above that Article XI:1 of the GATT 1994 imposes express obligations on WTO Members pertaining to their use of quantitative restrictions or restrictive import or export licensing requirements. In light of this general approach in Article XI:1, and in the absence of any indication that Article VIII should be construed differently from the approach adopted by the Panel above, the Panel considers that its interpretation of Article VIII:1(a) is consistent with the object and purpose of the WTO Agreement.

Other interpretative elements

7.834 Article 31(2) of the Vienna Convention indicates that context for the purpose of treaty interpretation may include, in addition to the text of the treaty under interpretation, agreements or instruments made in connection with the conclusion of the treaty. By virtue of Article 31(3), a treaty interpreter may also consider any subsequent agreement between the parties regarding the interpretation of the treaty, subsequent practice in the application of the treaty, or any relevant applicable rules of international law applicable in the relations between the parties. Finally, under Article 32 of the Vienna Convention, a treaty interpreter may resort to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, to confirm the meaning of the provision resulting from the application of Article 31, or to determine the meaning of a provision when interpretation leaves the meaning ambiguous or obscure or leads to an absurd or unreasonable result.

7.835 The United States and Mexico submit that the language of Article VIII was "enlarged" during negotiations, and that the Panel's interpretation should reflect this "enlarged" scope.¹²⁰²

7.836 China argues that certain documents preceding the conclusion of the GATT in 1947 confirm that Article VIII was intended to address only customs-related matters. In particular, as did the Panel in *US – Customs User Fee*¹²⁰³, China refers to the *International Convention Relating to the Simplification of Customs Formalities*¹²⁰⁴ and the *Suggested Charter for an International Trade Organization of the United Nations*¹²⁰⁵. China submits that, during negotiations for the GATT 1947, the United States proposed to include a provision in Article VIII:1(a) of the GATT 1994 referring to "fees, charges, formalities and requirements relating to all *customs* matters".¹²⁰⁶ In addition, China refers to a 1989 background note of the GATT Negotiating Group on Non-Tariff Measures¹²⁰⁷ noting examples of charges for services rendered that are imposed in connection with imports, including port

¹²⁰¹ GATT Panel Report, *US – Customs User Fee*, para. 77 ("It must be presumed, therefore, that the drafters meant the term 'services' to be used in a more artful political sense, i.e., government activities closely enough connected to the processes of customs entry that they might, with no more than the customary artistic licence accorded to taxing authorities, be called a 'service' to the importer in question.").

¹²⁰² United States' response to Panel question No. 6 following the first substantive meeting, para. 12; Mexico's response to Panel question No. 6 following the first substantive meeting.

¹²⁰³ GATT Panel Report, *US – Customs User Fee*, paras. 71, 75.

¹²⁰⁴ *International Convention Relating to the Simplification of Customs Formalities*, LNTS Volume 30 (1925), p. 372, done at Geneva on 3 November 1923, Preamble, (Exhibit CHN-291).

¹²⁰⁵ *Suggested Charter for an International Trade Organization of the United Nations*, Department of State (September 1946), Articles 13.1 and 13.4 (Exhibit CHN-292).

¹²⁰⁶ *Suggested Charter for an International Trade Organization of the United Nations*, Department of State (September 1946), Articles 13.1 and 13.4 (emphasis added) (Exhibit CHN-292).

¹²⁰⁷ *GATT Negotiating Group on Non-Tariff Measures, Fees, Duties and Other Import Charges – Background Note by the Secretariat* MTN.GNG/NG2/W/28 (1 May 1989), para. 3 (Exhibit CHN-293).

taxes, port improvement taxes, warehousing taxes, sanitary and phytosanitary taxes, customs user fees, and statistical taxes.

7.837 The Panel does not consider an Article 32 analysis is required in light of its conclusions above. However, even if it were, the 1923 *International Convention Relating to the Simplification of Customs Formalities* had as one of its major purposes the reduction of the number and level of fees imposed in connection with importation or exportation, as well as the simplification of customs-related laws, regulations and formalities.¹²⁰⁸ No reference is made to systems or methods of quota or licensing allocation, other than that such allocation must be equitable.¹²⁰⁹ As noted by China, the *Suggested Charter for an International Trade Organization of the United Nations* designates fees, charges, formalities and requirements "relating to all customs matters". The list of charges discussed in the Background Note of the GATT Negotiating Group on Non-Tariff Measures refers to customs user fees, but is not exhaustive.

7.838 In sum, these documents lead to a view that is consistent with the Panel's analysis above. These documents reflect that customs-related activities were a concern of participants in these discussions. The Panel sees no contradiction between these documents and the conclusions reached through the preceding analysis under Article 31 of the ordinary meaning of Article VIII:1(a), read in its context and in light of the object and purpose of the WTO Agreement. Accordingly, the Panel confirms its preliminary conclusion set out above.

Preliminary conclusions: The ordinary meaning of "fees" and "charges" in Article VIII:1(a) of the GATT 1994

7.839 In accordance with its interpretation set out above, the Panel concludes that Article VIII:1(a) applies to fees and charges imposed "on or in connection with importation or exportation" and requires that such fees and charges are solely applied in exchange for a "service rendered". As such fees, charges, formalities or requirements that are typically imposed when providing customs-related documentation, certification and inspection, and statistical matters are covered. Having so concluded, the Panel will next assess whether the bid-winning price collected by China in connection with quota allocation constitutes a "fee or charge of whatever character ... imposed ... in connection with ... exportation" within the meaning of Article VIII:1(a).

(ii) *Whether the bid-winning price constitutes a fee or charge within the meaning of Article VIII:1(a) of the GATT 1994*

7.840 The Panel must next evaluate whether the bid-winning price collected by China in connection with quota allocation constitutes a "fee or charge of whatever character ... imposed ... in connection with ... exportation" within the meaning of Article VIII:1(a) as discussed above.

7.841 The United States and Mexico argue that in light of the explicit reference to "fees and charges" relating to "quantitative restrictions" and "licensing" in Article VIII:4, the bid-winning price is such a fee, because China's export quotas restrict the quantity of exports of bauxite, fluorspar and silicon carbide, and because the payment of the bid-winning price is necessary in order to receive an export licence.¹²¹⁰

¹²⁰⁸ See, e.g., *International Convention Relating to the Simplification of Customs Formalities*, LNTS Volume 30 (1925), p. 372, done at Geneva on 3 November 1923, Articles 10, 11(8) and 12 (Exhibit CHN-291).

¹²⁰⁹ Article 3(e).

¹²¹⁰ United States' first written submission, para. 323; Mexico's first written submission, para. 326.

7.842 China argues that the bid-winning price is not "imposed" "in connection with" exportation. First, it argues that the bid-winning price is also not a "fee or charge" "imposed" by the government. The price reflects the value that a bidder has chosen to attach to the right to export.¹²¹¹ In addition, China argues that the bidding process takes place well before exporters have made binding commitments to export and has a different purpose: that of allocating the limited right to export. Therefore, China argues that the bid-winning fee is not connected with any of the customs-related activities that would fall within the scope of Article VIII:1(a). Only after this bidding process, it argues, can successful applicants enter sales contracts and make commitments to export and thereafter present goods at the border for exportation. China emphasizes that a winning bidder may ultimately decide not to export the product.¹²¹²

7.843 China additionally argues that auctions are one of the least trade-distorting means of quota allocation, and do not affect the price of exports in the market. In addition, China submits that Article XIII:2 of the GATT 1994 "stipulates a principle regarding the distribution of the tariff quota in the least trade-distorting manner".¹²¹³ China therefore considers that Article VIII cannot be read in such a manner to prohibit the allocation of quotas through bidding. Finally, China contends that the United States both authorizes the use of quota allocation through auctions¹²¹⁴ and permits trading partners to allocate quotas through auctions.¹²¹⁵

7.844 The Panel concluded above that the meaning of "fees" or "charges" that fall within the scope of Article VIII is broad. Notwithstanding this view, the Panel concluded further that only fees imposed "on or in connection with importation or exportation" and collected in exchange for a "service rendered" may be considered as falling within the scope of Article VIII:1(a). The Panel noted that typically such fees or charges would include payments provided for customs-related documentary, certification and inspection, and statistical activities.

7.845 In the Panel's view, the bid-winning price collected by China in connection with quota allocation is not a fee or charge imposed on or in connection with exportation, or imposed in exchange for a service rendered. Although payment of a bid-winning price is necessary to receive a quota allocation for products subject to a quota bidding regime in China, this fact alone does not mean that a bid-winning price is a fee or charge imposed in connection with exportation under Article VIII.

7.846 As explained above, a quantitative restriction or a licensing requirement of the kind at issue in this case does not on its own amount to a fee or charge within the meaning of Article VIII:1(a). As noted above, quantitative restrictions and licensing requirements are regulated generally under Article XI:1 of the GATT 1994. Under Article VIII, fees or charges imposed in connection with exportation must involve a service rendered, and must be limited in amount to the approximate cost of services rendered. If one or more of these requirements are missing, Article VIII does not apply.

7.847 As pointed out by China, under the measures discussed in paragraphs 7.188 to 7.198 above, the bid-winning price is initially a proposal submitted by an enterprise. The actual price is determined and assigned to the applicant enterprise at a point well before the exporter enters into a binding commitment to export the good subject to a quota. Indeed, an enterprise that is awarded a portion of

¹²¹¹ See, e.g., China's first written submission, para. 591. China's closing oral statement at the second substantive meeting, para. 9.

¹²¹² China's first written submission, para. 591; China's closing oral statement at the second substantive meeting, para. 7.

¹²¹³ China's closing oral statement at the second substantive meeting, para. 8, citing Appellate Body Report, *EC – Bananas III (21.5 – US)*, para. 338.

¹²¹⁴ China's second written submission, paras. 388-394.

¹²¹⁵ China's second written submission, para. 395.

the quota may decide to export less or none of the allocated quota, if it desires.¹²¹⁶ The precise moment when an enterprise will export under the assigned quota allocation, or whether that enterprise will export at all, is not known or contemplated at the time the bidding price is determined. In the Panel's view, this type of arrangement does not amount to the imposition of a fee or charge on or in connection with exportation.

7.848 In addition, the bidding process and collection of a bid-winning price is much different in nature from a customs-related service supplied in exchange for a particular fee or charge. The bid-winning price reflects the value that a potential exporter attributes to the right to export the product at some point in the future.

7.849 Thus, the bid-winning fee is a price offered in expectation of a future return. This is also conceptually different from a tariff, fee, or charge that affects the volume of trade or the export price.¹²¹⁷ In contrast to a tariff, fee or charge that may have distortive effects on the price of exported goods, a bid-winning price approach generally allows a more efficient allocation of quotas than would be possible through quota allocation based on request, or based on historical quota allocation proportions, or on some arbitrary basis. Where quotas are allocated through bidding, the most efficient enterprises capable of earning a higher return per unit sold – the difference between the price received from exporting the good and the cost to produce and export the good – are willing to pay a higher price for the ability to export.¹²¹⁸ The bidding process described above determines the enterprises that will be permitted to export, but it does not affect the price ultimately received by the seller for the goods. Rather it is the total volume permitted for export that generally will determine the export price in the market.

7.850 Finally, it is clear that the assessed bid-winning price is not in any way related to the approximate cost of a service rendered. This is because enterprises that choose to participate in a particular bidding process have the right to submit any bid price or bid quantity they wish when seeking to obtain an allocation of the export quota for the raw materials under discussion. Receiving the desired allocation does not depend directly on the bid price or quantity submitted; rather, it is dependent on the bid prices and amounts submitted by other applicant enterprises. While a particular bidding enterprise generally would not be willing to pay more than the full amount of economic rent it is able to earn through exportation, it almost certainly will be willing to pay less. In sum, the bid price necessarily will vary, depending on the particular circumstances involved and therefore cannot be related to any particular service that may be rendered. By their very nature, prices submitted through bidding are variable, which would always violate the requirement in Article VIII:1(a) that fees must approximate the cost of a particular service rendered – in this case, the allocation of a quota.

(iii) *Conclusions on the complainants' Article VIII:1(a) claim*

7.851 For the foregoing reasons, the Panel concludes that the bid-winning price collected by China in connection with quota allocation does not constitute a "fee or charge of whatever character ... imposed ... in connection with ... exportation" within the meaning of Article VIII:1(a). In particular, the Panel finds that the collection of the bid-winning prices does not amount to the imposition of a fee

¹²¹⁶ *Implementation Rules on Export Quota Bidding of Industrial Products*, Article 21 (Exhibit CHN-305); *Quota Bidding Implementation Rules*, Article 23 (Exhibit JE-78).

¹²¹⁷ See China's first written submission, paras. 600-601.

¹²¹⁸ See China's Statement on Export Quota Auctions as Optimal Allocation Mechanisms (July 2010) (Exhibit CHN-306); see also USDA, *Economic Analysis of TRQ Administrative Methods* (TB-1893) (Exhibit CHN-463).

or charge on or in connection with exportation.¹²¹⁹ Finally, we observe that a finding otherwise would mean that all quota allocation through bidding or auctioning would be prohibited.

- (c) Whether China's allocation of quotas on bauxite, fluorspar and silicon carbide based on the bid-winning price is inconsistent with Paragraph 11.3 and Annex 6 of China's Accession Protocol

7.852 In addition to their claims under Article VIII:1(a), the United States and Mexico argue that the bid-winning price is a tax or charge applied to exports that is inconsistent with Paragraph 11.3 and Annex 6 of China's Accession Protocol. The United States and Mexico submit that the bid-winning price is a government set price, the payment of which is required in order to obtain a certificate for a licence application.¹²²⁰ They argue that none of the products subject to export quota bidding requirements is listed in Annex 6. Moreover, they assert, as above, that the bid-winning price is not in conformity with Article VIII, thereby resulting in an express breach of the text of Paragraph 11.3.¹²²¹

7.853 China argues that the United States and Mexico have failed to demonstrate that a bid-winning price is a "tax" or "charge" that is "applied to exports" within the meaning of Paragraph 11.3, namely an export duty based on an *ad valorem* percentage. In contrast to the United States and Mexico, China argues that the bid-winning price merely reflects the bid-winning exporters' expectations about the value of exports of a particular quantity of goods. In addition, China argues that the bid-winning price is not "applied to exports" because liability is not incurred at the time of border crossing.¹²²²

7.854 The scope and meaning of Paragraph 11.3 has been addressed above in VII.B.5 au-dessus in a different context. Here, the Panel must consider whether the bid-winning price requirement discussed above is inconsistent with Paragraph 11.3, which explicitly allows China to maintain – independently to the disciplines imposed on export duties – "charges" applied consistently with Annex 6 of China's Accession Protocol and Article VIII of the GATT 1994.

7.855 To recall, Part I, Section 11 of China's Accession Protocol contains China's binding commitments on taxes and charges levied on imports and exports. Part I, Paragraph 11.3 states:

"China shall eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of this Protocol or applied in conformity with the provisions of Article VIII of the GATT 1994."¹²²³

7.856 Annex 6 of China's Accession Protocol is a list of 84 products, each listed sequentially by HS number and accompanied by a description of the product and an export duty rate listed as an *ad valorem* percentage.¹²²⁴

7.857 As discussed above, the Panel will interpret the meaning of this provision in accordance with the customary rules of interpretation codified in Articles 31 to 33 of the *Vienna Convention*. We begin with the ordinary meaning to be given to the terms of the provision in their context and in the light of the object and purpose of the treaty.

¹²¹⁹ The Panel notes that this method of allocation is economically desirable and is not otherwise prohibited under the GATT 1994 or WTO Agreement.

¹²²⁰ United States' second written submission, para. 373; Mexico's second written submission, para. 378.

¹²²¹ United State's first written submission, para. 330; Mexico's first written submission, para. 333.

¹²²² China's first written submission, paras. 603-605.

¹²²³ Exhibit JE-2.

¹²²⁴ Exhibit JE-2.

7.858 The Panel recalls that from paragraph 7.820 above, that definitions of "charge" in isolation do not provide a precise indication of the terms as they appear in Article VIII:1(a). As above, it is thus necessary to consider the meaning of "charges" in its context and the object and purpose of the WTO Agreement.

7.859 Despite differences in the text of Paragraph 11.3 and Article VIII:1(a), the thrust of Paragraph 11.3 appears to be the same as that in Article VIII:1(a). Specifically, Paragraph 11.3 prohibits any "charges applied to exports" unless they are expressly allowed under Annex 6 or otherwise in conformity with Article VIII of the GATT 1994. A bid-winning price is clearly not an *ad valorem* duty that is applied to exports, and therefore may not be justified on the basis of Annex 6. The Panel recalls its finding above that the collection of the bid-winning prices does not amount to the imposition of a fee or charge on or in connection with exportation within the meaning of Article VIII:1(a) of the GATT 1994. For purposes of its assessment here, the Panel sees no distinction that should be made between "charges applied to exports" and "fees or charges imposed ... on or in connection with ... exportation". Moreover, the express reference to Article VIII ("in conformity with the provisions of Article VIII of the GATT 1994") confirms that Members and China had in mind the type of charges referred to in Article VIII when drafting Paragraph 11.3.

7.860 In light of the wording of Paragraph 11.3 and the express reference to Article VIII, and the Panel's findings on the bid-winning price in respect of the complainants' claim under Article VIII, the Panel concludes that the bid-winning price is not a "charge[] applied to exports" that falls within the scope of Paragraph 11.3 of China's Accession Protocol.

(d) Summary

7.861 The Panel concludes that the bid-winning price collected by China in connection with quota allocation does not constitute a "fee or charge of whatever character ... imposed ... in connection with ... exportation" within the meaning of Article VIII:1(a) because the collection of the bid-winning price does not amount to the imposition of a fee or charge on or in connection with exportation. Nor does the bid-winning price approximate the cost of a service rendered as required by Article VIII:1(a). The Panel also concludes that a bid-winning price is not a "charge[] applied to exports" that falls within the scope of Paragraph 11.3 of China's Accession Protocol. Therefore, the Panel concludes that China's allocation of quotas on bauxite, fluorspar and silicon carbide based on the bid-winning price is not inconsistent with Article VIII:1(a) of the GATT 1994 or Paragraph 11.3 of China's Accession Protocol.

F. EXPORT LICENSING

7.862 The complainants have raised several challenges to China's export licensing framework through which China administers exports of forms of manganese and zinc and through which China administers export quotas on forms of bauxite, coke, fluorspar, silicon carbide and certain forms of zinc.¹²²⁵

7.863 The complainants submit that China's export licensing requirement for these raw materials is "non-automatic" and amounts to a restriction on exportation additional to the restriction effected by export quotas themselves. That additional restriction, they argue, is inconsistent with Article XI:1 of the GATT 1994.

¹²²⁵ The specific forms of the raw materials subject to the United States' and Mexico's claims are identified in Exhibit JE-6 and paragraph 2.2 of the Descriptive Part to these Reports.

7.864 The United States and Mexico submit that China restricts the exportation of the raw materials at issue through an export licensing system that is "non-automatic" in "nature".¹²²⁶ They submit that China has itself conceded that its export licensing system amounts to an export restriction under GATT Article XI:1.¹²²⁷ The European Union submits that China's export licensing system as set forth in relevant measures is "non-automatic by law"¹²²⁸ and is therefore inconsistent with Article XI:1.

7.865 The complainants submit that China's export licensing system is also inconsistent with Article XI:1 because it provides China's export licensing agencies with discretion to restrict exportation of the raw materials at issue.

7.866 The United States and Mexico assert that China's export licensing system "provides China with the authority, the ability and the discretion to control and restrict the exportation of the subject products."¹²²⁹ They argue that licensing agencies may exercise discretion to set the quantities of goods that can be exported, the price at which products can be exported, and the qualifications that exporters must possess; moreover, they can impose other conditions, such as requiring "undefined 'documents of approval' and 'other materials to be submitted' as bases for issuance of export licences".¹²³⁰

7.867 The European Union argues that China's export licensing system "allows China's authorities a very broad and unfettered discretion on whether to grant or refuse export licences to applicants".¹²³¹ It submits that there is no limitation on the discretion on the part of the Ministry of Commerce to require undefined "other documents"¹²³² or "documents of approval"¹²³³, which allows China's export licence agencies to restrict, or altogether ban, exportation by certain companies.¹²³⁴

7.868 In its first written submission, the European Union additionally argued that China's licence issuing authorities could restrict or prohibit the exportation of the raw materials at issue by exercising discretion to interpret undefined "management qualifications" in a discriminatory fashion.¹²³⁵ In response, China contested the European Union's translation of the term, arguing the term should be translated as "business qualifications".¹²³⁶ In addition, China submitted that its licence issuing authorities have no discretion whatsoever in interpreting the meaning of this term and explained that applicants must simply submit one of the documents set out in Article 6 of the Working Rules on

¹²²⁶ United States' first written submission, paras. 338-339, 342.

¹²²⁷ United States' second written submission, para. 378 and Mexico's second written submission, para. 383, referring to Committee on Market Access, Note by the Secretariat: Notifications of Quantitative Restrictions G/MA/NTM/QR/1Add.11 (11 April 2008) (Exhibit JE-171) and Catalogue of Products Subject to Export (Quota) License (2007 QRs of China final) (Exhibit JE-172).

¹²²⁸ European Union's first written submission, para. 317.

¹²²⁹ United States' oral statement at the second substantive meeting, para. 122; see also United States' second written submission, para. 377; Mexico's second written submission, para. 382 (stating that "the licensing system provides China with the authority and the ability to control and restrict, i.e., impose limiting conditions, on products designated for export restriction").

¹²³⁰ United States' first written submission, para. 340, fn. 415; Mexico's first written submission, para. 343, fn. 415.

¹²³¹ European Union's first written submission, para. 319.

¹²³² European Union's first written submission, para. 319; *2008 Export License Administration Measures*, Article 11 (Exhibits CHN-342, JE-74); *2008 Export Licensing Working Rules* (Exhibits CHN-344, JE-97).

¹²³³ European Union's first written submission, para. 321; *2008 Export License Administration Measures*, Article 11 (Exhibits CHN-342, JE-74).

¹²³⁴ European Union's first written submission, paras. 319, 321.

¹²³⁵ European Union's first written submission, para. 320, referring to *2008 Export Licensing Working Rules*, Article 8.

¹²³⁶ China's first written submission, para. 786.

Issuing Export Licences once a year to show that the applicant is qualified and registered to do business in China.¹²³⁷ Following China's explanation, the European Union indicated that it "accepts" China's "official declaration" in Exhibit CHN-345 that the fulfilment of the "business qualifications" condition simply requires "submission of the applicants' Business Licence and the certificate showing that the applicants are authorised to engage in import and export trade".¹²³⁸ (The European Union maintains, however, that China has acted inconsistently with GATT Article X:1 by failing to publish the "method of verification of the 'business qualifications' criteria"¹²³⁹). In light of further clarification by the European Union of its Article XI:1 claim, and in light of the Panel's determination that the European Union's Article X:1 claim in respect of export licensing is outside its terms of reference, the Panel will not consider further the European Union's claim in connection with the requirement to demonstrate "business qualifications" in Article 8 of the Working Rules on Issuing Export Licences.

7.869 In addition to their claims under GATT Article XI:1, the complainants submit that requirements imposed under this export licensing system are inconsistent with paragraphs 162 and 165 of China's Working Party Report. They argue that these paragraphs contain "enforceable commitments"¹²⁴⁰ and prohibit China's imposition of "non-automatic export licensing and export restrictions" that are not justified.¹²⁴¹

7.870 The European Union further contends that China's export licensing system is inconsistent with paragraphs 5.1 and 1.2 of China's Accession Protocol, read in combination with paragraphs 83 and 84 of China's Working Party Report. The European Union submits that, under these provisions, China is required to grant the right to export to all enterprises in China, including foreign ones, and to eliminate its system of examination and approval of enterprises' rights to export. The European Union submits that the discretion by China's licence issuing authorities to refuse to grant export licences is tantamount to a system of examination and approval of trading rights.¹²⁴²

7.871 Finally, the European Union claims in the alternative that China failed to publish regulations and rulings connected with the administration of its export licensing system in contravention of GATT Article X:1, and that China administers its export licensing system in a manner inconsistent with GATT Article X:3(a). The Panel determined, however, in Section VII.A.3 *au-dessus*, that the European Union's alternative claims under Articles X:1 and X:3(a) are not in the Panel's terms of reference.

7.872 China requests the Panel to reject the complainants' claims. First, China argues that it no longer subjects exports of fluorspar to an export quota under the 2010 Export Licensing Catalogue; hence, it argues that the Panel should not consider the complainants' claims in respect of fluorspar.¹²⁴³

7.873 China also contends the its export licensing agencies may not exercise discretion to refuse an export licence application for forms of bauxite, coke, fluorspar, manganese, silicon carbide and zinc at issue, when the requisite application and documents are submitted. China argues that in all cases export licensing authorities "automatically" grant export licences within three days following

¹²³⁷ China's first written submission, paras. 786-787.

¹²³⁸ European Union's second written submission, para. 87; European Union's response to the Panel question No. 59 following the second substantive meeting paras. 81-83.

¹²³⁹ European Union's response to the Panel question No. 59, following the second substantive meeting para 83.

¹²⁴⁰ United States' first written submission, para. 343; Mexico's first written submission, para. 346.

¹²⁴¹ United States' first written submission, paras. 345-346; European Union's first written submission, paras. 323-324; Mexico's first written submission, paras. 348-349.

¹²⁴² European Union's first written submission, paras. 334-336.

¹²⁴³ China's first written submission, para. 67.

submission of a valid application and specified documents.¹²⁴⁴ Accordingly, China argues that its export licensing system does not restrict exportation in a manner inconsistent with either Article XI:1 of the GATT 1994 or any obligations in paragraphs 5.1 and 1.2 of China's Accession Protocol, or with paragraphs 83 and 84, or 162 and 165 of China's Working Party Report.

7.874 If the Panel were to find China's export licence requirement inconsistent with Article XI:1, China requests that the Panel exercise judicial economy with respect to the complainants' remaining claims under its Accession Protocol and Working Party Report. China considers that these claims are "identical" to those under Article XI:1 and submits that findings under these provisions "would add nothing to the resolution of this dispute, nor would it aid in any potential implementation."¹²⁴⁵

7.875 In addition, China asserts that the United States and Mexico have abandoned their claims that China's export licence requirement is inconsistent with paragraphs 162 and 165 of its Working Party Report by failing to identify these provisions when asked by the Panel to list "all measures relevant to this dispute for which they are seeking 'recommendations' from the Panel".¹²⁴⁶

7.876 As a preliminary matter, the Panel recalls its finding in paragraph 7.33 *au-dessus* that, in general, measures that were in force when the Panel was established on 21 December 2009 form the basis of its terms of reference.¹²⁴⁷ At the request of the complainants, the Panel will only assess the WTO consistency of the 2009 measures while taking note that the 2010 measures do not set a quota for fluorspar.

7.877 Before turning to an analysis of the parties' claims, the Panel wishes to address first China's contention that the United States and Mexico abandoned their claims with respect to paragraphs 162 and 165 of China's Working Party Report, mentioned above. The Panel observes that China is correct in that the United States and Mexico did not list their claims under paragraphs 162 and 165 of China's Working Party Report when identifying, in response to the Panel's request, the measures and claims for which they are seeking recommendations.¹²⁴⁸ The United States and Mexico did, however, identify these provisions in their Panel Requests. They also addressed these claims in their first written submissions. In addition, the United States submitted Exhibit US-1 during the second substantive meeting of the parties, which refers to paragraphs 162 and 165 in connection with export licensing. In our view, the United States and Mexico have governed themselves in the course of these proceedings as if these claims were very much active ones, and we do not consider them as abandoned. The more appropriate conclusion is therefore, that the omission of these claims in response to a question from the Panel was merely an oversight. The Panel accordingly concludes that the United States and Mexico did not intend to abandon their claims with respect to Paragraphs 162 and 165 of China's Working Party Report, and accordingly will consider these claims below.

7.878 The Panel will first set out its understanding of the operation of China's export licensing systems for the raw materials at issue. It will then analyze the claims of the parties. Finally the Panel will address, as relevant, China's request that the Panel exercise judicial economy with respect to claims under China's Accession Protocol and Working Party Report.

¹²⁴⁴ China's first written submission, paras. 771, 776; China's second written submission, para. 499.

