

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

***Reports of the Panel***



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<i>Brazil – Retreaded Tyres</i>	Panel Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS332/AB/R, DSR 2007:V, 1649
<i>Canada – Continued Suspension</i>	Panel Report, <i>Canada – Continued Suspension of Obligations in the EC – Hormones Dispute</i> , WT/DS321/R, adopted 14 November 2008, as modified by Appellate Body Report WT/DS321/AB/R
<i>Canada – Dairy</i>	Appellate Body Report, <i>Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products</i> , WT/DS103/AB/R, WT/DS113/AB/R and Corr.1, adopted 27 October 1999, DSR 1999:V, 2057
<i>Canada – Dairy</i>	Panel Report, <i>Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products</i> , WT/DS103/R, WT/DS113/R, adopted 27 October 1999, as modified by Appellate Body Report WT/DS103/AB/R, WT/DS113/AB/R, DSR 1999:VI, 2097
<i>Chile – Price Band System</i>	Panel Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/R, adopted 23 October 2002, as modified by Appellate Body Report WT/DS207/AB/R, DSR 2002:VIII, 3127
<i>Chile – Swordfish</i>	<i>Chile – Measures Affecting the Transit and Importation of Swordfish (WT/DS193)</i>

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<i>China – Auto Parts</i>	Appellate Body Reports, <i>China – Measures Affecting Imports of Automobile Parts</i> , WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R, adopted 12 January 2009
<i>China – Auto Parts</i>	Panel Reports, <i>China – Measures Affecting Imports of Automobile Parts</i> , WT/DS339/R, WT/DS340/R, WT/DS342/R and Add.1 and Add.2, adopted 12 January 2009, upheld (WT/DS339/R) and as modified (WT/DS340/R, WT/DS342/R) by Appellate Body Reports WT/DS339/AB/R, WT/DS340/AB/R, WT/DS342/AB/R
<i>China – Publications and Audiovisual Products</i>	Appellate Body Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/AB/R, adopted 19 January 2010
<i>China – Publications and Audiovisual Products</i>	Panel Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R
<i>Colombia – Ports of Entry</i>	Panel Report, <i>Colombia – Indicative Prices and Restrictions on Ports of Entry</i> , WT/DS366/R and Corr.1, adopted 20 May 2009
<i>Dominican Republic – Import and Sale of Cigarettes</i>	Appellate Body Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV, 7367
<i>Dominican Republic – Import and Sale of Cigarettes</i>	Appellate Body Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV, 7367
<i>EC – Approval and Marketing of Biotech Products</i>	Panel Report, <i>European Communities – Measures Affecting the Approval and Marketing of Biotech Products</i> , WT/DS291/R, WT/DS292/R, WT/DS293/R, Add.1 to Add.9, and Corr.1, adopted 21 November 2006, DSR 2006:III-VIII, 847
<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:XII, 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 WT/DS244/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 WT/DS268/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</i> (WT/DS404)
<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</i> (WT/DS381)
<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]

Short Title	Full Case Title and Citation
<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

## GATT DISPUTE SETTLEMENT AND WORKING PARTY REPORTS

Short Title	Full Case Title and Citation
<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 RULING<sup>1</sup>**

<b>Short Titles</b>	<b>Full Titles</b>
"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)

<sup>1</sup> 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, wajingmaopeiguanhanzi (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 Charging and Use of 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 Communities<sup>2</sup> and on 21 August 2009, Mexico, each requested consultations with the People's Republic of China ("China")<sup>3</sup>, 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.

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<sup>2</sup> 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.

<sup>3</sup> 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.<sup>4</sup>

1.11 On 30 March 2010, China filed a request for a preliminary ruling.<sup>5</sup> The complainants submitted a joint response to China's request.<sup>6</sup> 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.<sup>7</sup> The parties responded to the Panel's questions on 3 May 2010<sup>8</sup> and submitted comments on each other's responses on 5 May 2010.<sup>9</sup>

1.12 The Panel issued its preliminary ruling to the parties on 7 May 2010.<sup>10</sup> 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.

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<sup>4</sup> WT/DSB/M/277, para. 74.

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

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

<sup>7</sup> 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.

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

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

<sup>10</sup> 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.<sup>11</sup> 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").<sup>12</sup> 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 Number<sup>13</sup>, and 2009 Chinese Commodity Codes.<sup>14</sup> 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

<sup>11</sup> 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.

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

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

<sup>14</sup> 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 Requests<sup>15</sup> 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.<sup>16</sup>

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

(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:

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<sup>15</sup> WT/DS394/7, WT/DS395/7, WT/DS398/6.

<sup>16</sup> 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.

<sup>17</sup> 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 CHINA<sup>18</sup>

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

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<sup>18</sup> 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
<b>Export Duties<sup>19</sup></b>	
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.	<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>
The application of special export duties to yellow phosphorus, is inconsistent with Paragraph 11.3 of China's Accession Protocol.	
<b>Export Quotas<sup>20</sup></b>	
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.	<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>

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

<sup>20</sup> 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
<b>Export Quotas: Application Conditions<sup>21</sup></b>	
<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>
<b>Export Quotas: Administration<sup>22</sup></b>	
<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>

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

<sup>22</sup> 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
	<i>1994 CCCMC Charter</i> <i>2001 CCCMC Charter</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>
<b>Export Quota Bid Winning Fee<sup>23</sup></b>	
<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>	<i>Foreign Trade Law (Articles 2, 14-19, 34, 61, 63, 64)</i> <i>Regulation on Import and Export Administration (Articles 4, 35-41, 43, 44, 64-66)</i> <i>2008 Export Licence Administration Measures</i> <i>2008 Export Licensing Working Rules</i> <i>Export Quota Bidding Measures</i> <i>Export Quota Bidding Implementation Rules</i> <i>2009 Export Quota Amounts</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>1994 CCCMC Charter</i> <i>2001 CCCMC Charter</i>

<sup>23</sup> 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
<b>Export Licensing</b>	
<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>
<b>Minimum Export Pricing<sup>24</sup>: Imposition of an MEP Requirement</b>	
<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>
<b>Minimum Export Pricing: Administration of the MEP Requirement</b>	
<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>
<b>Minimum Export Pricing: Publication of the MEP requirement</b>	
<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>

<sup>24</sup> 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.e., 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.e., Legal Instruments
<b>Export Duties<sup>25</sup></b>	
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.  The application of special export duties to yellow phosphorus is inconsistent with Paragraph 11.3 of China's Accession Protocol.	<i>Customs Law</i> (Articles 2, 3, 53, 55, 60) <i>Export Quota Administration Measures</i> (Articles 4, 9, 11, 36, 37) <i>2009 Tariff Implementation Program</i>
<b>Export Quotas<sup>26</sup></b>	
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.  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.	<i>Foreign Trade Law</i> (Articles 19, 61) <i>Regulation on Import and Export Administration</i> (Articles 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 64, 65, 66, 67, 70) <i>Export Quota Administration Measures</i> (Articles 4, 9, 11, 17, 18, 19, 20, 21, 22, 23, 25, 26, 31) <i>Export Quota Bidding Measures</i> (Articles 3, 8, 9, 10, 11, 13, 14, 16) <i>Export Quota Bidding Implementation Rules</i> (Articles 2, 3, 4, 5, 6) <i>2009 Export Licensing Catalogue</i> <i>2009 Coke Export Quota Application Procedure</i> <i>2010 First Batch Coke Export Quota for FIEs</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 First Round Export Quota Bidding Announcement</i> <i>2009 Second Round Export Quota Bidding Announcement</i> <i>2009 Export Quota Amounts</i> <i>2009 First Round Bauxite Bidding Procedures</i> <i>2009 Announcement of Second Bidding Round for Talc and Silicon Carbide</i> <i>2009 First Round Silicon Carbide Bidding Procedures</i> <i>2009 Second Round Silicon Carbide Bidding</i>

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

<sup>26</sup> 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
	<i>Procedures</i> <i>2009 First Round Fluorspar Bidding Procedures</i>
<b>Export Quotas: Allocation<sup>27</sup></b>	
<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>	<i>2009 Coke Export Quota Application Procedure</i>
<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>	<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>

<sup>27</sup> 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>	
<b>Export Quotas: Administration of export quota direct allocation system</b>	
<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>
<b>Export Quotas: Publication of Export Quotas</b>	
<p>Failure to publish the export quota for zinc ores and concentrates.</p>	<p><i>Export Quota Administration Measures (Article 9, 11)</i></p>
<b>Export Licensing: Non-Automatic Export Licences<sup>28</sup></b>	
<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>

<sup>28</sup> 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
<b>Export Licensing: Publication of Export Licensing Requirements</b>	
<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</i> (Article 5)  <i>Working Rules on Issuing Export Licenses</i> (Articles 5 and 8)</p>
<b>Export Licensing: Administration of Export Licensing Requirements</b>	
<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>
<b>Minimum Export Pricing:<sup>29</sup> Imposition of an MEP Requirement</b>	
<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)  1994 CCCMC Charter  2001 CCCMC Charter  <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>  CCCMC PVC Rules</p>

<sup>29</sup> 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>
<b>Minimum Export Pricing: Administration of the MEP Requirement</b>	
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>
<b>Minimum Export Pricing: Publication of the MEP Requirement</b>	
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:<sup>30</sup>

- (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.

<sup>30</sup> 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 Union 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.<sup>31</sup> These

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<sup>31</sup> 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*<sup>32</sup>;

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<sup>32</sup> Exhibits CHN-313, JE-101.

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

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.<sup>38</sup> Although China also noted that panels can make findings regarding an expired measure<sup>39</sup>, 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."<sup>40</sup> 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*.<sup>41</sup>

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<sup>33</sup> Exhibits CHN-315, JE-102.

<sup>34</sup> Exhibit JE-86.

<sup>35</sup> Exhibits CHN-16, JE-87.

<sup>36</sup> Exhibits CHN-350, JE-113.

<sup>37</sup> Exhibits CHN-358, JE-75.

<sup>38</sup> 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."

<sup>39</sup> See China's first written submission, para. 52.

<sup>40</sup> 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").

<sup>41</sup> 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.<sup>42</sup> 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.<sup>43</sup> 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".<sup>44</sup>

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"

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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).

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

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

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

of the identified measure.<sup>45</sup> 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]".<sup>46</sup> 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."<sup>47</sup> 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.<sup>48</sup>

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.<sup>49</sup> 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.<sup>50</sup> 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."<sup>51</sup> That panel also reasoned that to include such measures within the panel's terms of reference would prevent changing measures from evading review.<sup>52</sup>

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 authority<sup>53</sup> 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

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<sup>45</sup> 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."

<sup>46</sup> Appellate Body Report, *Chile – Price Band System*, para. 144.

<sup>47</sup> Appellate Body Report, *Chile – Price Band System*, para. 144.

<sup>48</sup> 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.

<sup>49</sup> WT/DS375/R, WT/DS376/R, WT/DS377/R

<sup>50</sup> Panel Report, *EC – IT Products*, paras. 7.141, 7.142, and 7.146.

<sup>51</sup> Appellate Body Report, *Chile-Price Band System*, paras. 136-139.

<sup>52</sup> Panel Report, *EC – IT Products*, paras. 7.141, 7.142, and 7.146.

<sup>53</sup> 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.<sup>54</sup>

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.<sup>55</sup> 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.<sup>56</sup> 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.

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<sup>54</sup> 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).

<sup>55</sup> 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.

<sup>56</sup> 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".<sup>57</sup> 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 measures<sup>58</sup>, 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.<sup>59</sup> 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 establishment<sup>60</sup>, and examining them creates a "moving target" that would permit China to shield its measures from review.<sup>61</sup> The European Union expressly stated that "it agrees with the views expressed by the United States and Mexico in their opening statement".<sup>62</sup> 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.<sup>63</sup> 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.<sup>64</sup> 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.<sup>65</sup> The European Union answered similarly<sup>66</sup>, with the exception of only one measure in force in 2010.<sup>67</sup>

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.

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

<sup>58</sup> 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.

<sup>59</sup> 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.

<sup>60</sup> United States' second written submission, para. 338; Mexico's second written submission, para. 343.

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

<sup>62</sup> 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.

<sup>63</sup> European Union's second written submissions paras 18-21.

<sup>64</sup> Panel question No. 2 following the first substantive meeting; Panel question No. 1 following the second substantive meeting.

<sup>65</sup> 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.

<sup>66</sup> 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.

<sup>67</sup> 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.<sup>68</sup>

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.<sup>69</sup> 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.<sup>70</sup>

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"<sup>71</sup> 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.<sup>72</sup> 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.<sup>73</sup> In *EC – Trademarks and Geographic Indications*, the panel noted that it could not make recommendations on measures that no

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

<sup>69</sup> 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."

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

<sup>71</sup> 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.

<sup>72</sup> Appellate Body Report, *US – Certain EC Products*, para. 81.

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

longer existed.<sup>74</sup> 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.<sup>75</sup>

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.<sup>76</sup>

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"<sup>77</sup> 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.<sup>78</sup>

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.<sup>79</sup> 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.

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<sup>74</sup> Panel Report, *EC – Trademarks and Geographic Indications*, para. 7.14.

<sup>75</sup> 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.

<sup>76</sup> 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.

<sup>77</sup> 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.

<sup>78</sup> 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).

<sup>79</sup> 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.<sup>80</sup>
- (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.

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<sup>80</sup> 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.<sup>81</sup> 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.<sup>82</sup> 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."<sup>83</sup>

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).<sup>84</sup> 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"<sup>85</sup> leading to an administrative decision concerning the allocation of direct quotas, the claim fails for lack of evidence.<sup>86</sup>

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.<sup>87</sup>

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.<sup>88</sup>

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

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<sup>81</sup> European Union's first written submission, para. 21.

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

<sup>83</sup> European Union's first written submission, para. 351.

<sup>84</sup> China's first written submission, para. 826.

<sup>85</sup> See the discussion on administrative processes in para. 7.689.

<sup>86</sup> China's first written submission, para. 828.

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

<sup>88</sup> 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."<sup>89</sup>

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.

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<sup>89</sup> 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.<sup>90</sup> 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".<sup>91</sup>

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.

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<sup>90</sup> Preliminary Ruling of 1 October 2010, para. 74 (annex F).

<sup>91</sup> 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 zinc<sup>92</sup> 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*<sup>93</sup>, *Regulations on Import and Export Duties*<sup>94</sup>, and *2009 Tariff Implementation Program*.<sup>95</sup>

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.<sup>96</sup> China acknowledges the existence of certain export duties in place in 2009 but argues that the Panel should consider only the 2010 measures.<sup>97</sup> 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.<sup>98</sup> China requests the Panel to consider only 2010 measures, even those for which it offers no justification.<sup>99</sup>

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

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<sup>92</sup> 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.

<sup>93</sup> *Customs Law*, (Exhibits CHN-14, JE-68).

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

<sup>95</sup> *2009 Tariff Implementation Program*, (Exhibit JE-21).

<sup>96</sup> 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."

<sup>97</sup> 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."

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

<sup>99</sup> 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*<sup>100</sup>, and (ii) *Regulations on Import and Export Duties*.<sup>101</sup> 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.<sup>102</sup> The Tariff Commission is responsible for making adjustments to tariff items, and tariff rates.<sup>103</sup> 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 exporters<sup>104</sup> within a specific time-period; in case of late payment, several penalties and sanctions would apply.<sup>105</sup>

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*.<sup>106</sup> From 1 January 2010, China imposed export duties pursuant to the *2010 Tariff Implementation Program*.<sup>107</sup>

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

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<sup>100</sup> *Customs Law* (Exhibit CHN-14, JE-68).

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

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

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

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

<sup>105</sup> 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).

<sup>106</sup> *2009 Tariff Implementation Program* (Exhibit JE-21).

<sup>107</sup> *2010 Tariff Implementation Plan* (CHN-5).

<sup>108</sup> *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.<sup>109</sup>

7.65 Paragraph 11.3 of China's Accession Protocol<sup>110</sup> 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 Protocol<sup>111</sup>, 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.<sup>112</sup>

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.

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

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

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

<sup>112</sup> 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*.<sup>113</sup>

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.<sup>114</sup> China requests the Panel to make no findings on the *2009 Tariff Implementation Program*<sup>115</sup>, in respect of yellow phosphorus.<sup>116</sup>

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.<sup>117</sup> 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.<sup>118</sup> Accordingly, the Panel concludes that the provision of the *2009 Tariff Implementation Program*<sup>119</sup> 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.<sup>120</sup>

(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)<sup>121</sup> and on "aluminium ores and concentrates" (HS 2606.0000)<sup>122</sup>, and an export duty at the level of 10% on "aluminium ash residues" (HS 2620.4000).<sup>123</sup> 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.

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<sup>113</sup> *2009 Tariff Implementation Program* (Exhibit JE-21).

<sup>114</sup> See China's first written submission, para. 56.

<sup>115</sup> *2009 Tariff Implementation Program* (Exhibit JE-21).

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

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

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

<sup>119</sup> *2009 Tariff Implementation Program* (Exhibit JE-21).

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

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

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

<sup>123</sup> *2009 Tariff Implementation Program* (Exhibit JE-21).

7.73 China asserts that the *2010 Tariff Implementation Program*<sup>124</sup> removed the duties as of 1 January 2010.<sup>125</sup> 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*<sup>126</sup>, *Regulations on Import and Export Duties*<sup>127</sup>, and *2009 Tariff Implementation Program*<sup>128</sup> 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".<sup>129</sup>

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.<sup>130</sup> 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.<sup>131</sup>

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*<sup>132</sup>, *Regulations on Import and Export Duties*<sup>133</sup>, and *2009 Tariff Implementation Program*<sup>134</sup> when operating in concert, result in the

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<sup>124</sup> *2010 Tariff Implementation Plan* (Exhibit CHN-5).

<sup>125</sup> China's first written submission, para. 84.

<sup>126</sup> *Customs Law* (Exhibit CHN-14, JE-68).

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

<sup>128</sup> *2009 Tariff Implementation Program*, (Exhibit JE-21).

<sup>129</sup> Appellate Body Report, *EC – Hormones*, para. 104.

<sup>130</sup> *2009 Tariff Implementation Program*, (Exhibit JE-21).

<sup>131</sup> China's first written submission, paras. 197, 199.

<sup>132</sup> *Customs Law* (Exhibit CHN-14, JE-68).

<sup>133</sup> *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.<sup>135</sup> 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*<sup>136</sup>, *Regulations on Import and Export Duties*<sup>137</sup>, and *2009 Tariff Implementation Program*<sup>138</sup> 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.<sup>139</sup> 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.

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<sup>134</sup> 2009 Tariff Implementation Program, (Exhibit JE-21).

<sup>135</sup> 2009 Tariff Implementation Program, (Exhibit JE-21).

<sup>136</sup> Customs Law (Exhibit CHN-14, JE-68).

<sup>137</sup> Regulations on Import and Export Duties (Exhibits CHN-13, JE-67).

<sup>138</sup> 2009 Tariff Implementation Program, (Exhibit JE-21).

<sup>139</sup> 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*<sup>140</sup>, *Regulations on Import and Export Duties*<sup>141</sup>, and *2009 Tariff Implementation Program*<sup>142</sup> 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.<sup>143</sup> 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.<sup>144</sup>

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*<sup>145</sup>, *Regulations on Import and Export Duties*<sup>146</sup>, and *2009 Tariff Implementation Program*<sup>147</sup> 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).

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<sup>140</sup> *Customs Law* (Exhibit CHN-14, JE-68).

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

<sup>142</sup> *2009 Tariff Implementation Program*, (Exhibit JE-21).

<sup>143</sup> *2009 Tariff Implementation Program*, (Exhibit JE-21).

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

<sup>145</sup> *Customs Law* (Exhibit CHN-14, JE-68).

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

<sup>147</sup> *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".<sup>148</sup>

(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.<sup>149</sup> 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.<sup>150</sup>

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*<sup>151</sup>, *Regulations on Import and Export Duties*<sup>152</sup>, and *2009 Tariff Implementation Program*<sup>153</sup> 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".<sup>154</sup>

(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)<sup>155</sup>, "hard zinc spelter" (HS 2620.1100)<sup>156</sup>, and "other zinc ash and residues" (HS 2620.1900).<sup>157</sup> 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.

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<sup>148</sup> Appellate Body Report, *EC – Hormones*, para. 104.

<sup>149</sup> *2009 Tariff Implementation Program*, (Exhibit JE-21).

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

<sup>151</sup> *Customs Law* (Exhibit CHN-14, JE-68).

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

<sup>153</sup> *2009 Tariff Implementation Program*, (Exhibit JE-21).

<sup>154</sup> Appellate Body Report, *EC – Hormones*, para. 104.

<sup>155</sup> *2009 Tariff Implementation Program*, (Exhibit JE-21).

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

<sup>157</sup> *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*<sup>158</sup>, *Regulations on Import and Export Duties*<sup>159</sup>, and *2009 Tariff Implementation Program*<sup>160</sup> 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 claims<sup>161</sup> 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."<sup>162</sup> China acknowledges that it failed to consult pursuant to the Note to Annex 6.<sup>163</sup>

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 zinc<sup>164</sup>), 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*

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<sup>158</sup> *Customs Law* (Exhibit CHN-14, JE-68).

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

<sup>160</sup> *2009 Tariff Implementation Program*, (Exhibit JE-21).

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

<sup>162</sup> 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.

<sup>163</sup> China's first written submission, para. 92.

<sup>164</sup> 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.<sup>165</sup> 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 Undertaking<sup>166</sup>, provide China with

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<sup>165</sup> See para. 7.71.

<sup>166</sup> China's second written submission, para. 155.

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

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.<sup>168</sup> 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.<sup>169</sup> 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.

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<sup>167</sup> China's second written submission, para. 166.

<sup>168</sup> 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.

<sup>169</sup> 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*.<sup>170</sup>

(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 occasions<sup>171</sup>, once dealing with the availability of Article XX as a defence to justify a violation of China's Accession Protocol.<sup>172</sup> 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.<sup>173</sup>

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.<sup>174</sup> 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.<sup>175</sup>

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

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

<sup>171</sup> Appellate Body Reports, *China – Publications and Audiovisual Products*, and *China – Auto Parts*.

<sup>172</sup> Appellate Body Report on *China – Publications and Audiovisual Products*; Panel Report on *China – Publications and Audiovisual Products*.

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

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

<sup>175</sup> *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.<sup>176</sup> 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:

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<sup>176</sup> 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."<sup>177</sup>

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.<sup>178</sup> 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.<sup>179</sup> 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..."

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<sup>177</sup> Exhibit JE-2).

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

<sup>179</sup> 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.<sup>180</sup>

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".<sup>181</sup> 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".<sup>182</sup> 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."<sup>183</sup> 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.<sup>184</sup>

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

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<sup>180</sup> China's second written submission, para. 166.

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

<sup>182</sup> Appellate Body Report, *China – Publications and Audiovisual Products*, para. 222.

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

<sup>184</sup> 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.<sup>185</sup> 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 Protocol<sup>186</sup> 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.<sup>187</sup> 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.

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

<sup>186</sup> 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.

<sup>187</sup> 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.<sup>188</sup> 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*".<sup>189</sup> 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.<sup>190</sup>

7.156 The Panel agrees with China that WTO Members have an inherent and sovereign right to regulate trade.<sup>191</sup> 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

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<sup>188</sup> 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.

<sup>189</sup> China's second written submission, para. 162.

<sup>190</sup> China's second written submission, para. 164.

<sup>191</sup> 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 imbalanced<sup>192</sup>, 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.<sup>193</sup> 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.<sup>194</sup>

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

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<sup>192</sup> 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.

<sup>193</sup> 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.

<sup>194</sup> *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.<sup>195</sup> The Panel notes the European Union's identification of the *2010 First Batch Coke Export Quota for FIEs*<sup>196</sup>. 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.<sup>197</sup>

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.<sup>198</sup>

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<sup>195</sup> 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.

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

<sup>197</sup> See section VII.A above.

<sup>198</sup> China's second written submission, para. 27.

7.168 China submits that the European Union solely identifies China's *Foreign Trade Law*<sup>199</sup> and *Regulation on Import and Export Administration*<sup>200</sup>, 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*<sup>201</sup> 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.<sup>202</sup>

7.169 The European Union argues that the challenged measures are "the export quotas on the relevant Raw Materials".<sup>203</sup> 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.<sup>204</sup> 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*,<sup>205</sup> China's *Regulation on Import and Export Administration*<sup>206</sup>, *Export Quota Administration Measures*<sup>207</sup>, *Export Quota Bidding Measures*<sup>208</sup>, 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.<sup>209</sup> 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.<sup>210</sup>

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.

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<sup>199</sup> Exhibits CHN-151, JE-72.

<sup>200</sup> Exhibits CHN-152, JE-73.

<sup>201</sup> Exhibits CHN-6, JE-22.

<sup>202</sup> China's first written submission, paras. 346-348.

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

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

<sup>205</sup> Exhibits CHN-151, JE-72.

<sup>206</sup> Exhibits CHN-152, JE-73.

<sup>207</sup> Exhibits CHN-312, JE-76.

<sup>208</sup> Exhibits CHN-304, JE-77.

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

<sup>210</sup> 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 quotas<sup>211</sup> and subjects those goods to an export quota administration.<sup>212</sup> 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.<sup>213</sup>

7.173 Under China's *Foreign Trade Law*, MOFCOM is responsible for the centralized administration of all export quotas for China.<sup>214</sup> MOFCOM, in collaboration with Customs, is responsible for "formulating, adjusting, and publishing" the catalogue listing all goods subject to export quotas.<sup>215</sup> 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.<sup>216</sup>

7.174 Applications to receive an allocation of an export quota must be submitted between 1 and 15 November.<sup>217</sup> China allocates quotas either directly or through a quota bidding system.<sup>218</sup> 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.<sup>219</sup> 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.<sup>220</sup> The exporter then seeks export clearance from Customs by presenting the export quota licence to Customs for declaration and examination.<sup>221</sup>

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.<sup>222</sup> Under China's *Regulation on Import and Export Administration*<sup>223</sup>, 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 issued<sup>224</sup>; or for exporting without permission, exceeding the quantitative limitations, or buying or selling quota certificates or other

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<sup>211</sup> *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).

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

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

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

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

<sup>216</sup> *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).

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

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

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

<sup>220</sup> *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).

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

<sup>222</sup> *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).

<sup>223</sup> Exhibits CHN-152, JE-73.

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



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

7.176 On 10 December 2008, MOFCOM and Customs published the *2009 Export Licensing Catalogue*<sup>228</sup> 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 directly<sup>229</sup>, while export quotas on bauxite, fluorspar, and silicon carbide are to be allocated through a bidding system.<sup>230</sup>

(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.<sup>231</sup> 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.<sup>232</sup> China's *Export Quota Administration Measures* do not apply to foreign-invested enterprises interested in applying for an allocation of the zinc quota.<sup>233</sup>

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.<sup>234</sup> Enterprises are required to submit their applications for export quotas to MOFCOM directly, or to the relevant local authorities, for review.<sup>235</sup> MOFCOM then distributes the quotas to enterprises directly or distributes quotas to local administrative authorities, which further distribute the quotas to the enterprises.<sup>236</sup> 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.<sup>237</sup>

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;

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

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

<sup>227</sup> *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).

<sup>228</sup> Exhibits CHN-6, JE-22.

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

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

<sup>231</sup> *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.

<sup>232</sup> *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.

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

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

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

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

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

or (iii) "obvious imbalances in the quota-use-pace" between enterprises or areas.<sup>238</sup> 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.<sup>239</sup>

(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.<sup>240</sup> MOFCOM and local administrative authorities may reallocate the unused and returned export quotas to other enterprises within their respective areas.<sup>241</sup> 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.<sup>242</sup> 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.<sup>243</sup> 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.<sup>244</sup>

Application requirements for Chinese and foreign-invested enterprises

7.182 The *2009 Coke Export Quota Application Procedure*<sup>245</sup> 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.<sup>246</sup> 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.<sup>247</sup>

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

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

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

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

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

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

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

<sup>245</sup> Exhibits CHN-308, JE-85.

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

<sup>247</sup> *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.<sup>248</sup>

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.<sup>249</sup> 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.<sup>250</sup> 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.<sup>251</sup>

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.<sup>252</sup> 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.<sup>253</sup> 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.<sup>254</sup> 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.<sup>255</sup> MOFCOM then decides which companies are qualified for coke export quotas and publishes the list of all companies.<sup>256</sup>

#### 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.<sup>257</sup> On 26 December 2008, China allocated an initial

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

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

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

<sup>251</sup> 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).

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

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

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

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

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

<sup>257</sup> *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 enterprises<sup>258</sup>, and on 29 June 2009, China allocated an additional 6,130,000 metric tonnes.<sup>259</sup> On 9 January 2009, China allocated an initial 591,000 metric tonnes to foreign-invested enterprises<sup>260</sup>, and on 8 September 2009, China allocated an additional 591,000 metric tonnes.<sup>261</sup> 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"<sup>262</sup> 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 ...".<sup>263</sup> The rules and procedures governing the quota bidding process are set out in the *Export Quota Bidding Measures*<sup>264</sup>, in conjunction with the *Export Quota Bidding Implementation Rules*.<sup>265</sup>

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."<sup>266</sup> 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."<sup>267</sup>

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."<sup>268</sup> The issuance of licences is subject to China's 2008 *Export License Administration Measures*.<sup>269</sup>

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.<sup>270</sup>

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<sup>258</sup> 2009 First Batch Coke Export Quotas (Exhibit JE-80).

<sup>259</sup> 2009 Second Batch Coke Export Quota (Exhibit CHN-338, JE-81).

<sup>260</sup> 2009 First Batch Coke Export Quotas for FIEs (Exhibit JE-82).

<sup>261</sup> 2009 Second Batch Coke Export Quotas for FIEs (Exhibit JE-83).

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

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

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

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

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

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

<sup>268</sup> *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).

<sup>269</sup> *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).

<sup>270</sup> *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.<sup>271</sup> 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.<sup>272</sup> 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.<sup>273</sup> 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".<sup>274</sup> The Bidding Committee is authorized to set a maximum and minimum quantity that each enterprise may bid.<sup>275</sup>

(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.<sup>276</sup>

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.<sup>277</sup>

7.194 The *Export Quota Bidding Measures*<sup>278</sup>, in conjunction with the *Export Quota Bidding Implementation Rules*<sup>279</sup>, 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

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

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

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

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

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

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

<sup>277</sup> *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).

<sup>278</sup> Exhibits CHN-304, JE-77.

<sup>279</sup> 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."<sup>280</sup> The Export Quota Bidding Implementation Rules further require that a bidder must "have reached certain levels in terms of registered capital".<sup>281</sup> They also provide that "other enterprises that satisfy the relevant government requirements and have been approved by MOFCOM may participate in public biddings."<sup>282</sup>

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.<sup>283</sup> 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".<sup>284</sup> 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.<sup>285</sup> 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.<sup>286</sup>
- (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.

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

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

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

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

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

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

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

7.196 The *2009 First Round Export Quota Bidding Announcement*<sup>287</sup> 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.<sup>288</sup> 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.<sup>289</sup>

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*.<sup>290</sup> However, the export experience requirements that must be satisfied for the second round of bidding are based on only one year of exports.<sup>291</sup> 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.<sup>292</sup> 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.<sup>293</sup> 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.<sup>294</sup>

(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.<sup>295</sup> 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.<sup>296</sup>

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

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<sup>287</sup> Exhibits CHN-309, JE-90.

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

<sup>289</sup> *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).

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

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

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

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

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

<sup>295</sup> *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).

<sup>296</sup> *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.<sup>297</sup> 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.<sup>298</sup> The winning bidders are thus determined based on the highest bid prices.<sup>299</sup>

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.<sup>300</sup> The security deposit may not exceed 20% of the total award price.<sup>301</sup> 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.<sup>302</sup> 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.<sup>303</sup> Exporting enterprises must present the export licence to China's Customs authorities for declaration and examination.<sup>304</sup>

(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.<sup>305</sup> 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.<sup>306</sup> A second invitation for public bidding for silicon carbide was held in September 2009.<sup>307</sup>

**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

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

<sup>298</sup> *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).