¹²⁴⁵ China's first written submission, paras. 808, 881.

¹²⁴⁶ China's second written submission, paras. 477-478.

¹²⁴⁷ The Panel observes, however, that its decision to assess the complainants' claims here does not foreclose the possibility of considering 2010 measures in other contexts.

¹²⁴⁸ Complainants' responses to first set of Panel questions, question No. 2.

1. The operation of China's export licensing system

7.879 China's Import and Export Regulations define "export licences" as "the various kinds of certificates and documents that are of export nature as provided in laws and administrative regulations".¹²⁴⁹ The exportation of goods from China is unrestricted unless otherwise provided for by law or regulation.¹²⁵⁰ China's *Foreign Trade Law* distinguishes between goods that may be freely exported (Article 15) and goods that may be restricted (Article 19). Goods that are freely exported pursuant to Article 15 may be subject to automatic licensing for monitoring purposes.¹²⁵¹ Goods that are subject to restriction pursuant to Article 19 may be subject to licensing as "goods subject to ... export restriction".¹²⁵²

7.880 For those goods subject to export restriction, an exporter may proceed to export only after obtaining an export licence for presentation to China's customs for declaration and examination.¹²⁵³ Export licences are generally valid for up to six months and expire no later than 31 December each year.¹²⁵⁴ The period of validity may be extended if an export licence is not fully used.¹²⁵⁵ For those goods that are simultaneously subject to export quotas, applications for licences must be made within the period of validity of the quota.¹²⁵⁶

7.881 China's MOFCOM, through its Bureau of Quota Licence, is responsible for the application of export licensing rules and for coordinating export licence issuing agencies that are organized in local administrative authorities.¹²⁵⁷ MOFCOM is responsible for imposing penalties on enterprises that do not comply with exportation licence requirements. Exportation of restricted goods without approval, or exportation in excess of a designated quota, is subject to investigation leading to potential criminal and administrative penalties. Penalties include invalidation of applicable licences and suspension or revocation of the right to engage in foreign trade for a period of up to three years.¹²⁵⁸ MOFCOM also subjects licensing entities to penalties for issuing licences to exporters in excess of a quota, or in cases where no quota is set. Penalties include warnings and suspension or termination of the right to issue licences.¹²⁵⁹ Individuals working in licensing entities who issue licences without approval may also be subject to criminal and administrative penalties, including removal from employment, warning,

¹²⁴⁹ *Regulation on Import and Export Administration*, Article 43 (Exhibit JE-73).

¹²⁵⁰ *Foreign Trade Law*, Article 14 (Exhibit JE-72); *Regulation on Import and Export Administration*, Article 4 (Exhibit JE-73).

¹²⁵¹ *Foreign Trade Law*, Articles 15, 16, 17 (Exhibit JE-72).

¹²⁵² *Foreign Trade Law*, Article 19 (Exhibit JE-72); *Regulation on Import and Export Administration*, Article 35 (Exhibit JE-73); *2008 Export Licence Administration Measures*, Article 2 (Exhibits CHN-342, JE-74).

¹²⁵³ *Regulation on Import and Export Administration*, Article 43 (Exhibit JE-73); *2008 Export Licence Administration Measures*, Article 6 (Exhibits CHN-342, JE-74).

¹²⁵⁴ *2008 Export Licence Administration Measures*, Article 30 (Exhibits CHN-342, JE-74). According to this provision, the Ministry of Commerce may adjust the period of validity for certain goods based on "specific circumstances."

¹²⁵⁵ *2008 Export Licence Administration Measures*, Article 31 (Exhibits CHN-342, JE-74); *2008 Export Licensing Working Rules*, Articles 17, 18, 19 (Exhibits CHN-344, JE-97).

¹²⁵⁶ *2008 Export Licence Administration Measures*, Article 28 (Exhibits CHN-342, JE-74).

¹²⁵⁷ *2008 Export Licence Administration Measures*, Articles 4, 5 (Exhibits CHN-342, JE-74); *Measures for Administration of Licensing Entities*, Article 4 (Exhibits CHN-385, JE-75).

¹²⁵⁸ *Foreign Trade Law*, Articles 61, 64 (Exhibit JE-72); *Regulation on Import and Export Administration*, Articles 64, 65 (Exhibit JE-73).

¹²⁵⁹ *2008 Export Licence Administration Measures*, Articles 21, 36, 38 (Exhibits CHN-342, JE-74); *Measures for Administration of Licensing Entities*, Articles 40 (Exhibits CHN-358, JE-75).

demotion, and dismissal.¹²⁶⁰ MOFCOM may also punish the forging, altering without approval, buying and selling of export licences.¹²⁶¹

7.882 MOFCOM together with China's General Administration of Customs publishes the Catalogue of Goods subject to the Administration of Export Licences, (Export Licensing Catalogue) which lists all goods subject to export restriction.¹²⁶² This catalogue is published annually at least 21 days before the list takes effect, which is on 1 January of each year.¹²⁶³ MOFCOM approves exportation of goods listed in this catalogue.¹²⁶⁴

7.883 On 10 December 2008, MOFCOM published the *2009 Export Licensing Catalogue* announcing the catalogue of export-restricted goods for 2009. The list includes the specific forms of bauxite, coke, fluorspar, manganese, silicon carbide and zinc that have been identified by the complainants in Exhibit JE-6.¹²⁶⁵

7.884 Under China's *Export Licence Administration Measures*, enterprises seeking a licence to export materials listed in the *2009 Export Licensing Catalogue* are required to submit certain documents. All applicants must submit an application form¹²⁶⁶; relevant "export quota or other applicable approval documents"¹²⁶⁷; and either of the Form for Archival Filing and Registration of a Foreign Trade Operator which has been sealed by the archival filing and registration stamp, a Qualification Certificate of Import and Export Enterprises of the People's Republic of China, or a Certificate of Approval for Enterprises with Foreign Investment.¹²⁶⁸

7.885 In addition, Under Article 11(1) of China's *Export Licence Administration Measures*, for the export of goods subject to the administration of quota licences, applicants must submit "quota-granting documents issued by the Ministry of Commerce or relevant department, and a valid export contract of the applicant. Under Article 11(2), for export goods subject to the administration of quota bidding, applicants must submit "the list of bid-winning Operators", "the bid-winning quantity"; either of the Certificate for the Application of an Export License of Goods subject to Quota Bidding, or the Certificate for Transfer of Goods Subject to Quota Bidding issued by the Ministry of Commerce; and

¹²⁶⁰ 2008 *Export Licence Administration Measures*, Article 42 (Exhibits CHN-342, JE-74) *Measures for Administration of Licensing Entities*, Articles 40 and 41 (Exhibits CHN-358, JE-75).

¹²⁶¹ *Foreign Trade Law*, Articles 34, 63 (Exhibit JE-72); *Regulation on Import and Export Administration*, Article 66 (Exhibit JE-73); 2008 *Export Licence Administration Measures*, Article 39 (Exhibits CHN-342, JE-74); *Measures for Administration of Licensing Entities*, Articles 40, 41, 42 (Exhibits CHN-358, JE-75).

¹²⁶² *Foreign Trade Law*, Article 18 (Exhibit JE-72); *Regulation on Import and Export Administration*, Article 35 (Exhibit JE-73), 2008 *Export Licence Administration Measures*, Article 3 (Exhibits CHN-342, JE-74).

¹²⁶³ *Regulation on Import and Export Administration*, Article 35 (Exhibit JE-73), 2008 *Export Licence Administration Measures*, Article 3 (Exhibits CHN-342, JE-74).

¹²⁶⁴ *Foreign Trade Law*, Article 19 (Exhibit JE-72).

¹²⁶⁵ 2009 *Export Licensing Catalogue* Notice (Exhibit JE-22); see United States' first written submission, para. 98; European Union's first written submission, para. 168. MOFCOM published the *2010 Export Licensing Catalogue* announcing the catalogue of export-restricted goods. The list includes the specific forms of bauxite, coke, manganese, silicon carbide and zinc that have been identified by the complainants in Exhibit JE-6, but does not identify fluorspar as subject to export restriction: see *2010 Graded Export Licensing Entities Catalogue* (Exhibit CHN-343). The Panel explained in paragraph 7.763 above that it considers the essence of the *2010 Export Licensing Catalogue* Notice to be different from that of the *2009 Export Licensing Catalogue* Notice with respect to fluorspar and, as a result, does not consider that this Notice falls within its terms of reference.

¹²⁶⁶ 2008 *Export Licence Administration Measures*, Article 8 (Exhibits CHN-342, JE-74).

¹²⁶⁷ 2008 *Export Licence Administration Measures*, Article 9 (Exhibits CHN-342, JE-74).

¹²⁶⁸ 2008 *Export Licence Administration Measures*, Article 10 (Exhibits CHN-342, JE-74).

the export contract of the bid-winning Operator. Under Article 11(7), for goods subject to export licensing administration only, applicants are directed to submit "approval documents from the Ministry of Commerce" and a valid export contract.

7.886 Article 5 of *2008 Export Licensing Working Rules*¹²⁶⁹, additionally provides that applicants to export goods subject to export licensing administration only shall submit an application form; "approval documents on export issued by the competent authorities"; a valid export contract; an agency agreement, where the exporter and the consignor are different; and "[o]ther materials that shall be submitted as stipulated by the Ministry of Commerce".

7.887 Enterprises that are subject to export quotas must first be allocated such quotas before they may apply for an export licence.¹²⁷⁰ Applicants that have been allocated such a quota must submit to the appropriate export licence issuing agency the relevant quota allocation certificate issued by the Bidding Committee or Bidding Office, in addition to the documents mentioned in paragraph 7.884 above.¹²⁷¹

7.888 In general, an export licence must be issued within three working days from the receipt of a completed application.¹²⁷² China uses three types of export licences.¹²⁷³ First, there is the "one licence for one customs house" export licence, which is used to export goods from a specific customs house. Second there is the "one batch, one license" export licence, which is used for customs declaration only once within their period of validity. Third, there is the "non-one batch, one license" export licence, which is used for customs declaration up to twelve times within their period of validity. Customs houses are required to indicate the respective quantity of outbound cargo on the customs release form when presented with an export licence. China issues "non-one batch, one license" types to foreign enterprises¹²⁷⁴ as well as for goods in the Catalogue for Goods Subject to the Administration of Export Licenses.¹²⁷⁵

7.889 Article 8 of the *2008 Export Licensing Working Rules*¹²⁷⁶ instructs export licensing agencies to examine: (i) whether an operator has the "qualifications" to operate the business; (ii) whether the "export approval documents submitted by the operator are complete and valid"; (iii) whether the applicant has submitted a complete and accurate "application" that is "consistent with the relevant provisions of the administration of export goods and licenses, the contents of the export approval documents and the export contract"; and (iv) whether the "other materials that need to be submitted are consistent with relevant provisions". The export licensing agency is directed to issue the corresponding export licences if it is satisfied that these conditions are met.¹²⁷⁷

7.890 China has indicated that its *Foreign Trade Law* is a "legislative act that delegates (through the State Council) to MOFCOM, an executive branch agency, implementing authority, *inter alia* (1) to specify the products subject to export quota and export licensing requirements, and (2) to adopt implementing rules concerning the grant of export licenses".¹²⁷⁸ The Appellate Body confirmed that "any act or omission attributable to a WTO Member can be a measure of that Member for purposes of

¹²⁶⁹ Exhibits CHN-344, JE-97.

¹²⁷⁰ *2008 Export Licence Administration Measures*, Article 21 (Exhibits CHN-342, JE-74).

¹²⁷¹ *2008 Export Licence Administration Measures*, Article 9 (Exhibits CHN-342, JE-74).

¹²⁷² *2008 Export Licence Administration Measures*, Article 19 (Exhibits CHN-342, JE-74); *2008 Export Licensing Working Rules*, Article 10 (Exhibits CHN-344, JE-97).

¹²⁷³ *2008 Export Licence Administration Measures*, Article 22 (Exhibits CHN-342, JE-74).

¹²⁷⁴ *2009 Export Licensing Catalogue*, Article VII (Exhibit JE-22).

¹²⁷⁵ *2008 Export Licence Administration Measures*, Article 22 (Exhibits CHN-342, JE-74).

¹²⁷⁶ Exhibits CHN-344, JE-97.

¹²⁷⁷ *2008 Export Licensing Working Rules*, Article 9 (Exhibit CHN-344, JE-97).

¹²⁷⁸ China's response to question No. 2 from the European Union, para. 279.

dispute settlement proceedings."¹²⁷⁹ In light of China's explanation, and in the absence of any assertion that the measures discussed above are not attributable to China, the Panel will consider these measures to be measures of China for purposes of its analysis.

2. Whether China's export licensing system on certain forms of bauxite, coke, fluorspar, manganese, silicon carbide and zinc is inconsistent with Article XI:1 of the GATT 1994

7.891 The complainants allege that China's export licensing system, as applied to bauxite, coke, fluorspar, manganese, silicon carbide and zinc under the *2009 Export Licensing Catalogue*, is both "non-automatic" and "discretionary" and, therefore, is inconsistent with GATT Article XI:1.

7.892 Article XI of the GATT 1994 provides:

"No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party."

7.893 Thus, Article XI:1 forbids import and export restrictions or prohibitions, including those "made effective through ... export licences."

7.894 The Appellate Body has not yet been required to consider the meaning of "restrictions" in Article XI:1. Some panels, however, have done so. In *Colombia – Ports of Entry*, after reviewing several GATT and WTO cases, the panel concluded that "restrictions" in the sense contemplated by Article XI:1 refers to measures that create uncertainties and affect investment plans, restrict market access for imports, or make importation prohibitively costly.¹²⁸⁰ The panel in that dispute considered Article XI:1 in the context of measures that restricted access to ports of entry for goods being imported from Panama.

7.895 In the context of import licensing, the panel in *India – Quantitative Restrictions* concluded that the scope of the term "restriction" is "broad" and, in terms of its ordinary meaning, is "a limitation on action, a limiting condition or regulation."¹²⁸¹ The panel thereafter concluded that "a discretionary or non-automatic import licensing requirement is a restriction prohibited by Article XI:1."¹²⁸² The panel in *India – Autos* similarly endorsed a broad interpretation of the term "restriction", concluding that Article XI:1 applies to conditions that are "limiting' or have a "limiting effect ... on importation itself".¹²⁸³

7.896 While these reports shed light on the meaning of "restriction", the Panel considers it useful to undertake a further review of Article XI:1 in order to assess its applicability to export licensing, including export licensing requirements that may be considered "non-automatic" or "discretionary". Although the panel in *India – Quantitative Restrictions* opined that a "discretionary or non-automatic import licensing requirement" is a restriction, the panel in *India – Quantitative Restrictions* did not distinguish between "non-automatic" and "discretionary" licensing systems or explain potential

¹²⁷⁹ Appellate Body Report, *US – Corrosion Resistant Steel Sunset Reviews*, para. 81.

¹²⁸⁰ Panel Report, *Colombia – Ports of Entry*, para. 7.240.

¹²⁸¹ Panel Report, *India – Quantitative Restrictions*, para. 5.128.

¹²⁸² Panel Report, *India – Quantitative Restrictions*, para. 5.129.

¹²⁸³ Panel Report, *India – Autos*, para. 7.270. Several WTO panels have cited with approval this interpretation of the term "restrictions" in Article XI:1: see Panel Report, *Colombia – Ports of Entry*, paras. 7.233-7.234; Panel Report, *Brazil – Retreaded Tyres*, para. 7.371; Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.252 and 7.258.

differences in the meanings of these terms.¹²⁸⁴ That panel ultimately found that the particular licensing requirement at issue was a "discretionary import licensing system" where "licences are not granted in all cases, but rather on unspecified merits".¹²⁸⁵ The Panel does not find in the reasoning articulated by that panel a specific explanation of why "non-automatic" licensing systems are prohibited under Article XI:1 that would assist us here.

7.897 The Panel will first consider this general issue and thereafter will consider China's export licensing system in light of its determination on the scope of GATT Article XI:1.

(a) "Non-automatic" or "discretionary" export licensing under Article XI:1 of the GATT 1994

7.898 The complainants submit that Article XI:1 prohibits "non-automatic" export licensing requirements. In other words, the complainants contend that export licensing requirements that accord licensing authorities "discretionary" authority in determining whether to grant an export licence to a particular applicant are prohibited under Article XI:1.

7.899 The United States and Mexico point out that Article XI:1 expressly identifies export licences as a type of measure that can restrict exportation.¹²⁸⁶ The United States adds as well that Article XI:1 "qualifies its ban on restrictions" by explicitly *excluding* from its scope duties, taxes or other charges. According to the United States, this demonstrates that the restrictions that fall *within* the scope of Article XI:1 include other types of restrictions imposed on exportation. It notes further that GATT and WTO panels have interpreted Article XI:1 to cover restrictions other than just "quantitative" restrictions.¹²⁸⁷ The United States and Mexico submit, in particular, that the panel in *India – Quantitative Restrictions* concluded that a "discretionary or non-automatic import licensing requirement" is a "restriction" that is prohibited by Article XI:1.¹²⁸⁸

7.900 The European Union submits that "[i]t is generally accepted that an import or export licensing requirement falls within the scope of Article XI when it is 'discretionary or non-automatic'".¹²⁸⁹ It argues that Article XI:1 has been found broadly to protect trading and competitive opportunities for both Members and traders.¹²⁹⁰ The European Union contends that a discretionary export licensing system "by its very nature limits such opportunities because certain exports may not be permitted".¹²⁹¹

7.901 China submits that Article XI:1 should not be construed broadly to prohibit all forms of export licensing. China argues that Article XI:1 does not prohibit Members from imposing any and all regulatory conditions on exportation; rather it prohibits the imposition of certain conditions, namely those that have a "limiting effect" on the quantity of exports.¹²⁹² China submits that a complainant must prove that although a measure such as a licensing requirement does not contain any express restriction on exportation, it functions to restrict exports.¹²⁹³

¹²⁸⁴ Panel Report, *India – Quantitative Restrictions*, para. 5.129, 5.137.

¹²⁸⁵ Panel Report, *India – Quantitative Restrictions*, para. 5.130.

¹²⁸⁶ United States' first written submission, paras. 332-333; Mexico's first written submission, paras. 334-335.

¹²⁸⁷ United States' opening oral statement at the second substantive meeting, para. 124.

¹²⁸⁸ United States' first written submission, paras 341; Mexico's first written submission, paras 344, referring to Panel Report, *India – Quantitative Restrictions*, para. 5.129.

¹²⁸⁹ European Union's first written submission, para. 316.

¹²⁹⁰ European Union's second written submission, paras. 90 and 103.

¹²⁹¹ European Union's second written submission, para. 90.

¹²⁹² China's first written submission, paras. 748-752; China's second written submission, paras. 482-484.

¹²⁹³ China's first written submission, para. 752.

7.902 China submits that not all types of licences have a "limiting effect" on the quantity of imports or exports and therefore not all licences are inconsistent with Article XI:1. For instance, China contends that a licence that is issued "automatically" has no limiting effect and is therefore permissible.¹²⁹⁴ Relying on the ordinary meaning of "automatic" and the definition of "automatic" licensing in the Import Licensing Agreement, China submits that licensing is "automatic" and consequently should not be prohibited if the export licence is issued in all cases, where pre-established conditions are met.¹²⁹⁵

7.903 According to China, Article 1.1 of the Import Licensing Agreement confirms that the mere requirement to submit a valid and complete application or other documentation as a condition to receive a licence is not sufficient to render a licensing requirement a restriction on the quantity of exports and hence inconsistent with Article XI:1.¹²⁹⁶

7.904 China submits that criteria set out in Article 2 of the Import Licensing Agreement support the view that licensing may be "automatic" and thus permissible. According to China, automatic licensing in this context includes situations where a licensing agency has no right to refuse issuance of an export licence, upon submission of enumerated application documents; when licences are issued "regularly" upon receipt of the relevant and completed application; when a licence application procedure is "accessible"; and when the time taken for issuance is not too long.¹²⁹⁷

7.905 China argues that even when a licence may not be considered "automatic" based on these factors, a licence should nevertheless not be presumed to restrict the quantity of exports *per se* in a way that would violate Article XI:1. In this respect, China submits that Article 3.2 of the Import Licensing Agreement clarifies that licences that are not "automatic" within the meaning of Article 2 of the Import Licensing Agreement should not be prohibited, so long as they are not more "trade-restrictive" or "trade-distortive", or "burdensome" than necessary to administer the measure. These licences would be considered "non-automatic" but are nevertheless WTO-permissible, in its view. According to China, if a non-automatic licence does not "limit the quantity of imports or exports", it is not WTO-inconsistent.¹²⁹⁸

7.906 More broadly, China argues that where a measure does not expressly or necessarily provide for WTO-inconsistent conduct, the discretion to apply the rule in a WTO-inconsistent manner is insufficient to render the measure WTO-inconsistent. China argues that it should be presumed to act in good faith with its obligations.¹²⁹⁹ Thus, China argues, the absence of any explicit limitation on this discretion does not render an export licence non-automatic in such a way as to have a limiting effect on the quantity of exports.

(i) *Import and export licensing under Article XI:1 of the GATT 1994*

7.907 The Panel recalls, as set out above, that Article XI:1 of the GATT 1994 forbids "import and export restrictions or prohibitions made effective through ... export licences". Duties, taxes or other charges are explicitly excluded as types of "restrictions or "prohibitions" that fall within the scope of Article XI:1.

¹²⁹⁴ China's first written submission, para. 753.

¹²⁹⁵ China's first written submission, paras. 754, 755.

¹²⁹⁶ China's first written submission, paras. 758-759; China's second written submission, paras. 488-489.

¹²⁹⁷ China's first written submission, paras. 754, 756 referring to Import Licensing Agreement, Article 2.2(a).

¹²⁹⁸ China's second written submission, para. 487.

¹²⁹⁹ China's first written submission, paras. 803-804.

7.908 It is useful to bear in mind that import or export prohibitions or restrictions may be permitted or justified under other provisions, such as Articles XI:2, XII, XVIII, XIX, XX and XXI of the GATT 1994. Restrictions permitted under these provisions may be implemented through, e.g., a licensing regime. Article XIII of the GATT 1994 sets out rules for the administration of such restrictions. In the context of import licensing, the Import Licensing Agreement clarifies rules for import licensing procedures.

7.909 China, as well as the Kingdom of Saudi Arabia¹³⁰⁰, as a Third Party, submit that the Import Licensing Agreement provides useful context to inform which licensing requirements may be permitted under Article XI:1.¹³⁰¹ In China's view, the Import Licensing Agreement makes clear that licensing is permissible, regardless of a label assigned to it, "if the export license is issued in all cases, provided pre-established conditions are met".¹³⁰² Even if a licence falls into the residual category of "non-automatic" licensing set out in Article 3.2 of the Import Licensing Agreement, according to China, that license procedure is not WTO-inconsistent, so long as it does not "limit the quantity of imports or exports".¹³⁰³

7.910 Saudi Arabia does not consider an export licensing system to be "automatic" where its application requirements include or enforce export conditions, such as an export quota.¹³⁰⁴ Nevertheless, it agrees with China that the presence of an application process does not necessarily render an export licensing system "non-automatic" or *per se* WTO-inconsistent.

7.911 We agree with China and Saudi Arabia that the Import Licensing Agreement informs the meaning of the terms "automatic" and "non-automatic" (as a residual category of "automatic" licenses) in the context of import licensing systems. However, that Agreement does not address *export* licensing systems. Nor for that matter does it set out in precise terms which *import* licences would be WTO-inconsistent, although it does provide that import licences should be in conformity with all "relevant" provisions of the GATT 1994 "as interpreted by [the Import Licensing Agreement]".¹³⁰⁵ Hence, the Panel considers that the Import Licensing Agreement itself provides only limited assistance in the task of interpreting Article XI:1.

7.912 The Appellate Body has indicated that the title of a provision may be useful in defining its objective.¹³⁰⁶ The Panel notes the title of Article XI:1 – "General Elimination of Quantitative Restrictions" suggests that the provision is intended to govern elimination of quantitative restrictions generally. While relevant, the Panel's interpretative task does not of course end with the title. To determine the scope and meaning of Article XI:1, the Panel needs to consider the particular terms of the provision.

7.913 Article XI:1 by its terms prohibits restrictions or prohibitions that are made effective through a variety of means not solely through a category of measures that may be considered formal quantitative restrictions, such as a quota. Article XI:1 also prohibits restrictions effected through

¹³⁰⁰ Third party written submission of Kingdom of Saudi Arabia, paras. 17-27.

¹³⁰¹ See, e.g., China's response to Panel question No. 66 following the second substantive meeting, para. 337, fn. 392.

¹³⁰² China's first written submission, para. 754.

¹³⁰³ China's second written submission, para. 487.

¹³⁰⁴ Third party written submission of Kingdom of Saudi Arabia, para. 18.

¹³⁰⁵ Article 1.2 of the Import Licensing Agreement provides: "Members shall ensure that the administrative procedures used to implement import licensing regimes are in conformity with the relevant provisions of GATT 1994 including its annexes and protocols, as interpreted by this Agreement, with a view to preventing trade distortions that may arise from an inappropriate operation of those procedures".

¹³⁰⁶ Appellate Body Report, *US – Softwood Lumber IV*, para. 93; Appellate Body Report, *US – Carbon Steel*, para. 67.

export licenses, as well as an unqualified category of "other measures". In the Panel's view, the fact that the title uses the term "quantitative restrictions" does not change the fact that a broad category of "other measures" falls within the scope of Article XI:1.

7.914 The Panel's view is consistent with findings of other GATT and WTO panels that types of measures "other" than quotas, import or export licences, duties, taxes or charges that have a "limiting effect" or impose a "limiting condition" are prohibited under Article XI:1.¹³⁰⁷ Panels have assessed such measures by examining their design and structure to determine whether they have a "limiting" or "restrictive" effect.¹³⁰⁸

7.915 The Panel will adopt a similar analytical approach. The Panel sees no merit in seeking to determine whether or not a measure is permissible under Article XI:1 based solely on its label. In other words, the Panel does not find useful for its analysis here whether a measure is categorized as an "automatic" or "non-automatic" licence. Indeed, the obligation set forth in Article XI:1 does not distinguish between types of import or export licences that would be prohibited, be they automatic, non-automatic or discretionary. Rather, it concerns "prohibitions or restrictions" including those "made effective through ... import or export licenses". Hence, our analysis will examine the design and structure of the licence to determine if it has a "limiting" or "restrictive" effect.

7.916 Setting aside the use of a particular label or nomenclature for a licence, the Panel considers that a licensing system that operates such that a licence to import or export is granted upon application to each and every applicant would not run afoul of Article XI:1. This is because such a system does not imply any restriction or limiting effect on importation or exportation in connection with the application and granting of the licence. An example of such a system is one that is designed to gather statistical information or for monitoring purposes, but presents no impediment to obtaining the licence as it is granted in every case.

7.917 The Panel also considers that requiring an applicant to satisfy a certain prerequisite before being granted an import or export licence would not necessarily offend Article XI:1. The requirement to satisfy a prerequisite would be prohibited under Article XI:1 only if the prerequisite itself created a restriction or limiting effect on importation or exportation. For example, if a licensing system is maintained in order to administer an import quota that is authorized under the GATT 1994, requiring the applicant to submit a particular document attesting to an applicant's right to import quota in order to receive the licence is unlikely to constitute a violation of Article XI:1. This is because the requirement to submit the document does not effect any restriction or impose a limiting effect on importation; the restriction on importation is the quota itself. A different conclusion could obtain, however, if the prerequisite were of a different nature.

7.918 Therefore, the Panel concludes that import and export licences, including those granted only upon meeting a certain prerequisite, may be, but are not necessarily, permissible under Article XI:1; the key is whether the licensing system is designed and operates such that by its nature it does not have a restrictive or limiting effect on importation or exportation. If it meets this test, it will not offend Article XI:1 of the GATT 1994.

(ii) *Discretionary licensing requirements*

7.919 Before turning to examine China's export licensing system, we should address discretionary licensing requirements.

¹³⁰⁷ See, e.g., discussion in paragraphs 7.205-7.206 above.

¹³⁰⁸ Panel Report, *India – Autos*, paras. 7.266-7.268; Panel Report, *Colombia – Ports of Entry*, para. 7.252.

7.920 As noted above, the panel in *India – Quantitative Restrictions* found that the particular licensing requirement at issue was a "discretionary import licensing system" where "licences are not granted in all cases, but rather on unspecified merits", and was therefore WTO-inconsistent.¹³⁰⁹ The panel in *Turkey – Rice* considered that whether a licensing practice is "discretionary" depends on the freedom of the administering authority to grant or reject an import licence.¹³¹⁰ The panel in *China – Publications and Audiovisual Products* similarly found that a measure was "discretionary" because the implementing authority had "the freedom to choose, based essentially on its own preference, whether or not such rights are granted".¹³¹¹

7.921 It seems to the Panel that if a licensing system is designed such that a licensing agency has discretion to grant or deny a licence based on unspecified criteria, this would not meet the test we set out above in order to be permissible under Article XI:1. The possibility to deny the licence would be ever present; hence, the system by its very nature would always have a restrictive or limiting effect. It makes no difference, in the Panel's view, that discretion may be applied in a particular case such that a licence is authorized. The system offers no certainty that licences will be granted and hence it is not permissible.

7.922 With this in mind, the Panel will next consider whether China's export licensing system for the forms of bauxite, coke, fluorspar, manganese, silicon carbide and zinc at issue is inconsistent with Article XI:1. In doing so, the Panel recalls China's argument that, where a measure does not expressly provide for WTO-inconsistent conduct, the discretion to apply the rule in a WTO-inconsistent manner is insufficient to render the measure WTO-inconsistent.¹³¹² The Panel explained above that it will examine the design and structure of the measure at issue it making its assessment.

(b) China's export licensing system for the forms of bauxite, coke, fluorspar, manganese, silicon carbide and zinc

7.923 The complainants allege that China's export licensing system, as applied to the forms of bauxite, coke, fluorspar, manganese, silicon carbide and zinc under the *2009 Export Licensing Catalogue*, is inconsistent with Article XI:1 because it is "non-automatic" and because it provides China's export licensing agencies with discretion to restrict exportation of these materials.

7.924 The complainants argue that Article 19 of China's *Foreign Trade Law* imposes a "non-automatic" licence requirement for specified goods that are "subject to export restriction". They distinguish this alleged "non-automatic" requirement from an "automatic" licence requirement that is implemented for "freely exported goods" under Article 15 of China's *Foreign Trade Law* for "monitoring purposes".

7.925 The United States and Mexico submit that regulation of export licences under the provisions of Article 19 is "non-automatic" by its nature.¹³¹³ They argue that licensing agencies may exercise discretion and impose conditions on the granting of licences to set the quantities of goods that can be exported. Conditions include requiring "undefined 'documents of approval' and 'other materials to be submitted' as bases for issuance of export licenses".¹³¹⁴ The United States and Mexico submit that China has itself conceded that its export licensing system amounts to an export restriction under

¹³⁰⁹ Panel Report, *India – Quantitative Restrictions*, para. 5.130.

¹³¹⁰ Panel Report, *Turkey – Rice*, paras. 7.128, 7.134.

¹³¹¹ Panel Report, *China – Publications and Audiovisual Products*, para. 7.324.

¹³¹² China's first written submission, paras. 803-804.

¹³¹³ United States' first written submission, paras. 338-339, 342.

¹³¹⁴ United States' first written submission, para. 340, fn. 415; Mexico's first written submission, para. 343, fn. 415.

GATT Article XI:1 through its notification to the WTO Committee on Market Access in 2006 and 2007 that its licence requirements are a "quantitative restriction" justified pursuant to Article XI and XX of the GATT 1994.¹³¹⁵

7.926 The European Union argues that a logical interpretation of Articles 15 and 19 of China's *Foreign Trade Law* leads to the conclusion that export licences imposed on goods subject to restriction under Article 19 are not "automatic" by operation of law.¹³¹⁶ The European Union cites references in the *Regulation on Import and Export Administration*¹³¹⁷ to goods "prohibited from exportation" and goods "limited in exportation"¹³¹⁸, including those goods that are "subject to the administration of licenses".¹³¹⁹ It submits that these goods are subject to non-automatic export licences.¹³²⁰ The European Union contends that Articles 16, 17 and 18 of China's *Foreign Trade Law*, which set out conditions that must be met and procedures that must be followed in order for a good to be declared as "restricted or forbidden from export", confirm that China mandates its authorities to treat Article 19 export licences as non-automatic.¹³²¹

7.927 The European Union also argues that the non-automatic nature of the licences is made clear from the text of Notices that China publishes annually announcing the "list of goods that are submitted to export license management".¹³²² In respect of goods subject to export licensing administration only, the European Union additionally contends that China's export licensing system is inconsistent with Article XI:1 because it "allows China's authorities a very broad and unfettered discretion on whether to grant or refuse export licenses to applicants".¹³²³ Specifically, the European Union argues that China's export licence agencies may require, under Article 5(5) of China's *2008 Export Licensing Working Rules*, undefined "other documents" prescribed by the Ministry of Commerce for some applicants but not others, or to require documents during certain times but not others.¹³²⁴ The European Union argues that there is no proof of limitation of discretion to require documents. If there were no discretion, it argues, the export licence would always be issued for the entire quantity requested based on the export contract. In addition, the European Union submits that China's export licensing agencies, under Article 11(7) of China's *2008 Export Licence Administration Measures*, have discretion to require undefined "documents of approval of the Ministry of Commerce".¹³²⁵ The European Union argues that the discretion inherent in these criteria allows

¹³¹⁵ United States' second written submission, para. 378 and Mexico's second written submission, para. 383, referring to Committee on Market Access, Note by the Secretariat: Notifications of Quantitative Restrictions G/MA/NTM/QR/1Add.11 (11 April 2008) (Exhibit JE-171); *Catalogue of Products Subject to Export (Quota) License (2007 QRs of China final)* (Exhibit JE-172)).

¹³¹⁶ European Union's opening oral statement at the first substantive meeting, para. 9.

¹³¹⁷ *Regulation on Import and Export Administration* (Exhibit CHN-152, Exhibit JE-73).

¹³¹⁸ *Regulation on Import and Export Administration*, Articles 33 and 35 (Exhibit CHN-152, Exhibit JE-73).

¹³¹⁹ *Regulation on Import and Export Administration*, Article 43 (Exhibit CHN-152, Exhibit JE-73).

¹³²⁰ European Union's first written submission, para. 317.

¹³²¹ European Union's second written submission, para. 64.

¹³²² European Union's first written submission, para. 317, referring to Notice 100/2008 (Exhibit JE-22).

¹³²³ European Union's first written submission, para. 319.

¹³²⁴ European Union's first written submission, para. 319; European Union's second written submission, para. 69, referring to *2008 Export Licensing Working Rules*, Article 5.5 (Exhibits CHN-344, JE-97). China submits that the correct interpretation is "other materials that shall be submitted as stipulated by the Ministry of Commerce." China's second written submission, para. 509.

¹³²⁵ European Union's first written submission, para. 321; *Measures for Administration of Licensing Entities*, Article 11.7 (Exhibits CHN-358, JE-75).

China's export licence authorities to restrict, or altogether ban, exportation by certain companies or individuals.¹³²⁶

7.928 China disputes the complainants' claims that its export licence regime is inconsistent with GATT Article XI:1 due to references to the term "restriction" in provisions of its law. It considers that the label applied to its export licence system does not determine a violation of Article XI:1.¹³²⁷ China similarly rejects that export licence issuing agencies enjoy discretion in granting an export licence, including discretion to determine the quantity that an applicant may export.¹³²⁸ China submits that requiring documentation as a condition for receipt of a licence does not convert an otherwise valid licence requirement into a prohibited restriction on the quantity of exports.¹³²⁹

7.929 Under applicable Chinese law, China contends that export licences for bauxite, coke, manganese, silicon carbide and zinc are automatically granted in all cases, and within three days, provided that a valid and complete set of documents is submitted with the application.¹³³⁰ In two official statements issued by the Quota & License Administrative Bureau of MOFCOM, dated 20 July 2010 and 11 November 2010 respectively (Exhibit CHN-345 and Exhibit CHN-529), China specifies which documents are required to receive an export licence in the case of: (i) goods subject to quotas directly allocated, (ii) goods subject to quota bidding, and (iii) manganese and unwrought zinc, which are not subject to quotas but are subject to export licensing requirements.¹³³¹ China argues that full details on the required documents and steps to acquire a licence appear in Articles 8 to 10 of its *2008 Export Licence Administration Measures*¹³³², and Article 9 of the *2008 Export Licensing Working Rules*.¹³³³ China submits that the *2008 Export Licensing Working Rules* do not implement the *Measures for the Administration for the Export of Goods*; instead, they are an "internal guide for the personnel of the licence-issuing authorities on the applicable rules governing the issuance of export licences".¹³³⁴

7.930 Article 11(7) of the *Measures for the Administration of Licenses for the Export of Goods* applies to goods that are not subject to quotas but are subject to export licensing requirements. For

¹³²⁶ European Union's first written submission, paras. 319, 321; European Union's second written submission, para. 98.

¹³²⁷ China's first written submission, para. 762, referring to Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 87, fn. 87; China's second written submission, para. 497.

¹³²⁸ China's first written submission, para. 798.

¹³²⁹ China's first written submission, paras. 758-759, 800.

¹³³⁰ China's first written submission, paras. 771, 776; China's second written submission, para. 499.

¹³³¹ China's first written submission, paras. 773-774. For goods subject to quota licence administration, China submits that an applicant must submit: (a) an application form; (b) the Form for Archival Filing and Registration of a Foreign Trade Operator or the Qualification Certificate of Import and Export Enterprises or the Certificate of Approval for Foreign-Invested Enterprises; (c) the "quota-granting documents issued by relevant authorities"; and (d) the export contract. For goods subject to quota bidding, China submits that an applicant must submit: (a) an application form; (b) the Form for Archival Filing and Registration of a Foreign Trade Operator or the Qualification Certificate of Import and Export Enterprises or the Certificate of Approval for Foreign-Invested Enterprises; (c) the list of bid-winning operators and the bid-winning quantity announced; (d) the Certificate for the Application of an Export License of Goods subject to Quota Bidding or the Certificate for Transfer of Goods Subject to Quota Bidding; and (e) the export contract of the bid-winning operator. China submits that applicants wishing to export manganese and unwrought zinc must submit: (a) an application form; (b) Form for Archival Filing and Registration of a Foreign Trade Operator or the Qualification Certificate of Import and Export Enterprises or the Certificate of Approval for Foreign-Invested Enterprises; and (c) an export contract. China argues this is confirmed under the *2010 Export Licensing Catalogue*.

¹³³² China's first written submission, para. 775.

¹³³³ China's first written submission, para. 777.

¹³³⁴ China's opening oral statement at the second substantive meeting, para. 355; see also China's response to Panel question Nos. 22 and 23 following the first substantive meeting paras 113-117.

those products at issue that are not subject to an export quota, unwrought zinc and manganese. China submits that the *2010 Export Licensing Catalogue* includes a notation in its Appendix 1 that export licences for these products will be "applied for and granted" upon presentation of an export contract in the *2010 Catalogue*. China argues that, as a matter of Chinese law, this constitutes an "approval" by MOFCOM within the meaning of Article 11.7.¹³³⁵ Finally, China submits that the European Union has not provided any examples in which an applicant was required to provide documents other than those specified in the *2008 Export Licence Administration Measures*. Accordingly, it requests the Panel to reject the European Union's claim on these aspects.¹³³⁶

7.931 In respect of goods subject to export licensing administration only, the European Union submits that the Panel may wish to accept in good faith official statements issued in 2010 by the Quota & License Administrative Bureau of MOFCOM (Exhibit CHN-345 and Exhibit CHN-529) that export licensing agencies do not exercise discretion to grant export licences.¹³³⁷ It accepts that the Panel may incorporate these statements in its final Reports to the DSB and attribute legal importance to them to achieve a positive solution to the dispute.¹³³⁸ If it were to do so, the European Union requests the Panel to state the consequence were China to repudiate these statements.¹³³⁹ The European Union cautions as well that the Panel cannot accept such a statement where it would amount to "an administrative promise to disregard the defending Member's own binding internal legislation, i.e., by an administrative undertaking to act illegally".¹³⁴⁰

7.932 The European Union, however, disputes that Article 11 of the *2008 Export Licence Administration Measures* determines the relevant documents, thereby removing all discretion. The European Union submits that Article 5 of the *2008 Working Rules on Export Licenses*, as implementing measures of the *2008 Export Licence Administration Measures*, refers to documents that are not mentioned in the *2008 Export Licence Administration Measures*.¹³⁴¹ It submits that the *2008 Export Licensing Working Rules* include undefined terms.¹³⁴² The European Union also notes that Article 9 of the *2008 Export Licensing Working Rules* comes into play only after the authorities have concluded that the "applications conform to the regulations".¹³⁴³

7.933 Finally, the European Union disputes the relevance of the note in the appendix of the *2010 Export Licensing Catalogue* and related official statement dated 11 November 2010 (Exhibit CHN-529), which specifies that export licences are to be issued on the basis of export contracts alone for goods not subject to an export quota, notably manganese and unwrought zinc. The European Union submits that the *2010 Export Licensing Catalogue* leaves MOFCOM with discretion to issue

¹³³⁵ China's first written submission, para. 822, footnote 1166. See also China's first written submission, para. 817, footnote 1160, para. 773, footnote 1106 and para. 796, footnote 1138, China's response to question No. 2 from the European Union following the first substantive meeting, para. 285; China's second written submission, para. 544, footnotes 734 and 737.

¹³³⁶ In its opening oral statement at the second substantive meeting (paras. 362 and 363), China submits that the European Union additionally claims that China's power to amend the list of documents required to support an application is inconsistent with GATT Article XI:1. The European Union indicated it was not making such a claim in response to Panel question No. 62 following the second substantive meeting paras. 85-86. Accordingly, the Panel does not consider further this argument by China.

¹³³⁷ European Union's second written submission, para. 55; European Union's opening oral statement at the first substantive meeting, para. 6.

¹³³⁸ European Union's opening oral statement at the first substantive meeting, para. 6; European Union's second written submission, para. 73.

¹³³⁹ European Union's second written submission, para. 73.

¹³⁴⁰ Panel Report, *US – Section 301 Trade Act*, para. 7.103.

¹³⁴¹ European Union's second written submission, para. 76.

¹³⁴² European Union's second written submission, para. 75.

¹³⁴³ European Union's second written submission, para. 85.

documents of approval limiting the quantities of manganese and unwrought zinc that may be exported. In addition, it argues that future versions of the annual Catalogue of Goods Subject to Export Licensing Administration may not permit the granting of a licence on the basis of export contracts alone.¹³⁴⁴ Absent modification or repeal of the Export Licensing Measures, the European Union argues that China has not removed the discretion enjoyed under this provision.¹³⁴⁵

7.934 The Panel first recalls its conclusion in paragraph 7.918 above that export licences are not *per se* inconsistent with GATT Article XI:1. In particular, the Panel found that licensing conditions may be imposed in licensing systems that are themselves justified pursuant to a provision of the WTO Agreement, such as GATT Articles XI:2, XII, XVIII, XIX, XX and XXI provided they do not by their nature have a restrictive or limiting effect.

7.935 Under the provisions in China's law identified by the complainants, certain goods are subject to export restriction (under Article 19 of *China's Foreign Trade Law*), while other goods are not (under Article 15 of *China's Foreign Trade Law*). In the Panel's view, the fact that goods subject to export restriction are in turn subject to a licensing requirement is not sufficient to establish that such a requirement is impermissible under GATT Article XI:1. As stated, prerequisites may be imposed in licensing systems that implement a permitted restriction. Hence, the inquiry as to whether or not a licence requirement is or is not permissible under Article XI:1 does not end at the text of the measure imposing the licensing requirement. It is necessary to determine if there is a restrictive or limiting effect.

7.936 It is possible that license requirements for certain goods eligible for export under Article 19 of *China's Foreign Trade Law* may in fact be justified. There is also no evidence before us indicating that the measures must necessarily be applied in such a way as to impose any restriction additional to that arising from the underlying restriction. As explained in paragraph 7.917 above, in the Panel's view, the mere requirement to submit an application or documentation as a condition to obtain a licence to export does not on its own necessarily rise to the level of a restriction under Article XI:1.

7.937 Articles 16, 17 and 18 of *China's Foreign Trade Law* do not on their face indicate that a particular licence requirement is to be imposed in such a way as to impose any additional limiting or restrictive effect. Articles 16 and 17 set out reasons for which China may restrict or ban the export of particular goods, including for numerous reasons similar to those set out in GATT Articles XX and XXI. The measures do not indicate on their face, and the complainants have not submitted any evidence to prove, that export licensing applied in conformity with the rationale in Articles 16 and 17 of *China's Foreign Trade Law* imposes additional restrictions to that which may arise from the underlying measure.

7.938 Accordingly, for the reasons set out above, the Panel does not agree with the complainants that China's export licensing requirement imposed on certain forms of bauxite, coke, fluorspar, manganese, silicon carbide and zinc is inconsistent with Article XI:1 simply because a licence requirement is applied to "goods subject to ... export restrictions". In the Panel's view, GATT Article XI:1 does not support such a conclusion.

7.939 The Panel will next address the additional claim that China's export licensing requirement is inconsistent with Article XI:1 because China's export licensing agencies exercise discretion in deciding whether to grant export licences to applicants to export bauxite, coke, fluorspar, manganese, silicon carbide and zinc.

¹³⁴⁴ European Union's second written submission, para. 93.

¹³⁴⁵ European Union's second written submission, para. 95.

7.940 The Panel explained in paragraph 7.919 above that an additional restriction sufficient to violate Article XI:1 could arise where a licensing agency exercises discretion in its decision to grant an export licence.

7.941 The arguments of the parties turn on whether there is an exhaustive list of the particular documents that are required to receive an export licence. As discussed in paragraph 7.929 above, China submits that there is an all-inclusive definitive list of materials that must be submitted, in the case of goods subject to quota licence administration, goods subject to quota bidding, and lastly, those goods subject to an export licensing requirement only, namely the forms of manganese and unwrought zinc at issue in this dispute. China contends that for goods subject to quota licence administration, an applicant must submit: (i) an application form; (ii) a form demonstrating that the applicant is registered and authorized to export¹³⁴⁶; (iii) evidence that the applicant is one of the enterprises granted a quota share; and (iv) an export contract.

7.942 For goods subject to quota bidding, an applicant must submit: (i) an application form; (ii) a form demonstrating that the applicant is registered and authorized to export¹³⁴⁷; (iii) evidence that the applicant is one of the export quota bid winners; (iv) a Certificate for the Application of an Export License of Goods subject to Quota Bidding or a Certificate for Transfer of Goods Subject to Quota Bidding; and (v) an export contract of the bid-winning operator.

7.943 In respect of manganese and unwrought zinc that are subject to export licensing administration only, under the *2010 Export Licensing Catalogue*, applicants seeking to export must submit: (i) an application form; (ii) a form demonstrating that the applicant is registered and authorized to export¹³⁴⁸; and (iii) an export contract. Appendix 1 of the *2010 Export Licensing Catalogue* indicates that an applicant is only required to present an export contract to obtain an export licence.¹³⁴⁹ Effectively, as clarified in statements by the Quota & License Administrative Bureau of MOFCOM¹³⁵⁰, China has suspended the requirement for an applicant to submit any other documents of approval in 2010 in order to obtain a licence to export either manganese or unwrought zinc.

7.944 The Panel does not question China's position as confirmed in statements by the Quota & License Administrative Bureau of MOFCOM (Exhibits CHN-345 and CHN-529) that China does not require materials in addition to these enumerated documents. However, the Panel observes that Article 11(7) of *2008 Export Licence Administration Measures* and Article 5(2) and 8(2) of *China's Working Rules on Export Licenses* also refer to a requirement to submit undefined "other documents of approval". In addition, Articles 5(5) and 8(4) of *China's Working Rules on Export Licenses* refer to undefined "other materials" as required by the Ministry of Commerce.

7.945 The Panel accepts that the reference to "other documents of approval" in Article 9, and "documents of approval for export" in Article 12 of China's *2008 Export Licence Administration Measures* refer to the documents enumerated in the subparagraphs of Article 11 of the *2008 Export Licence Administration Measures*. Further, the Panel understands the reference to "documents of

¹³⁴⁶ To satisfy this requirement, an applicant must submit either the Form for Archival Filing and Registration of a Foreign Trade Operator; the Qualification Certificate of Import and Export Enterprises; or the Certificate of Approval for Foreign-Invested Enterprises.

¹³⁴⁷ To satisfy this requirement, an applicant must submit either the Form for Archival Filing and Registration of a Foreign Trade Operator; the Qualification Certificate of Import and Export Enterprises; or the Certificate of Approval for Foreign-Invested Enterprises.

¹³⁴⁸ To satisfy this requirement, an applicant must submit either the Form for Archival Filing and Registration of a Foreign Trade Operator; the Qualification Certificate of Import and Export Enterprises; or the Certificate of Approval for Foreign-Invested Enterprises.

¹³⁴⁹ China's first written submission, para. 796, fn 1138.

¹³⁵⁰ Exhibit CHN-345 and Exhibit CHN-529.

approval" in Articles 5(2) and 8(2) of China's Working Rules on Export Licenses to refer to these same documents.

7.946 However, the Panel does not understand the reference to "documents of approval" in Article 11(7) of the *2008 Export Licence Administration Measures*, as applicable to goods subject to export licensing only, or the "other materials" in Articles 5(5) and 8(4) of the *2008 Export Licensing Working Rules*, applicable generally, to refer to any enumerated documents. As argued by the complainants, this unspecific language leaves open the possibility of expanding or modifying the documents or materials that may be required to receive an export licence. Thus, it is unclear whether additional documents will be required from a particular applicant in order to satisfy the requirement to submit a complete and accurate application in accordance with Article 12 of China's *2008 Export Licence Administration Measures*, or Article 10 of China's *Working Rules on Export Licenses*. In the Panel's view, these undefined requirements operate so as to leave Chinese License Authorities with open-ended discretion to restrict or prohibit the exportation of the subject raw materials.¹³⁵¹

7.947 China considers that, where a measure does not expressly or necessarily provide for WTO-inconsistent conduct, any discretion to apply the rule in a WTO-inconsistent manner is insufficient to render the measure WTO-inconsistent.¹³⁵² In view of that, China argues that the absence of any explicit limitation on this discretion in these measures does not render an export licence a licence that restricts exportation and thus prohibited under Article XI:1.

7.948 In the Panel's view, in the context of a licensing requirement, the open-ended discretion created by the unspecific and generalized requirement to submit an unqualified number of "other" documents of approval in Article 11(7), as applicable to goods subject to export licensing only, or the "other materials" in Articles 5(5) and 8(4) of China's *2008 Export Licensing Working Rules*, creates uncertainty as to an applicant's ability to obtain an export licence. The authority to deny the licence is ever present because the conditions for granting it are subject to the demands of the particular licensing authority. This uncertainty amounts to a restriction on exportation that is inconsistent with Article XI:1.

7.949 The Panel reaches these conclusions in light of the measures in its terms of reference, including the *2009 Export Licensing Catalogue*. In respect of goods subject to export licensing only, China submits that Appendix 1 of the *2010 Export Licensing Catalogue* removes any uncertainty by suspending the requirement for an applicant to submit any other documents of approval in 2010 in order to obtain a licence.

7.950 Setting aside the issue of whether the *2010 Catalogue* falls within the Panel's mandate, the Panel observes that the reference in Appendix 1 of the *2010 Catalogue* does not modify or remove the documentation requirements in Article 11(7) of China's *2008 Export Licence Administration Measures* or in China's *2008 Export Licensing Working Rules*. Absent modification or repeal of *2008 Export Licence Administration Measures*, the Panel considers that Appendix 1 of the *2010 Catalogue* does not remove the inconsistency of the problematic measures as pertains to manganese and unwrought zinc that are subject to export licensing administration only.

¹³⁵¹ The Panel foresees the possibility that other evidence or documents may be desirable or necessary, in certain circumstances, to approve the authorization of an enterprise to export. For instance, Article 11(5) of China's *2008 Export Licence Administration Measures* provides that the exportation of chemicals under supervision and control requires an applicant to submit documents of approval to the Office of State Leading Group for the Performance of the Convention on Prohibition of Chemical Weapons. However, this would be a specific requirement and thus different from an undefined requirement.

¹³⁵² China's first written submission, paras. 803-804.

7.951 The Panel lastly considers arguments of the United States and Mexico that China's export licensing regime for the raw materials at issue is inconsistent with Article XI:1 because it allows agencies discretion to determine the quantities that can be exported¹³⁵³; impose minimum price conditions¹³⁵⁴; or reduce quotas, stop issuing licences, or withdraw export rights under Article 21 of the *CCCMC Coordination Measures*.¹³⁵⁵

7.952 The measures identified by the complainants do not expressly state that licensing agencies may determine the quantities that can be exported. The Panel concluded above that China's export licensing requirement is not inconsistent with Article XI:1 simply because a licence requirement is imposed with respect to "goods subject to ... export restrictions", in particular under Article 19 of China's *Foreign Trade Law*. The Panel explained that quantitative restrictions may be permitted on certain occasions, and accordingly, Article 19 was not on its face inconsistent with GATT Article XI:1. The Panel also concluded that certain provisions at issue allow export licensing agencies a degree of discretion that may sometimes lead to a decision not to grant an export licence. For these reasons, the Panel does not consider it necessary to address the United States' and Mexico's concern further.

7.953 The United States and Mexico additionally refer to Article 40(3) of China's *Measures for the Administration of Licensing Entities*, which sets out the punishment that may be imposed on export licensing agencies that issue licences without following coordinated export prices. The complainants have also identified this provision, and the use of penalties and punishment as prescribed in other provisions of Chinese law, in respect of their claim that China imposes a minimum export price requirement that is inconsistent with GATT Article XI:1. The Panel considers this provision relates to the alleged restrictive effect of a minimum export price requirement. The Panel will thus address the WTO-consistency of these aspects in Section VII.G of these Reports.

7.954 Finally, Article 21 of the *CCCMC Export Coordination Measures* provides: "if more than half of the voting member companies of the coordination organization agree, CCCMC can request the competent authority to reduce [non-compliant companies'] quotas or stop issuing licences for the commodities or even withdraw part or all of their export rights". China claims that this provision does not grant the CCCMC the authority to impose conditions on the issuance of licences, but provides "an internal framework for the CCCMC membership to vote on whether to request MOFCOM to take action to sanction non-compliant firms".¹³⁵⁶

7.955 The Panel concluded above that licences may be used to implement an underlying restriction that is justified pursuant to another provision of the WTO Agreement; however, such a licence may not be applied in a manner that would impose an additional limiting or restrictive effect. In addition, the Panel explained that the discretion granted to export licensing agencies to refuse to grant an export licence may amount to an additional restriction that is inconsistent with GATT Article XI:1 if the refusal to grant such a licence does not relate to the underlying measure that is implemented through the licensing requirement.

¹³⁵³ United States' first written submission, para. 340; Mexico's first written submission, para. 342; see 2008 *Export Licence Administration Measures*, Article 6 (Exhibits CHN-342, JE-74); *Export Quota Measures*, Article 25 (Exhibit JE-76).

¹³⁵⁴ United States' first written submission, para. 340; United States' second written submission, para. 377, Mexico's first written submission, para. 342; Mexico's second written submission, para. 382; see *Measures for the Administration of Licensing Entities*, Article 40(3) (Exhibits CHN-358, JE-75), *Bauxite Branch Coordination Measures*, Article 7 (Exhibit JE-108).

¹³⁵⁵ United States' second written submission, para. 377; Mexico's second written submission, para. 382; see *CCCMC Coordination Measures*, Article 21 (Exhibit JE-107).

¹³⁵⁶ China's opening oral statement at the second substantive meeting, para. 368.

7.956 On its face, Article 21 of the *CCCMC Coordination Measures* allows the CCCMC to request a licensing agency to refuse issuance of licences solely on the basis that more than half of the voting member companies of the coordination organization request such action. The Panel recalls from its 1 October 2010 preliminary ruling its finding that the *CCCMC Coordination Measures*, among other measures, was outside the Panel's terms of reference. Therefore, the Panel will not make findings on this measure.