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

<sup>300</sup> *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).

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

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

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

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

<sup>305</sup> *2009 Export Quota Amounts* (Exhibit JE-79).

<sup>306</sup> *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).

<sup>307</sup> *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".<sup>308</sup> 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."<sup>309</sup> 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.<sup>310</sup> 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."<sup>311</sup> 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".<sup>312</sup> Quotas have been found to be inconsistent with Article XI:1 on a number of occasions.<sup>313</sup>

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

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

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

<sup>310</sup> Panel Report, *Colombia – Ports of Entry*, para. 7.240.

<sup>311</sup> Panel Report, *India – Quantitative Restrictions*, para. 5.128.

<sup>312</sup> 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.

<sup>313</sup> 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."<sup>314</sup> 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.<sup>315</sup> 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.<sup>316</sup> 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*.<sup>317</sup>

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.<sup>318</sup> China characterizes the Appellate Body's statement as "obiter" and no longer applicable in light of an evolving "taxonomy" adopted by the Appellate Body.<sup>319</sup>

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".<sup>320</sup>

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.<sup>321</sup>

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<sup>314</sup> China's first written submission, para. 350; China's second written submission, para. 36.

<sup>315</sup> China's first written submission, para. 353.

<sup>316</sup> China's first written submission, para. 353; China's second written submission, para. 29.

<sup>317</sup> 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.

<sup>318</sup> 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.

<sup>319</sup> China's second written submission, paras. 31-36.

<sup>320</sup> 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.

<sup>321</sup> 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 ...".<sup>322</sup> 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."<sup>323</sup> The *Export Quota Administration Measures* provide that MOFCOM "applies export quota administration with respect to the commodities restricted from export by the State."<sup>324</sup> Goods that are subject to restriction pursuant to Article 19 may be subject to licensing as "goods restricted from exportation."<sup>325</sup> 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.<sup>326</sup> 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.<sup>327</sup>

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.<sup>328</sup> China allocates export quotas either through direct allocation or a quota bidding system.<sup>329</sup> In 2009, MOFCOM and Customs published the *2009 Export Licensing Catalogue*<sup>330</sup>, 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.<sup>331</sup> China's *Export Quota Administration Measures*<sup>332</sup> 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.<sup>333</sup> China's MOFCOM allocates coke

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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).

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

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

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

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

<sup>326</sup> *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).

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

<sup>328</sup> *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).

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

<sup>330</sup> Exhibits CHN-6, JE-22.

<sup>331</sup> *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).

<sup>332</sup> Exhibits CHN-312, JE-76.

<sup>333</sup> *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.<sup>334</sup> Enterprises must comply with the *2009 Coke Export Application Procedures* in order to be considered for an allocation.<sup>335</sup> China's MOFCOM administers the allocation of quotas on bauxite, fluorspar and silicon carbide through a bidding system.<sup>336</sup>

7.216 In October 2008, MOFCOM published the total 2009 export quota amounts for bauxite, fluorspar, and silicon carbide.<sup>337</sup> 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.<sup>338</sup> 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.<sup>339</sup> China explained that when MOFCOM does not "make effective" an export quota on zinc, then no zinc can be exported for that year.<sup>340</sup> 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

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<sup>334</sup> *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).

<sup>335</sup> *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).

<sup>336</sup> *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).

<sup>337</sup> *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).

<sup>338</sup> *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).

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

<sup>340</sup> 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*<sup>341</sup>, Articles 2, 14-19, 34, 61 63, 64; *Regulation on Import and Export Administration*<sup>342</sup>, Articles 4, 35-44, 64, 66; 67 and 70; *Export Quota Bidding Measures*<sup>343</sup>, Articles 3, 8, 9, 10, 11, 13, 14, 16; *2008 Export Licence Administration Measures*<sup>344</sup>, Article 25; *2009 Graded Export Licensing Entities Catalogue*<sup>345</sup>, Articles 1(2), 5, Attachment; *2008 Export Licensing Working Rules*<sup>346</sup>; *Export Quota Bidding Implementation Rules*<sup>347</sup>, Articles 2-6; *2009 Export Quota Amounts*<sup>348</sup>; *2009 Announcement of Second Bidding Round for Talc and Silicon Carbide*<sup>349</sup>; *2009 Export Licensing Catalogue*<sup>350</sup>; *2009 First Round Export Quota Bidding Announcement*<sup>351</sup>; *2009 Second Round Export Quota Bidding Announcement*<sup>352</sup>; and *2009 First Round Bauxite Bidding Procedures*.<sup>353</sup>

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

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

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<sup>341</sup> *Foreign Trade Law* (Exhibits CHN-151, JE-72).

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

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

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

<sup>345</sup> *2009 Graded Export Licensing Entities Catalogue* (Exhibit JE-96).

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

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

<sup>348</sup> *2009 Export Quota Amounts* (Exhibit JE-79).

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

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

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

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

<sup>353</sup> *2009 First Round Bauxite Bidding Procedures* (Exhibit JE-94).

<sup>354</sup> *Foreign Trade Law* (Exhibits CHN-151, JE-72).

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

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

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

<sup>358</sup> *2009 Graded Export Licensing Entities Catalogue* (Exhibit JE-96).

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

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

<sup>361</sup> *2009 Export Quota Amounts* (Exhibit JE-79).

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

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

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

*Announcement*<sup>365</sup>; and *2009 First Round Fluorspar Bidding Procedures*.<sup>366</sup> 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*<sup>367</sup>, Articles 2, 14-19, 34, 61 63, 64; *Regulation on Import and Export Administration*<sup>368</sup>, Articles 4, 35-44, 64, 66; 67 and 70; *Export Quota Bidding Measures*<sup>369</sup>, Articles 3, 8, 9, 10, 11, 13, 14, 16; *2008 Export Licence Administration Measures*<sup>370</sup>, Article 25; *2009 Graded Export Licensing Entities Catalogue*<sup>371</sup>, Articles 1(2), 5, Attachment; *2008 Export Licensing Working Rules*<sup>372</sup>; *Export Quota Bidding Implementation Rules*<sup>373</sup>, Articles 2-6; *2009 Export Quota Amounts*<sup>374</sup>; *2009 Export Licensing Catalogue*<sup>375</sup>; *2009 First Round Export Quota Bidding Announcement*<sup>376</sup>; *2009 Second Round Export Quota Bidding Announcement*<sup>377</sup>; *2009 Second Round Silicon Carbide Bidding Procedures*<sup>378</sup>; *2009 First Round Silicon Carbide Bidding Procedures*<sup>379</sup>; and *2009 Announcement of Second Bidding Round for Talc and Silicon Carbide*.<sup>380</sup>

(d) Export quotas on coke (HS 2704.0010)

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

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

<sup>366</sup> *2009 First Round Fluorspar Bidding Procedures* (Exhibit JE-93).

<sup>367</sup> *Foreign Trade Law* (Exhibits CHN-151, JE-72).

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

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

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

<sup>371</sup> *2009 Graded Export Licensing Entities Catalogue* (Exhibit JE-96).

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

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

<sup>374</sup> *2009 Export Quota Amounts* (Exhibit JE-79).

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

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

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

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

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

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

<sup>381</sup> *Foreign Trade Law* (Exhibit CHN-151, JE-72).

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

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

<sup>384</sup> *2009 Graded Export Licensing Entities Catalogue* (Exhibit JE-96).

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

<sup>386</sup> *2009 Export Licensing Catalogue* (Exhibit CHN-6, JE-22).

<sup>387</sup> *2009 First Batch Coke Export Quotas* (Exhibit JE-80).

<sup>388</sup> *2009 Second Batch Coke Export Quota* (Exhibit CHN-338, JE-81).

<sup>389</sup> *2009 First Batch Coke Export Quotas for FIEs* (Exhibit JE-82).

<sup>390</sup> *2009 Second Batch Coke Export Quotas for FIEs* (Exhibit JE-83).

<sup>391</sup> *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*<sup>392</sup>, Articles 2, 14-19, 34, 61-63, 64; *Regulation on Import and Export Administration*<sup>393</sup>, Articles 4, 35-44, 64, 66; 67 and 70; *2008 Export Licence Administration Measures*<sup>394</sup>, Article 25; *2009 Graded Export Licensing Entities Catalogue*<sup>395</sup>, Articles 1(2), Attachment; *2008 Export Licensing Working Rules*<sup>396</sup>; *Export Quota Administration Measures*<sup>397</sup>, Articles 4, 9, 11, 17-23, 25, 26, 31; and *2009 Export Licensing Catalogue*.<sup>398</sup>

#### 4. Summary

7.224 For each of these products (bauxite, coke, fluorspar, silicon carbide and zinc<sup>399</sup>), 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 zinc<sup>400</sup> that are inconsistent with Paragraph 11.3 of China's Accession Protocol.<sup>401</sup> The Panel also concluded, that on 21 December 2009 China maintained certain export quotas or a prohibition on bauxite, coke, fluorspar, silicon carbide and zinc<sup>402</sup> that are inconsistent with Article XI:1 of the GATT 1994.<sup>403</sup>

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<sup>392</sup> *Foreign Trade Law* (Exhibits CHN-151, JE-72).

<sup>393</sup> *Regulation on Import and Export Administration* (Exhibits CHN-152, JE-73).

<sup>394</sup> *2008 Export Licence Administration Measures* (Exhibits CHN-342, JE-74).

<sup>395</sup> *2009 Graded Export Licensing Entities Catalogue* (Exhibit JE-96).

<sup>396</sup> *2008 Export Licensing Working Rules* (Exhibits CHN-344, JE-97).

<sup>397</sup> *Export Quota Administration Measures* (Exhibits CHN-312, JE-76).

<sup>398</sup> *2009 Export Licensing Catalogue* (Exhibits CHN-6, JE-22).

<sup>399</sup> 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.

<sup>400</sup> 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.

<sup>401</sup> See para. 7.105 above.

<sup>402</sup> 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.

<sup>403</sup> 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 zinc<sup>404</sup> 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 bauxite<sup>405</sup> 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 measures<sup>406</sup>, including those imposing export duties and export quotas in 2009.<sup>407</sup> China stated its defences concern 2010 measures only.<sup>408</sup> The Panel decided<sup>409</sup> 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.<sup>410</sup> 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.

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<sup>404</sup> 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.

<sup>405</sup> See Section VII.D.

<sup>406</sup> 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."

<sup>407</sup> 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").

<sup>408</sup> 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").

<sup>409</sup> See para. 7.33 above.

<sup>410</sup> 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".<sup>411</sup>

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.

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<sup>411</sup> 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"	Article XX (b)	
	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.<sup>412</sup> 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.<sup>413</sup> 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.<sup>414</sup>

7.243 The complainants argue that China has failed to provide a correct or "narrow"<sup>415</sup> 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.<sup>416</sup> 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.<sup>417</sup>

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<sup>412</sup> China's first written submission, para. 342.

<sup>413</sup> See, e.g., China's first written submission, paras. 361-363.

<sup>414</sup> 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).

<sup>415</sup> European Union's second written submission, para. 191.

<sup>416</sup> Complainants' joint opening oral statement at the first substantive meeting, paras. 130-131.

<sup>417</sup> 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.<sup>418</sup> China describes this product as having certain chemical and physical characteristics (such as "stringent physical and chemical specifications"<sup>419</sup>) that distinguish it from other products classified in this same heading. The complainants have taken note of the distinction between different types of "bauxite".<sup>420</sup> China describes this product as follows:

"Chemically, the product has a high aluminium oxide (" $\text{Al}_2\text{O}_3$ ") content normally in excess of 80%, a low iron oxide (" $\text{Fe}_2\text{O}_3$ ") 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  $3.25 \text{ g/cm}^3$  ...."<sup>421</sup>

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*.<sup>422</sup> 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).<sup>423</sup> In any event, Article XI:2(a) by its terms must be viewed through the prism of the Member applying the restriction.

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<sup>418</sup> China's opening oral statement at the second substantive meeting, para. 92; Exhibit CHN-513.

<sup>419</sup> China's opening oral statement at the second substantive meeting, para. 92.

<sup>420</sup> 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).

<sup>421</sup> 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).

<sup>422</sup> 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.

<sup>423</sup> 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.<sup>424</sup>

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.<sup>425</sup> 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.<sup>426</sup> China submits that the time period will be defined in relation to the time required to prevent or relieve the critical shortage.<sup>427</sup>

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).<sup>428</sup>

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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).

<sup>424</sup> China's first written submission, para. 371.

<sup>425</sup> China's first written submission, para. 373.

<sup>426</sup> 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).

<sup>427</sup> China's second written submission, para. 112.

<sup>428</sup> 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.<sup>429</sup> 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.<sup>430</sup>

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".<sup>431</sup> 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).<sup>432</sup> 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.<sup>433</sup>

7.255 The Panel observes that the ordinary meaning of "temporarily" is "for a time (only)" and "during a limited time".<sup>434</sup> The term "limited time" means "appointed, fixed" and "circumscribed within definite limits, bounded, restricted".<sup>435</sup> 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,

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<sup>429</sup> 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.

<sup>430</sup> 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.

<sup>431</sup> 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.

<sup>432</sup> Brazil's third party oral statement, para. 9.

<sup>433</sup> Canada's third party oral submission, para. 17.

<sup>434</sup> *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)).

<sup>435</sup> *Oxford English Dictionary Online*, *limited*, ppl., a. (Exhibit CHN-157).

harmoniously."<sup>436</sup> 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.<sup>437</sup> 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.<sup>438</sup> China argues that the term "other products essential to the

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<sup>436</sup> 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.

<sup>437</sup> 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).

<sup>438</sup> 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."<sup>439</sup>

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.<sup>440</sup> 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.<sup>441</sup> China considers that for a product to be essential, it must be "material, important or requisite for the exporting Member".<sup>442</sup>

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.<sup>443</sup> 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".<sup>444</sup>

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.<sup>445</sup> China considers that Article XXXVI:5 applies to China in the same manner as it applies to other Members,

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<sup>439</sup> 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.

<sup>440</sup> China's second written submission, para. 52.

<sup>441</sup> 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.

<sup>442</sup> China's second written submission, para. 50.

<sup>443</sup> China's second written submission, para. 51.

<sup>444</sup> 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."

<sup>445</sup> 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.<sup>446</sup>

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.<sup>447</sup> 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.<sup>448</sup> 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".<sup>449</sup> 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.<sup>450</sup>

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).<sup>451</sup>

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

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<sup>446</sup> China's second written submission, paras. 66-67.

<sup>447</sup> 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).

<sup>448</sup> Chapter XIX Pastoral Production, 1946-1947 Official Yearbook of the Commonwealth of Australia pp. 853, 866, 871, 873, 882 (Exhibit CHN-465).

<sup>449</sup> China's opening oral statement at the first substantive meeting, para. 135.

<sup>450</sup> 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.

<sup>451</sup> European Union's second written submission, para. 192.

industry association document.<sup>452</sup> The United States argues that such a statement made outside of the framework of the GATT is not relevant.<sup>453</sup>

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".<sup>454</sup> 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.<sup>455</sup> 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."<sup>456</sup>

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.<sup>457</sup> 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.<sup>458</sup> 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.<sup>459</sup> 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.<sup>460</sup>

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<sup>452</sup> United States' response to Panel question No. 17, following the first substantive meeting, para. 32.

<sup>453</sup> United States' second written submission, para. 220; Mexico's second written submission, para. 225.

<sup>454</sup> 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.

<sup>455</sup> European Union's opening oral statement at the second substantive meeting, para. 23.

<sup>456</sup> European Union's second written submission, para. 194; European Union's opening oral statement at the second substantive meeting, para. 23.

<sup>457</sup> 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).

<sup>458</sup> European Union's opening oral statement at the second substantive meeting, para. 27.

<sup>459</sup> European Union's opening oral statement at the second substantive meeting, para. 32.

<sup>460</sup> 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"<sup>461</sup> 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.<sup>462</sup>

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".<sup>463</sup>

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".<sup>464</sup> 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".<sup>465</sup> 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

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<sup>461</sup> EPCT/C.II/36 (30 Oct. 1946) ("Fifth Preparatory Committee Meeting of 30 Oct"), p. 9.

<sup>462</sup> 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.

<sup>463</sup> *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)).

<sup>464</sup> *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".

<sup>465</sup> 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.<sup>466</sup>

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

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<sup>466</sup> 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"<sup>467</sup>, the Panel does not consider China's identification of Australia's restriction on merino sheep particularly useful to the Panel's interpretative exercise.<sup>468</sup> 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".<sup>469</sup> 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.<sup>470</sup>

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".<sup>471</sup> 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".<sup>472</sup> 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".<sup>473</sup>

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".<sup>474</sup> Thus, China considers Article XI:2 may apply where a critical shortage is foreseen and not simply in cases

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<sup>467</sup> China's second written submission, paras. 83-84.

<sup>468</sup> 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.

<sup>469</sup> China's first written submission, para. 399.

<sup>470</sup> China's second written submission, paras. 86.

<sup>471</sup> China's first written submission, paras. 390, 392.

<sup>472</sup> China's second written submission, para. 89.

<sup>473</sup> China's second written submission, para. 90.

<sup>474</sup> China's first written submission, para. 400.

of an exogenous shock.<sup>475</sup> In its view, the degree of shortage need not be so extreme that it can only be relieved through an export ban.<sup>476</sup>

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".<sup>477</sup>

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.<sup>478</sup>

7.288 China argues that the negotiating history supports the conclusion that Article XI:2(a) foresees preventive action, and allows a WTO Member to restrict or prohibit exports even if a critical shortage has not yet occurred.<sup>479</sup> 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.<sup>480</sup>

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".<sup>481</sup> 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).<sup>482</sup>

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.<sup>483</sup>

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

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<sup>475</sup> China's second written submission, para. 95.

<sup>476</sup> China's second written submission, para. 91.

<sup>477</sup> China's second written submission, para. 100.

<sup>478</sup> China's second written submission, paras. 105.

<sup>479</sup> China's first written submission, paras. 401-402.

<sup>480</sup> China's first written submission, paras. 403.

<sup>481</sup> Complainants' joint opening oral statement at the first substantive meeting, para. 140.

<sup>482</sup> Complainants' joint opening oral statement at the first substantive meeting, para. 141, 143; United States' second written submission, para. 230.

<sup>483</sup> 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.<sup>484</sup>

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".<sup>485</sup> 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".<sup>486</sup>

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.<sup>487</sup>

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".<sup>488</sup> 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".<sup>489</sup>

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<sup>484</sup> European Union's second written submission, fn. 145.

<sup>485</sup> Complainants' joint opening oral statement at the first substantive meeting, para. 141, referring to Exhibit CHN-180, para. 19.

<sup>486</sup> 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.

<sup>487</sup> European Union's second written submission, para. 206.

<sup>488</sup> *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)).

<sup>489</sup> *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".<sup>490</sup> 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".<sup>491</sup> 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.". <sup>492</sup>

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).

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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".

<sup>490</sup> *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".

<sup>491</sup> *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.

<sup>492</sup> (*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."<sup>493</sup>

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

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<sup>493</sup> 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."<sup>494</sup>

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

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<sup>494</sup> China's first written submission, para. 436.

product essential.<sup>495</sup> 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".<sup>496</sup> In addition, China refers to a study by the European Union that considers bauxite to be an economically important product.<sup>497</sup>

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.<sup>498</sup> 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.<sup>499</sup>

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.<sup>500</sup> 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.<sup>501</sup> China argues that it has a "more pressing" need for steel-making materials, like refractory-grade bauxite, than other countries.<sup>502</sup>

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<sup>495</sup> China's first written submission, paras. 435-436, referring to U.S. NRC Critical Materials Study, p. 32 (Exhibit CHN-77).

<sup>496</sup> China's first written submission, paras. 437-439, fn. 639, referring to U.S. NRC Critical Materials Study, p. 11 (Exhibit CHN-77).

<sup>497</sup> 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).

<sup>498</sup> 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.

<sup>499</sup> 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).

<sup>500</sup> 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.

<sup>501</sup> 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.

<sup>502</sup> 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."<sup>503</sup> 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 argues<sup>504</sup>, 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.<sup>505</sup> China submits that its iron and steel industry itself now employs over 3 million people<sup>506</sup> 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]".<sup>507</sup> China further highlights the contribution of refractory-grade bauxite to education, healthcare, infrastructure, technological progress, and scientific research in China.<sup>508</sup>

7.315 Finally, China argues that refractory-grade bauxite should be considered essential due to its "unique chemical and physical properties"<sup>509</sup>, and due to the fact that cost-effective substitutes are not "readily available".<sup>510</sup> 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".<sup>511</sup> 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 ('Al<sub>2</sub>O<sub>3</sub>'), along with unacceptably high levels of iron oxide ('Fe<sub>2</sub>O<sub>3</sub>')"). China argues that this form of bauxite is insufficient for use as a refractory-grade product, and thus is not a substitute.<sup>512</sup> 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.<sup>513</sup>

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

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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.

<sup>503</sup> China's second written submission, para. 134.

<sup>504</sup> 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).

<sup>505</sup> Exhibit CHN-144: *Guidelines of the Eleventh Five-Year Plan for National Economic and Social Development*, p. 41; Exhibit JE-8, p. 17.

<sup>506</sup> China's first written submission, para. 456, referring to Exhibit CHN-264: Table 13.2 China Statistical Yearbook 2009.

<sup>507</sup> China's second written submission, para. 134.

<sup>508</sup> China's second written submission, para. 136.

<sup>509</sup> China's second written submission, para. 130.

<sup>510</sup> China's second written submission, para. 131.

<sup>511</sup> 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).

<sup>512</sup> 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).

<sup>513</sup> 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".<sup>514</sup>

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.<sup>515</sup>

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).<sup>516</sup>

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.<sup>517</sup> 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.<sup>518</sup>

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.<sup>519</sup> 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.<sup>520</sup> China argues that

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<sup>514</sup> Complainants' joint opening oral statement at the first substantive meeting, para. 134.

<sup>515</sup> United States' second written submission, paras. 221-228; Mexico's second written submission, paras. 226-233.

<sup>516</sup> Complainants' joint opening oral statement at the first substantive meeting, para. 132.

<sup>517</sup> China's second written submission, para. 141.

<sup>518</sup> China's second written submission, paras. 145-147.

<sup>519</sup> China's first written submission, paras. 462-463.

<sup>520</sup> 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.<sup>521</sup>

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.<sup>522</sup> 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".<sup>523</sup> China submits that production of refractory-grade bauxite in China in 2009 was 2.4 million metric tonnes<sup>524</sup>, which at current reserve and production rates, suggests a 16-year reserve life for China's refractory-grade bauxite.<sup>525</sup> 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.<sup>526</sup>

7.323 Moreover, China argues that refractory-grade bauxite cannot be substituted.<sup>527</sup> China argues that a refractory product is selected "because of the specific combination of physical, chemical and thermal properties."<sup>528</sup> 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.<sup>529</sup> 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 bauxite<sup>530</sup>, or produced from material similarly subject to resource constraints.<sup>531</sup> China also submits that there is an associated cost involved with changing suppliers in the event of substituting a material.<sup>532</sup>

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.<sup>533</sup> China refers to conservation measures that China adopted to manage its raw materials in a sustainable manner, including extraction and production caps

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<sup>521</sup> China's first written submission, para. 467; China's opening oral statement at the second substantive meeting, para. 151.

<sup>522</sup> 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).

<sup>523</sup> China's first written submission, para. 472; Report by China on Refractory Bauxite, p. 34 (Exhibit CHN-10).

<sup>524</sup> 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).

<sup>525</sup> Report by China on Refractory Bauxite, p. 34, (Exhibit CHN-10).

<sup>526</sup> Exhibit CHN-79: China's Policy on Mineral Resources, p. 4.

<sup>527</sup> 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.

<sup>528</sup> China's opening oral statement at the second substantive meeting, para. 134, Report by China on Refractory Bauxite, pp. 8, 30 (Exhibit CHN-10).

<sup>529</sup> China's opening oral statement at the second substantive meeting, paras. 135-140.

<sup>530</sup> China's opening oral statement at the second substantive meeting, paras. 143-144, 146.

<sup>531</sup> China's opening oral statement at the second substantive meeting, para. 143.

<sup>532</sup> China's opening oral statement at the second substantive meeting, para. 148.

<sup>533</sup> 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.<sup>534</sup> 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.<sup>535</sup>

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.<sup>536</sup> 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 sector<sup>537</sup>; and local or regional communities' acceptance of mining activity.<sup>538</sup>

7.327 Finally, China submits that export restrictions on ferrous scrap<sup>539</sup>, high domestic demand<sup>540</sup> and international demand for refractory-grade bauxite<sup>541</sup>, and the lack of available refractory-grade bauxite with refractory characteristics outside China, contribute to a critical shortage of bauxite.<sup>542</sup>

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<sup>534</sup> 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).

<sup>535</sup> 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).

<sup>536</sup> 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.

<sup>537</sup> 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).

<sup>538</sup> 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).

<sup>539</sup> 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.

<sup>540</sup> 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.

<sup>541</sup> 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.<sup>543</sup>

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.<sup>544</sup>

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.<sup>545</sup> 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.<sup>546</sup>

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.<sup>547</sup>

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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.

<sup>542</sup> 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.

<sup>543</sup> United States' second written submission, para. 239, referring to Exhibit JE-165, p. 26, figure 12.

<sup>544</sup> United States' second written submission, paras. 221-228, referring to Bauxite Report, pp. 3-31 (Exhibit JE-165).

<sup>545</sup> Exhibit JE-165, p. 23.

<sup>546</sup> United States' second written submission, paras. 235, 237, Exhibit JE-165, p. 23.

<sup>547</sup> 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.<sup>548</sup>

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).<sup>549</sup>

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.<sup>550</sup> 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".<sup>551</sup>

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).<sup>552</sup> 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.<sup>553</sup>

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.<sup>554</sup>

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<sup>548</sup> European Union's second written submission, para. 210.

<sup>549</sup> 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.

<sup>550</sup> 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).

<sup>551</sup> China's opening oral statement at the second substantive meeting, paras. 78-79.

<sup>552</sup> 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).

<sup>553</sup> China's first written submission, para. 492.

<sup>554</sup> 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 instance<sup>555</sup>), 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.<sup>556</sup> 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.<sup>557</sup> 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.<sup>558</sup>

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 them<sup>559</sup>, or due to constraints on their availability.<sup>560</sup>

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<sup>555</sup> See Report by China on Refractory Bauxite, pp. 6, 7 (Exhibit CHN-10).

<sup>556</sup> 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).

<sup>557</sup> See Exhibit JE-165, p. 9.

<sup>558</sup> China's first written submission, para. 456, referring to Exhibit CHN-264: Table 13.2 China Statistical Yearbook 2009.

<sup>559</sup> 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).

<sup>560</sup> 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 bauxite<sup>561</sup>, 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.<sup>562</sup> 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-

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<sup>561</sup> 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.

<sup>562</sup> 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.<sup>563</sup> 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.<sup>564</sup>

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.<sup>565</sup> China contests the complainants' estimation of a 91-year remaining lifespan.<sup>566</sup>

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<sup>563</sup> 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).

<sup>564</sup> China's second written submission, para. 141.

<sup>565</sup> United States' second written submission, paras. 235, 237, Exhibit JE-165, p. 23.

<sup>566</sup> 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.<sup>567</sup>

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.<sup>568</sup>

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<sup>567</sup> 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).

<sup>568</sup> 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.<sup>569</sup>

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".<sup>570</sup>

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".<sup>571</sup> 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.

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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.

<sup>569</sup> See China's First written submission, paras 123-126; China's opening oral statement at the first substantive meeting, paras. 26-29.

<sup>570</sup> Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996:I, 3, at p. 20.

<sup>571</sup> 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".<sup>572</sup> 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).<sup>573</sup> 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.<sup>574</sup>

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 development<sup>575</sup>, 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.<sup>576</sup>

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).<sup>577</sup> 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.<sup>578</sup>

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.<sup>579</sup>

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,

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<sup>572</sup> China's first written submission, para. 101.

<sup>573</sup> China's first written submission, para. 107.

<sup>574</sup> China's first written submission, para. 97.

<sup>575</sup> China's first written submission, paras. 120-130.

<sup>576</sup> China's second written submission, paras. 184-194.

<sup>577</sup> European Union's second written submission, para. 240.

<sup>578</sup> European Union's second written submission, para. 241; United States' opening oral statement at the second substantive meeting, para 72.

<sup>579</sup> 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.<sup>580</sup>

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.<sup>581</sup> However, China does not invoke Article XX (i) as a justification for its trade-restrictive measures.<sup>582</sup>

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)".<sup>583</sup> 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).<sup>584</sup> It noted that the phrase "primarily aimed at" was "not designed as a simple litmus test for inclusion or exclusion from Article XX(g)".<sup>585</sup> In *US – Shrimp*, the Appellate Body accepted that sub-paragraph (g) referred to measures "primarily aimed at" conservation;<sup>586</sup> it also described this relationship as "a close and genuine relationship of ends and means"<sup>587</sup> that requires an examination of the relationship between the general structure and design of a measure and the policy goal it purports to serve.<sup>588</sup> 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".<sup>589</sup>

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

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<sup>580</sup> European Union's second written submission, paras. 242, 245; United States' second written submission, para. 119; Mexico's second written submission, para. 123.

<sup>581</sup> United States' second written submission, para. 121; Mexico's second written submission, para. 125.

<sup>582</sup> United States' second written submission, para. 125; Mexico's second written submission, para. 129.

<sup>583</sup> Appellate Body Report, *US – Gasoline*, p. 18, DSR 1996:I, 3, at p. 17 (emphasis added).

<sup>584</sup> Appellate Body Report, *US – Gasoline*, p. 19, DSR 1996:I, 3, at p. 18.

<sup>585</sup> Appellate Body Report, *US – Gasoline*, p. 19, DSR 1996:I, 3, at p. 17.

<sup>586</sup> Appellate Body Report, *US – Shrimp*, para. 136.

<sup>587</sup> Appellate Body Report, *US – Shrimp*, para. 136.

<sup>588</sup> Appellate Body Report, *US – Shrimp*, para. 137.

<sup>589</sup> 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".<sup>590</sup> 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".<sup>591</sup> The noun "preservation" is defined as "The action or an act of preserving or protecting something; the fact of being preserved".<sup>592</sup> To "preserve", is to "Keep from harm, injury; take care of, protect...keep from decay; maintain (a state of things)".<sup>593</sup> 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).<sup>594</sup>

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".<sup>595</sup>

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*".<sup>596</sup>

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<sup>590</sup> *Shorter Oxford English Dictionary*, 5th edn., L. Brown (ed.) (Oxford University Press, 2002), Vol. 1, p. 492.

<sup>591</sup> *Shorter Oxford English Dictionary*, 5th edn., L. Brown (ed.) (Oxford University Press, 2002), Vol. 1, p. 493.

<sup>592</sup> *Shorter Oxford English Dictionary*, 5th edn., L. Brown (ed.) (Oxford University Press, 2002), Vol. 2, p. 2333.

<sup>593</sup> *Shorter Oxford English Dictionary*, 5th edn., L. Brown (ed.) (Oxford University Press, 2002), Vol. 2, p. 2333.

<sup>594</sup> 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".

<sup>595</sup> Appellate Body Report, *US – Shrimp*, para. 153.

<sup>596</sup> 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".<sup>597</sup>

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"<sup>598</sup> 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).<sup>599</sup>

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.<sup>600</sup> 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".<sup>601</sup> This principle was further elaborated in the PCIJ's advisory opinion on the *Exchange of Greek and Turkish Populations* (1925).<sup>602</sup> 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".<sup>603</sup>

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 law<sup>604</sup>, and allowing states to "freely use and exploit their natural wealth and resources wherever deemed desirable by them for their own

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<sup>597</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para.151.

<sup>598</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

<sup>599</sup> Appellate Body Report, *US – Gasoline*, p. 30, DSR 1996:I, 3, at p. 28.

<sup>600</sup> Panel Report, *EC – Approval and Marketing of Biotech Products*, para. 7.67.