(c) Summary

7.957 The Panel concludes above that licences that are granted without condition or those that implement an underlying measure that is justified pursuant to another provision of the WTO Agreement, such as GATT Article XI:2, XII, XVIII, XIX, XX or XXI, may be consistent with Article XI:1, so long as the licence does not by its nature have a limiting or restrictive effect. Conversely, a licence requirement that results in a restriction additional to that inherent in a permissible measure would be inconsistent with GATT Article XI:1. Such restriction may arise in cases where licensing agencies have unfettered or undefined discretion to reject a licence *application*.

7.958 The Panel finds that China's export licensing regime is not *per se* inconsistent with Article XI:1 on the basis that it permits export licensing agencies to require a licence for "goods subject to ... export restrictions", as provided for in Article 19 of China's *Foreign Trade Law*. The Panel finds, however, that the discretion that arises from the undefined and generalized requirement to submit an unqualified number of "other" documents of approval in Article 11(7) of China's *2008 Export Licence Administration Measures*, as applicable to goods subject to export licensing only, or the "other materials" in Articles 5(5) and 8(4) of China's *Working Rules on Export Licenses*, amounts to an additional restriction inconsistent with Article XI:1.

7.959 The Panel makes no findings as to whether the claims of the United States and Mexico that 40(3) of China's *Measures for the Administration of Licensing Entities* or Article 21 of the *CCCMC Coordination Measures* are inconsistent with GATT Article XI:1, as these measures fall outside its terms of reference. The Panel will consider in Section VII.G below whether Article 40(3) of China's *Measures for the Administration of Licensing Entities* is inconsistent with Article XI:1 of the GATT 1994.

3. Whether China's export licensing system on certain forms of bauxite, coke, fluorspar, manganese, silicon carbide and zinc is inconsistent with Paragraph 1.2 of China's Accession Protocol and Paragraphs 162 and 165 of China's Working Party Report

7.960 In addition to their challenge under Article XI:1 of the GATT 1994, the complainants argue that China's export licensing system applied to bauxite, coke, fluorspar, manganese, silicon carbide and zinc is also inconsistent with China's obligations in Paragraph 1.2 of China's Accession Protocol read in combination with Paragraphs 162 and 165 of China's Working Party Report.¹³⁵⁷ The complainants argue that China committed to eliminate any non-automatic export licence requirements and to remove export restrictions unless they could be justified.

7.961 To the extent the Panel finds China's export licence requirement to be inconsistent with Article XI:1, China requests that the Panel exercise judicial economy with respect to claims under Paragraphs 162 and 165 of its Working Party Report. China considers the complainants' claims under these provisions to be "identical" to those under Article XI:1, as assumed by all Members under Article XI:1. It argues that making findings under these provisions "would add nothing to the

¹³⁵⁷ United States' first written submission, paras. 343-347; European Union's first written submission, paras. 323-324; Mexico's first written submission, paras. 345-349.

resolution of this dispute, nor would it aid in any potential implementation."¹³⁵⁸ Regardless, as discussed in the context of the complainants' Article XI:1 claim above, China submits that its export licence requirement is automatic and therefore places no restriction or limit on the quantity of exports of bauxite, coke, fluorspar, manganese, silicon carbide and zinc. China additionally considers that it has "taken steps ... to ensure that it ... abides by WTO rules in respect of non-automatic licensing."¹³⁵⁹ For these reasons, China considers that it has not acted inconsistently with Paragraphs 162 and 165 of its Working Party Report.

7.962 The Panel recalls that Article 1.2 of China's Accession Protocol is an "integral part of the WTO Agreement" and therefore contains enforceable commitments including those "commitments referred to in paragraph 342 of the Working Party Report"¹³⁶⁰ Paragraph 342 of China's Working Party Report additionally refers to commitments undertaken by China that are reproduced in paragraphs 162 and 165 of the Working Party Report.

7.963 Paragraph 162 of China's Working Party Report provides:

"...China confirmed that China would abide by WTO rules in respect of non-automatic export licensing and export restrictions. The Foreign Trade Law would also be brought into conformity with GATT requirements. Moreover, export restrictions and licensing would only be applied, after the date of accession, in those cases where this was justified by GATT provisions..."

7.964 Paragraph 165 of China's Working Party Report provides:

"...China confirmed that upon accession, remaining non-automatic 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 Draft Protocol..."

7.965 Thus, Paragraph 162 requires that China's export licensing requirements, to the extent they are "non-automatic", would be brought into conformity with the GATT. Under the second sentence of Paragraph 162, export licensing or restrictions may only be applied if justified under an provision of the GATT.

7.966 The Panel concluded above that China's export licence system as imposed on bauxite, fluorspar, silicon carbide, coke and zinc is not inconsistent with GATT Article XI:1 because of the mere fact that it applies to "goods subject to ... export restrictions". The Panel found, however, that the discretion that arises from the undefined and generalized requirement to submit an unqualified number of "other" documents of approval in Article 11(7) of China's Export Licensing Measures, as applicable to goods subject to export licensing only, or the "other materials" in Articles 5(5) and 8(4) of China's Working Rules on Export Licenses, amounts to an additional restriction inconsistent with Article XI:1. China did not seek to justify any aspect of its export licensing system under any provision of the GATT 1994.

7.967 The Panel recalls that China requested the Panel to exercise judicial economy in respect of the complainants' additional claims under Paragraphs 162 and 165 of China's Working Party Report. The Appellate Body has stated that panels are not obliged to address all legal claims raised by parties,

¹³⁵⁸ China's first written submission, para. 808, referring to Panel Report, *EC – Salmon*, para. 7.636.

¹³⁵⁹ China's response to second set of Panel questions, question No. 66.

¹³⁶⁰ China's Accession Protocol (Exhibit JE-2); see paras. 7.620 to 7.621 above.

explaining that "[n]othing in [Article 11 of the DSU]¹³⁶¹ or in previous GATT practice *requires* a panel to examine *all* legal claims made by the complaining party."¹³⁶² The Appellate Body later explained that "a panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings "in order to ensure effective resolution of the disputes to the benefits of Members."¹³⁶³

7.968 Paragraph 162 provides that export licensing may only be applied if justified under any provision of the GATT. Paragraph 165 provides that "non-automatic restrictions" would be eliminated unless they could be justified under the WTO Agreement or Draft Protocol. In the latter respect, the term "non-automatic restrictions" is not defined, although Paragraph 162 notably refers to "restrictions" and "licensing" separately.

7.969 It would seem that three outcomes may arise in respect of China's export licensing requirements at issue. First, the export licensing requirements at issue may be inconsistent with a provision of the WTO Agreement and may not be justified. Second, the export licensing requirements may be inconsistent with a particular provision, such as Article XI:1 of the GATT but may be justified by a provision of the WTO Agreement. Third, as explained above, the export licensing requirements may not be inconsistent with any particular provision of the GATT. Under each circumstance, the question arises whether the particular licensing requirements would nevertheless be inconsistent with China's Accession Protocol.

7.970 The Panel does not consider that findings under Paragraph 162 or Paragraph 165 would be required to resolve the dispute in the first case, discussed in the preceding paragraph, i.e., where export licensing requirements at issue may be inconsistent with a provision of the WTO Agreement and may not be justified. The Panel recalls its conclusion that, if particular export requirements operate such that by their nature they have a restrictive or limiting effect on exportation beyond the restriction arising from the underlying permissible restriction itself, then such requirements would not be permissible under Article XI:1 of the GATT 1994. In this dispute, for goods subject to export licensing administration only, the Panel concluded that the requirements of Article 11(7) of *2008 Export Licence Administration Measures* and Articles 5(5) and 8(4) of *2008 Export Licensing Working Rules* are inconsistent with Article XI:1 for this reason. China has not sought to justify these requirements under any provision of the WTO Agreement. In the Panel's view, no additional finding of violation under Paragraph 162 or Paragraph 165 would add to resolving the matter.

7.971 The Panel further does not see how findings under Paragraph 162 or Paragraph 165 would be required to resolve the dispute where export licensing requirements may be inconsistent but may be justified by a provision of the WTO Agreement. If particular export licensing requirements are inconsistent but somehow justified, then, by the terms of Paragraph 162 and Paragraph 165 of China's Working Party Report, those requirements may be applied. Again, no finding under Paragraph 162 or Paragraph 165 would aid or in fact is needed to resolve the matter.

¹³⁶¹ Article 11 of the DSU provides, in relevant part: "...a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."

¹³⁶² Appellate Body Report, *US – Wool Shirts and Blouses*, p. 18, DSR 1997:I, 323, at p. 339; DSR 1997:I, at p. 339-340 citing inter alia, *EEC – Import Restrictions*, BISD 30S/129, para. 33; *Canada –FIRA*, BISD 30S/140, para. 5.16; *US –Sugar Quota*, BISD 31S/67, paras. 4.5-4.6; *Japan – Semi-Conductors*, BISD 35S/116, para. 122; and *US –MFN Footwear*, BISD 39S/128, para. 6.18.

¹³⁶³ Appellate Body Report, *Australia – Salmon*, para. 223.

7.972 Finally, the question arises whether findings in respect of Paragraph 162 or Paragraph 165 would be required to resolve the dispute where an export licensing requirement may not be inconsistent with any particular GATT provision. The Panel concluded above that the export licensing requirement imposed under China's *Foreign Trade Law* applied to "goods subject to ... export restrictions" is not *per se* inconsistent with Article XI:1. In this dispute, the complainants have not submitted evidence beyond the text of certain provisions of China's *Foreign Trade Law* to demonstrate that export licensing applied to the raw materials at issue imposes additional restrictions to those which may arise from the underlying export quota. The Panel explained its view above that the inquiry whether or not a licence requirement is or is not permissible under Article XI:1 does not end at the text of the measure imposing the licensing requirement. In the absence of further evidence, the Panel considers that additional findings under Paragraphs 162 and 165 of China's Working Party Report would not aid in resolving the dispute.¹³⁶⁴ The Panel declines to consider the complainants' claim while bearing in mind its findings that the underlying export quotas at issue are not justified pursuant to Article XI:2 or Article XX of the GATT 1994, and bearing in mind that China has not sought to justify its export licensing regime pursuant to any provision of the GATT or the WTO Agreement.

7.973 For the foregoing reasons, the Panel declines to make findings under Paragraphs 162 and 165 of China's Working Party Report.

4. Whether China's export licensing system on certain forms of bauxite, coke, fluorspar, manganese, silicon carbide and zinc is inconsistent with paragraph 1.2 and 5.1 of China's Accession Protocol and paragraphs 83 and 84 of China's Working Party Report

7.974 In addition to its claims under Article XI:1 of the GATT 1994 and Paragraphs 162 and 165 of China's Working Party Report, the European Union argues that China's export licensing system is inconsistent with paragraphs 5.1 and 1.2 of China's Accession Protocol, in combination with paragraphs 83 and 84 of China's Working Party Report. The European Union argues that China's licensing system amounts to an "examination and approval of trading rights" system in violation of paragraph 84(a) of China's Working Party Report.¹³⁶⁵ By allowing licence issuing agencies discretion to require undefined "other" documents, the European Union argues that China fails to grant to "all enterprises" in China the right to trade the raw materials at issue in violation of Paragraphs 83(d) and 84(a) of China's Working Party Report.¹³⁶⁶ Finally, by granting "broad and unfettered discretion" to export licensing agencies to either accept or refuse applications by foreign enterprises and individuals, the European Union argues that China fails to grant foreign enterprises and individuals the right to

¹³⁶⁴ The Panel additionally takes note, as raised by China in its 18 March comments to the Panel, that the complainants have presented new argumentation, at a late stage in the proceedings, in arguing that China's export licensing requirements are inconsistent with Paragraphs 162 and 165 of China's Working Party Report. See United States' response to Panel question Nos. 61 and 64 following the second substantive meeting; European Union's response to Panel question No. 61 following the second substantive meeting; Mexico's response to Panel question Nos. 61 and 64 following the second substantive meeting; United States' comments on China's response to Panel question Nos. 61 and 66 following the second substantive meeting; European Union's comments on China's response to Panel question Nos. 61 and 66 following the second substantive meeting; Mexico's comments on China's response to Panel question Nos. 61 and 66 following the second substantive meeting. The European Union argues in particular that that Paragraph 162 "introduces a specific obligation for export licences in general, irrespective of whether they are 'automatic' or 'non-automatic'" – namely, that such licenses "would only be applied ... where ... justified by GATT provisions". European Union's comments on China's response to Panel question No. 66 following the second substantive meeting, paras. 85 and 86. China submits that this position fundamentally changes the nature of the European Union's claim and compromises due process.

¹³⁶⁵ European Union's first written submission, para. 334.

¹³⁶⁶ European Union's first written submission, para. 335.

trade in a non-discriminatory manner, in violation of paragraph 84(b) of China's Working Party Report.¹³⁶⁷

7.975 To the extent the Panel finds China's export licence requirements to be inconsistent with Article XI:1, China requests that the Panel also exercise judicial economy with respect to the complainants' claims. China considers these claims are "identical" to those under Article XI:1, and that making findings under these provisions "would add nothing to the resolution of this dispute, nor would it aid in any potential implementation."¹³⁶⁸ Regardless, as discussed in the context of the complainants' Article XI:1 claim above, China submits that its licensing system does not restrict or limit on the quantity of exports of bauxite, coke, fluorspar, manganese, silicon carbide and zinc. Thus, China requests the Panel to reject the European Union's claims.

7.976 The Panel recalls that Article 5.1 of China's Accession Protocol provides:

"Without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement...within three years after accession, all enterprises in China shall have the right to trade in all goods...except for those goods listed in Annex 2A... Such right to trade shall be the right to import and export goods...For those goods listed in Annex 2B, China shall phase out limitation on the grant of trading rights pursuant to the schedule in that Annex. China shall complete all necessary legislative procedures to implement these provisions during the transition period."

7.977 As noted, Article 1.2 of China's Accession Protocol is an "integral part of the WTO Agreement" and therefore contains enforceable commitments including those "commitments referred to in paragraph 342 of the Working Party Report"¹³⁶⁹ Paragraph 342 of China's Working Party Report additionally refers to commitments undertaken by China that are reproduced in paragraphs 83 and 84 of the Working Party Report.

7.978 Paragraph 83(d) of China's Working Party Report provides:

"...China also confirmed that within three years after accession, all enterprises in China would be granted the right to trade."

7.979 Paragraph 84(a) of China's Working Party Report provides:

"...China reconfirmed that China would eliminate its system of examination and approval of trading rights within three years after accession. At that time, China would permit all enterprises in China and foreign enterprises and individuals...to export...all goods..."

7.980 Paragraph 84(b) of China's Working Party Report provides:

"With respect to the grant of trading rights to foreign enterprises and individuals... China confirmed that such rights would be granted in a non-discriminatory and non-discretionary way...[A]ny requirements for obtaining trading rights would be for customs and fiscal purposes only and would not constitute a barrier to trade..."

¹³⁶⁷ European Union's first written submission, para. 336.

¹³⁶⁸ China's first written submission, para. 811, referring to Panel Report, *EC – Salmon*, para. 7.636.

¹³⁶⁹ China's Accession Protocol (Exhibit JE-2); see paras. 7.620 to 7.621 above.

7.981 As noted in paragraph 7.653 above, the Appellate Body in *China – Audiovisual Products and Services*, addressed the meaning of China's right to regulate trade under Article 5.1 of China's Accession Protocol. Of particular relevance to these claims of the complainants, the Appellate Body explained that the "obligations assumed by China in respect of trading rights, which relate to traders" is "closely intertwined" with "obligations imposed on all WTO Members in respect of their regulation of trade in goods", including those under Article XI of the GATT 1994.¹³⁷⁰

7.982 The Panel concluded in paragraph 7.938 above that China's export license system as imposed on bauxite, fluor spar, silicon carbide, coke and zinc is not inconsistent with GATT Article XI:1 because of the mere fact that it applies to "goods subject to ... export restrictions". The Panel found, however, that the discretion that arises from the undefined and generalized requirement to submit an unqualified number of "other" documents of approval in Article 11(7) of China's Export Licensing Measures, as applicable to goods subject to export licensing only, or the "other materials" in Articles 5(5) and 8(4) of China's Working Rules on Export Licenses, amounts to an additional restriction inconsistent with Article XI:1. China did not seek to justify any aspect of its export licensing system under any provision of the GATT 1994.

7.983 The Panel fails to see how further findings in respect of Paragraphs 83 and 84 of China's Working Party Report would aid in resolving the dispute. The Panel recalls that China requested the Panel to exercise judicial economy in respect of the European Union's claims. As mentioned in paragraph 7.967 above, the Appellate Body has clarified that "a panel has the discretion to determine the claims it must address in order to resolve the dispute between the parties."¹³⁷¹ In light of its finding that the requirements of Article 11(7) of China's Export Licensing Measures and Articles 5(5) and 8(4) of China's Working Rules on Export Licenses are inconsistent with GATT Article XI:1, and are not justified, the Panel considers that further findings on this matter would not be necessary to resolve the dispute. Therefore, the Panel does not make findings in this regard.

G. MINIMUM EXPORT PRICES

7.984 The complainants claim that China imposes a minimum export price (MEP) requirement for certain forms of bauxite coke, fluor spar, magnesium, silicon carbide, yellow phosphorus and zinc¹³⁷² that constitutes a restriction on exportation that is inconsistent with Article XI:1 of the GATT 1994. They submit that coordination of export prices continued to be enforced through application of the Price Verification and Chop (PVC) export clearance process even after the apparent repeal of this procedure in 26 May 2008.¹³⁷³ The complainants further claim that the manner in which China administers the MEP requirement through the involvement of the CCCMC in the PVC export clearance process is inconsistent with the obligation to administer laws in a uniform, impartial and reasonable manner under Article X:3(a) of the GATT 1994.¹³⁷⁴ Finally, the complainants claim that China failed to publish certain measures providing rules and details on how the CCCMC coordinates export prices in contravention of Article X:1 of the GATT 1994.¹³⁷⁵

¹³⁷⁰ Appellate Body Report, *China – Publications and Audiovisual Products*, para. 226.

¹³⁷¹ Appellate Body Report, *India – Patents (US)*, para. 87.

¹³⁷² The specific forms of the raw materials subject to the United States' claims are identified in Exhibit JE-7 and paragraph 2.2 of the Descriptive Part to these Reports.

¹³⁷³ United States' first written submission, paras. 360-361; European Union's first written submission, paras. 364-365; Mexico's first written submission, paras. 363-364.

¹³⁷⁴ United States' first written submission, paras. 364-374; European Union's first written submission, paras. 368-378; Mexico's first written submission, paras. 367-377.

¹³⁷⁵ United States' first written submission, paras. 375-381; European Union's first written submission, paras. 379-385; Mexico's first written submission, paras. 378-384.

7.985 China contends that it "abandoned" price coordination in 2008 before the Panel's establishment¹³⁷⁶, and therefore requests the Panel not to make findings on measures identified in connection with the complainants' MEP-related claims. In addition, China asserts that the complainants have failed to establish that China continued to impose and enforce an MEP requirement after the repeal of export price coordination in 2008¹³⁷⁷, or that an alleged MEP requirement restricts export in a manner inconsistent with Article XI:1.¹³⁷⁸ Finally, China asserts that the Panel should not make findings on the complainants' claims under Articles X:1 and X:3(a) of the GATT 1994. China submits that the Panel should not make findings on measures governing the administration of the PVC system because such system was repealed and the measures no longer exist.¹³⁷⁹ China further argues that the measures which are alleged not to have been published either no longer apply or have been formally repealed, and therefore require no publication pursuant to Article X:1 of the GATT 1994.¹³⁸⁰

7.986 The Panel will address the complainants' claims under Articles XI:1, X:1 and X:3(a) of the GATT 1994 separately below. Before doing so, the Panel will address measures within its terms of reference. The Panel will then address China's claim that it effectively abandoned export price coordination in 2008, prior to the Panel's establishment. Thereafter, we will consider the complainants' assertion that China continued to enforce export price coordination, even after the repeal of the PVC procedure by the 2008 PVC Notice. In the event that China had in place a minimum price requirement at the time of the Panel's establishment, we will address whether this requirement is inconsistent with Articles XI:1, X:1 and X:3(a).

1. MEP-related measures within the Panel's terms of reference

7.987 The Panel recalls from its 1 October 2010 preliminary ruling its finding that only six measures referred to by the complainants in both their consultation requests and Panel Requests would form part of the Panel's terms of reference.¹³⁸¹ In its preliminary ruling request, China asked the Panel to find, *inter alia*, that the complainants' Panel Requests failed to comply with the requirements of Article 6.2 of the DSU because "Section III" of the complainants' Panel Requests did not identify clearly and specifically the measures under challenge, including those concerning its MEP-related claims, or provide a brief summary of the legal basis sufficient to present the problem clearly.¹³⁸²

7.988 To recall, in their Panel Requests, the complainants identified nine measures that related to their MEP-related claims. Three of these measures were not listed in the complainants' consultation requests. In the first phase of its preliminary ruling, the Panel stated that it would reserve its decision on whether "Section III" of the complainants' Panel Requests identify clearly and specifically the measures under challenge (including the complainants' MEP-related claims), and whether "Section III" of their requests provides a brief summary of the legal basis sufficient to present the problem clearly, until after it had received the complainants' first written submissions.

7.989 In their first written submissions, the complainants referred to six additional MEP-related measures that were not included in their consultation or Panel Requests. The complainants did not

¹³⁷⁶ China's first written submission, para. 838; China's response to Panel question No. 1, para. 20.

¹³⁷⁷ China's first written submission, paras. 842-853.

¹³⁷⁸ China's first written submission, paras. 854-865.

¹³⁷⁹ China's first written submission, para. 867.

¹³⁸⁰ China's first written submission, paras. 868-872.

¹³⁸¹ See paragraphs 1.10 to 1.13 above; Annex F to these Reports.

¹³⁸² The text of the complainants' Panel Requests is identical.

indicate any particular basis for mentioning these additional measures in their first written submissions.

7.990 Following receipt of the complainants' and China's first written submissions, the Panel asked the complainants to indicate which measures are properly before the Panel whether due to their inclusion in the consultation and/or Panel Request, or as an amendment, extension, replacement measure, renewal measure or implementing measure.¹³⁸³ The complainants indicated which measures that they considered to be in the Panel's terms of reference.¹³⁸⁴

7.991 On 1 October 2010, the Panel issued the second phase of its preliminary ruling. The Panel concluded that the complainants' Panel Requests, as clarified by their first submissions, provide sufficient connection between the measures listed in "Section III" and the listed claims of violations, with the exception of the European Union's publication claim concerning coke quotas. In addition, the Panel concluded that alleged measures referred to solely in the complainants' Panel Requests, but not in their consultation requests, and those alleged measures referred to by the complainants in their subsequent submissions, were not properly before the Panel as measures at issue. On this basis, the Panel concluded that only six MEP-related measures remained in the Panel's terms of reference. These are: (1) *Measures for Administration of Trade Social Organizations*¹³⁸⁵; (2) *Regulations for Personnel Management of Chambers of Commerce*¹³⁸⁶; (3) *1994 CCCMC Charter*¹³⁸⁷; (4) *2001 CCCMC Charter*¹³⁸⁸; (5) *Export Price Penalties Regulations*¹³⁸⁹; and (6) *Measures for Administration of Licensing Entities*.¹³⁹⁰

7.992 The complainants submit that the Panel's findings in the second phase of its preliminary ruling that certain MEP-related measures are outside the Panel's terms of reference were not made in response to a preliminary ruling request and cannot be part of a ruling. The United States argues that the findings pertaining to MEP-related measures in the second phase of the Panel's preliminary ruling were not made in response to a preliminary ruling under the Panel's Working Procedures. Moreover, it argues that China's first written submission did not include a request for a preliminary ruling. Even if China had made a second preliminary ruling request, the United States argues that the Panel did not determine a time prior to the first substantive meeting for the complainants to respond to China's terms of reference arguments on the MEP-related measures. Therefore, the complainants consider the aspects of the Panel's preliminary ruling regarding these measures to be invalid and request the Panel to re-examine *de novo* its decision on these measures.¹³⁹¹ The United States submits further that, under the DSU and Panel's Working Procedures, the complainants are permitted to make rebuttals – including on the status of excluded MEP-related measures – until the second substantive meeting.¹³⁹²

7.993 The Panel considers that it was permitted to address whether the particular MEP-related measures that either were not listed in the complainants' consultation requests, or were not included in their Panel Requests, were within its terms of reference. The Appellate Body clarified that Panels may address "issues which go to the root of their jurisdiction – that is, to their authority to deal with and dispose of matters ... if necessary, on their own motion – in order to satisfy themselves that they

¹³⁸³ Panel question No. 1(a) and (b).

¹³⁸⁴ See complainants' response to Panel question No. 1 following the first substantive meeting; United States' Attachment – Chart A re Question 1(a) & (b).

¹³⁸⁵ Exhibits CHN-313, JE-101.

¹³⁸⁶ Exhibits CHN-315, JE-102.

¹³⁸⁷ Exhibit JE-86.

¹³⁸⁸ Exhibits CHN-16, JE-87.

¹³⁸⁹ Exhibits CHN-350, JE-113.

¹³⁹⁰ Exhibits CHN-358, JE-75.

¹³⁹¹ United States' second written submission, paras. 408-414.

¹³⁹² United States' second written submission, para. 416.

have authority to proceed".¹³⁹³ The Panel sought to clarify the scope of its mandate concerning the complainants' MEP-related claims.

7.994 With respect to three measures relating to the PVC procedure that were included in the Panel Requests but not the consultations requests¹³⁹⁴, the Panel notes that all of the particular measures sought to be included in the Panel's terms of reference existed well in advance of the time of consultations and the submission of the complainants' Panel Requests. These additional instruments are not amendments to any of the measures listed in the consultation requests that came into existence between the time of consultations and submission of the Panel Requests. The Panel fails to see any basis for the complainants not to have included these measures, due to the fact that these measures were available to the complainants. Moreover, these measures as presented to the Panel do not identify any of the products at issue in this dispute.¹³⁹⁵

7.995 Similarly, with respect to measures that are not included in either the consultation or Panel Requests, but are alleged to be "implementing" measures, the Panel again notes that all of the alleged additional "implementing measures" set out by the complainants in their first written submissions¹³⁹⁶ existed well in advance of the time of consultations and the submission of the complainants' Panel Requests. The Panel thus sees no reason why the complainants opted to delay or withhold identifying these measures. It is evident from the complainants' submissions that these measures were identified in connection with statements made and evidence submitted in the context of various US court proceedings concerning allegations of price-fixing and other anticompetitive activities, dating as far back as 2006.¹³⁹⁷ In addition, the complainants failed to offer any elaboration as to how these measures are "implementing measures" to basic framework laws until the conclusion of their second written submissions.¹³⁹⁸

¹³⁹³ Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36.

¹³⁹⁴ In particular, *Notice of the Rules on Price Reviews of Export Products by the Customs* (not submitted); *CCCMC PVC Rules* (Exhibit JE-127); and *Online PVC Instructions* (Exhibit JE-123).

¹³⁹⁵ The complainants consider that those instruments included in the Panel Requests but not the consultations requests should be considered as measures at issue in this dispute because the measures are "all part of the same PVC procedure of which the 2002 PVC Notice (Exhibit JE-122) and 2004 PVC Notice (Exhibit JE-121), which were consulted on, form a part", and because these additional instruments "relate to the same procedure and same product at issue under the 2002 PVC Notice and the 2004 PVC Notice". The complainants argue that the inclusion of these measures therefore does not "expand the scope of the dispute". (See, e.g., United States' second written submission, para. 440). The complainants consider that the Appellate Body Report on *US – Continued Zeroing* is "apposite" to an assessment of whether the additional PVC measures should be included in the Panel's terms of reference. We note, however, that the Appellate Body in that appeal found that the measures subject to the complainant's challenge "encompass[ed] the anti-dumping duties resulting from the proceedings identified in the consultations request" and "additional measures relate to the same duties identified in the consultations request, and the legal basis of the claims raised is the same". (Appellate Body Report on *US – Continued Zeroing*, paras. 226, 228) As noted, the complainants have not provided cogent reasons for the failure to raise these measures at the time of consultations. Moreover, the complainants' submitted versions of the 2002 and 2004 PVC Notices, which are alleged to form the basis for the later inclusion of the *Notice of the Rules on Price Reviews of Export Products by the Customs* (not submitted); *CCCMC PVC Rules* (Exhibit JE-127); and *Online PVC Instructions* (Exhibit JE-123) do not include reference to any of the raw materials at issue in this dispute.

¹³⁹⁶ In particular, *CCCMC Export Coordination Measures* (Exhibit JE-107); *CCCMC Bauxite Branch Coordination Measures* (Exhibit JE-108); *Bauxite Branch Charter* (Exhibit JE-112); and "system of self discipline" (see complainants' first written submission, paragraph 205).

¹³⁹⁷ See United States' first written submission, paras. 207-208, fns. 284, 285, 288, 289, 209; MOFCOM Statement in *In re Vitamin C Antitrust Litigation*, para. 3 (Exhibit JE-111).

¹³⁹⁸ The complainants argue in their second written submissions that measures may be included in a panel's terms of reference if the panel request refers to "implementing measures", and those measures can be

7.996 For the foregoing reasons, and in light of its preliminary ruling, the Panel will limit any rulings on the complainants' MEP-related claims to the six measures that appear in the complainants' Panel Requests. Notwithstanding this view, the Panel may consider other instruments and documents referred to by the complainants – though outside its terms of reference – in order to assess fully the legal situation and operation of an MEP requirement in China.¹³⁹⁹ The Panel does not consider the fact that certain measures are outside the Panel's terms of reference to mean that such laws, regulations or instruments did or do not exist, or should be completely excluded from the Panel's assessment. The Panel will not, however, make findings or recommendations on any laws, regulations or instruments that are excluded from its terms of reference.

2. Whether China enforced a coordinated MEP requirement on exporters of bauxite, coke, fluorspar, magnesium, silicon carbide, yellow phosphorus and zinc at the time of the Panel's establishment

7.997 The complainants argue that China imposes an MEP requirement for certain forms of bauxite, coke, fluorspar, magnesium, silicon carbide, yellow phosphorus and zinc.¹⁴⁰⁰ The complainants argue that China coordinates export prices for the products at issue through a "system of self-discipline" based on informal statements and oral agreements between traders and export regulators and where the CCCMC directs commodity-specific branches or coordination groups.¹⁴⁰¹ The complainants submit price data for bauxite and yellow phosphorus, in particular, to show that China set coordinated export prices for these two products.¹⁴⁰² The complainants also allege that China enforces these coordinated export prices through the application of penalties imposed by MOFCOM against non-conforming exporters as well as penalties imposed against licensing authorities that issue licences to non-conforming exporters.¹⁴⁰³ Finally, the complainants allege that China enforces coordinated prices, at least on yellow phosphorus through the use of the PVC procedure which permits customs authorities to deny clearance to yellow phosphorus exports that do not conform to the minimum coordinated price.¹⁴⁰⁴ The complainants submit evidence of price data and screenshots of online web pages from 2008 and 2009 in arguing that the coordination of export prices continued to be enforced through application of the PVC export clearance process even after the apparent repeal of this procedure on 26 May 2008.¹⁴⁰⁵

considered to "implement" measures that are specifically identified in the panel request. See United States' second written submission, para 421, citing Panel Report, *Japan – Film*, para 10.8.

¹³⁹⁹ Appellate Body Report, *EC – Selected Customs Matters*, para. 188 (stating that "[a] panel is not precluded from assessing a piece of evidence for the mere reason that it pre dates or post-dates its establishment").

¹⁴⁰⁰ The specific forms of the raw materials subject to the United States' claims are identified in Exhibit JE-7 and paragraph 2.2 of the Descriptive Part to these Reports.

¹⁴⁰¹ United States' first written submission, para. 349-351; European Communities' first written submission, para. 353-355; Mexico's first written submission, para. 352-354; United States' comments on China's response to Panel question No. 10; CCCMC website pages, 5-7 (Exhibit JE-88).

¹⁴⁰² See United States' first written submission, para. 226; European Union's first written submission, paras. 230; Mexico's first written submission, para. 229; United States' second written submission, para. 391; European Union's second written submission, para. 172; Mexico's first written submission, para. 394; Exhibit JE-126.

¹⁴⁰³ United States' first written submission, paras. 352-355; European Union's first written submission, para. 356-359; Mexico's first written submission, para. 355-358; Complainants' response to Panel question No. 13.

¹⁴⁰⁴ United States' first written submission, paras. 356-359; European Communities' first written submission, paras. 360-363; Mexico's first written submission, paras. 359-362; Complainants' response to Panel question No. 11.

¹⁴⁰⁵ United States' first written submission, paras. 357, 360; European Communities' first written submission, paras. 361, 364; Mexico's first written submission, paras. 360, 363; United States' second written

7.998 China alleges that it abandoned price coordination in 2008 through measures submitted by MOFCOM¹⁴⁰⁶, and requests the Panel not make findings in respect of the complainants' MEP-related claims. Prior to 2008, China submits that it designated MOFCOM to coordinate export prices to minimize the possibility of injurious dumping of Chinese exports by individual exporters.¹⁴⁰⁷ China argues that it repealed a number of measures that authorized the coordination of export prices, the sanction of exporter licensing entities, and use of the PVC procedure.¹⁴⁰⁸ It considers that any outstanding measures that were not formally repealed became effectively "inapplicable".¹⁴⁰⁹ China considers that findings on these measures would serve no purpose because the measures do not have legal effect such that they could violate WTO obligations or nullify or impair benefits.¹⁴¹⁰ China further submits that the complainants have not provided evidence – either through reference to events that occurred between 2001 and 2007¹⁴¹¹, screenshots taken from the CCCMC website after 2008¹⁴¹² or price data on yellow phosphorus and bauxite taken in May 2008¹⁴¹³ – to support its allegations that enterprises were required to coordinate export prices after 2008.

7.999 The Panel will address the various allegations by the complainants that China enforces an MEP requirement on exporters of certain raw materials. The Panel explained above that it would not make rulings or recommendations on any laws, regulations or instruments that are excluded from its terms of reference, but may consider them in assessing fully the legal situation and operation of an MEP requirement in China.

7.1000 The Panel will first consider whether these measures may form the basis of a WTO violation. Then, the Panel will assess the operation of these measures and whether these measures remain in force or have been repealed as argued by China. Finally, the Panel will consider the complainants' allegation that China continued to coordinate and enforce an MEP requirement even after the apparent repeal of this procedure on 26 May 2008.

(a) Whether the measures at issue may be subject to WTO dispute settlement

7.1001 A first issue facing the Panel is whether the measures presented by the complainants can be considered WTO measures under the DSU and WTO Dispute Settlement Mechanism for purposes of the complainants' claims. The Panel recalls that certain of the measures identified by the complainants are not formal legislation but are charters and regulations of non-governmental bodies, such as the CCCMC or CCCMC Bauxite Branch.

7.1002 The complainants argue that China's Chambers of Commerce, including the CCCMC, "function as entities under MOFCOM's direct and active supervision and, accordingly, play a central role in regulating the trade of China's industries".¹⁴¹⁴ Through its intervention in a 2006 US court

submission, paras. 448, 450; European Union's second written submission, para. 172; Mexico's first written submission, paras. 365, 368.

¹⁴⁰⁶ China's response to Panel question No. 1, para. 20.

¹⁴⁰⁷ China's first written submission, paras. 838-847; China's second written submission, para. 565;

Normal Export Price Provisions, Article 5 (Exhibit CHN-50).

¹⁴⁰⁸ China's first written submission, para. 838.

¹⁴⁰⁹ China's second written submission, paras. 567-570; Exhibit CHN-438.

¹⁴¹⁰ China's first written submission, paras. 47, 52, 57-67.

¹⁴¹¹ China's first written submission, paras. 842.

¹⁴¹² China's first written submission, paras. 839, 843.

¹⁴¹³ China's first written submission, para. 851, Exhibits CHN-361, CHN-362, CHN-363.

¹⁴¹⁴ United State's first written submission, para. 207, referring to Brief of Amicus Curiae: MOFCOM.

In Re Vitamin C Antitrust Litigation (E.D. NY Jun. 26, 2006), at p. 5 (Exhibit JE-98).

proceeding¹⁴¹⁵, the complainants submit that China referred to its authority over China's Chambers of Commerce, including the CCCMC, as established through various provisions of the Measures for Administration of Trade Social Organizations¹⁴¹⁶ and the Regulations for Personnel Management of Chambers of Commerce.¹⁴¹⁷ The complainants submit that China described its authority over these entities as "plenary" and described the Chamber of Commerce as "the instrumentality through which [MOFCOM] oversees and regulates the business of importing and exporting [] products in China".¹⁴¹⁸ On this basis, the complainants consider that the CCCMC's export-price related functions and responsibilities are attributable to China.¹⁴¹⁹

7.1003 China has asserted that certain measures are not "sources of Chinese law".¹⁴²⁰ China admits that MOFCOM and the GAC delegated certain implementing authority to the CCCMC to coordinate export prices¹⁴²¹, but it explains that with the repeal of the PVC system in 2008, implementation authority granted to CCCMC terminated.¹⁴²²

7.1004 Article 3.3 of the DSU allows WTO Members to resort to the dispute settlement system of the WTO in "situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member". In *US – Corrosion Resistant Steel Sunset Reviews*, the Appellate Body explained that "[i]n principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings."¹⁴²³ Thus, governmental actions may clearly be challenged under dispute settlement proceedings. Private actions have also been found to be "attributable" to a government, and thus subject to challenge, where there is "some governmental connection to or endorsement of

¹⁴¹⁵ United States' first written submission, para. 208. In footnote 285, the United States notes the statement by the US presiding judge in the Opinion *In re Vitamin C Antitrust Litigation* that "The Chinese government's appearance as *amicus curiae* is unprecedented. It has never ... come before the United States as *amicus* to present its views" See *In re Vitamin C Antitrust Litigation*, 584 F. Supp. 2d 546 (E.D. NY Nov. 6, 2008), at p. 546-55 (Exhibit JE-103).

¹⁴¹⁶ Exhibit JE-101, Article 14.

¹⁴¹⁷ Exhibit JE-102.

¹⁴¹⁸ United States' first written submission, para. 208, citing Brief of Amicus Curiae: MOFCOM at p. 9 (Exhibit JE-98); United States' response to Panel question 67 following the second substantive meeting para. 133; European Union's response to Panel question 67 following the second substantive meeting; Mexico's response to Panel question 67 following the second substantive meeting.

¹⁴¹⁹ In addition, the complainants claim that China's MOFCOM itself considers the CCCMC as an "instrumentality through which [MOFCOM] oversees and regulates the business of importing and exporting [] products in China." United States' first written submission, para. 208, fn. 290, citing Brief of Amicus Curiae: MOFCOM. *In Re Vitamin C Antitrust Litigation* (E.D. NY Jun. 26, 2006), at p. 9 (Exhibit JE-98); see also Memorandum in Support of Defendants' Joint Motion to Dismiss First Amended Complaint in *Resco Products, Inc. v. Bosai Minerals Group and CMP Tiajin Co.* (Oct. 7, 2008) at p. 9 (Exhibit JE-105), Memorandum in Support of Motion to Dismiss Plaintiffs' First Amended Class Action Complaint by Defendants, China Minmetals Corp. and China National Minerals Co. in *Animal Science Products, Inc. v. China National Metals and Minerals Import and Export Corp.* (D. NJ Jun. 26, 2009) at p. 11 (Exhibit JE-106).

¹⁴²⁰ China's response to Panel question No. 1, para. 14 following the first substantive meeting.

¹⁴²¹ China states that MOFCOM and the GAC, acting under the State Council, enjoy authority over the administration of customs-related matters, foreign trade, investment, and economic cooperation in China. See China's response to Panel question No. 1, para. 21 following the first substantive meeting.

¹⁴²² China's response to Panel question No. 1 following the first substantive meeting, para. 21; China submits that the CCCMC affirmed that any document pertaining to the PVC system has not been applied since 2008. See *Resolution of the Fifth Standing Committee of the CCCMC on Abolishing Certain Documents Including Measures of the CCCMC on the Coordination and Administration of Export Commodities* (Exhibit CHN-4).

¹⁴²³ Appellate Body Report, *US – Corrosion Resistant Steel Sunset Reviews*, para. 81 (emphasis added).

those actions".¹⁴²⁴ For instance, the panel in *Japan – Film* concluded, as the GATT panel on *Japan-Semi-conductors* before it, that "administrative guidance" that "creates incentives or disincentives largely dependent upon governmental action for private parties to act in a particular manner" may constitute a governmental measure.¹⁴²⁵

7.1005 China acknowledges that through MOFCOM and the GAC it delegated certain implementing authority to the CCCMC to coordinate export prices. Evidence presented by the complainants in the form of statements made by China's MOFCOM in the context of US domestic court proceedings prior to this dispute appear to confirm this fact. In the Panel's view, this confirms that actions undertaken by the CCCMC with respect to minimum export price requirements at issue in this dispute are attributable to China, and are thus "measures" that can be challenged under the WTO dispute settlement proceedings. In addition, China does not dispute that it, through MOFCOM, regulates the administration of licence issuance and, through China's Customs, regulates customs clearance proceedings.

7.1006 Accordingly, the Panel is satisfied that the measures at issue in this dispute that have been identified by the complainants are measures "attributable" to China. The Panel will therefore consider whether these measures remained in force at the time of the Panel's establishment, and whether the measures operate as a minimum export price requirement that is inconsistent with Article XI:1 of the GATT 1994, as alleged by the complainants.

- (b) Whether China requires exporters to coordinate minimum export prices on exports of bauxite, coke, fluorspar, magnesium, silicon carbide, yellow phosphorus and zinc

7.1007 The Panel will assess whether the measures identified by the complainants remained in force at the time of the Panel's establishment, and whether these measures establish the existence of an MEP requirement. First, the Panel will assess whether China through the various CCCMC measures directs exporters of the raw materials to coordinate export prices. Second, the Panel will assess whether China requires exporters to adhere to coordinated export prices through: (i) penalties imposed on exporters that fail to set prices in accordance with the coordinated export prices; (ii) penalties imposed on licensing entities that issue licences to non-complying exporters; and (iii) application of the PVC export clearance process. The Panel will also assess the complainants' assertion that China otherwise enforced coordinated minimum export prices after the Panel's establishment despite the repeal of certain measures.

- (i) *Whether China through the CCCMC coordinates export prices*

7.1008 The complainants argue that the (1) *1994 CCCMC Charter*¹⁴²⁶; (2) *2001 CCCMC Charter*¹⁴²⁷; (3) *CCCMC Export Coordination Measures*¹⁴²⁸; (4) *CCCMC Brochure*¹⁴²⁹ and CCCMC website pages¹⁴³⁰; (5) *CCCMC Bauxite Branch Coordination Measures*¹⁴³¹; and (6) *CCCMC Bauxite Branch*

¹⁴²⁴ Panel Report, *Japan – Film*, para. 10.52.

¹⁴²⁵ Panel Report, *Japan – Film*, para. 10.45. The GATT panel in *Japan – Semi-conductors* held that, in cases where "sufficient incentives or disincentives existed for non-mandatory measures to take effect" and "the operation of measures ... was essentially dependent on [g]overnment action or intervention", then "the measures would be operating in a manner equivalent to mandatory requirements such that the difference between the measures and mandatory requirements was only one of form and not of substance ..." GATT Panel Report, *Japan – Semi-conductors*, para. 109.

¹⁴²⁶ Articles 3, 6, 14 (Exhibit JE-86).

¹⁴²⁷ Articles 3, 6, 14 (Exhibits CHN-16, JE-87).

¹⁴²⁸ Article 2, 4(3) and 18, 19, 20, 21 (Exhibit JE-107).

¹⁴²⁹ Exhibit JE-89, p.14.

¹⁴³⁰ Exhibit JE-88 pages 3-5.

*Charter*¹⁴³² establish that China, through the CCCMC coordinates export prices. In particular, under the 1994 and 2001 CCCMC Charters, CCCMC Export Coordination Measures and CCCMC Bauxite Branch Charter, the complainants submit that the CCCMC directs commodity-specific branches or coordination groups to coordinate export prices for the relevant commodities.¹⁴³³ The complainants refer to official statements by China's MOFCOM¹⁴³⁴ and documents submitted by exporters and members of the CCCMC to support their allegation that the CCCMC coordinates export prices.¹⁴³⁵ Finally, the complainants submit price data for bauxite and yellow phosphorus, in particular, to show that China set coordinated export prices for these two products.¹⁴³⁶ Only the 1994 and 2001 CCCMC Charters remain in the Panel's terms of reference.

7.1009 Article 6 of the 1994 CCCMC Charter indicates that the CCCMC should "coordinate[e] ... the industry's import and export prices, markets and customers etc. in accordance with the National Authorities' opinions or on the basis of the joint requests and industry agreements between the member companies". Article 14 indicates that the CCCMC may impose sanctions against exporters that fail to comply with the Charter or coordination programs.

7.1010 Article 3 of the 2001 CCCMC Charter specifies that the CCCMC is to "coordinate and direct import and export trade activities of Metals, Minerals & Chemicals industries". Article 6 of the 2001 CCCMC Charter does not refer to export price coordination; however, Article 6(3) provides that the CCCMC shall "promote the industry's self-discipline", including adopting "sanction measures against breaching companies."¹⁴³⁷

7.1011 Although the 1994 CCCMC Charter indicates that the CCCMC is responsible for coordinating industry export prices, the 2001 CCCMC Charter does not clearly indicate that the CCCMC retains such responsibility. China argues that the 2001 CCCMC Charter fully replaced the 1994 CCCMC Charter. The complainants disagree, and suggest there is evidence that exporters were required to follow industry export prices even after 2001.¹⁴³⁸

¹⁴³¹ Articles 1, 4, 7, 21 (Exhibit JE-108).

¹⁴³² Articles 8, 20(3), 45 (Exhibit JE-112).

¹⁴³³ United States' first written submission, para. 350; European Union's first written submission, para. 354; Mexico's first written submission, para. 353; United States' comments on China's response to Panel question No. 10 following the first substantive meeting para 25; CCCMC website pages, 5-7 (Exhibit JE-88).

¹⁴³⁴ See, e.g., MOFTEC Assistant Minister Liu Xiangdong's Speech to the Third Congress of the CCCMC, paras. 10-11 (Exhibit JE-109); 1998 Price Coordination Circular, paras. 2 and 4 (Exhibit JE-110); CCCMC Website Pages, para. 3 (Exhibit JE-88); CCCMC Brochure, para. 4 (Exhibit JE-89).

¹⁴³⁵ United States' first written submission, para. 351; European Union's first written submission, para. 355; Mexico's first written submission, para. 354; United States' response to Panel question No. 10 following the first substantive meeting, para 15; European Union's response to Panel question No. 10 following the first substantive meeting; Mexico's response to Panel question No. 10 following the first substantive meeting.

¹⁴³⁶ See United States' first written submission, para. 226; European Union's first written submission, paras. 230; Mexico's first written submission, para. 229; United States' second written submission, para. 391; European Union's second written submission, para. 172; Mexico's first written submission, para. 394; Exhibit JE-126.

¹⁴³⁷ Article 6 of the 2001 CCCMC Charter instead refers to the need to "coordinate and direct import and export trade activities", "promote the industry's self-discipline", and "[o]rganize members in responding to allegations launched by foreign countries against China for dumping, subsidies and protective measures related to metal, mineral and chemical products" (Exhibit JE-87).

¹⁴³⁸ Evidence includes price data for bauxite and yellow phosphorus and screenshots of CCCMC website pages. See United States' first written submission, para. 226; European Union's first written submission, paras. 230; Mexico's first written submission, para. 229; United States' second written submission, para. 391; European Union's second written submission, para. 172; Mexico's first written submission, para. 394; Exhibit

7.1012 China argues that the *2010 CCCMC Charter* formally replaces both the *1994* and *2001 CCCMC Charters*, and in no way authorizes the CCCMC to regulate industry price coordination.¹⁴³⁹

7.1013 In addition, China argues that it effectively abandoned price coordination on 9 January 2008¹⁴⁴⁰, which was later formalized on 26 May 2008 through issuance of the *2008 PVC Notice*.¹⁴⁴¹ Moreover, China argues that in a 2010 Resolution¹⁴⁴² it abolished all aspects of the export coordination system.

7.1014 The *2010 CCCMC Charter* and *CCCMC Resolution on Abolition of Coordination and Administration of Export Commodities* discussed above entered into force following the date of the Panel's establishment. As explained in paragraph 7.33 au-dessus, in general, only measures that were in force when the Panel was established on 21 December 2009 form the basis of its terms of reference.¹⁴⁴³ At the request of the complainants¹⁴⁴⁴, the Panel will only assess the WTO consistency of the 2009 measures while taking note that the 2010 measures.¹⁴⁴⁵ Accordingly, the Panel will not consider the *2010 CCCMC Charter* or *CCCMC Resolution on Abolition of Coordination and Administration of Export Commodities* in its assessment.

7.1015 A notice or resolution stating that China's Customs authorities will no longer enforce the PVC procedure does not determine whether the CCCMC is nevertheless authorized to coordinate export prices. The PVC procedure is limited to enforcing a coordinated price at the border. In addition, the PVC procedure was only employed for one of the products at issue – yellow phosphorus. The Panel will therefore evaluate whether the measures at issue authorized the CCCMC to coordinate export prices, independently of whether the PVC procedure remained in operation.

7.1016 There is no evidence on the face of the *2001 CCCMC Charter* to indicate that it would replace in full the *1994 CCCMC Charter* version. Notwithstanding, it is plausible that a subsequent version of a Charter would replace or supersede a prior version in its entirety, unless a successive version were to plainly indicate that were not the case. China submits that a resolution of 21 February 2001 confirms that the 2001 Charter replaced the 1994 one.¹⁴⁴⁶ In addition, Article 16 of the 2001 Charter indicates that the General Assembly of Member Representatives of the CCCMC may draw up or amend the Organization's Charter. Each Charter is in its own right a complete document containing general provisions, description of the CCCMC's functions, members, organization, branches, and finances.¹⁴⁴⁷ The Panel considers that the two Charters did not remain in force

JE-1261; *CCCMC Export Coordination Measures*, Articles 3, 5 (Exhibit JE-107); CCCMC Brochure, at 14 (Exhibit JE-89); CCCMC Website Pages, at 3-5 (Exhibit JE-188).

¹⁴³⁹ China's second written submission, paras. 562, 574.

¹⁴⁴⁰ *2008 Notice Ceasing the Work of PVC for Export Contract of 9 Types of Commodities* (Exhibit CHN-352).

¹⁴⁴¹ *2008 PVC Notice* (Exhibits CHN-2, JE-125).

¹⁴⁴² *CCCMC Resolution on Abolition of Coordination and Administration of Export Commodities* (Exhibit CHN-4).

¹⁴⁴³ The Panel observes, however, that its decision to assess the complainants' claims here does not foreclose the possibility of considering 2010 measures in other contexts.

¹⁴⁴⁴ See United States' and Mexico's responses to Panel question No. 2 following the first substantive meeting and to Panel question No. 1 following the second substantive meeting.

¹⁴⁴⁵ In any event, the *2010 CCCMC Charter* and *CCCMC Resolution on Abolition of Coordination and Administration of Export Commodities* appear to have a different "essence" than the *2001 CCCMC Charter* that was in place at the time of the Panel's establishment because they appear to remove all authority from the CCCMC to coordinate export prices.

¹⁴⁴⁶ China's response to Panel question No. 69 following the second substantive meeting paras 341-343; See Letter by the China CCCMC, 3 December 2010.

¹⁴⁴⁷ Exhibit JE-86, JE-87.

simultaneously. Accordingly, the Panel concludes that the *2001 CCCMC Charter* alone was in force at the time of the Panel's establishment.

7.1017 Despite no express reference to export price coordination in the *2001 CCCMC Charter*, the reference to "coordinat[ion]" of "export trade activities" is broad enough to encompass price coordination. In the Panel's view, evidence confirms that under the *2001 CCCMC Charter*, the CCCMC was indeed authorized to coordinate export prices, at least until 2010 when China issued a Notice and MOFCOM orders to formally repeal the various elements of China's system of coordinating export prices.

7.1018 Additional Chinese instruments identified by the complainants in their first written submissions confirm that the CCCMC was directed to coordinate export prices through a system of self-discipline. These measures are not within the Panel's terms of reference; however, the Panel explained that it may nevertheless consider these instruments as evidence in assessing the operation of China's alleged MEP requirement.

7.1019 Article 2 of the *CCCMC Export Coordination Measures* identifies "self discipline" as an objective of "coordination". Article 4(3) specifically indicates that the CCCMC's "coordination content" shall include "export price". Article 18 indicates that "[c]oordination programs examined, passed and recorded in democratic discussion are collective contracts, and all member companies must fully implement them". Article 19 provides that member companies must provide business statistics or other materials in regard to their exportation, in order "[t]o facilitate supervision and guidance with the implementation of coordination programs". Article 20 states that "[c]oordination organizations for a particular commodity shall regularly inspect the implementation of the Particular Commodity Coordination Management Measures and coordination programs mainly by self-checking".

7.1020 Article 1 of the *Bauxite Branch Coordination Measures* states that "coordination" shall contribute to "self-discipline". Article 4 specifies that the Branch "shall examine and determine the industry coordinated export prices for bauxite exports", including "once every semester" generally, or at other times "in case of relatively significant price fluctuations on the international markets". Article 7 indicates that industry coordinated export prices should be, inter alia "sent to the license issuing bodies as a basis for license issuance". Article 10 provides that the coordinated export price is "equivalent to a collective economic contract" and that "each and every company must implement it strictly".

7.1021 Article 8 of the *CCCMC Bauxite Branch Charter* refers to the need to "promote the industry's self-discipline". Article 20(3) provides for disciplinary measures against members that "[f]ail to implement industry coordination". Article 45 indicates that the Bauxite Branch may levy fines to "supervise the implementation of the industry's self-disciplined coordination".

7.1022 China indicates that the *CCCMC Export Coordination Measures* and *CCCMC Bauxite Branch Coordination Measures* were "declared inapplicable" through a 9 January 2008 Notice¹⁴⁴⁸, but states that these measures were repealed by resolution only on 28 July 2010.¹⁴⁴⁹

7.1023 The complainants do not provide evidence of price coordination managed by other raw material-specific branches; however, the *CCCMC Export Coordination Measures* and the CCCMC

¹⁴⁴⁸ 2008 Notice Ceasing the Work of PVC for Export Contract of 9 Types of Commodities (Exhibit CHN-352).

¹⁴⁴⁹ CCCMC Resolution on Abolition of Coordination and Administration of Export Commodities (Exhibit CHN-4).

Brochure and identified CCCMC website pages confirm that commodity coordination branches exist for the raw materials at issue.¹⁴⁵⁰

7.1024 In the Panel's view, the above *CCCMC Export Coordination Measures* and *CCCMC Bauxite Branch Coordination Measures*, as well as CCCMC Brochure and identified CCCMC website, confirm that the CCCMC was authorized to direct and coordinate industry export prices, including during the period between 2001 until 2010. Thus, the Panel concludes that the broad language in the *2001 CCCMC Charter* authorises such coordination for commodity branches overseen by the CCCMC.

7.1025 In the Panel's view, China has not provided evidence to convince the Panel that the practice of coordinating industry prices was formally removed "from the books" in 2008 or any other time before the Panel's establishment on 21 December 2009. The Panel notes in particular China's distinction between points in time in which measures were "declared inapplicable" in comparison to when those measures were formally "repealed". The Panel notes however that China's has only confirmed the formal repeal of measures authorizing the coordination of export prices in 2010, via the 28 July 2010 Resolution discussed above.¹⁴⁵¹

7.1026 Accordingly, the Panel finds that, at least until 28 July 2010, the *2001 CCCMC Charter*, when interpreted in light of available evidence, directed the CCCMC to set and coordinate export prices for all branches under its authority, including for all the raw materials identified in connection with the complainants' claims, namely bauxite, coke, fluorspar, magnesium, silicon carbide, yellow phosphorus and zinc. In light of this finding, the Panel considers it unnecessary to consider price data for bauxite and yellow phosphorus, in particular, to show that China set coordinated export prices for these two products.¹⁴⁵²

(ii) *Whether China enforces an MEP requirement through penalties imposed on exporters and licensing entities and the use of the PVC procedure*

7.1027 The complainants submit that China requires exporters to adhere to coordinated export prices through: (i) penalties imposed on exporters that fail to set prices in accordance with the coordinated export prices; (ii) penalties imposed on licensing entities that issue licences to non-complying exporters; and (iii) application of the PVC export clearance process. The Panel considers these three aspects below.