<sup>601</sup> PCIJ, *S.S Wimbledon*, p.25.

<sup>602</sup> [1925] *Publ. PCIJ*, Series B, no 10, p. 21.

<sup>603</sup> *Jurisdiction of the European Danube Commission between Galatz and Braila*, [1927] *Publ. PCIJ*, Series B, no 14, p. 36.

<sup>604</sup> Resolution 1803 (XVII), *Permanent Sovereignty Over Natural Resources* (14 December 1962) (adopted by 87 votes to 2, 12 abstentions).

progress and economic development".<sup>605</sup> 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".<sup>606</sup>

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.<sup>607</sup>

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

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<sup>605</sup> U.N. G.A. Resolution 626 (VII), *Right to Exploit Freely Natural Wealth and Resources* (21 December 1952).

<sup>606</sup> *The Convention on Biological Diversity*, done at Rio de Janeiro, 5 June 1992, 1760 UNTS 79; 31 International Legal Materials.

<sup>607</sup> 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.<sup>608</sup>

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.<sup>609</sup> 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.

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<sup>608</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

<sup>609</sup> 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.<sup>610</sup> 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.<sup>611</sup>

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.<sup>612</sup> 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).<sup>613</sup> 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*".<sup>614</sup>

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.<sup>615</sup> 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.<sup>616</sup>

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.<sup>617</sup>

#### 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.

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<sup>610</sup> China's first written submission, para. 153.

<sup>611</sup> China's second written submission, paras. 195-219.

<sup>612</sup> European Union's second written submission, para. 252.

<sup>613</sup> European Union's second written submission, para. 253.

<sup>614</sup> European Union's second written submission, para. 254.

<sup>615</sup> United States' second written submission, para. 131; Mexico's second written submission, para. 135.

<sup>616</sup> United States' second written submission, paras. 134-136; Mexico's second written submission, paras. 138- 140.

<sup>617</sup> 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"<sup>618</sup> the action or fact of confining or binding the extent, amount, duration, etc. of permitted<sup>619</sup> - in the case of Article XX(g) - domestic production or consumption.<sup>620</sup> 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*".<sup>621</sup>

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".<sup>622</sup> 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]".<sup>623</sup>

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.<sup>624</sup>

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".<sup>625</sup> The requirement that export and domestic restrictions occur together is consistent with the requirement that the export restriction be *primarily*

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<sup>618</sup> *Shorter Oxford English Dictionary*, 1st edn., L. Brown (ed.) (Oxford University Press, 1993), Vol. 2, p. 2569.

<sup>619</sup> *Shorter Oxford English Dictionary*, 1st edn., L. Brown (ed.) (Oxford University Press, 1993), Vol. 2, p. 2569.

<sup>620</sup> 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.

<sup>621</sup> GATT Panel Report, *Canada – Herring and Salmon*, para. 4.6.

<sup>622</sup> Appellate Body Report, *US – Gasoline*, p. 20, DSR 1996:I, 3, at p. 19.

<sup>623</sup> Appellate Body Report, *US – Gasoline*, p. 20, DSR 1996:I, 3, at p. 19.

<sup>624</sup> GATT Panel Report, *Canada – Herring and Salmon*, para. 4.6.

<sup>625</sup> Webster's New Encyclopaedic Dictionary.

*aimed at rendering effective* the domestic restriction.<sup>626</sup> 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.<sup>627</sup> 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.<sup>628</sup> 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.<sup>629</sup> 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".<sup>630</sup>

"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

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<sup>626</sup> GATT Panel Report, *Canada – Herring and Salmon*, para. 4.6.

<sup>627</sup> China's first opening oral statement, para. 24.

<sup>628</sup> China's response to Panel question No. 34 following the second substantive meeting, paras. 157-159.

<sup>629</sup> 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.

<sup>630</sup> 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".<sup>631</sup> [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"<sup>632</sup> and "recognizes[s] the objective of achieving economic diversification of developing country economies through the development of industries to process primary products".<sup>633</sup> 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*<sup>634</sup> 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

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<sup>631</sup> Appellate Body Report, *US – Gasoline*, p. 21, DSR 1996:I, 3, at p. 19.

<sup>632</sup> China's second written submission, para. 203.

<sup>633</sup> China's second written submission, para. 203.

<sup>634</sup> 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)".<sup>635</sup>

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.<sup>636</sup> 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.<sup>637</sup> 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)<sup>638</sup>, 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.

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<sup>635</sup> Appellate Body Report, *US – Gasoline*, footnote 42.

<sup>636</sup> Appellate Body Report, *US – Gasoline*, pp. 22-23, DSR 1996:I, 3, at p. 21.

<sup>637</sup> 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.

<sup>638</sup> 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.<sup>639</sup>

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.<sup>640</sup> 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.<sup>641</sup> 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".<sup>642</sup> 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.<sup>643</sup>

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<sup>639</sup> China's first written submission, para. 188.

<sup>640</sup> United States' second written submission, paras. 141 and 251; Mexico's second written submission, paras. 145 and 256.

<sup>641</sup> 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).

<sup>642</sup> United States' second written submission, para. 161; Mexico's second written submission, para. 165.

<sup>643</sup> 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 portion<sup>644</sup> 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)<sup>645</sup>; 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 conservation<sup>646</sup>; 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.<sup>647</sup>

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"<sup>648</sup> and a "comprehensive set of measures relating to the conservation of bauxite".<sup>649</sup> It continues by referring to its 2001 *"Mineral Resources Policy"*.<sup>650</sup> 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".<sup>651</sup> 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

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<sup>644</sup> 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.

<sup>645</sup> 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.

<sup>646</sup> Exhibit JE-21.

<sup>647</sup> Exhibit JE-79.

<sup>648</sup> China's first written submission, para. 156.

<sup>649</sup> China's first written submission, para. 526.

<sup>650</sup> China's first written submission, para. 157-158.

<sup>651</sup> 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*<sup>652</sup> of 1986;
- (b) *Environmental Protection Law*<sup>653</sup> of 1989;
- (c) *Provisional Regulations on Resource Tax*<sup>654</sup> of 1994 and *Detailed Rules for the Implementation of the Provisional Regulations on Resource Tax*<sup>655</sup> of 1994;
- (d) *Administration of Collection of the Mineral Resources Compensation Fees*<sup>656</sup> of 1997;
- (e) *Administration of Registration of Mining of Mineral Resources*<sup>657</sup> of 1998 ;
- (f) *National Mineral Resources Plan*<sup>658</sup> of 2001;
- (g) *Notice of Opinions of Authorities on the Integration of Exploitation of Mineral Resources*<sup>659</sup> of 2006; and
- (h) *National Mineral Resources Plan (2008-2015)*.<sup>660</sup>

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".<sup>661</sup> 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 fluorspar<sup>662</sup>, 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.<sup>663</sup>

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<sup>652</sup> Exhibit CHN-78.

<sup>653</sup> Exhibit CHN-88.

<sup>654</sup> Exhibit CHN-89.

<sup>655</sup> Exhibit CHN-91.

<sup>656</sup> Exhibit CHN-92.

<sup>657</sup> Exhibit CHN-93.

<sup>658</sup> Exhibits CHN-94, JE-17.

<sup>659</sup> Exhibit CHN-95.

<sup>660</sup> Exhibit CHN-80.

<sup>661</sup> Exhibit CHN-80.

<sup>662</sup> Exhibit CHN-80, pp. 7-8.

<sup>663</sup> 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.<sup>664</sup> 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.<sup>665</sup> The *Environmental Protection Law* (item (b) above) provides guidelines to foster environmental protection and to introduce environmental standards.<sup>666</sup>

7.425 In its first written submission, China submits excerpts from the *2009 Further Adjust of Import and Export Tariffs*<sup>667</sup>, 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 . . .".<sup>668</sup>

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.<sup>669</sup> 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.<sup>670</sup>

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.

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<sup>664</sup> Exhibit CHN-93.

<sup>665</sup> Exhibit CHN-94, JE-17.

<sup>666</sup> 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.

<sup>667</sup> Exhibit CHN-100.

<sup>668</sup> Exhibit CHN-100, para. 3 (emphasis added).

<sup>669</sup> China's first written submission, paras. 156, 164 and 187.

<sup>670</sup> 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%".<sup>671</sup> 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.<sup>672</sup> 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".<sup>673</sup> 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 subsidy<sup>674</sup> to the downstream sector<sup>675</sup>, 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.<sup>676</sup>

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*".<sup>677</sup> However, in its response to the Panel's questions, China could not provide an explanation

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<sup>671</sup> Market Research on Fluorspar and Selected Fluorochemicals, October 2010, p. 9 and p. 34 (Exhibit JE-164).

<sup>672</sup> Exhibits CHN-83 (for fluorspar ores extraction data) and CHN-369 (for bauxite ores extraction data).

<sup>673</sup> 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).

<sup>674</sup> The use of the term "subsidy" herewith does not implicate a legal conclusion under the WTO Agreement on Subsidies and Countervailing Duties.

<sup>675</sup> 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).

<sup>676</sup> 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).

<sup>677</sup> 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.<sup>678</sup>

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.<sup>679</sup> 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".<sup>680</sup> 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".<sup>681</sup>

(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]".<sup>682</sup> 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:

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<sup>678</sup> China's responses to Panel question Nos. 17-18 following the second substantive meeting, paras. 47-56.

<sup>679</sup> 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).

<sup>680</sup> China's responses to Panel question Nos. 17-18 following the second substantive meeting, para. 49.

<sup>681</sup> The Panel does so in order to ensure prompt settlement of the dispute.

<sup>682</sup> China's first written submission para. 168 (for fluorspar) and 502 (for refractory grade bauxite).

- (a) *Mineral Resources Law*<sup>683</sup> of 1986;
- (b) *Environmental Protection Law*<sup>684</sup> of 1989;
- (c) *Provisional Regulations on Resource Tax*<sup>685</sup> of 1994 and *Detailed Rules for Implementation of the Provisional Regulations on Resource Tax*<sup>686</sup> of 1994;
- (d) *Administration of Collection of the Mineral Resources Compensation Fees*<sup>687</sup> of 1997;
- (e) *Administration of Registration of Mining of Mineral Resources*<sup>688</sup> of 1998;
- (f) *National Mineral Resources Plan*<sup>689</sup> of 2001;
- (g) *Notice of Opinions of Authorities on the Integration of Exploitation of Mineral Resource*<sup>690</sup> of 2006;
- (h) *National Mineral Resources Plan (2008-2015)*.<sup>691</sup>

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".<sup>692</sup> 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 observed<sup>693</sup>, 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 fluorspar<sup>694</sup> 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*.<sup>695</sup>

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<sup>683</sup> Exhibit CHN-78.

<sup>684</sup> Exhibit CHN-88.

<sup>685</sup> Exhibit CHN-89.

<sup>686</sup> Exhibit CHN-91.

<sup>687</sup> Exhibit CHN-92.

<sup>688</sup> Exhibit CHN-93.

<sup>689</sup> Exhibits CHN-94, JE-17.

<sup>690</sup> Exhibit CHN-95.

<sup>691</sup> Exhibit CHN-80.

<sup>692</sup> China's first written submission, para. 168 (for fluorspar) and 502 (for refractory grade bauxite).

<sup>693</sup> See para. 7.424.

<sup>694</sup> Exhibit CHN-80, pp. 7-8.

<sup>695</sup> 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*<sup>696</sup> and the *Rules for the Implementation of Regulations on Resource Tax*.<sup>697</sup>

7.444 According to China, "[t]he objective of the mineral resources tax [...] is to increase extraction costs and, hence, prices of the mineral".<sup>698</sup> 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)<sup>699</sup>, or about 0.1% of refractory-grade bauxite or fluorspar prices in China in the same period.<sup>700</sup> As of 1 June 2010, for both refractory-grade bauxite and fluorspar<sup>701</sup>, the tax was raised to 1% of their respective prices.<sup>702</sup>

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).<sup>703</sup> 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).<sup>704</sup> 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

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<sup>696</sup> Exhibit CHN-89.

<sup>697</sup> Exhibit CHN-91.

<sup>698</sup> China's first written submissions, para. 172.

<sup>699</sup> Exhibit CHN-91, Appendix 1.

<sup>700</sup> 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).

<sup>701</sup> Exhibit CHN-90.

<sup>702</sup> 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.

<sup>703</sup> Exhibit CHN-92.

<sup>704</sup> 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*<sup>705</sup>;
- (b) *2010 Public Notice on Refractory-Grade Bauxite (High Alumina Bauxite) Industry Entrance Standards*<sup>706</sup>;
- (c) *2010 Circular on Passing Down the 2010 Controlling Quota on Total Extraction Quantity of High-alumina Bauxite Ores and Fluorspar Ores*<sup>707</sup>;
- (d) *2010 Circular on Passing Down the Controlling Quota of the 2010 Total Production Quantity of High-Alumina Refractory-Grade Bauxite and Fluorspar*<sup>708</sup>;
- (e) *2010 Catalogue of Goods Subject to Export Licensing Administration*<sup>709</sup>, and *Notice on Announcement of the 2010 Export Quota Amounts for Agricultural and Industrial Products*.<sup>710</sup>

7.449 China invokes the same 2010 measures with respect to fluorspar, except for the following changes: the *2010 Export Licensing Catalogue*<sup>711</sup> and the *2010 Export Quota Amounts*<sup>712</sup> are not invoked for fluorspar, for which instead the *2010 Tariff Implementation Plan*<sup>713</sup> is invoked. Moreover, in the case of fluorspar, the *2010 Public Notice on Refractory-Grade Bauxite Standards*<sup>714</sup> is replaced by the *2010 Public Notice on Fluorspar Standards*.<sup>715</sup>

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*<sup>716</sup> (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*<sup>717</sup> 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.

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<sup>705</sup> Exhibits CHN-87, JE-167.

<sup>706</sup> Exhibit CHN-96.

<sup>707</sup> Exhibits CHN-97, JE-168.

<sup>708</sup> Exhibits CHN-98, JE-169.

<sup>709</sup> Exhibit CHN-7.

<sup>710</sup> Exhibit CHN-8.

<sup>711</sup> Exhibit CHN-7.

<sup>712</sup> Exhibit CHN-8.

<sup>713</sup> Exhibit CHN-5.

<sup>714</sup> Exhibit CHN-275.

<sup>715</sup> Exhibit CHN-96.

<sup>716</sup> Exhibit CHN-275.

<sup>717</sup> 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*<sup>718</sup> exceeds the total 2009 extraction of 9.4 million metric tonnes of fluorspar ores.<sup>719</sup> This mining cap is also well above the pre-2009 fluorspar extraction levels, which never exceeded 5.89 million metric tonnes.<sup>720</sup> 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.<sup>721</sup>

7.453 Similarly, the *2010 Quota of High-alumina refractory-Grade Bauxite and Fluorspar*<sup>722</sup> 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.<sup>723</sup> 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.<sup>724</sup> 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.<sup>725</sup> 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".<sup>726</sup> Thus according to China, the "restrictions on domestic production" are not intended to effect restrictions currently, but only in the future.<sup>727</sup> 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.

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<sup>718</sup> Exhibits CHN-97, JE-168.

<sup>719</sup> Exhibits CHN-86, JE-166.

<sup>720</sup> 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.

<sup>721</sup> Exhibits CHN-86, JE-166.

<sup>722</sup> Exhibits CHN-98, JE-169.

<sup>723</sup> 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.

<sup>724</sup> 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).

<sup>725</sup> 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."

<sup>726</sup> China's opening oral statement at the second substantive meeting, para. 246 (emphasis added).

<sup>727</sup> 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.<sup>728</sup> 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*.<sup>729</sup> 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".<sup>730</sup> China also asserts that "the level of permitted extractions will be reduced year by year".<sup>731</sup> 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.<sup>732</sup> 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.

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<sup>728</sup> Exhibits JE-164 p.7 for fluorspar, and JE-165 p.14 for refractory-grade bauxite.

<sup>729</sup> Exhibits CHN-87, JE-167.

<sup>730</sup> Exhibits CHN-86, pp.3-4, JE-166. See also China's opening oral statement at the second substantive meeting, para 246.