Penalties on exporters

7.1028 The complainants argue that the (1) *Export Price Penalties Regulations*¹⁴⁵³; (2) *CCCMC Export Coordination Measures*¹⁴⁵⁴, (3) *CCCMC Bauxite Branch Coordination Measures*¹⁴⁵⁵; and (4) statements by China's MOFCOM, including reference to the existence of a "system of self-

¹⁴⁵⁰ See *CCCMC Export Coordination Measures*, Articles 3, 5 (Exhibit JE-107); CCCMC Brochure, p. 14 (Exhibit JE-89); CCCMC Website Pages 3-5 (Exhibit JE-188).

¹⁴⁵¹ *CCCMC Resolution on Abolition of Coordination and Administration of Export Commodities* (Exhibit CHN-4).

¹⁴⁵² See United States' first written submission, para. 226; European Union's first written submission, paras. 230; Mexico's first written submission, para. 229; United States' second written submission, para. 391; European Union's second written submission, para. 172; Mexico's first written submission, para. 394; Exhibit JE-126.

¹⁴⁵³ Articles 3, 4, 6 and 9 (Exhibit JE-113).

¹⁴⁵⁴ Article 4(3) (Exhibit JE-107).

¹⁴⁵⁵ Articles 7, 8 and 10 (Exhibit JE-108).

discipline"¹⁴⁵⁶ and the existence of a "collective contract"¹⁴⁵⁷ establish that China imposes penalties on exporters that fail to set prices in accordance with the coordinated export prices. Alleged penalties imposed on exporters include warnings, suspension of membership or expulsion from the CCCMC, criticism, fines or revocation of exporting rights.¹⁴⁵⁸ Only the *Export Price Penalties Regulations* are within the Panel's terms of reference.

7.1029 Article 4 of the *Export Price Penalties Regulations* indicates that "all export enterprises shall ... set export prices which are suitable in countries to which the goods are exported". Article 3 indicates that MOFTEC may punish the enterprises that export at "lower-than-normal price". Finally, Article 6 identifies applicable penalties that include notices of criticism, fines of more than 60% of income gained from lower-than-normal price exports, suspension or revocation of bidding or export rights for the enterprise, and full "economic responsibility". This measure was repealed by order on 12 September 2010.¹⁴⁵⁹ Article 9 authorizes MOFCOM or the relevant authority to investigate export enterprises suspected of exporting at a lower-than-normal price.

7.1030 As explained in paragraphs 7.33 au-dessus, in general, only measures that were in force when the Panel was established on 21 December 2009 form the basis of its terms of reference.¹⁴⁶⁰ At the request of the complainants¹⁴⁶¹, the Panel will only assess the WTO consistency of the 2009 measures while taking note of 2010 measures.¹⁴⁶² Thus, for purposes of its assessment of the complainants' claims, the Panel will assess the effect of the *Export Price Penalties Regulations* before its repeal by order on 12 September 2010.

7.1031 The language of the *Export Price Penalties Regulations* is unequivocal in providing a legal basis to impose penalties against enterprises that do not conform to coordinated export prices. China has not provided evidence to convince the Panel that the practice of imposing penalties on exporters that fail to set prices in accordance with the coordinated export prices was formally removed "from the books" before the Panel's establishment on 21 December 2009. China may in fact have ceased to impose such penalties on exporters on 28 May 2008, at the time it asserts that the PVC procedure was repealed. However, China has only provided evidence of the formal repeal of this provision in 2010 after the Panel's establishment.

7.1032 Additional instruments identified by the complainants – though ruled outside the Panel's terms of reference – confirm that export enterprises would be subject to penalties for failing to conform to coordinated export prices. As explained, these instruments are not within the Panel's terms of reference; however, the Panel explained that it may nevertheless consider these instruments as evidence in assessing the operation of China's alleged MEP requirement.

¹⁴⁵⁶ See, in particular, MOFCOM Statement *In re Vitamin C Antitrust Litigation* (August 31, 2009), para. 3 (Exhibit JE-111).

¹⁴⁵⁷ See *CCCMC Export Coordination Measures*, Article 21 (Exhibit JE-107).

¹⁴⁵⁸ United States' first written submission, paras. 352-354; European Union's first written submission, para. 356-358; Mexico's first written submission, paras. 355-357.

¹⁴⁵⁹ *Order No. 2 of 2010 of MOFCOM*, 12 September 2010 (Exhibit CHN-448).

¹⁴⁶⁰ The Panel observes, however, that its decision to assess the complainants' claims here does not foreclose the possibility of considering 2010 measures in other contexts.

¹⁴⁶¹ See United States' and Mexico's responses to Panel question No. 2 following the first substantive meeting and to Panel question No. 1 following the second substantive meeting.

¹⁴⁶² In any event, the repeal by order on 12 September 2010 appears to have a different "essence" than the 1996 *Export Price Penalties Regulations* that was in place at the time of the Panel's establishment because it removes the authority to impose penalties on exporters that fail to set prices in accordance with the coordinated export prices.

7.1033 Article 21 of the *CCCMC Export Coordination Measures* indicates that enterprises that follow "coordination programs" will be "honor[ed]" with requests to increase export quotas for that company. In contrast, member companies that do not comply are to be "criticized, warned, ordered to suspend or withdraw their membership, and economically punished according to the damage they have caused", or have their quotas reduced, licences declined, and export rights withdrawn. As pertains to bauxite specifically, Article 8 of the *CCCMC Bauxite Branch Coordination Measures* addresses sanctions imposed on enterprises in breach, including fines and cancellation of foreign trade operating rights, bidding rights, tax refunds, and financial support. Article 10 of the *CCCMC Bauxite Branch Coordination Measures* provides that coordination of prices is "equivalent to a collective economic contract", and enterprises are "not allowed to act on the basis of [their] individual initiative".

7.1034 As noted in paragraph 7.1022, China has not provided evidence to convince the Panel that the *CCCMC Export Coordination Measures* were formally "repealed" before the Panel's establishment on 21 December 2009. While the complainants do not provide evidence of price coordination managed by other raw material-specific branches, as discussed in paragraph 7.1023, the *CCCMC Export Coordination Measures* and the CCCMC Brochure and identified CCCMC website pages confirm that commodity coordination branches exist for the raw materials at issue.

7.1035 In addition to these measures, the complainants have also referred to statements made by China's MOFCOM in the context of antitrust litigation in the United States.¹⁴⁶³ These statements were made in connection with events taking place prior to 2008, but nevertheless refer to the existence of a "system of self-discipline" and reveal that further parties would be subject to penalties for failure to participate in price coordination.

7.1036 For the foregoing reasons, the Panel concludes that, through the *Export Price Penalties Regulations*, China had in place a system of penalties imposed on exporters that failed to set prices in accordance with the coordinated export prices at least until 12 September 2010.

Penalties on export licence issuing authorities

7.1037 The complainants argue that the *Measures for Administration of Licensing Entities*¹⁴⁶⁴ and *CCCMC Bauxite Branch Coordination Measures*¹⁴⁶⁵ establish that China imposes penalties on licensing entities that issue licences to non-complying exporters. Alleged penalties against licensing entities include circulation of a notice of criticism, suspension of the licence-issuing authority, or termination of this authority.¹⁴⁶⁶ Only the *Measures for Administration of Licensing Entities* are within the Panel's terms of reference.

7.1038 Article 40(3) of the *Measures for Administration of Licensing Entities* indicates that punishment shall be imposed on licensing authorities for "issuing licenses without following the coordinated export prices". Under Article 41, punishment includes public condemnation, and suspension or cancellation of the right to issue licences.

7.1039 China submits that this measure was repealed by the *2004 Export Licence Administration Measures*¹⁴⁶⁷, which was in turn repealed by the 2008 Measures for the Administration of License for

¹⁴⁶³ See, in particular, Exhibit JE-111.

¹⁴⁶⁴ Article 40(3), 41 (Exhibits CHN-358, JE-75).

¹⁴⁶⁵ Articles 7, 8 and 10 (Exhibit JE-108).

¹⁴⁶⁶ United States' first written submission, paras. 352-355; European Union's first written submission, para. 356-359; Mexico's first written submission, para. 355-358; Complainants' response to Panel question No. 13 following the first substantive meeting.

¹⁴⁶⁷ Exhibit CHN-360.

the Export of Goods.¹⁴⁶⁸ China submits that these latter two measures set out general rules on the administration of export licences. For purposes of legal certainty, China submits that Article 40(3) of the *Measures for Administration of Licensing Entities* was removed by a 12 September 2010 decision of the Ministry of Commerce.¹⁴⁶⁹

7.1040 As explained in paragraphs 7.33 au-dessus, in general, only measures that were in force when the Panel was established on 21 December 2009 form the basis of its terms of reference.¹⁴⁷⁰ At the request of the complainants¹⁴⁷¹, the Panel will only assess the WTO consistency of the 2009 measures while taking note that the 2010 measures.¹⁴⁷² Thus, for purposes of its assessment of the complainants' claims, the Panel will assess the effect of the *Measures for Administration of Licensing Entities*, or any potential superseding measures, that were effective at the date of the Panel's establishment on 21 December 2009, before the issuance of the 2010 Ministry of Commerce decision.

7.1041 In the Panel's assessment, the content of both the *2004 Export Licence Administration Measures* and *2008 Export Licence Administration Measures* is not identical to that of the *Measures for Administration of Licensing Entities*.¹⁴⁷³ Notably, as the complainants point out¹⁴⁷⁴, the 2004 and 2008 measures address the "Administration of Licenses" and contain rules and requirements governing the issuance of export licences, whereas the 1999 measure at issue addresses the "Administration of the *Organs* for Issuing the Licenses", concerning activities and conduct of China's import and export licensing entities. It is thus unclear whether these latter measures are full replacement measures for the 1999 measure at issue, that is, whether they supersede all aspects of the 1999 measure at issue. Furthermore, there is no express reference on the face of the 2004 or 2008 measures to indicate that they supersede or replace the *Measures for Administration of Licensing Entities*. This stands in contrast to the 2008 Measures for the Administration of License for the Export of Goods, which states that it amends the "Measures for the Administration of License for the Export of Goods", the same title given to the 2004 version of that measure.

7.1042 Finally, China has stated that it "abandoned" price coordination on 26 May 2008.¹⁴⁷⁵ In a 2010 decision of the Ministry of Commerce, China removed specific language in Article 40(3) of the 1999 Measures for Administration of Licensing Entities.

7.1043 Accordingly, for the foregoing reasons, the Panel concludes that the 1999 *Measures for Administration of Licensing Entities* were not replaced by either the *2004 Export Licence Administration Measures* or *2008 Export Licence Administration Measures*. As a consequence, the Panel has no evidence that the *Measures for Administration of Licensing Entities* was not valid at the time of the Panel's establishment on 21 December 2009.

¹⁴⁶⁸ Exhibit CHN-342.

¹⁴⁶⁹ *2010 Amendment of Measures for Administration of Licensing Entities* (Exhibit CHN-449).

¹⁴⁷⁰ The Panel observes, however, that its decision to assess the complainants' claims here does not foreclose the possibility of considering 2010 measures in other contexts.

¹⁴⁷¹ See United States' and Mexico's responses to Panel question No. 2 following the first substantive meeting and to Panel question No. 1 following the second substantive meeting.

¹⁴⁷² In any event, the 2010 Ministry of Commerce decision appears to have a different "essence" than the *Measures for Administration of Licensing Entities* that was in place at the time of the Panel's establishment because it removes the authority to impose penalties on licensing entities that issue licences to non-complying exporters.

¹⁴⁷³ It should be noted that the content of the *2004 Export Licence Administration Measures* and *2008 Export Licence Administration Measures* is highly similar.

¹⁴⁷⁴ United States' second written submission, para. 463; European Union's second written submission, para. 172; Mexico's second written submission, para. 467.

¹⁴⁷⁵ China's first written submission, para. 838; China's response to Panel question No. 1 following the first substantive meeting, para. 20.

7.1044 The complainants have also identified the *CCCMC Bauxite Branch Coordination Measures* as relevant. As discussed above, China indicates that the *CCCMC Bauxite Branch Coordination Measures* were repealed by resolution only on 28 July 2010.¹⁴⁷⁶ Prior to that date, China argues that this measure was declared inapplicable" through a 9 January 2008 Notice.¹⁴⁷⁷ Accordingly, the Panel considers this measure was "on the books" at the date of the Panel's establishment.¹⁴⁷⁸ As pertains to bauxite specifically, Article 7 of the *CCCMC Bauxite Branch Coordination Measures* provides that industry coordinated export prices shall be notified to licence issuing bodies "as a basis for license issuance". Although this measure is outside the Panel's terms of reference, this measure confirms that the granting of an export licence is conditioned on conformity with industry coordinated export prices.

7.1045 The complainants do not provide evidence of price coordination managed by other raw material-specific branches; however, the *CCCMC Export Coordination Measures* and the CCCMC Brochure (discussed above) and identified CCCMC website pages confirm that commodity coordination branches exist for the raw materials at issue.

7.1046 In light of the above, the Panel concludes that, at the time of establishment of the Panel on 21 December 2009 and at least until 12 September 2010, China, through the *Measures for Administration of Licensing Entities*, had in place a system that imposed penalties on licensing entities that issue licences to exporters that did not follow the coordinated export prices.

Application of the PVC export clearance process to exporters of yellow phosphorus

7.1047 The complainants argue that (1) *China's Customs Law*¹⁴⁷⁹; (2) the *2002 PVC Notice*¹⁴⁸⁰; (3) the *2004 PVC Notice*¹⁴⁸¹; (4) the *2008 PVC Notice*¹⁴⁸²; (5) *Online PVC Instructions*¹⁴⁸³; (6) a screenshot of the CCCMC online PVC interface, dated 28 May 2008¹⁴⁸⁴; (7) the *CCCMC PVC Rules*¹⁴⁸⁵; (8) *Notice of the Rules on Price Reviews of Export Products by the Customs (Customs Export Price Review Rules)*¹⁴⁸⁶; (9) *Rules for Coordination with Respect to Customs Price Review of Export Products (Customs Export Price Review Coordinating Rules)*¹⁴⁸⁷; and (10) *Provisional Rules on Export Price Verification and Chop for Key Products Subject to Price Review (Provisional Rules*

¹⁴⁷⁶ *Resolution of the Fifth Standing Committee of the CCCMC on Abolishing Certain Documents Including Measures of the CCCMC on the Coordination and Administration of Export Commodities*, 28 July 2010 (Exhibit CHN-4).

¹⁴⁷⁷ *2008 Notice Ceasing the Work of PVC for Export Contract of 9 Types of Commodities* (Exhibit CHN-352).

¹⁴⁷⁸ See the Panel's discussion in paragraphs 7.1022 to 7.1026 above.

¹⁴⁷⁹ Articles 2, 9 and 23 (Exhibit JE-68).

¹⁴⁸⁰ Exhibit JE-121, Article 4.

¹⁴⁸¹ Paras. 2, 4 (Exhibits CHN-364, JE-122).

¹⁴⁸² *2008 PVC Notice* (Exhibits CHN-2 JE-125).

¹⁴⁸³ Exhibit JE-123, Sections 1, 4, 9(2).

¹⁴⁸⁴ Exhibit JE-124, at pages 1-2 and 3-4.

¹⁴⁸⁵ Exhibit JE-127, Annex 3.

¹⁴⁸⁶ This measure was not submitted to the Panel. See United States' first written submission, para. 222. China submits that the *1997 Customs Export Price Review Rules* contains two annexes, which include additional measures referred to by the complainants: the *Customs Export Price Review Coordinating Rules* and *Provisional Rules on Export PVC*. China argues that *1997 Customs Export Price Review Rules* was superseded by the *2003 PVC Notice* and formally repealed on 26 May 2008 when China "abandoned" export price verification. See China's first written submission, para. 849. China submits that the *2010 Abolition of Price Review of Export Commodities* confirms this repeal. See Exhibit CHN-434.

¹⁴⁸⁷ This measure was not submitted to the Panel. See United States' first written submission, para. 222.

on Export PVC)¹⁴⁸⁸ establish that China requires exporters to conform to coordinated export prices through application of the PVC export clearance process to exports of yellow phosphorus.¹⁴⁸⁹

7.1048 Based on the *Customs Export Price Review Rules*, the *Customs Export Price Review Coordinating Rules*, and the *Provisional Rules on Export PVC*, and references in the *2002 PVC Notice* and *2004 PVC Notice*, the complainants submit that the exportation of yellow phosphorus is subject to price review by China's Customs as part of the export clearance process.

7.1049 The *CCCMC PVC Rules* direct the CCCMC to verify the export price of an export contract and affix a PVC chop (seal or stamp) to a PVC form and the contract where the price complies with the coordinated export price.¹⁴⁹⁰ The exporter must then declare the export contract to Customs for clearance.¹⁴⁹¹ Customs may deny any contract that does not bear the CCCMC PVC chop.¹⁴⁹² Penalties may also be imposed against exporters that forge PVC chops.¹⁴⁹³ Exporters of yellow phosphorus may submit contract information electronically for verification.¹⁴⁹⁴ Online instructions indicate that a contract will only pass "price-review" if "the contract price less the transportation fee is greater or equal to the coordinated price".¹⁴⁹⁵

7.1050 The complainants submit that the *CCCMC PVC Rules*, *Online PVC Instructions*, *Customs Export Price Review Rules*, the *Customs Export Price Review Coordinating Rules*, and the *Provisional Rules on Export PVC*, in particular, continued to be available and effective after 26 May 2008, and thereby maintained in place the PVC export clearance process.¹⁴⁹⁶ The complainants submit that price data and screenshots of online web pages from 2008 confirm that China continued to apply the PVC export clearance process to exporters of yellow phosphorus, even after the apparent repeal of the PVC procedure on 26 May 2008.¹⁴⁹⁷ The complainants submit that a computer screen snapshot for an exporter submitting contract information for CCCMC verification and chop dated 2008 reveals an industry coordinated price of US\$8000 per metric tonne FOB for yellow phosphorus.¹⁴⁹⁸ The complainants contend that a note on this form indicates that the contract will be approved in cases where the contract price is more than or equivalent to the coordinated price.¹⁴⁹⁹ In addition, the complainants argue that a 15 October 2009 screenshot shows that CCCMC measures implementing the PVC procedure, including the *CCCMC PVC Rules*, and Online Verifications and

¹⁴⁸⁸ This measure was not submitted to the Panel. See United States' first written submission, para. 222.

¹⁴⁸⁹ The complainants do not allege that the PVC procedure is applicable to any of the other raw materials identified by the complainants with respect to their MEP-related claims.

¹⁴⁹⁰ Exhibit JE-127, Annex 3.

¹⁴⁹¹ *2004 PVC Notice*, para. 4 (Exhibit JE-122).

¹⁴⁹² *2004 PVC Notice*, para. 2 (Exhibit JE-122).

¹⁴⁹³ *2004 PVC Notice*, para. 4 (Exhibit JE-122).

¹⁴⁹⁴ See *Online PVC Instructions* (Exhibit JE-123), Sections 1, 4.

¹⁴⁹⁵ *Online PVC Instructions* (Exhibit JE-123), Section 9(2).

¹⁴⁹⁶ United States' first written submission, para. 361; European Union's first written submission, paras. 365; Mexico's first written submission, para. 364.

¹⁴⁹⁷ United States' first written submission, paras. 357, 360; European Union's first written submission, paras. 361, 364; Mexico's first written submission, paras. 360, 363; United States' second written submission, paras. 448, 450; European Union's second written submission, para. 172; Mexico's first written submission, paras. 365, 368; CCCMC PVC Online Input Screen Shots (May 2008), at pages 1-4 (Exhibit JE-124); Screenshot capture, Exhibit JE-127.

¹⁴⁹⁸ CCCMC PVC Online Input Screen Shots (May 2008), at pages 1-4 (Exhibit JE-124).

¹⁴⁹⁹ United States' first written submission, para. 226; European Union's first written submission, paras. 230; Mexico's first written submission, para. 229.

Certification Operating Steps, remained available on the CCCMC website after the alleged repeal of the PVC procedure.¹⁵⁰⁰

7.1051 China disputes that any measures were in effect after 26 May 2008 that authorized application of the PVC export clearance. China considers the fact that the *CCCMC PVC Rules* and the *CCCMC Online PVC Instructions* may have been found on the CCCMC website on 28 May 2008 or 15 October 2009 does not establish that the PVC procedure continued in use after the repeal of measures establishing the PVC system.¹⁵⁰¹ China argues that the lack of any requirement or reference to the PVC procedure in the 2008-2010 Customs Handbook confirms that the PVC procedure was discontinued.¹⁵⁰² Regardless, China argues that the PVC system in China was confirmed to be repealed in its entirety by a 2010 Circular.¹⁵⁰³

7.1052 Finally, China argues that price data submitted by the complainants for yellow phosphorus does not demonstrate that prices were coordinated to prevent or restrict exportation. Contrary to the complainants' assertions that a coordinated price of US\$8000 per metric tonne FOB for yellow phosphorus in May 2008, China submits that export prices were permitted below US\$8000 per metric tonne FOB in May 2008.¹⁵⁰⁴

7.1053 The complainants dispute China's conclusion on price data for yellow phosphorus. The complainants submit that the price of yellow phosphorus "uniformly surged" in the United States and Europe, and stayed above the level of US\$8000 per metric tonne FOB "beginning soon after the end of May in June 2008" until November 2008. The complainants add that prices of yellow phosphorus exports to the United States were "almost identical" to those to the European Union during that timeframe.¹⁵⁰⁵ Thus, the complainants argue that China's presentation of data showing that the prices fell below US\$8000 per metric tonne FOB in 2007 and early 2008, but not after May 2008, does not rebut their allegation that China imposed an MEP requirement for yellow phosphorus. Moreover, they submit that exports of yellow phosphorus below US\$8000 per metric tonne in early May 2008 accounted for 2.8% of exports for that month, and that overall, only 2.5% of yellow phosphorus exports throughout 2008 fell below US\$8000 per metric tonne FOB.¹⁵⁰⁶

7.1054 The Panel determined in its 1 October 2010 preliminary ruling that all of the measures identified in connection with the PVC procedure were outside the Panel's terms of reference. Therefore the Panel will not reach findings on these measures. To the extent the Panel were to consider these measures in its analysis, those measures in place at the time of the Panel's establishment would be relevant. As explained in paragraphs XX above, in general, only measures that were in force when the Panel was established on 21 December 2009 form the basis of its terms of reference.¹⁵⁰⁷ The *2010 Circular*¹⁵⁰⁸ retroactively confirms the repeal of the PVC procedure in 26

¹⁵⁰⁰ United States' first written submission, para. 227; European Union's first written submission, paras. 231; Mexico's first written submission, para. 230; Exhibit JE-127.

¹⁵⁰¹ China's first written submission, para. 839.

¹⁵⁰² China's first written submission, paras. 843.

¹⁵⁰³ *2010 Circular of the Ministry of Commerce and the General Administration of Customs on Abolishing Two Documents Regarding Price Review of Export Commodities by Customs*, 16 August 2010 (Exhibit CHN-434).

¹⁵⁰⁴ China's first written submission, para. 851, Exhibits CHN-361, CHN-362.

¹⁵⁰⁵ United States' second written submission, para. 391; European Union's second written submission, para. 172; Mexico's first written submission, para. 394.

¹⁵⁰⁶ United States' second written submission, para. 394; European Union's second written submission, para. 172; Mexico's first written submission, para. 397.

¹⁵⁰⁷ The Panel observes, however, that its decision to assess the complainants' claims here does not foreclose the possibility of considering 2010 measures in other contexts.

¹⁵⁰⁸ *2010 Abolition of Price Review of Export Commodities* (Exhibit CHN-434).

May 2008. However, the complainants have alleged that China in fact imposed the PVC customs clearance procedure between 26 May 2008 and issuance of the 2010 Circular.

7.1055 Articles 9 and 23 of China's *Customs Law* provide that all goods for exportation must be approved by China's customs authorities. In this context, the *2002 PVC Notice* and *2004 PVC Notice* confirm that 35 products, including yellow phosphorus are subject to the PVC procedure. Its second and fourth paragraphs indicate that products may not be exported that do not bear the CCCMC "chop" or seal. Appendix 2 of the *2004 PVC Notice* confirms that exports will be rejected that do not conform to MOFCOM and GAC rules. The *CCCMC PVC Rules* and *Online Verification and Certification Operating Steps* in its step 9, further confirm the designation of commodity branches and the use of coordinated export prices and a mineral and chemical commodity pre-verification and chop system for certain products, including yellow phosphorus.

7.1056 The complainants acknowledge that the *2004 PVC Notice* superseded the *2002 PVC Notice*, and that the *2008 PVC Notice* repealed the *2004 PVC Notice* on 26 May 2008.¹⁵⁰⁹ However, the complainants allege that the *Customs Export Price Review Rules*, *Customs Export Price Review Coordinating Rules* and *Provisional Rules on Export PVC* continued to be effective after this date.¹⁵¹⁰

7.1057 The 2008 PVC Notice unequivocally repeals the *2004 PVC Notice* on 26 May 2008.¹⁵¹¹ The Panel has no evidence that the *Customs Export Price Review Rules*, *Customs Export Price Review Coordinating Rules* and *Provisional Rules on Export PVC* continued to be in force after this date. Accordingly, the Panel has no basis to conclude that the PVC procedure continued in effect, as the complainants allege, on the face of the Chinese instruments before the Panel.

7.1058 The complainants refer in particular to a webpage screenshot of the CCCMC online PVC interface, dated 28 May 2008, and a screenshot of *CCCMC PVC Rules* and *Online PVC instructions*, dated 15 October 2009, in arguing that the PVC procedure continued to be employed by China's customs officials even after the apparent repeal of the PVC procedure on 26 May 2008.

7.1059 The Panel notes that the screenshot of the CCCMC online PVC interface was taken two days after the repeal of the 2004 PVC Notice. In addition, the Panel is hesitant to conclude that the PVC procedure continued in effect solely on the basis of screenshots of *CCCMC PVC Rules* and *Online PVC instructions* taken on 15 October 2009. In the Panel's view, the failure to update a website, does not on its own provide evidence to make conclusions contrary to the express language of the 2008 PVC Notice that the PVC would no longer be applied to exports of subject goods, including yellow phosphorus. In addition, as noted by China, the complainants have not even submitted a screenshot of the CCCMC website closer to the date of the Panel's establishment on 21 December 2009 in support of their argument that the PVC was effective at the time of the Panel's establishment despite the apparent formal repeal of the PVC procedure.¹⁵¹²

7.1060 Finally, the complainants submit that an analysis of price data for exports of yellow phosphorus in May 2008 and beyond confirms that China had in place a coordinated price for yellow phosphorus after the alleged formal repeal of the PVC procedure, and enforced this price at the time of customs clearance through the PVC procedure. Evidence provided by the complainants¹⁵¹³ and

¹⁵⁰⁹ United States' first written submission, para. 360; Exhibit JE-125; Exhibit CHN-2.

¹⁵¹⁰ United States' first written submission, para. 361; European Union's first written submission, para. 365; Mexico's first written submission, para. 364.

¹⁵¹¹ Exhibit CHN-125, stating "it is decided to repeal the MOFCOM and General Administration of Customs Communication No. 36 of the year 2003 [the *2004 PVC Notice*]. The present communications takes effect on the day it is published."

¹⁵¹² China's first written submission, para. 60.

¹⁵¹³ Exhibit JE-173.

China¹⁵¹⁴ shows an increase in the export price of yellow phosphorus beginning in May 2008, for example, from prices below US\$3 per kg during May 2008 and prior months to prices above US\$5 per kg from June 2008 until November 2008.¹⁵¹⁵ This appears to be confirmed by Exhibit JE-173.

7.1061 In the Panel's view, the mere submission of price data for yellow phosphorus alone is insufficient to conclude the existence of a coordinated price for yellow phosphorus, and by extension, that a coordinated price was enforced through application of the PVC procedure. The Panel concluded above that the PVC procedure was formally repealed on 26 May 2008, upon publication of the *2008 PVC Notice*. Price increases or conformity of export prices to the United States, European Union and other destinations may result from a multitude of market factors. The Panel cannot draw the conclusion that an increase or trends in export prices alone support the conclusion that China enforced an MEP requirement for yellow phosphorus through the PVC, in the face of evidence that this procedure was repealed.

7.1062 Based on the foregoing reasons, it appears that China did not formally have in place or otherwise maintain a PVC customs clearance procedure on exporters of yellow phosphorus at the time of the Panel's establishment on 21 December 2009.

- (c) Conclusions on whether China imposes an MEP requirement on exporters of bauxite coke, fluorspar, magnesium, silicon carbide, yellow phosphorus and zinc

7.1063 The Panel concludes above that the *2001 CCCMC Charter*, interpreted in light of the *CCCMC Export Coordination Measures*, *CCCMC Bauxite Branch Coordination Measures*, CCCMC Brochure and identified CCCMC website pages, authorized the CCCMC to set and coordinate export prices for all branches under its authority, including for all the raw materials identified in connection with the complainants' claims, namely bauxite, coke, fluorspar, magnesium, silicon carbide, yellow phosphorus and zinc. The Panel further concludes that, at the time of the Panel's establishment on 21 December 2009, China through the *1996 Export Price Penalties Regulations* imposed penalties on exporters that fail to set prices in accordance with the coordinated export prices. In addition, the Panel concludes that, under the *Measures for Administration of Licensing Entities*, China imposed penalties on licensing entities that issued licences to exporters that did not follow the coordinated export prices.

7.1064 In light of these conclusions, the Panel additionally finds that the authority to coordinate export prices and enforce these prices through the imposition of penalties on exporting enterprises, or on export licensing entities that issue licences to exporters that do not follow the coordinated export prices, amounts to a requirement to coordinate export prices for the raw materials at issue. The requirement derives from the fact that failure to comply with the coordinated price will result in punishment that rises to a level to prevent an enterprise from exporting altogether. In addition, under the measures at issue, export licensing entities may be punished for failing to enforce a given coordinated price. The measures do not permit exporting enterprises to deviate from coordinated export prices, or otherwise grant discretion to export licensing agencies to make exceptions. Thus, coordinated export prices must be adhered to whenever set by the CCCMC.

7.1065 Finally, the Panel concludes that the complainants failed to establish that China formally had in place or otherwise maintained a PVC customs clearance procedure on exporters of yellow phosphorus at the time of the Panel's establishment on 21 December 2009. The Panel does not consider the absence of this final customs clearance step sufficient to conclude that exporting

¹⁵¹⁴ Exhibits CHN-361 and CHN-362.

¹⁵¹⁵ Exhibit CHN-362.

enterprises are not otherwise required to adhere to coordinated export prices. In addition, only one of the raw materials at issue – yellow phosphorus – was subject to the PVC clearance procedure.

7.1066 Accordingly, the Panel concludes that China, through the measures in the Panel's terms of reference, imposed an MEP requirement on exporters of bauxite, coke, fluorspar, magnesium, silicon carbide, yellow phosphorus and zinc at the time of the Panel's establishment. Coordinated export prices were enforced through the imposition of penalties on exporters and licensing entities that failed to conform to coordinated export prices. The Panel finds that this system continued at least until the issuance of a resolution on 28 July 2010.¹⁵¹⁶ Having concluded so, the Panel will consider the complainants' claims under Article XI:1, X:1 and X:3(a) of the GATT 1994.

3. Whether a requirement to export at a coordinated minimum export price constitutes a restriction on exportation that is inconsistent with Article XI:1 of the GATT 1994

7.1067 The complainants argue that the requirement to export at a coordinated minimum export price amounts to a restriction that is inconsistent with Article XI:1 of the GATT 1994 because such a requirement prohibits exportation if the price of the export is lower than the floor established by the minimum export price. In the complainants' view, this amounts to a "limiting condition" that is a restriction within the meaning of Article XI:1 of the GATT 1994.¹⁵¹⁷ They argue that China's system has an impact on prices and distorts world market conditions for the raw materials at issue because of China's alleged position as a leading producer of these materials.¹⁵¹⁸

7.1068 China argues that Article XI:1 does not broadly prohibit regulation, or any condition imposed on exports or imports *per se*. Rather, China argues that Article XI:1 prohibits WTO Members from imposing a condition on exportation or importation that has a "limiting effect" on the *quantity* of exports or imports. China argues that in determining compliance of an MEP with Article XI:1, the relevant feature of an MEP requirement to consider is the benchmark price used to determine the MEP and its relationship to the relevant world trading price for a particular product. Such analysis cannot assume that the MEP requirement is necessarily higher than the market price, such that it would restrict exports; according to China, this must be proved.¹⁵¹⁹

7.1069 The complainants request the Panel to conclude that a requirement to export at a coordinated minimum export price constitutes a restriction on exportation that is inconsistent with Article XI:1 of the GATT 1994.

7.1070 The Panel concluded above that the operation of the measures at issue amounts to a requirement to coordinate export prices. In addition, the Panel concluded that the measures at issue, including those that delegate authority to the CCCMC, are attributable to China and may be subject to WTO dispute settlement. The Panel will consider below whether requirement to export at a coordinated minimum export price constitutes a measure that may be challenged under Article XI:1.

7.1071 Article XI of the GATT 1994 is entitled "General Elimination of Quantitative Restrictions". Article XI:1 provides:

¹⁵¹⁶ CCCMC Resolution on Abolition of Coordination and Administration of Export Commodities (Exhibit CHN-4).

¹⁵¹⁷ United States' second written submission, para. 396; European Union's second written submission, para. 172; Mexico's first written submission, para. 399.

¹⁵¹⁸ Complainants' joint opening oral statement at the first substantive meeting, para. 32.

¹⁵¹⁹ China's first written submission, para. 860.

"No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party."

7.1072 Thus, Article XI:1 requires the elimination of import and export restrictions or prohibitions made effective through quotas, import or export licences or *other measures*.

7.1073 The GATT panel in *Japan – Semi-Conductors* found that "Article XI:1, unlike other provisions of the General Agreement, did not refer to laws or regulations but more broadly to 'measures'. This wording indicated clearly that any measure instituted or maintained by a contracting party which restricted the exportation or sale for export of products was covered by this provision, irrespective of the legal status of the measure."¹⁵²⁰ The panel in *India – Quantitative Restrictions* found that the text of Article XI:1 of the GATT 1994 is "broad" in scope, providing for a general ban on import or export restrictions or prohibitions "other than duties, taxes or other charges".¹⁵²¹

7.1074 In line with these views, the Panel concludes that the requirement to export at a coordinated minimum export price, which is operated through a series of measures that are attributable to China, is a type of measure that may be challenged under Article XI:1.¹⁵²² Accordingly, the Panel will next consider whether the alleged MEP requirement is a "prohibition or restriction" on exportation under Article XI:1.

7.1075 The applicability of Article XI:1 to minimum price requirements has been previously addressed by two GATT panels. In *EEC – Minimum Import Prices*, a GATT panel examined a requirement that importers of tomato concentrates provide additional security to guarantee that the free-at-frontier price plus the customs duty payable would equal or exceed a determined minimum import price. The security would be forfeited in proportion to any quantities imported at a price lower than the minimum price. Subject to an assessment of a possible exemption under Article XI:2(c)(i)

¹⁵²⁰ GATT Panel Report, *Japan – Semi-Conductors*, para. 106.

¹⁵²¹ The panel in *India – Quantitative Restrictions* found:

"[T]he text of Article XI:1 is very broad in scope, providing for a general ban on import or export restrictions or prohibitions 'other than duties, taxes or other charges'. As was noted by the panel in *Japan – Trade in Semi-conductors*, the wording of Article XI:1 is comprehensive: it applies 'to all measures instituted or maintained by a [Member] prohibiting or restricting the importation, exportation, or sale for export of products other than measures that take the form of duties, taxes or other charges.' The scope of the term 'restriction' is also broad, as seen in its ordinary meaning, which is 'a limitation on action, a limiting condition or regulation.'" (original footnotes omitted).

Panel Report, *India – Quantitative Restrictions*, para. 5.128. See also Panel Report, *EC – Poultry*, para. 7.450; Panel Report, *Colombia – Ports of Entry*, para. 7.226.

¹⁵²² The Panel considers its conclusion is consistent with the view taken by the GATT panel on *Japan – Semi-Conductors*. The panel in that dispute concluded that a "complex of measures", comprising "an administrative structure" created by the Japanese government amounted to "a coherent system restricting the sale for export of monitored semi-conductors at prices below specific company-specific costs to markets other than the United States, inconsistent with Article XI:1." See GATT Panel Report on *Japan – Semi-Conductors*, paras. 106, 117. The panel concluded that measures including repeated direct requests by the Japanese government, statutory requirements, and price monitoring, among others, operated to "facilitate strong peer pressure to comply with requests by [the Japanese government]." Even in the absence of what it described as "formal legally binding obligations", the panel concluded that the "complex of measures exhibited the rationale as well as the essential elements of a formal system of export control". See para. 117.

and (ii), the panel found that the minimum import price system, as enforced by the additional security, was a restriction "other than duties, taxes or other charges" within the meaning of Article XI:1.¹⁵²³

7.1076 In *Japan – Semi-Conductors*, a GATT panel examined whether measures applied to exports of semi-conductors at prices below company-specific costs constituted a restriction under Article XI:1 of the GATT 1994. The panel expressly referred to the rationale applied in *EEC – Minimum Import Prices* in concluding that a regulation preventing exportation below a minimum price level was a restriction on exportation inconsistent with Article XI:1.¹⁵²⁴

7.1077 The panel in *India – Quantitative Restrictions* concluded that the scope of the term "restriction" is "broad", and, in terms of its ordinary meaning, is "a limitation on action, a limiting condition or regulation."¹⁵²⁵ The panel in *India – Autos* also elaborated on the meaning of the term "restriction":

"On a plain reading, it is clear that a 'restriction' need not be a blanket prohibition or a precise numerical limit. Indeed, the term 'restriction' cannot mean merely 'prohibitions' on importation, since Article XI:1 expressly covers both 'prohibition or restriction'. Furthermore, the Panel considers that the expression 'limiting condition' used by the *India – Quantitative Restrictions* panel to define the term 'restriction' and which this Panel endorses, is helpful in identifying the scope of the notion in the context of the facts before it. That phrase suggests the need to identify not merely a condition placed on importation, but a condition that is limiting, i.e., that has a limiting effect. In the context of Article XI, that limiting effect must be on importation itself."¹⁵²⁶

7.1078 More recently, the panel in the *Colombia – Ports of Entry*, after reviewing several GATT and WTO cases, concluded that "restrictions" in the sense contemplated by Article XI:1 refers to measures that create uncertainties and affect investment plans, restrict market access for imports or make importation prohibitively costly.¹⁵²⁷ In making an assessment of whether a measure constitutes a restriction, the panel considered it important to look at the design of the measure and its potential to adversely affect importation.¹⁵²⁸

¹⁵²³ GATT Panel Report, *EEC – Minimum Import Prices*, para. 4.9.

¹⁵²⁴ GATT Panel Report, *Japan – Semi-Conductors*, para. 106. The Panel concluded, that the "complex of measures" amounted to "a coherent system restricting the sale for export of monitored semi-conductors at prices below specific company-specific costs to markets other than the United States, inconsistent with Article XI:1." GATT Panel Report, *Japan – Semi-Conductors*, para. 117.

¹⁵²⁵ Panel Report, *India – Quantitative Restrictions*, para. 5.128.

¹⁵²⁶ Panel Report, *India – Autos*, para. 7.270 (underlining and emphasis original). Several WTO panels have cited with approval the interpretation that the term "restriction" in Article XI:1 refers to the imposition of a "limiting condition": see Panel Report, *Colombia – Ports of Entry*, paras. 7.233-7.234; Panel Report, *Brazil – Retreaded Tyres*, para. 7.371; Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.252 and 7.258.

¹⁵²⁷ Panel Report, *Colombia – Ports of Entry*, para. 7.240. The panel in *Argentina – Hides and Leather* recalled that "Article XI:1, like Articles I, II and III of the *GATT 1994*, protects competitive opportunities of imported products not trade flows". See Panel Report, *Argentina – Hides and Leather*, para. 11.20.

¹⁵²⁸ Panel Report, *Colombia – Ports of Entry*, para. 7.240, see also Panel Report, *US – Poultry (China)*, para. 7.454.

7.1079 The term "restriction", as discussed by these three panels, aligns with the dictionary definition of the term "restriction", which is "a thing which restricts someone or something, a limitation on action, a limiting condition or regulation".¹⁵²⁹

7.1080 The Panel concluded above that, through a series of measures at issue, China requires exporting enterprises to export at set or coordinated export prices or otherwise face penalties, including the possibility of having one's exporting rights revoked.

7.1081 The Panel agrees with the approach set out in *EEC - Minimum Import Prices* (taken in the case of importation) and followed in *Japan - Semi-Conductors*, that a measure preventing exportation below a minimum price level inherently constitutes a "restriction" that is inconsistent with Article XI:1. In the Panel's view, the authority to determine and require exporters to follow a particular export price level and not deviate below it without facing what amounts to a strict penalty, including revocation of the right to export altogether, has the potential to restrict trade. The restriction or limitation on exportation arises from the possibility that a price is set at such a level that exporters cannot find a potential buyer in order to sell their product. Products that would have otherwise been exported would remain in the domestic market as a subsidiary effect of this.¹⁵³⁰ The Panel consider the very *potential* to limit trade is sufficient to constitute a "restriction[] ... on the exportation or sale for export of any product" within the meaning of Article XI:1 of the GATT 1994.¹⁵³¹ The Panel considers this view is consistent with the conclusion by the panel on *Colombia - Ports of Entry* that any measure that creates uncertainty as to the ability to import/export, and otherwise "compete" in the marketplace, violates Article XI:1.¹⁵³²

7.1082 At the time of the Panel's establishment, the Panel concludes that, under the measures at issue, China required exporting enterprises to export at set or coordinated export prices or otherwise face penalties, including the possibility of having one's exporting rights revoked. The Panel concludes that this requirement constitutes a "restriction[] ... on the exportation or sale for export of any product" within the meaning of Article XI:1 of the GATT 1994 because this requirement to export at a coordinated minimum export price by its very nature has a limiting or restricting effect on trade.

¹⁵²⁹ *Shorter Oxford English Dictionary*, 5th edn., L. Brown (ed.) (Oxford University Press, 2002), Vol. 2, p. 2554.

¹⁵³⁰ A requirement to set an export price *above* the price that would otherwise prevail under free trade would have the effect of reducing export volumes. Under this scenario, exporters would be unable to export the same volume of their product for sale at that higher price. Unsold exports would remain in the domestic market that otherwise would have been sold abroad. The reduction in exportation would amount to a limiting effect on exportation with the additional effect of driving down the domestic price of the particular product due to increased domestic supply. Such an outcome would appear to result regardless of whether a particular exporting country has a relatively substantial share of production or a limited share. The only difference to note is the following: if an exporting country controls a substantial or monopoly share of the world export market for a particular product (due to its position as a leading or sole producer of that product), the world price would increase as a result of the imposition of a minimum export price requirement that is set above the trading price that would prevail under free trade. In this case, export volumes would decrease but would not fall to zero. If an exporting country were to control only a small share of the world export market for a particular product, the world price would not be affected by the imposition of a minimum export requirement above the trading price that would prevail under free trade. As a result, exports of that product would fall to zero.

¹⁵³¹ In other contexts, panels and the Appellate Body have concluded that the *potential* to violate a provision was sufficient to result in inconsistency. Under Article III, for instance, the GATT panel on *EEC - Oilseeds I* examined whether a purchase regulation which did not necessarily discriminate against imported products in all cases but was *capable* of doing so was inconsistent with Article III:4. That panel concluded that the "exposure of a particular imported product to a risk of discrimination" constitutes a form of discrimination sufficient to violate Article III:4. See GATT Panel Report, *EEC - Oilseeds I*, para. 141.

¹⁵³² Panel Report, *Colombia - Ports of Entry*, para. 7.240.

4. Whether China's administration of the minimum export price requirement through the PVC procedure as it applies to yellow phosphorus is inconsistent with China's obligations under Article X:3(a) of the GATT 1994

7.1083 The complainants additionally submit that China acts inconsistently with its obligations under Article X:3(a) of the GATT 1994 by authorizing the CCCMC to participate in the PVC customs clearance procedure in respect of yellow phosphorus. The complainants allege that the CCCMC's involvement permits the flow of exporters' sensitive commercial information to representatives of parties with interests that are in conflict with those of the exporters.¹⁵³³ In their view, this contravenes China's obligation to administer its laws, regulations, decisions, and rulings pertaining to restrictions on exports in an impartial and reasonable manner under Article X:3(a) of the GATT 1994.¹⁵³⁴

7.1084 China submitted that it formally repealed the PVC procedure in May 2008 when it "abandoned" price coordination, and therefore requests the Panel to reject the complainants' claims.¹⁵³⁵ China argues that the Panel cannot make recommendations regarding the administration of measures that have ceased to exist.¹⁵³⁶

7.1085 The Panel recalls from its 1 October 2010 preliminary ruling its finding that all of the measures identified in connection with the PVC procedure were outside the Panel's terms of reference because the complainants' Panel Requests did not identify clearly and specifically the measures under challenge.¹⁵³⁷ Accordingly, the Panel considers it is outside of its mandate to rule on the complainants' claims that China's administration of the minimum export price requirement through the PVC procedure as it applies to yellow phosphorus is inconsistent with under Article X:3(a).

7.1086 Even if the Panel were to have concluded otherwise, the Panel recalls its conclusion in paragraph 7.1062 above that "China did not formally have in place or otherwise maintain a PVC customs clearance procedure on exporters of yellow phosphorus at the time of the Panel's establishment on 21 December 2009". Accordingly, for this further reason, the Panel considers it would be inappropriate to consider the complainants' claim.

7.1087 Consequently, the Panel does not make findings under Article X:3(a) of the GATT 1994 on whether China is in breach of its obligations in respect of China's administration of the minimum export price requirement through the PVC procedure as it applies to yellow phosphorus.

5. Whether China has failed to publish measures through which China administers its alleged minimum price requirement inconsistently with China's obligations under Article X:1 of the GATT 1994

7.1088 The complainants submit that China has breached its obligations under Article X:1 by failing to publish promptly the: (i) *2001 CCCMC Charter*; (ii) *CCCMC Branch-Specific Coordination Measures*; (iii) *Rules for Coordination with Respect to Customs Price Review of Export Products*; (iv) *Notice of the Rules on Price Reviews of Export Products by the Customs*; and (v) *Provisional Rules on Export PVC*.

¹⁵³³ The PVC procedure requires exporters of yellow phosphorus to submit their export contracts and special PVC forms to the CCCMC for verification.

¹⁵³⁴ United States' first written submission, para. 364, European Union's first written submission, para. 368; Mexico's first written submission para. 367.

¹⁵³⁵ China's first written submission, para. 867.

¹⁵³⁶ China's first written submission, para. 867.

¹⁵³⁷ See paragraphs 1.10 to 1.13 above; Annex F to these Reports.

7.1089 The Panel recalls from its 1 October 2010 preliminary ruling its finding that only six measures referred to by the complainants in both their consultation requests and Panel Requests would form part of the Panel's terms of reference.¹⁵³⁸ Of the five measures identified in the preceding paragraph, only the *2001 CCCMC Charter* falls within the Panel's terms of reference. Accordingly, the Panel will consider the complainants' claim in respect of this measure only.

7.1090 The complainants submit that the CCCMC Charter is the CCCMC's constitution setting forth the mission, functions, authority, and rules and regulations of the CCCMC. In addition, the complainants submit that China has described the Chamber of Commerce as "the instrumentality through which [MOFCOM] oversees and regulates the business of importing and exporting [] products in China".¹⁵³⁹ They argue that the *2001 CCCMC Charter* is therefore a law or regulation of general application made effective by a WTO Member pertaining to restrictions on exports, and is subject to the obligations of Article X:1 of the GATT 1994.¹⁵⁴⁰

7.1091 China submits that the complainants have not adduced argument and evidence showing that, in terms of Article X:1, the Charter is a "law[], regulation[], judicial decision[] and administration ruling[] of general application", within the meaning of Article X:1.¹⁵⁴¹ China asserts that such a determination "must be based primarily on the content and substance of the instrument, and not merely on its form or nomenclature".¹⁵⁴² China argues that the *2001 CCCMC Charter* does not contain either imperative or authoritative rules of conduct that would bring it within the scope of Article X:1.¹⁵⁴³ Even assuming Article X:1 would apply, China argues that the *2001 CCCMC Charter* was formally replaced by the *2010 CCCMC Charter*. China argues that obliging it to publish an expired measure serves no purpose.¹⁵⁴⁴

7.1092 As noted in footnote 1445, the *2010 CCCMC Charter* has a different "essence" than the *2001 Charter* that was in place at the time of the Panel's establishment because it appears to remove all authority from the CCCMC to coordinate export prices. Many of the provisions of the *2010 CCCMC Charter* are similar to those in the *2001 CCCMC Charter*, and in some cases identical. However, in view of the at least one significant difference just noted between the two charters, with regard to the role of the CCCMC, publication of the *2010 CCCMC Charter* cannot constitute publication of the former. Moreover, at the request of the complainants, the Panel will only assess the WTO consistency of the measures in existence on 21 December 2009, in this case the *2001 CCCMC Charter*, while taking note that the *2010 CCCMC Charter* no longer provides for the CCCMC to coordinate export prices. Accordingly, the Panel will not consider the *2010 CCCMC Charter* in addressing whether China failed to publish the *2001 CCCMC Charter* inconsistently with its obligations under Article X:1 of the GATT 1994.

7.1093 Article X:1 of the GATT 1994 provides in relevant part:

¹⁵³⁸ See paragraphs 1.10 to 1.13 above; Annex F to these Reports.

¹⁵³⁹ United States' first written submission, para. 208, citing Brief of Amicus Curiae: MOFCOM p. 9 (Exhibit JE-98); United States' response to Panel question No. 67 following the second substantive meeting, para. 133; The European Union and Mexico refer to the United States' response to Panel question No. 67 following the second substantive meeting.

¹⁵⁴⁰ Complainants' response to Panel question No. 68 following the second substantive meeting, para. 134.

¹⁵⁴¹ China's second written submission, para. 580.

¹⁵⁴² China's comments on the complainants' responses to Panel question No. 68 following the second substantive meeting, referring to Panel Report, *EC – IT Products*, para. 7.1023.

¹⁵⁴³ China's comments on the complainants' responses to Panel question No. 68 following the second substantive meeting, referring to Panel Report, *EC – IT Products*, para. 7.1027.

¹⁵⁴⁴ China's second written submission, para. 582.

"Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to ... restrictions or prohibitions on ... exports ... shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. ..."

7.1094 The complainants in this dispute must thus establish that the relevant measure falls within the scope of "laws, regulations, judicial decisions and administrative rulings of general application made effective by" China that pertains to restrictions or prohibitions on exports; if so, China must promptly publish the minimum export price requirement in such a manner as to enable governments and traders to become acquainted with it.

7.1095 The panel on *EC – Selected Customs Matters* found that "laws, regulations, judicial decisions and administrative rulings of general application" described in Article X:1 of the GATT 1994 are those "laws, regulations, judicial decisions and administrative rulings that apply to a range of situations or cases, rather than being limited in their scope of application".¹⁵⁴⁵ The Panel on *EC – IT Products* concluded that the phrase "laws, regulations, judicial decisions and administrative rulings" "reflects an intention on the part of the drafters to include a wide range of measures that have the potential to affect trade and traders."¹⁵⁴⁶ In *US – Underwear*, the Panel explained that an administrative order was of "general application" "to the extent that the restraint affects an unidentified number of economic operators, including domestic and foreign producers."¹⁵⁴⁷ The term "made effective" in the context of Article X:1 has so far only been addressed by the panel on *EC – IT Products*. This panel held that the term "made effective" covers measures that were brought into effect, or made operative, in practice and is not limited to measures formally promulgated or that have formally entered into force.¹⁵⁴⁸

7.1096 The Panel recalls its earlier conclusion at paragraph 7.1006 above that the *2001 CCCMC Charter* is a measure attributable to China and thus is a measure that can be challenged under the WTO dispute settlement proceedings. In reaching this conclusion, the Panel noted China's acknowledgement that it delegated certain implementing authority to the CCCMC to coordinate export prices. This is reflected in statements made by China's MOFCOM in the context of US domestic court proceedings prior to this dispute. For this reason, the Panel considered that actions undertaken by the CCCMC with respect to minimum export price requirements at issue in this dispute are attributable to China.

7.1097 Thus, the *2001 CCCMC Charter* grants authority to the CCCMC and sets out the functions, structure and operation of the CCCMC. In particular it directs the CCCMC to "provide[] coordination, guidance and consultation services", including to "[d]isseminate and implement[] the state's foreign trade laws, regulations, guidelines, and policies" and "coordinate and direct import and export trade activities by business within the industries".¹⁵⁴⁹ The scope of authority is further indicated in the description of the Charter's overall objectives, which include to "coordinate and direct import and export trade activities of Metals, Minerals & Chemicals Industries".¹⁵⁵⁰

7.1098 In the Panel's view, China's statement of the authority vested in the CCCMC, and the cited provisions of the *2001 CCCMC Charter* make clear that the *2001 CCCMC Charter* is a measure that has the potential to affect trade and traders, including a wide array of domestic and foreign economic

¹⁵⁴⁵ Panel Report, *EC – Selected Customs Matters*, para. 7.116.

¹⁵⁴⁶ Panel Report, *EC – IT Products*, para. 7.1026.

¹⁵⁴⁷ Panel Report, *US – Underwear*, para. 7.65.

¹⁵⁴⁸ Panel Report, *EC – IT Products*, para. 7.1047.

¹⁵⁴⁹ *2001 CCCMC Charter*, Article 6(1) (Exhibit JE-87).

¹⁵⁵⁰ *2001 CCCMC Charter*, Article 3 (Exhibit JE-87).

operators, in particular, the "trade activities" of business within the broad metals, minerals and chemicals industries. Accordingly, in line with the Appellate Body's view on "measures of general application" and previous panels' views on the scope of Article X:1, we conclude that the *2001 CCCMC Charter* is a law, regulation, judicial decision or administrative ruling of general application within the meaning of Article X:1.

7.1099 China submits that a resolution of 21 February 2001 confirms that the *2001 CCCMC Charter* replaced the *1994 CCCMC Charter*.¹⁵⁵¹ Thus, from this statement it appears that the *2001 CCCMC Charter* became effective at a point in 2001.

7.1100 The Panel further recalls its finding in paragraph 7.1017 above that the reference to "coordinat[ion]" of "export trade activities" in Article 3 of the *2001 CCCMC Charter* is broad enough to encompass price coordination, and that the CCCMC was indeed authorized to coordinate export prices under the *2001 CCCMC Charter*.¹⁵⁵² The Panel concluded that the requirement to export at a coordinated minimum export price by its very nature has a limiting or restricting effect on trade, and therefore constitutes a restriction within the meaning of Article XI:1. Accordingly, for purposes of its Article X:1 assessment, the Panel further concludes that the *2001 CCCMC Charter* pertains to restrictions or prohibitions on exports within the meaning of Article X:1.

7.1101 Finally, the complainants assert that the *2001 CCCMC Charter* was not published on the CCCMC website until well into 2009, after the request for consultations in this dispute had been made, and therefore was not "published promptly" in a manner consistent with the requirements of Article X:1. The concept of "prompt" is not addressed in Article X:1 or elsewhere in the WTO Agreement. In the Panel's view, an analysis of whether a measure was published promptly requires a reference point, some act or thing to act as a point of comparison so as to determine whether publication was prompt.¹⁵⁵³ It would seem an appropriate reference point in this instance should approximate the date when the *2001 CCCMC Charter* became effective. The Panel noted China's confirmation that that the *2001 CCCMC Charter* replaced the preceding Charter on 21 February 2001. Due to its publication in 2009, it therefore appears that *2001 CCCMC Charter* was only published on the CCCMC website eight years after the date that it had been made effective.