<sup>731</sup> China's opening oral statement at the second substantive meeting, para. 246.

<sup>732</sup> 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.<sup>733</sup>

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".<sup>734</sup>

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".<sup>735</sup> 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.<sup>736</sup>

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".<sup>737</sup> 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.<sup>738</sup> 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.

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<sup>733</sup> 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.

<sup>734</sup> China's first written submission, para. 188.

<sup>735</sup> Appellate Body Report, *US – Gasoline*, p. 21, DSR 1996:I, 3, at p. 19.

<sup>736</sup> Appellate Body Report, *US – Gasoline*, p. 21, DSR 1996:I, 3, at p. 19.

<sup>737</sup> China's second written submission, para. 200.

<sup>738</sup> 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.<sup>739</sup> 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]".<sup>740</sup> 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.

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<sup>739</sup> Appellate Body Report, *US – Gasoline*, p. 21, DSR 1996:I, 3, at p. 19.

<sup>740</sup> 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.<sup>741</sup> 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).<sup>742</sup> 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.<sup>743</sup>

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.

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<sup>741</sup> China's first written submission, paras. 200, 285 and China's second written submission, paras. 233, 253.

<sup>742</sup> China's first written submission, paras. 316-17.

<sup>743</sup> 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.<sup>744</sup>

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*<sup>745</sup> 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.<sup>746</sup>

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.<sup>747</sup> 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.<sup>748</sup>

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.<sup>749</sup> 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

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<sup>744</sup> China's first written submission, paras. 203 and 209.

<sup>745</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

<sup>746</sup> China's first written submission, paras. 215 and 220.

<sup>747</sup> European Union's second written submission, para. 344; United States second written submission, para. 45; Mexico's second written submission, para. 49.

<sup>748</sup> European Union's second written submission, paras. 353, and 354; United States' second written submission, para. 47; Mexico's second written submission, para. 51.

<sup>749</sup> 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.<sup>750</sup>

- (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.<sup>751</sup> 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 gasoline<sup>752</sup>; and the reduction of the risks arising from the accumulation of waste tyres.<sup>753</sup> Panels and the Appellate Body are, however, not entitled to question a Members' chosen *level* of protection.<sup>754</sup> WTO Members enjoy "the right to determine the level of protection of health that they consider appropriate in a given situation".<sup>755</sup>

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".<sup>756</sup> 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."<sup>757</sup>

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

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<sup>750</sup> European Union's second written submission, para. 356 United States' second written submission, para. 46; Mexico's second written submission, para. 49.

<sup>751</sup> 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.

<sup>752</sup> Panel Report, *US – Gasoline*, para. 6.21.

<sup>753</sup> Panel Report, *Brazil – Retreaded Tyres*, paras. 7.108 and 7.115.

<sup>754</sup> Appellate Body Report, *EC – Asbestos*, para. 168; Appellate Body Report, *Brazil – Retreaded Tyres*, para. 140.

<sup>755</sup> 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.

<sup>756</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 161.

<sup>757</sup> 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."<sup>758</sup> 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"<sup>759</sup> and that a measure is necessary if it is "apt to make a material contribution to the achievement of its objective".<sup>760</sup>

(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".<sup>761</sup> 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".<sup>762</sup>

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.<sup>763</sup> 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'".<sup>764</sup>

7.485 It is also accepted that a measure could be considered "necessary" even if the contribution of the measure "is not immediately observable".<sup>765</sup> 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".<sup>766</sup> 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.<sup>767</sup> 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

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<sup>758</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para 178.

<sup>759</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 145.

<sup>760</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para 150, 151.

<sup>761</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 162; Appellate Body Report, *EC – Asbestos*, para. 172.

<sup>762</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, paras. 144 and 179.

<sup>763</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

<sup>764</sup> Appellate Body Report, *China – Publications and Audiovisual Products*, para. 251; Appellate Body Report, *Korea – Various Measures on Beef*, para. 163.

<sup>765</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

<sup>766</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 151.

<sup>767</sup> 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".<sup>768</sup>

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."<sup>769</sup> (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".<sup>770</sup> Essentially, "[t]he less restrictive the effects of the measure, the more likely it is to be characterized as 'necessary'".<sup>771</sup> 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."<sup>772</sup>

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.<sup>773</sup> 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*<sup>774</sup>, 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.<sup>775</sup> 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

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<sup>768</sup> Appellate Body Report, *Brazil - Retreaded Tyres*, para. 151.

<sup>769</sup> Appellate Body Report, *Brazil - Retreaded Tyres*, para. 151.

<sup>770</sup> Appellate Body Report, *Korea - Various Measures on Beef*, para. 163, footnote 105.

<sup>771</sup> Appellate Body Report, *China - Publications and Audiovisual Products*, para. 310.

<sup>772</sup> Appellate Body Report, *China - Publications and Audiovisual Products*, para. 310.

<sup>773</sup> Appellate Body Reports, *US - Gambling*, para. 311.

<sup>774</sup> Appellate Body Reports, *US - Gambling*, para. 309 and *Brazil - Retreaded Tyres*, para. 156.

<sup>775</sup> 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".<sup>776</sup> 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".<sup>777</sup> 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".<sup>778</sup>

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".<sup>779</sup>

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.<sup>780</sup>

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 EPRs<sup>781</sup>

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.<sup>782</sup> 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.<sup>783</sup> 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.<sup>784</sup> According to China, its system will reduce the production of EPRs and stimulate the production of the more environmentally friendly products.

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<sup>776</sup> Appellate Body Report, *US – Gambling*, para. 308.

<sup>777</sup> Appellate Body Report, *US – Gambling*, para. 308.

<sup>778</sup> Appellate Body Reports, *Brazil – Retreaded Tyres*, para. 156 and *US – Gambling*, para. 311.

<sup>779</sup> Appellate Body Reports, *Brazil – Retreaded Tyres*, para. 171 citing, at the end of the quotation, *US – Gambling*, para. 308.

<sup>780</sup> 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.

<sup>781</sup> Export duties on manganese metal, magnesium metal and coke and export quotas on coke and silicon carbide.

<sup>782</sup> China's first written submission, para. 197.

<sup>783</sup> China's first written submission, paras. 257-59.

<sup>784</sup> 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.<sup>785</sup> 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".<sup>786</sup> 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".<sup>787</sup>

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.<sup>788</sup> They argue that China

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<sup>785</sup> See para. 7.237 above.

<sup>786</sup> China's response to the Panel question No. 12 following the second substantive meeting, para. 35.

<sup>787</sup> China's first written submission, paras. 224-227.

<sup>788</sup> 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.<sup>789</sup>

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 dispute<sup>790</sup> 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".<sup>791</sup> It then states that they "are taken in implementation of the Eleventh Five-Year Plan for Environmental Protection (2006-2010)".<sup>792</sup> 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".<sup>793</sup>

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.<sup>794</sup> 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.<sup>795</sup> The Circular states:

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<sup>789</sup> Complainants' joint opening oral statement at the first substantive meeting, paras. 11-13, 97-98.

<sup>790</sup> See para. 2.4 above.

<sup>791</sup> China's first written submission, para. 308.

<sup>792</sup> *Eleventh Five-Year Plan for Environmental Protection (2006-2010)* (Exhibit CHN-123). China's first written submission, para. 312.

<sup>793</sup> Ibid.

<sup>794</sup> China's second written submission, para. 233.

<sup>795</sup> 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".<sup>796</sup>

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.<sup>797</sup> 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.<sup>798</sup> 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 products<sup>799</sup>, and reaffirmed in 2008 in the context of announcing the *2009 Further Adjust of Import and Export Tariffs*.<sup>800</sup> In these announcements, China clarifies that these export duties "are targeted at high energy-consumption commodities, high-pollution commodities and resource-based commodities"<sup>801</sup>, 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

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<sup>796</sup> 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*.

<sup>797</sup> Exhibit CHN-366: *EU Anti-dumping Orders*.

<sup>798</sup> China's second written submission, p.77, footnote 300.

<sup>799</sup> 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*.

<sup>800</sup> Exhibit CHN-100: *2009 Further Adjust of Import and Export Tariffs*.

<sup>801</sup> China's second written submission, para. 236, pp. 77-78.

introducing or reforming... export tax,"<sup>802</sup> 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".<sup>803</sup> This principle is further reaffirmed in the *2007 Plan for Energy Conservation and Pollutant Discharge Reduction*<sup>804</sup> and the 2008 and 2009 *Work Arrangement for Energy Conservation and Pollutant Discharge Reduction*.<sup>805</sup> 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.<sup>806</sup> 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".<sup>807</sup> 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*<sup>808</sup>, 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.<sup>809</sup>

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<sup>802</sup> Exhibit CHN-123: *Eleventh Five-Year Plan for Environmental Protection (2006-2010)*, Section V(IV), Article 2, paras. 1-2, pp. 19-20.

<sup>803</sup> Exhibit CHN-144: *Guidelines of the Eleventh Five-Year Plan for National Economic and Social Development*, Part 9, Chapter 35, Section I, p.41.

<sup>804</sup> Exhibit CHN-145: *2007 Plan for Energy Conservation and Pollutant Discharge Reduction*.

<sup>805</sup> 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*.

<sup>806</sup> China's second written submission, para. 242.

<sup>807</sup> Exhibit CHN-272: *Energy Conservation Law*, Article 36.

<sup>808</sup> Exhibit CHN-269.

<sup>809</sup> 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*<sup>810</sup>, the *Law on the Promotion of Recycle Economy*<sup>811</sup>, the *Policies and Actions for Addressing Climate Change*<sup>812</sup>, the *2008 Arrangement for Energy Conservation and Pollutant Discharge Reduction*<sup>813</sup>, the *Adjustment and Revitalization Plan for Non-Ferrous Industry*<sup>814</sup>, the *Guidance for Enhancing the Management of Raw Materials Industries*<sup>815</sup>, the *Law on Renewable Energies*<sup>816</sup>, and the *2009 Arrangement for Energy Conservation and Pollutant Discharge Reduction*<sup>817</sup>, 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*<sup>818</sup> and the *Circular on Strengthening the Elimination of Outdated Capacity*<sup>819</sup> to encourage the reduction of pollution in energy-intensive industries.<sup>820</sup> 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

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<sup>810</sup> Exhibit CHN-192.

<sup>811</sup> Exhibit CHN-101.

<sup>812</sup> Exhibit CHN-420.

<sup>813</sup> Exhibit CHN-287.

<sup>814</sup> Exhibits JE-13, CHN-99.

<sup>815</sup> Exhibit JE-10.

<sup>816</sup> Exhibit CHN-273.

<sup>817</sup> Exhibit CHN-288.

<sup>818</sup> Exhibit CHN-478.

<sup>819</sup> Exhibit CHN-479.

<sup>820</sup> 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.<sup>821</sup> 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".<sup>822</sup>

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).

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<sup>821</sup> 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.

<sup>822</sup> 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.<sup>823</sup> 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.<sup>824</sup> 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.<sup>825</sup> 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%.<sup>826</sup>

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%.<sup>827</sup> China asserts that the export duty is the actual "biting" constraint on the exports of coke;<sup>828</sup> 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.<sup>829</sup>

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<sup>823</sup> Exhibits CHN-124 and CHN-147.

<sup>824</sup> 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.

<sup>825</sup> 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.

<sup>826</sup> China's first written submission, para. 319 (for magnesium metal and manganese metal) and para. 550 (for silicon carbide).

<sup>827</sup> 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.

<sup>828</sup> 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.<sup>830</sup> 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".<sup>831</sup>

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.<sup>832</sup> 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.<sup>833</sup> 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.<sup>834</sup> 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".<sup>835</sup> 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

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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.

<sup>829</sup> 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).

<sup>830</sup> 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.

<sup>831</sup> China's response to Panel question No 39 following the second substantive meeting, para. 264 and China's second written submission, para 252.

<sup>832</sup> 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.

<sup>833</sup> Exhibit JE-158, pp.3-6.

<sup>834</sup> United States' second written submission, paras. 62-64; Mexico's second written submission, paras. 65-67. See also Exhibit JE-158, pp. 7-9.

<sup>835</sup> 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 industry<sup>836</sup>), 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.<sup>837</sup>

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.<sup>838</sup> 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.

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<sup>836</sup> China's first written submission para. 250.

<sup>837</sup> 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.

<sup>838</sup> 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.<sup>839</sup> 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.<sup>840</sup> 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.<sup>841</sup> 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.<sup>842</sup> 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

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<sup>839</sup> Exhibit CHN-124.

<sup>840</sup> 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).

<sup>841</sup> Exhibit CHN-519, table 3.2.

<sup>842</sup> 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.<sup>843</sup> The Panel has a further concern with regard to the specification of the estimated regression model.<sup>844</sup>

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.<sup>845</sup> 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.<sup>846</sup> 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

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<sup>843</sup> 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.

<sup>844</sup> 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.

<sup>845</sup> Exhibit CHN-481.

<sup>846</sup> 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.<sup>847</sup> 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).<sup>848</sup> 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.<sup>849</sup>

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.<sup>850</sup> 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

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<sup>847</sup> China's second written submission, para. 298.

<sup>848</sup> China's response to Panel question No. 28 following the second substantive meeting, paras. 133-134.

<sup>849</sup> 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.

<sup>850</sup> 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"<sup>851</sup>, 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.<sup>852</sup>

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".<sup>853</sup>

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".<sup>854</sup> 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".<sup>855</sup>

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<sup>851</sup> China's first written submission, para 334.

<sup>852</sup> Exhibit CHN-442.

<sup>853</sup> United States' comments on China's response to Panel question No. 30 following the second substantive meeting (Exhibit JE-185, p. 3).

<sup>854</sup> Exhibit CHN-266: Hausmann, R., Hwang, J., and Rodrik, D. (2007). "What you export matters", *Journal of Economic Growth* 12: 1-25.

<sup>855</sup> 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.<sup>856</sup>

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 growth<sup>857</sup>, 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.<sup>858</sup> 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"<sup>859</sup> 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 China<sup>860</sup>, 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.

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<sup>856</sup> Exhibit No. CHN-519, paras. 45-52.

<sup>857</sup> 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.

<sup>858</sup> Exhibit JE-178, p.5.

<sup>859</sup> China's comments on the complainants response to Panel question No. 22 following the second substantive meeting, para 97.

<sup>860</sup> 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 possibility<sup>861</sup> 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".<sup>862</sup> China argues that this relationship is supported by the empirical evidence of the so-called "Environmental Kuznets Curve" (EKC).<sup>863</sup> 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.<sup>864</sup> 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.<sup>865</sup> 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.<sup>866</sup>

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

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<sup>861</sup> See Grossman, G.M. and Helpman (1991), Innovation and Growth in the Global Economy, MIT Press.

<sup>862</sup> China's comments on the complainants' response to Panel question No. 22 following the second substantive meeting, para. 87.

<sup>863</sup> Exhibit CHN-442.

<sup>864</sup> 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.

<sup>865</sup> Grossman, Gene M. and Kruger, A.K. (1995). "Economic Growth and the Environment", Quarterly Journal of Economics, pp. 353-377.

<sup>866</sup> 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'".<sup>867</sup>

7.556 The complainants assert that China's export measures "severely distort the conditions of competition in the global market place".<sup>868</sup>

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"<sup>869</sup> 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).<sup>870</sup> Thus China's export restrictions, even if modest, can have an important impact worldwide.

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<sup>867</sup> Appellate Body Report, *China – Publications and Audiovisual Products*, para. 310.

<sup>868</sup> Complainants' opening oral statement, para 6.

<sup>869</sup> China's second written submission, para. 258.

<sup>870</sup> 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".<sup>871</sup> 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.<sup>872</sup>

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.<sup>873</sup> 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".<sup>874</sup>

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<sup>871</sup> 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.

<sup>872</sup> China's second written submission, paras. 269-276.

<sup>873</sup> Appellate Body Report *Brazil – Retreaded Tyres*, para. 182.

<sup>874</sup> 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.<sup>875</sup>

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 goods<sup>876</sup>; (iii) increasing environmental standards<sup>877</sup>; (iv) investing in "infrastructure necessary to facilitate recycling scrap"<sup>878</sup>; (v) stimulating greater local demand for scrap material without discouraging local supply<sup>879</sup>; and (vi) introducing production restrictions or pollution controls on primary production.<sup>880</sup>

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.