7.1102 Consequently, for the foregoing reasons, the Panel finds that China failed to publish promptly the *2001 CCCMC Charter* in such a manner as to enable governments and traders to become acquainted as is required under Article X:1 of the GATT 1994. Accordingly, the Panel concludes that China has acted inconsistently with Article X:1.

6. Summary

7.1103 At the time of the Panel's establishment, the Panel concludes that, under the measures at issue, China required exporting enterprises to export at set or coordinated export prices or otherwise face penalties, including the possibility of having one's exporting rights revoked. The Panel concludes that this requirement, which was formally in force in China at the time of the Panel's establishment, constitutes a "restriction[] ... on the exportation or sale for export of any product" within the meaning of Article XI:1 of the GATT 1994 because this requirement to export at a coordinated minimum

¹⁵⁵¹ China's response to Panel question No. 69 following the second substantive meeting, paras 341-343; See Letter by the China CCCMC, 3 December 2010 (Exhibit CHN-541).

¹⁵⁵² The Panel recalls that Article 3 of the *2001 CCCMC Charter* specifies that the CCCMC is to "coordinate and direct import and export trade activities of Metals, Minerals & Chemicals industries". Article 6(3) provides that the CCCMC shall "promote the industry's self-discipline", including adopting "sanction measures against breaching companies."

¹⁵⁵³ The panel in *EC – IT Products* stated that "the meaning of prompt is not an absolute concept, i.e. a pre-set period of time applicable in all cases": see Panel report, *EC – IT Products*, para. 7.1074.

export price by its very nature has a limiting or restricting effect on trade. The Panel also concludes that China failed to publish promptly the *2001 CCCMC Charter* in such manner as to enable governments and traders to become acquainted as is required under Article X:1 of the GATT 1994. The Panel does not make findings under Article X:3(a) of the GATT 1994 on whether China is in breach of its obligations in respect of China's administration of the minimum export price requirement through the PVC procedure as it applies to yellow phosphorus.

VIII. CONCLUSIONS AND RECOMMENDATIONS

8.1 The Panel issues its findings in the form of a single document containing three separate Reports with common sections on the Panel's findings and separate sections on the Panel's conclusions and recommendations for each complaining party. The Panel's findings incorporate the conclusions of its preliminary rulings, attached to these Reports as Annex F.

A. COMPLAINT BY THE UNITED STATES (DS394)

1. Conclusions

8.2 In respect of claims concerning export duties:¹⁵⁵⁴

- (a) The Panel finds that the application of export duties to certain forms of bauxite, coke, fluorspar, magnesium, manganese, silicon metal and zinc, by virtue of the series of measures at issue¹⁵⁵⁵, is inconsistent with Paragraph 11.3 of China's Accession Protocol;
- (b) The Panel finds that China may not seek to justify the application of export duties to forms of fluorspar pursuant to Article XX(g) of the GATT 1994. Even assuming *arguendo* that China could seek to justify the application of export duties, the Panel finds that China has not demonstrated that the application of export duties to forms of fluorspar is justified pursuant to Article XX(g) of the GATT 1994;
- (c) The Panel finds that China may not seek to justify the application of export duties to forms of magnesium, manganese and zinc pursuant to Article XX(b) of the GATT 1994. Even assuming *arguendo* that China could seek to justify the application of export duties, the Panel finds that China has not demonstrated that the application of export duties to forms of magnesium, manganese and zinc is justified pursuant to Article XX(b) of the GATT 1994; and
- (d) The Panel concludes that the *Adjustment of Export Tariffs Circular* removed the WTO-inconsistent special duty applicable to yellow phosphorus before the Panel's establishment on 21 December 2009. Therefore, the Panel makes no findings on the *2009 Tariff Implementation Program* that applied a special duty rate to yellow phosphorus prior to 1 July 2009.

8.3 In respect of claims concerning export quotas:¹⁵⁵⁶

- (a) The Panel finds that the application of export quotas to certain forms of bauxite, coke, fluorspar and silicon carbide, by virtue of the series of measures at issue¹⁵⁵⁷, is inconsistent with Article XI:1 of the GATT 1994;
- (b) The Panel finds that the application of an export ban on certain forms of zinc, by virtue of the series measures at issue¹⁵⁵⁸, is inconsistent with Article XI:1 of the GATT 1994;
- (c) The Panel finds that China has not demonstrated that the application of an export quota to refractory-grade bauxite, classifiable under HS No. 2508.3000, is justified pursuant to Articles XI:2(a) or XX(g) of the GATT 1994;
- (d) The Panel finds that China has not demonstrated that the application of export quotas to coke and silicon carbide is justified pursuant to Article XX(b) of the GATT 1994; and

¹⁵⁵⁴ The specific forms of the raw materials subject to the United States' claims are identified in Exhibit JE-5 and paragraph 2.2 of the Descriptive Part to these Reports.

¹⁵⁵⁵ See discussion in Section VII.B.2 above.

¹⁵⁵⁶ The specific forms of the raw materials subject to the United States' claims are identified in Exhibit JE-6 and paragraph 2.2 of the Descriptive Part to these Reports.

¹⁵⁵⁷ See discussion in Section VII.C.3 above.

¹⁵⁵⁸ See discussion in Section VII.C.3 above.

- (e) The Panel exercises judicial economy in respect of whether the application of export quotas to bauxite, coke, fluorspar and silicon carbide, or the application of an export prohibition to zinc, are inconsistent with Paragraph 1.2 of China's Accession Protocol and Paragraphs 162 and 165 of China's Working Party Report.

8.4 In respect of claims concerning export quota administration and allocation:¹⁵⁵⁹

- (a) The Panel finds that China's prior export experience or export performance requirement, and minimum registered capital requirement, imposed on coke by virtue of the measures at issue¹⁵⁶⁰, are inconsistent with Paragraphs 1.2 and 5.1 of China's Accession Protocol, read in combination with Paragraphs 83(a), 83(b) and 83(d); and Paragraphs 84(a) and 84(b) of China's Working Party Report;
- (b) The Panel finds that China's prior export experience or export performance requirements, and minimum registered capital requirement, imposed on bauxite, fluorspar and silicon carbide by virtue of the measures at issue¹⁵⁶¹, are inconsistent with Paragraphs 1.2 and 5.1 of China's Accession Protocol, read in combination with Paragraphs 83(a), 83(b) and 83(d); and read in combination with Paragraphs 84(a) and 84(b) of China's Working Party Report;
- (c) The Panel finds that China's administration of its coke export quota through the involvement of the CCCMC is not inconsistent with Article X:3(a) of the GATT 1994;
- (d) The Panel finds that China's administration of its export quota bidding system for bauxite, fluorspar and silicon carbide through the involvement of the CCCMC is not inconsistent with Article X:3(a) of the GATT 1994; and
- (e) The Panel finds that the requirement for an exporter applicant to pay a bid-winning price for the right to export bauxite, fluorspar and silicon carbide is not inconsistent with Article VIII:1(a) of the GATT 1994 or Paragraph 11.3 of China's Accession Protocol.

8.5 In respect of claims concerning export licensing requirements:¹⁵⁶²

- (a) The Panel finds that China's export licensing regime is not *per se* inconsistent with Article XI:1 of the GATT 1994 solely on the basis that it permits export licensing agencies to require a licence for goods subject to export restrictions;
- (b) The Panel finds that Article 11(7) of *2008 Export License Administration Measures*, and Articles 5(5) and 8(4) of the *Working Rules on Export Licenses*, as applicable to export licences granted to applicants to export bauxite, coke, fluorspar, manganese, silicon carbide and zinc, are inconsistent with Article XI:1 of the GATT 1994;
- (c) The Panel does not make findings that Article 21 of the *CCCMC Coordination Measures* is inconsistent with GATT Article XI:1 in respect of the United States' claims concerning China's export licensing requirements because it is outside the Panel's terms of reference;

¹⁵⁵⁹ The specific forms of the raw materials subject to the United States' claims are identified in Exhibit JE-6 and paragraph 2.2 of the Descriptive Part to these Reports.

¹⁵⁶⁰ See discussion in Section VII.E.1 above.

¹⁵⁶¹ See discussion in Section VII.E.1 above.

¹⁵⁶² The specific forms of the raw materials subject to the United States' claims are identified in Exhibit JE-6 and paragraph 2.2 of the Descriptive Part to these Reports.

- (d) The Panel does not make findings that Article 40(3) of China's *Measures for the Administration of Licensing Entities* is inconsistent with GATT Article XI:1 in respect of the United States' claims concerning China's export licensing requirements; and
- (e) The Panel exercises judicial economy in respect of whether China's export licensing regime is inconsistent with Paragraph 1.2 of China's Accession Protocol, read in combination with Paragraphs 162 and 165 of China's Working Party Report.

8.6 In respect of claims concerning a minimum export price requirement:¹⁵⁶³

- (a) The Panel finds that China, through the *2001 CCCMC Charter, Export Price Penalties Regulations, and Measures for Administration of Licensing Entities*, imposed a minimum export price requirement on exporters of bauxite, coke, fluorspar, magnesium, silicon carbide, yellow phosphorus and zinc, that is inconsistent with Article XI:1 of the GATT 1994;
- (b) The Panel finds that China failed to publish promptly the *2001 CCCMC Charter* in such manner that is consistent with Article X:1 of the GATT 1994; and
- (c) The Panel does not make findings on whether the administration of the price verification and chop procedure to yellow phosphorus by the CCCMC is inconsistent with Article X:3(a) of the GATT 1994 because it is outside the Panel's terms of reference.

2. Nullification and impairment

8.7 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that where China has acted inconsistently with Articles X:1, X:3(a), XI:1 of the GATT 1994; Paragraphs 1.2, 5.1 and 11.3 of China's Accession Protocol; and Paragraphs 83 and 84 of China's Working Party Report, it has nullified or impaired benefits accruing to the United States under the WTO Agreement.

3. Recommendations

8.8 Pursuant to Article 19.1 of the DSU, having found that China has acted inconsistently with Articles X:1, X:3(a) and XI:1 of the GATT 1994; Paragraphs 1.2, 5.1 and 11.3 of China's Accession Protocol; and Paragraphs 83 and 84 of China's Working Party Report, the Panel recommends that the Dispute Settlement Body requests China to bring the existing measures at issue into conformity with its obligations under the GATT 1994, China's Accession Protocol and China's Working Party Report. The Panel makes no recommendation on expired measures, namely the 2009 measures at issue and pre-2009 MEP-related measures. In respect of findings concerning export duties and export quotas, the Panel found that the series of measures operating collectively has resulted in the imposition of export duties or export quotas that are inconsistent with China's WTO obligations. The Panel, therefore, recommends that the Dispute Settlement Body requests China to bring its measures into conformity with its WTO obligations such that the "series of measures" does not operate to bring about a WTO-inconsistent result.

¹⁵⁶³ The specific forms of the raw materials subject to the United States' claims are identified in Exhibit JE-7 and paragraph 2.2 of the Descriptive Part to these Reports.

B. COMPLAINT BY THE EUROPEAN UNION (DS395)

1. Conclusions

8.9 In respect of claims concerning export duties:¹⁵⁶⁴

- (a) The Panel finds that the application of export duties to certain forms of bauxite, coke, fluorspar, magnesium, manganese, silicon metal and zinc, by virtue of the series of measures at issue¹⁵⁶⁵, is inconsistent with Paragraph 11.3 of China's Accession Protocol;
- (b) The Panel finds that China may not seek to justify the application of export duties to forms of fluorspar pursuant to Article XX(g) of the GATT 1994. Even assuming *arguendo* that China could seek to justify the application of export duties, the Panel finds that China has not demonstrated that the application of export duties to forms of fluorspar is justified pursuant to Article XX(g) of the GATT 1994;
- (c) The Panel finds that China may not seek to justify the application of export duties to forms of magnesium, manganese and zinc pursuant to Article XX(b) of the GATT 1994. Even assuming *arguendo* that China could seek to justify the application of export duties, the Panel finds that China has not demonstrated that the application of export duties to forms of magnesium, manganese and zinc is justified pursuant to Article XX(b) of the GATT 1994; and
- (d) The Panel concludes that the *Adjustment of Export Tariffs Circular* removed the WTO-inconsistent special duty applicable to yellow phosphorus before the Panel's establishment on 21 December 2009. Therefore, the Panel makes no findings on the *2009 Tariff Implementation Program* that applied a special duty rate to yellow phosphorus prior to 1 July 2009.

8.10 In respect of claims concerning export quotas:¹⁵⁶⁶

- (a) The Panel finds that the application of export quotas to certain forms of bauxite, coke, fluorspar and silicon carbide, by virtue of the series of measures at issue¹⁵⁶⁷, is inconsistent with Article XI:1 of the GATT 1994;
- (b) The Panel finds that the application of an export ban on certain forms of zinc, by virtue of the series measures at issue¹⁵⁶⁸, is inconsistent with Article XI:1 of the GATT 1994;
- (c) The Panel finds that China has not demonstrated that the application of an export quota to refractory-grade bauxite, classifiable under HS No. 2508.3000, is justified pursuant to Articles XI:2(a) or XX(g) of the GATT 1994;
- (d) The Panel finds that China has not demonstrated that the application of export quotas to coke and silicon carbide is justified pursuant to Article XX(b) of the GATT 1994; and

¹⁵⁶⁴ The specific forms of the raw materials subject to the European Union's claims are identified in Exhibit JE-5 and paragraph 2.2 of the Descriptive Part to these Reports.

¹⁵⁶⁵ See discussion in Section VII.B.2 above.

¹⁵⁶⁶ The specific forms of the raw materials subject to the European Union's claims are identified in Exhibit JE-6 and paragraph 2.2 of the Descriptive Part to these Reports.

¹⁵⁶⁷ See discussion in Section VII.C.3 above.

¹⁵⁶⁸ See discussion in Section VII.C.3 above.

- (e) The Panel exercises judicial economy in respect of whether the application of export quotas to bauxite, coke, fluorspar and silicon carbide, or the application of an export prohibition to zinc, are inconsistent with Paragraph 1.2 of China's Accession Protocol and Paragraphs 162 and 165 of China's Working Party Report.

8.11 In respect of claims concerning export quota administration and allocation:¹⁵⁶⁹

- (a) The Panel finds that China's prior export experience or export performance requirement, and minimum registered capital requirement, imposed on coke by virtue of the measures at issue¹⁵⁷⁰, are inconsistent with Paragraphs 1.2 and 5.1 of China's Accession Protocol, read in combination with Paragraphs 83(a), 83(b) and 83(d); and Paragraphs 84(a) and 84(b) of China's Working Party Report;
- (b) The Panel finds that China's prior export experience or export performance requirement, imposed on coke is not inconsistent with Paragraph 5.2 of China's Accession Protocol read in combination with Paragraphs 84(a) and 84(b) of China's Working Party Report;
- (c) The Panel finds that China's prior export experience or export performance requirements, and minimum registered capital requirement, imposed on bauxite, fluorspar and silicon carbide by virtue the measures at issue¹⁵⁷¹, are inconsistent with Paragraphs 1.2 and 5.1 of China's Accession Protocol, read in combination with Paragraphs 83(a), 83(b) and 83(d); and read in combination with Paragraphs 84(a) and 84(b) of China's Working Party Report;
- (d) The Panel finds that China's prior export experience or export performance requirement imposed on bauxite, fluorspar and silicon carbide is not inconsistent with Paragraph 5.2 of China's Accession Protocol read in combination with Paragraphs 84(a) and 84(b) of China's Working Party Report;
- (e) The Panel finds that China's allocation of directly allocated export quotas through the use of the operation capacity criterion, by virtue of the measures at issue¹⁵⁷², is inconsistent with Article X:3(a) of the GATT 1994;
- (f) The Panel finds that China's did not publish promptly the total amount and procedure for the allocation of a zinc export quota and thus acted in a manner inconsistent with Article X:1 of the GATT 1994; and
- (g) The Panel does not make findings that China did not publish promptly the total amount of the coke export quota in such a manner that is inconsistent with Article X:1 of the GATT 1994 because this claim is outside the Panel's terms of reference.

8.12 In respect of claims concerning export licensing requirements:¹⁵⁷³

¹⁵⁶⁹ The specific forms of the raw materials subject to the European Union's claims are identified in Exhibit JE-6 and paragraph 2.2 of the Descriptive Part to these Reports.

¹⁵⁷⁰ See discussion in Section VII.E.1 above.

¹⁵⁷¹ See discussion in Section VII.E.1 above.

¹⁵⁷² See discussion in Section VII.E.2 above.

¹⁵⁷³ The specific forms of the raw materials subject to the European Union's claims are identified in Exhibit JE-6 and paragraph 2.2 of the Descriptive Part to these Reports.

- (a) The Panel finds that China's export licensing regime is not *per se* inconsistent with Article XI:1 of the GATT 1994 solely on the basis that it permits export licensing agencies to require a licence for goods subject to export restrictions;
- (b) The Panel finds that Article 11(7) of *2008 Export License Administration Measures*, and Articles 5(5) and 8(4) of the *Working Rules on Export Licenses*, as applicable to export licences granted to applicants to export bauxite, coke, fluorspar, manganese, silicon carbide and zinc, are inconsistent with Article XI:1 of the GATT 1994;
- (c) The Panel finds that the European Union's claims under Articles X:1 and X:3(a) concerning export licensing are outside the Panel's terms of reference;
- (d) The Panel exercises judicial economy in respect of whether China's export licensing regime is inconsistent with Paragraph 1.2 of China's Accession Protocol, read in combination with Paragraphs 162 and 165 of China's Working Party Report; and
- (e) The Panel exercises judicial economy in respect of whether China's export licensing regime is inconsistent with Paragraphs 1.2 and 5.1 of China's Accession Protocol, read in combination with Paragraphs 83 and 84 of China's Working Party Report.

8.13 In respect of claims concerning a minimum export price requirement.¹⁵⁷⁴

- (a) The Panel finds that China, through the *2001 CCCMC Charter, Export Price Penalties Regulations*, and *Measures for Administration of Licensing Entities*, imposed a minimum export price requirement on exporters of bauxite, coke, fluorspar, magnesium, silicon carbide, yellow phosphorus and zinc, that is inconsistent with Article XI:1 of the GATT 1994;
- (b) The Panel finds that China failed to publish promptly the *2001 CCCMC Charter* in such manner that is consistent with Article X:1 of the GATT 1994; and
- (c) The Panel does not make findings on whether the administration of the price verification and chop procedure to yellow phosphorus by the CCCMC is inconsistent with Article X:3(a) of the GATT 1994 because it is outside the Panel's terms of reference.

2. Nullification and impairment

8.14 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that where China has acted inconsistently with Articles X:1, X:3(a), XI:1 of the GATT 1994; Paragraphs 1.2, 5.1 and 11.3 of China's Accession Protocol; and Paragraphs 83 and 84 of China's Working Party Report, it has nullified or impaired benefits accruing to the European Union under the WTO Agreement.

3. Recommendations

8.15 Pursuant to Article 19.1 of the DSU, having found that China has acted inconsistently with Articles X:1, X:3(a) and XI:1 of the GATT 1994; Paragraphs 1.2, 5.1 and 11.3 of China's Accession Protocol; and Paragraphs 83 and 84 of China's Working Party Report, the Panel recommends that the Dispute Settlement Body requests China to bring the existing measures at issue into conformity with

¹⁵⁷⁴ The specific forms of the raw materials subject to the European Union's claims are identified in Exhibit JE-7 and paragraph 2.2 of the Descriptive Part to these Reports.

its obligations under the GATT 1994, China's Accession Protocol and China's Working Party Report. The Panel makes no recommendation on expired measures, namely the 2009 measures at issue and pre-2009 MEP-related measures. In respect of findings concerning export duties and export quotas, the Panel found that the series of measures operating collectively has resulted in the imposition of export duties or export quotas that are inconsistent with China's WTO obligations. The Panel, therefore, recommends that the Dispute Settlement Body requests China to bring its measures into conformity with its WTO obligations such that the "series of measures" does not operate to bring about a WTO-inconsistent result.

C. COMPLAINT BY MEXICO (DS398)

1. Conclusions

8.16 In respect of claims concerning export duties:¹⁵⁷⁵

- (a) The Panel finds that the application of export duties to certain forms of bauxite, coke, fluorspar, magnesium, manganese, silicon metal and zinc, by virtue of the series of measures at issue¹⁵⁷⁶, is inconsistent with Paragraph 11.3 of China's Accession Protocol;
- (b) The Panel finds that China may not seek to justify the application of export duties to forms of fluorspar pursuant to Article XX(g) of the GATT 1994. Even assuming *arguendo* that China could seek to justify the application of export duties, the Panel finds that China has not demonstrated that the application of export duties to forms of fluorspar is justified pursuant to Article XX(g) of the GATT 1994;
- (c) The Panel finds that China may not seek to justify the application of export duties to forms of magnesium, manganese and zinc pursuant to Article XX(b) of the GATT 1994. Even assuming *arguendo* that China could seek to justify the application of export duties, the Panel finds that China has not demonstrated that the application of export duties to forms of magnesium, manganese and zinc is justified pursuant to Article XX(b) of the GATT 1994; and
- (d) The Panel concludes that the *Adjustment of Export Tariffs Circular* removed the WTO-inconsistent special duty applicable to yellow phosphorus before the Panel's establishment on 21 December 2009. Therefore, the Panel makes no findings on the *2009 Tariff Implementation Program* that applied a special duty rate to yellow phosphorus prior to 1 July 2009.

8.17 In respect of claims concerning export quotas:¹⁵⁷⁷

- (a) The Panel finds that the application of export quotas to certain forms of bauxite, coke, fluorspar and silicon carbide, by virtue of the series of measures at issue¹⁵⁷⁸, is inconsistent with Article XI:1 of the GATT 1994;
- (b) The Panel finds that the application of an export ban on certain forms of zinc, by virtue of the series measures at issue¹⁵⁷⁹, is inconsistent with Article XI:1 of the GATT 1994;
- (c) The Panel finds that China has not demonstrated that the application of an export quota to refractory-grade bauxite, classifiable under HS No. 2508.3000, is justified pursuant to Articles XI:2(a) or XX(g) of the GATT 1994;
- (d) The Panel finds that China has not demonstrated that the application of export quotas to coke and silicon carbide is justified pursuant to Article XX(b) of the GATT 1994; and

¹⁵⁷⁵ The specific forms of the raw materials subject to Mexico's claims are identified in Exhibit JE-5 and paragraph 2.2 of the Descriptive Part to these Reports.

¹⁵⁷⁶ See discussion in Section VII.B.2 above.

¹⁵⁷⁷ The specific forms of the raw materials subject to Mexico's claims are identified in Exhibit JE-6 and paragraph 2.2 of the Descriptive Part to these Reports.

¹⁵⁷⁸ See discussion in Section VII.C.3 above.

¹⁵⁷⁹ See discussion in Section VII.C.3 above.

- (e) The Panel exercises judicial economy in respect of whether the application of export quotas to bauxite, coke, fluorspar and silicon carbide, or the application of an export prohibition to zinc, are inconsistent with Paragraph 1.2 of China's Accession Protocol and Paragraphs 162 and 165 of China's Working Party Report.

8.18 In respect of claims concerning export quota administration and allocation:¹⁵⁸⁰

- (a) The Panel finds that China's prior export experience or export performance requirement, and minimum registered capital requirement, imposed on coke by virtue of the measures at issue¹⁵⁸¹, are inconsistent with Paragraphs 1.2 and 5.1 of China's Accession Protocol, read in combination with Paragraphs 83(a), 83(b) and 83(d); and Paragraphs 84(a) and 84(b) of China's Working Party Report;
- (b) The Panel finds that China's prior export experience or export performance requirements, and minimum registered capital requirement, imposed on bauxite, fluorspar and silicon carbide by virtue the measures at issue¹⁵⁸², are inconsistent with Paragraphs 1.2 and 5.1 of China's Accession Protocol, read in combination with Paragraphs 83(a), 83(b) and 83(d); and read in combination with Paragraphs 84(a) and 84(b) of China's Working Party Report;
- (c) The Panel finds that China's administration of its coke export quota through the involvement of the CCCMC is not inconsistent with Article X:3(a) of the GATT 1994;
- (d) The Panel finds that China's administration of its export quota bidding system for bauxite, fluorspar and silicon carbide through the involvement of the CCCMC is not inconsistent with Article X:3(a) of the GATT 1994; and
- (e) The Panel finds that the requirement for an exporter applicant to pay a bid-winning price for the right to export bauxite, fluorspar and silicon carbide is not inconsistent with Article VIII:1(a) of the GATT 1994 or Paragraph 11.3 of China's Accession Protocol.

8.19 In respect of claims concerning export licensing requirements:¹⁵⁸³

- (a) The Panel finds that China's export licensing regime is not *per se* inconsistent with Article XI:1 of the GATT 1994 solely on the basis that it permits export licensing agencies to require a licence for goods subject to export restrictions;
- (b) The Panel finds that Article 11(7) of *2008 Export License Administration Measures*, and Articles 5(5) and 8(4) of the *Working Rules on Export Licenses*, as applicable to export licences granted to applicants to export bauxite, coke, fluorspar, manganese, silicon carbide and zinc, are inconsistent with Article XI:1 of the GATT 1994;
- (c) The Panel does not make findings that Article 21 of the *CCCMC Coordination Measures* or Article 40(3) of China's *Measures for the Administration of Licensing Entities* is inconsistent with GATT Article XI:1 in respect of Mexico's claims concerning China's export licensing requirements;

¹⁵⁸⁰ The specific forms of the raw materials subject to Mexico's claims are identified in Exhibit JE-6 and paragraph 2.2 of the Descriptive Part to these Reports.

¹⁵⁸¹ See discussion in Section VII.E.1 above.

¹⁵⁸² See discussion in Section VII.E.1 above.

¹⁵⁸³ The specific forms of the raw materials subject to Mexico's claims are identified in Exhibit JE-6 and paragraph 2.2 of the Descriptive Part to these Reports.

- (d) The Panel exercises judicial economy in respect of whether China's export licensing regime is inconsistent with Paragraph 1.2 of China's Accession Protocol, read in combination with Paragraphs 162 and 165 of China's Working Party Report.

8.20 In respect of claims concerning a minimum export price requirement:¹⁵⁸⁴

- (a) The Panel finds that China, through the *2001 CCCMC Charter, Export Price Penalties Regulations, and Measures for Administration of Licensing Entities*, imposed a minimum export price requirement on exporters of bauxite, coke, fluorspar, magnesium, silicon carbide, yellow phosphorus and zinc, that is inconsistent with Article XI:1 of the GATT 1994;
- (b) The Panel finds that China failed to publish promptly the *2001 CCCMC Charter* in such manner that is consistent with Article X:1 of the GATT 1994; and
- (c) The Panel does not make findings on whether the administration of the price verification and chop procedure to yellow phosphorus by the CCCMC is inconsistent with Article X:3(a) of the GATT 1994 because it is outside the Panel's terms of reference.

2. Nullification and impairment

8.21 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that where China has acted inconsistently with Articles X:1, X:3(a), XI:1 of the GATT 1994; Paragraphs 1.2, 5.1 and 11.3 of China's Accession Protocol; and Paragraphs 83 and 84 of China's Working Party Report, it has nullified or impaired benefits accruing to Mexico under the WTO Agreement.

3. Recommendations

8.22 Pursuant to Article 19.1 of the DSU, having found that China has acted inconsistently with Articles X:1, X:3(a) and XI:1 of the GATT 1994; Paragraphs 1.2, 5.1 and 11.3 of China's Accession Protocol; and Paragraphs 83 and 84 of China's Working Party Report, the Panel recommends that the Dispute Settlement Body requests China to bring the existing measures at issue into conformity with its obligations under the GATT 1994, China's Accession Protocol and China's Working Party Report. The Panel makes no recommendation on expired measures, namely the 2009 measures at issue and pre-2009 MEP-related measures. In respect of findings concerning export duties and export quotas, the Panel found that the series of measures operating collectively has resulted in the imposition of export duties or export quotas that are inconsistent with China's WTO obligations. The Panel, therefore, recommends that the Dispute Settlement Body requests China to bring its measures into conformity with its WTO obligations such that the "series of measures" does not operate to bring about a WTO-inconsistent result.

¹⁵⁸⁴ The specific forms of the raw materials subject to the Mexico's claims are identified in Exhibit JE-7 and paragraph 2.2 of the Descriptive Part to these Reports.