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<sup>875</sup> WTO Appellate Body Report, *Brazil – Retreaded Tyres*, para. 171 citing, at the end of the quotation, *US – Gambling*, para. 308.

<sup>876</sup> European Union's second written submission, para. 396.

<sup>877</sup> European Union's second written submission, para. 400.

<sup>878</sup> United States' second written submission, para. 68. Mexico's second written submission, para. 71.

<sup>879</sup> Exhibit JE-158, p. 6.

<sup>880</sup> 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.<sup>881</sup> 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*<sup>882</sup> 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*<sup>883</sup>, the *Law on the Prevention and Control of Environmental Pollution by Solid Wastes*<sup>884</sup>, and the *Law on the Prevention and Control of Water Pollution*.<sup>885</sup> 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*<sup>886</sup>, 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."<sup>887</sup> 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*<sup>888</sup> 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"<sup>889</sup> and "[a] mining enterprise shall adopt scientific mining methods..."<sup>890</sup>. The same language is reiterated in the *Law on the Promotion of Recycle Economy*.<sup>891</sup> 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*<sup>892</sup> and the *2007 Plan for Energy Conservation and Pollutant Discharge Reduction*<sup>893</sup>, which

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<sup>881</sup> 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).

<sup>882</sup> Exhibit CHN-268.

<sup>883</sup> Exhibit CHN-271, Arts. 6 and 14.

<sup>884</sup> Exhibit CHN-270, Art. 6.

<sup>885</sup> Exhibit CHN-269, Art. 6.

<sup>886</sup> Exhibit CHN-271.

<sup>887</sup> Exhibit CHN-271, Art. 29.

<sup>888</sup> Exhibit CHN-270.

<sup>889</sup> Exhibit CHN-270, Art. 31.

<sup>890</sup> Exhibit CHN-270, Art 36.

<sup>891</sup> Exhibit CHN-101, Arts. 42 and 44.

<sup>892</sup> Exhibit CHN-523.

<sup>893</sup> 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..."<sup>894</sup>, while the *2007 Plan for Energy Conservation and Pollutant Discharge Reduction* lists a number of goals including "Accelerate Research and Development of Technologies..."<sup>895</sup> and "Accelerate Industrialization Demonstration..."<sup>896</sup>. Similar goals also form part of the *2008 Arrangement for Energy Conservation and Pollutant Discharge Reduction*<sup>897</sup>, 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.<sup>898</sup> 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..."<sup>899</sup>; it also mandates cities to "establish and improve the garbage collection system..."<sup>900</sup> 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*<sup>901</sup> 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..."<sup>902</sup>, 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.<sup>903</sup> 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.

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<sup>894</sup> Exhibit CHN-523, Art. 1(3).

<sup>895</sup> Exhibit CHN-145, Section V(17).

<sup>896</sup> Exhibit CHN-145, Section V(18). See also Section V (19) and (21).

<sup>897</sup> Exhibit CHN-287, Section VI.

<sup>898</sup> China's response to Panel question No. 19 following the second substantive meeting, Annex 19-1.

<sup>899</sup> Exhibit CHN-145, Section IV(12).

<sup>900</sup> Exhibit CHN-145, Section IV(15). See also Section IV(28).

<sup>901</sup> Exhibit CHN-287, Section VII.

<sup>902</sup> Exhibit CHN-288, Section VI.

<sup>903</sup> 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.<sup>904</sup> 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*<sup>905</sup> provides requirements applicable to new projects, but otherwise does not include any environmental standards. Further, the *Environmental Protection Law*<sup>906</sup> indicates that "the environmental protection administrative department of the State Council shall formulate national environment quality standards..."<sup>907</sup>, without providing evidence whether these standards have in fact been formulated.<sup>908</sup>

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 fees<sup>909</sup>; (ii) monitoring systems and on-site inspection powers of local governments<sup>910</sup>; (iii) implementing financial penalties<sup>911</sup>; (iv) ordering the suspension or shutting down of an operation<sup>912</sup>; and (v) sanctioning by

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<sup>904</sup> Exhibit CHN-276, Arts. 2, 17, 22 and 25-28.

<sup>905</sup> Exhibit CHN-469.

<sup>906</sup> Exhibit CHN-88.

<sup>907</sup> Exhibit CHN-88, Arts. 9 and 10.

<sup>908</sup> 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).

<sup>909</sup> 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.

<sup>910</sup> 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.

<sup>911</sup> 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.

<sup>912</sup> 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.<sup>913</sup> China submitted evidence of the impact of a number of its environmental regulations on the production of EPR products and associated pollution levels.<sup>914</sup> 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.<sup>915</sup> 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..."<sup>916</sup> 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..."<sup>917</sup> 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.<sup>918</sup> In addition to the *Energy Conservation*

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<sup>913</sup> Exhibit CHN-475, *Circular on Further Strengthening the Checks on Clean Production of Key Enterprises*, Art. 5 (2).

<sup>914</sup> Annex 39-3.

<sup>915</sup> 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.

<sup>916</sup> Exhibit CHN-101, *Law on the Promotion of Recycle Economy*, Art. 44.

<sup>917</sup> Exhibit CHN-101, *Law on the Promotion of Recycle Economy*, Art. 43. See also Art. 46.

<sup>918</sup> See Annex 14 to China's response to Panel question following the second substantive meeting.

*Law*<sup>919</sup>, which does not include any specifics on how the relevant provisions are implemented or enforced, China also submits evidence of Energy Consumption caps on coke<sup>920</sup>, magnesium<sup>921</sup>, zinc smelting<sup>922</sup>, and ferro-alloys<sup>923</sup>, 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.<sup>924</sup> 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.<sup>925</sup> China argues that in connection with the

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<sup>919</sup> Exhibit CHN-272, *Energy Conservation Law*, Art. 16.

<sup>920</sup> Exhibit CHN-470, *Energy Consumption Caps and Coke*.

<sup>921</sup> Exhibit CHN-471, *Energy Consumption Caps on Magnesium*.

<sup>922</sup> Exhibit CHN-472, *Energy Consumption Caps on Zinc-smelting*.

<sup>923</sup> Exhibit CHN-473, *Energy Consumption Caps on Ferro- alloys*.

<sup>924</sup> 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.

<sup>925</sup> 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.<sup>926</sup>

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 measures<sup>927</sup> 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

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<sup>926</sup> China's response to Panel question No. 14 following the second substantive meeting.

<sup>927</sup> 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.<sup>928</sup>

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.<sup>929</sup> 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.<sup>930</sup>

7.586 The difficulty with China's contention is that export restrictions generally do not internalize the social environmental costs<sup>931</sup> 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.<sup>932</sup> 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.<sup>933</sup>

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<sup>928</sup> China's response to Panel question No. 39, following the second substantive meeting, paras 43-62.

<sup>929</sup> 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.

<sup>930</sup> China's response to Panel question No. 39 following the second substantive meeting, para. 252.

<sup>931</sup> The social environmental costs are the costs of polluting the environment while producing EPRs.

<sup>932</sup> See also United States' comments on China's response to Panel questions No. 39 following the second substantive meeting, para. 144.

<sup>933</sup> 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".<sup>934</sup> 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 [...]".<sup>935</sup> 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"<sup>936</sup>, 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 risks<sup>937</sup> 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.<sup>938</sup> Export duties on scrap are necessary to bring about

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<sup>934</sup> European Union's second written submission, para. 395. See also: United States' second written submission, para. 102; Mexico's second written submission, para. 106.

<sup>935</sup> 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.

<sup>936</sup> China's response to Panel question No. 39, following the second substantive meeting, para. 265.

<sup>937</sup> Identified in Annex B of China's first written submission.

<sup>938</sup> 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.<sup>939</sup>

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.<sup>940</sup>

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

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<sup>939</sup> China's first written submission, paras. 263- 282.

<sup>940</sup> 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%.<sup>941</sup> 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).<sup>942</sup>

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.<sup>943</sup>

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".<sup>944</sup> 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 scrap<sup>945</sup> 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

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<sup>941</sup> China's first written submission, para. 269.

<sup>942</sup> Exhibits CHN-124 and CHN-147.

<sup>943</sup> 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.

<sup>944</sup> 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.

<sup>945</sup> Exhibit CHN-124.



between primary and secondary production of the metals at issue. However, as discussed above for export restrictions on EPR products<sup>946</sup>, 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.<sup>947</sup> 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.<sup>948</sup> 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".<sup>949</sup> "The export duties will safeguard stable and predictable markets for scrap"<sup>950</sup>, 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.<sup>951</sup>

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<sup>946</sup> See para. 7.534 above.

<sup>947</sup> China's response to Panel question No. 49 following the first substantive meeting, para. 247.

<sup>948</sup> China's response to Panel question No. 36 following the second substantive meeting, para. 164.

<sup>949</sup> China's first written submission, para. 265.

<sup>950</sup> China's first written submission, para. 282.

<sup>951</sup> 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".<sup>952</sup> 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 above<sup>953</sup>, 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.<sup>954</sup> 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".<sup>955</sup> 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.<sup>956</sup>

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).

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<sup>952</sup> China's response to Panel question No. 37 following the second substantive meeting, para. 192.

<sup>953</sup> See para. 7.602 above.

<sup>954</sup> China's first written submission, para. 278.

<sup>955</sup> China's response to Panel question No. 36 following the second substantive meeting, para. 164.

<sup>956</sup> 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.<sup>957</sup>

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<sup>957</sup> 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".<sup>958</sup> 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]<sup>959</sup> or in previous GATT practice *requires* a panel to examine *all* legal claims made by the complaining party."<sup>960</sup> 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

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<sup>958</sup> China's Accession Protocol (Exhibit JE-2).

<sup>959</sup> 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."

<sup>960</sup> 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."<sup>961</sup>

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 zinc<sup>962</sup>, 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

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<sup>961</sup> Appellate Body Report, *Australia – Salmon*, para. 223.

<sup>962</sup> 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.<sup>963</sup>

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".<sup>964</sup> 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 above<sup>965</sup> 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.<sup>966</sup> 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."<sup>967</sup>

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.

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<sup>963</sup> China's first written submission, paras. 568-569.

<sup>964</sup> 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.

<sup>965</sup> See Sections VII.C and VII.D above.

<sup>966</sup> 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.

<sup>967</sup> 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.<sup>968</sup>

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.<sup>969</sup> China also criticizes the European Union's identification of the relevant measures at issue in respect of its claims.<sup>970</sup> 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.<sup>971</sup> In addition, China submits that the *2001 Export Quota Bidding Measures*<sup>972</sup> and *Export Quota Bidding Implementation Rules*<sup>973</sup> have now expired, and have been replaced by the *2010 Second-Batch Bidding Qualifications and Review for Export Quotas*.<sup>974</sup> China submits that, the *2009 Second Round Export Quota Bidding Announcement*<sup>975</sup> was replaced by the *2010 First-Batch Bidding*

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<sup>968</sup> United States' first written submission, paras. 283, 289; Mexico's first written submission paras. 286 and 292.

<sup>969</sup> China's first written submission, para. 613.

<sup>970</sup> China's first written submission, paras. 614, 618.

<sup>971</sup> China's first written submission, paras. 615, 620.

<sup>972</sup> Exhibits JE-77, CHN-304.

<sup>973</sup> Exhibits JE-78, CHN-305.

<sup>974</sup> Exhibit CHN- 307; China's first written submission, para. 616.

<sup>975</sup> Exhibits CHN-310, JE-91.

*Qualifications for Export Quotas of Industrial Products*<sup>976</sup>, which was in turn replaced by the *2010 Second-Batch Bidding Qualifications and Review for Export Quotas*.<sup>977</sup>

7.642 The Panel recalls its finding from its 1 October 2010 ruling<sup>978</sup> 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.<sup>979</sup>

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:

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<sup>976</sup> Exhibit CHN-311.

<sup>977</sup> Exhibit CHN- 307. See: China's first written submission, para. 616.

<sup>978</sup> See paragraphs 1.10 to 1.13 above; Annex F to these Reports.

<sup>979</sup> 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".<sup>980</sup> 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".<sup>981</sup> 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.<sup>982</sup>

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<sup>980</sup> Appellate Body Report, *China – Publications and Audiovisual Products*, para. 222.

<sup>981</sup> Appellate Body Report, *China – Publications and Audiovisual Products*, para. 223.

<sup>982</sup> 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."<sup>983</sup>

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.<sup>984</sup> 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*<sup>985</sup>, 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.<sup>986</sup> 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*<sup>987</sup> or be prohibited to export under the quota for that year.<sup>988</sup> The complainants submit that these requirements are also applicable to foreign-invested companies under the *2009 First Batch Coke Export Quotas for FIEs*<sup>989</sup> and *2009 Second Batch Coke Export Quotas for FIEs*<sup>990</sup>, allocating the coke export quota to such companies.<sup>991</sup>

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<sup>983</sup> 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.

<sup>984</sup> China's Accession Protocol, WT/L/432, Annex 2A2, 2B, pp. 20, 30 (Exhibit JE-2).

<sup>985</sup> Exhibits CHN-308, JE-85.

<sup>986</sup> 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.

<sup>987</sup> Exhibits CHN-338, JE-81.

<sup>988</sup> United States' first written submission, para. 279-280; European Union's first written submission, para. 236; Mexico's first written submission para. 282-283.

<sup>989</sup> Exhibit JE-82.

<sup>990</sup> Exhibit JE-83.

7.659 The complainants additionally submit that, through the *Export Quota Bidding Measures*<sup>992</sup> and *Export Quota Bidding Implementation Rules*<sup>993</sup>, 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.<sup>994</sup> 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*<sup>995</sup> and 2009 *Second Round Export Quota Bidding Announcement*.<sup>996</sup>

7.660 The European Union argues that the prior export performance requirement also has the effect of denying new applicants the possibility to export.<sup>997</sup>

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.<sup>998</sup> 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.<sup>999</sup> 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'"<sup>1000</sup> 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."<sup>1001</sup>

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.<sup>1002</sup> 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

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<sup>991</sup> United States' first written submission, para. 281; Mexico's first written submission, para. 284.

<sup>992</sup> *Export Quota Bidding Measures*, CHN-304, Exhibit JE-77.

<sup>993</sup> Articles 11, 6(I) (CHN-305, Exhibit JE-78).

<sup>994</sup> 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.

<sup>995</sup> Article III(II)iii, III(II)v, III(II)vi (Exhibits JE-90, CHN-309).

<sup>996</sup> 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.

<sup>997</sup> European Union's first written submission, paras. 224-225.

<sup>998</sup> European Union's first written submission, paras. 226-227.

<sup>999</sup> China's first written submission, para. 622.

<sup>1000</sup> China's first written submission, para. 624.

<sup>1001</sup> China's first written submission, para. 625; see also China's second written submission, paras. 404-405.

<sup>1002</sup> China's first written submission, paras. 627-628.

Licensing Agreement in support of this position.<sup>1003</sup> 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 above<sup>1004</sup>, 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 products<sup>1005</sup> 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

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<sup>1003</sup> China's first written submission, para. 630; China's second written submission, para. 406.

<sup>1004</sup> See paragraphs 7.653-7.655 above.

<sup>1005</sup> 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.<sup>1006</sup> In addition, the relevant measures identified by the complainants impose particular minimum registered capital requirements on applicants to export.<sup>1007</sup> 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*<sup>1008</sup>, *2009 Second Batch Coke Export Quota*<sup>1009</sup>, *2009 First Batch Coke Export Quotas for FIEs*<sup>1010</sup>, and *2009 Second Batch Coke Export Quotas for FIEs*<sup>1011</sup> 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*<sup>1012</sup>, *Export Quota Bidding Implementation Rules* 2009 First Round *Export Quota Bidding Announcement*<sup>1013</sup>, and *2009 Second Round Export Quota Bidding Announcement*<sup>1014</sup> 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

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<sup>1006</sup> 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).

<sup>1007</sup> 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).

<sup>1008</sup> Articles I(1)2 and I(2)2 (Exhibit JE-85, CHN-308).

<sup>1009</sup> Exhibits JE-81, CHN-338 p. 1.

<sup>1010</sup> Exhibit JE-82.

<sup>1011</sup> Exhibit JE-83.

<sup>1012</sup> Articles 12, 13 (Exhibits JE-77, CHN-304).

<sup>1013</sup> Articles III(II)iii, III(II)v, III(II)vi (Exhibit JE-90, CHN-309).

<sup>1014</sup> Articles III.3, III.5, III.6 (Exhibit JE-91, CHN-310).

exporting, the [r]aw [m]aterials."<sup>1015</sup> 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".<sup>1016</sup>

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 above<sup>1017</sup>, 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.<sup>1018</sup>

7.675 In the Panel's view, the measures do not expressly "operate[] to the detriment and exclusion of foreign enterprises from quota allocation."<sup>1019</sup> 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."<sup>1020</sup> 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.<sup>1021</sup>

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,

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<sup>1015</sup> European Union's first written submission, para. 231; see also European Union's second written submission, para. 146.

<sup>1016</sup> China's first written submission, para. 634; China's second written submission, para. 409.

<sup>1017</sup> See paragraphs 7.646-7.647 above.

<sup>1018</sup> 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).

<sup>1019</sup> European Union's second written submission, para. 146.

<sup>1020</sup> European Union's second written submission, para. 147.

<sup>1021</sup> 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*<sup>1022</sup>, *2009 Second Batch Coke Export Quota*<sup>1023</sup>, *2009 First Batch Coke Export Quotas for FIEs*<sup>1024</sup>, and *2009 Second Batch Coke Export Quotas for FIEs*<sup>1025</sup> 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*<sup>1026</sup>, *Export Quota Bidding Implementation Rules*<sup>1027</sup>, *2009 First Round Export Quota Bidding Announcement*<sup>1028</sup>, and *2009 Second Round Export Quota Bidding Announcement*<sup>1029</sup> 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.

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<sup>1022</sup> Articles I(1)2 and I(2)2 (Exhibits JE-85, CHN-308).

<sup>1023</sup> Exhibits JE-81, CHN-338 p. 1.

<sup>1024</sup> Exhibit JE-82

<sup>1025</sup> Exhibit JE-83.

<sup>1026</sup> Articles 12, 13 (Exhibits JE-77, CHN-304)

<sup>1027</sup> Articles 15-18 (Exhibits JE-78, CHN-305).

<sup>1028</sup> Articles III(II)iii, III(II)v, III(II)vi (Exhibits JE-90, CHN-309)

<sup>1029</sup> 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."<sup>1030</sup>

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.<sup>1031</sup> 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.<sup>1032</sup> 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).

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<sup>1030</sup> 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 ..."

<sup>1031</sup> Appellate Body Report, *US – Shrimp*, para. 83.

<sup>1032</sup> 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.<sup>1033</sup>

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.<sup>1034</sup> 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".<sup>1035</sup>

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.<sup>1036</sup>

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".<sup>1037</sup>

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).

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<sup>1033</sup> Appellate Body Reports on *EC – Bananas III*, para. 200; *EC – Poultry*, para. 115.

<sup>1034</sup> 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".

<sup>1035</sup> Panel Report, *Argentina – Hides and Leather*, para. 11.70 (emphasis added).

<sup>1036</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 224-225.

<sup>1037</sup> (*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".<sup>1038</sup>

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."<sup>1039</sup> 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".<sup>1040</sup> 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.<sup>1041</sup> 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.<sup>1042</sup> 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.<sup>1043</sup>

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".<sup>1044</sup> 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.

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<sup>1038</sup> Panel Report, *Argentina – Hides and Leather*, para. 11.83.

<sup>1039</sup> *Shorter Oxford English Dictionary*, 5th edn., L. Brown (ed.) (Oxford University Press, 2002), Vol. 2, p. 3444 (2002).

<sup>1040</sup> *Shorter Oxford English Dictionary*, 5th edn., L. Brown (ed.) (Oxford University Press, 2002), Vol. 1, p. 1325.

<sup>1041</sup> Panel Report, *Argentina – Hides and Leather*, para. 11.99.

<sup>1042</sup> Panel Report, *Argentina – Hides and Leather*, para. 11.100.

<sup>1043</sup> Panel Report, *Argentina – Hides and Leather*, para. 11.101.

<sup>1044</sup> *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).<sup>1045</sup> As stated at paragraph 7.695 *audessus*, 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".<sup>1046</sup>

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."<sup>1047</sup> The Appellate Body also cautioned that a simple recitation of the characteristics of an administrative process would not suffice to sustain a claim.<sup>1048</sup>

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 inference; 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."<sup>1049</sup> 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).<sup>1050</sup> 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

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<sup>1045</sup> Panel Report, *Argentina – Hides and Leather*, para. 11.94.

<sup>1046</sup> Panel Report, *Argentina – Hides and Leather*, para. 11.100.

<sup>1047</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 226.

<sup>1048</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 225.

<sup>1049</sup> *Oxford English Dictionary*, accessed online, 23 December 2010.

<sup>1050</sup> 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." <sup>1051</sup> (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." <sup>1052</sup> (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" <sup>1053</sup>.

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. <sup>1054</sup>

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

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<sup>1051</sup> Panel Report, *Argentina – Hides and Leather*, para. 11.77.

<sup>1052</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 225.

<sup>1053</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 226.

<sup>1054</sup> Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.872.

Member.<sup>1055</sup> 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."<sup>1056</sup> 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.<sup>1057</sup> 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.<sup>1058</sup> 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.<sup>1059</sup>

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

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<sup>1055</sup> Panel Report, *EC – Selected Customs Matters*, para. 7.108.

<sup>1056</sup> European Union's second written submission, para. 162.

<sup>1057</sup> European Union's response to Panel question No. 46 following the second substantive meeting para 51.

<sup>1058</sup> 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*.

<sup>1059</sup> 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)."<sup>1060</sup>

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 zinc<sup>1061</sup> 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.<sup>1062</sup> 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 quotas<sup>1063</sup> and subjects those goods to an export quota

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<sup>1060</sup> 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.

<sup>1061</sup> 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.

<sup>1062</sup> China's second written submission, para. 413.

<sup>1063</sup> *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.<sup>1064</sup> The *Regulation on Import and Export Administration* regulates the administration of the export of goods.<sup>1065</sup> The *Export Quota Administration Measures* are formulated in accordance with<sup>1066</sup> 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.<sup>1067</sup> The export quotas on coke and zinc are allocated "directly".<sup>1068</sup> The export quotas on bauxite, fluorspar, and silicon carbide are allocated through a bidding system.<sup>1069</sup>

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.<sup>1070</sup> 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.<sup>1071</sup> 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*.<sup>1072</sup> 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.<sup>1073</sup> The Panel also notes that pursuant to the same provision in the 2010 List, zinc is also subject to a quota allocated directly.<sup>1074</sup>

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

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<sup>1064</sup> *Regulation on Import and Export Administration*, Article 36 (Exhibits CHN-152, JE-73); *Export Quota Administration Measures*, Article 1 (Exhibits CHN-312, JE-76).

<sup>1065</sup> *Regulation on Import and Export Administration*, Article 1.

<sup>1066</sup> *Export Quota Administration Measures*, Article 1, (Exhibit CHN-312, JE-76).

<sup>1067</sup> *Regulation on Import and Export Administration*, Article 39 (Exhibit JE-73, CHN-152).

<sup>1068</sup> 2009 *Export Licensing Catalogue*, Article I(1) (Exhibit CHN-6, JE-22), see also Section VII.C.2(b) above.

<sup>1069</sup> *Ibid.*, Article I(2), see also VII.C.2(a) above.

<sup>1070</sup> 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".<sup>1070</sup> 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.

<sup>1071</sup> China's second written submission, para. 413.

<sup>1072</sup> European Union's second written submission, para. 150.

<sup>1073</sup> 2009 *Export Licensing Catalogue* (Exhibits CHN-6, JE-22).

<sup>1074</sup> 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).<sup>1075</sup> 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).<sup>1076</sup>

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.<sup>1077</sup>

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.<sup>1078</sup>

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".<sup>1079</sup>

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.<sup>1080</sup>

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

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<sup>1075</sup> *Export Quota Administration Measures* (Exhibits CHN-312, JE-76).

<sup>1076</sup> European Union's first written submission, paras. 238 to 245.

<sup>1077</sup> European Union's first written submission, para. 242.

<sup>1078</sup> European Union's first written submission, para. 243.

<sup>1079</sup> European Union's first written submission, para. 244.

<sup>1080</sup> 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.<sup>1081</sup> 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).<sup>1082</sup>

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".<sup>1083</sup> 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.<sup>1084</sup>

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.<sup>1085</sup>

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:

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<sup>1081</sup> China's response to Panel question No. 50, following the second substantive meeting, para. 297.

<sup>1082</sup> 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.

<sup>1083</sup> China's first written submission, para. 663, referring to Appellate Body Report, *US – OCTG Sunset Reviews*, para. 217.

<sup>1084</sup> 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.

<sup>1085</sup> 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."<sup>1086</sup>

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."<sup>1087</sup>

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.<sup>1088</sup> 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".<sup>1089</sup> 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.<sup>1090</sup> 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.

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<sup>1086</sup> Panel Report, *EC- Selected Customs Matters*, para. 7.116 (emphasis original).

<sup>1087</sup> 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.

<sup>1088</sup> *Foreign Trade Law*, Article 18 (Exhibits CHN-151, JE-72).

<sup>1089</sup> China's first written submission, para. 643.

<sup>1090</sup> *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).<sup>1091</sup>

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.<sup>1092</sup>

#### Reasonable administration

7.741 As stated above<sup>1093</sup>, 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".<sup>1094</sup> 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

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<sup>1091</sup> 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."

<sup>1092</sup> 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.

<sup>1093</sup> See para. 7.696 above.

<sup>1094</sup> *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".<sup>1095</sup> 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*.<sup>1096</sup>

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 above<sup>1097</sup>, 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."<sup>1098</sup> 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*.<sup>1099</sup>

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

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<sup>1095</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 225.

<sup>1096</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 225.

<sup>1097</sup> See paras. 7.692-7.693 above.

<sup>1098</sup> *Shorter Oxford English Dictionary*, 5th edn., L. Brown (ed.) (Oxford University Press, 2002),

Vol. 2, p. 3488.

<sup>1099</sup> 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".<sup>1100</sup> 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*.<sup>1101</sup>

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".<sup>1102</sup>

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"<sup>1103</sup> of the operation capacity criterion.

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<sup>1100</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 225.

<sup>1101</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 225.

<sup>1102</sup> *Shorter Oxford English Dictionary*, 5th edn., L. Brown (ed.) (Oxford University Press, 2002), Vol. 1, p. 1325.

<sup>1103</sup> 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.<sup>1104</sup> The United States and Mexico assert that they challenge the administration of the export quotas.<sup>1105</sup> 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.<sup>1106</sup>

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.<sup>1107</sup> 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

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<sup>1104</sup> United States' response to Panel question No. 50 following the second substantive meeting, para. 109; Mexico refers to the United States' response.

<sup>1105</sup> United States' first written submission, paras. 278-290; Mexico's first written submission, paras. 281-293.

<sup>1106</sup> See, for example, United States' first written submission, para. 311; Mexico's first written submission, para. 314.

<sup>1107</sup> 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).<sup>1108</sup>

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.<sup>1109</sup> 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.<sup>1110</sup> China asserts that each type of required information/documentation is pertinent to the verification of whether the applicant satisfies the eligibility criteria.<sup>1111</sup> 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.<sup>1112</sup>

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.<sup>1113</sup> 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".<sup>1114</sup> 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.<sup>1115</sup> The CCCMC's daily operations are

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<sup>1108</sup> United States' response to Panel question, para. 115 following the second substantive meeting, Mexico refers to the United States' response.

<sup>1109</sup> China's first written submission, para. 667.

<sup>1110</sup> China's first written submission, para. 712.

<sup>1111</sup> China's comments on the United States' and Mexico's responses to Panel question No. 55 following the second substantive meeting, paras. 201-210.

<sup>1112</sup> China's first written submission, paras. 715-724.

<sup>1113</sup> 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.

<sup>1114</sup> *Measures for Administration of Trade Social Entities*, Articles 5 and 6 (Exhibits CHN-313, JE-101).

<sup>1115</sup> On the issue of the relevant charter, see paragraph 7.1017.

managed by a Secretariat, also called the Standing Administrative Organ of the CCCMC.<sup>1116</sup> 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.<sup>1117</sup> 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 process<sup>1118</sup>, is assisted by the Bidding Office, which in turn is responsible for implementing individual auctions organized by the Bidding Committee.<sup>1119</sup> 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.<sup>1120</sup>

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

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<sup>1116</sup> 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.

<sup>1117</sup> *2009 Coke Export Quota Application Procedures* (Exhibits CHN-308, JE-85).

<sup>1118</sup> *Export Quota Bidding Implementation Rules* (Exhibits CHN-305, JE-78), Articles 2 and 3.

<sup>1119</sup> *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).

<sup>1120</sup> *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.<sup>1121</sup> 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.<sup>1122</sup> 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

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<sup>1121</sup> 2009 *Export Licensing Catalogue* (Exhibits CHN-6, JE-22).

<sup>1122</sup> 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".<sup>1123</sup> 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.<sup>1124</sup> According to China, within the CCCMC Secretariat, the Minerals & Metals Department is the sole administrative division charged with this verification competence.<sup>1125</sup> Applications for export quotas are provided solely to CCCMC's Minerals & Metals Department and not to the membership of the CCCMC itself.<sup>1126</sup>

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.<sup>1127</sup> 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

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<sup>1123</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 225.

<sup>1124</sup> *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).

<sup>1125</sup> China's first written submission, para. 691.

<sup>1126</sup> China's first written submission, para. 693.

<sup>1127</sup> *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.<sup>1128</sup> China also submitted a letter confirming that the verification work is undertaken by the CCCMC Minerals & Metals Department.<sup>1129</sup>

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.<sup>1130</sup>

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*<sup>1131</sup> and the successful bid quantity is determined according to the procedures set out in Article 20(II) of the *Export Quota Bidding Measures*.<sup>1132</sup> 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.<sup>1133</sup>

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.<sup>1134</sup> 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.<sup>1135</sup> 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

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<sup>1128</sup> 2009 *Coke Export Quota Application Procedures*, Article II, (Exhibits CHN-308, JE-85), third and fourth paras.

<sup>1129</sup> Letter from the CCCMC Secretariat, dated 10 November 2010 (Exhibit CHN-530).

<sup>1130</sup> *Export Quota Bidding Measures* (Exhibits CHN-304, JE-77); *Export Quota Bidding Implementation Rules* Article 5(VIII) (Exhibits CHN-305, JE-78).

<sup>1131</sup> Exhibits CHN-304, JE-77.

<sup>1132</sup> Exhibits CHN-304, JE-77.

<sup>1133</sup> The Panel recalls from its description of the quota allocation system that bauxite, fluorspar, and silicon carbide are subject to public bidding.

<sup>1134</sup> United States' second written submission, para. 359; Mexico's second written submission, para. 363.

<sup>1135</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 225.

CCCMC in the management of the Bidding Office.<sup>1136</sup> 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*.<sup>1137</sup> 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.<sup>1138</sup> 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

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<sup>1136</sup> See para. 7.766 above.

<sup>1137</sup> Exhibits CHN-304, JE-77.

<sup>1138</sup> United States' second written submission, para. 360; Mexico's second written submission, para. 364.

administration of the application process for export quotas.<sup>1139</sup> 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)."<sup>1140</sup>

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.<sup>1141</sup>

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 coke<sup>1142</sup>, allows verification of whether the exporter satisfies the minimum export performance requirement.<sup>1143</sup> 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*.<sup>1144</sup> China asserts that the business licence must be submitted as supporting documentation<sup>1145</sup>, showing that the coke quota applicant is lawfully registered and satisfies the business qualification requirement.<sup>1146</sup> The Panel has verified that a requirement similar to the 2010 requirement exists in

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<sup>1139</sup> 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.

<sup>1140</sup> Panel Report, *Argentina – Hides and Leather*, para. 11.94.

<sup>1141</sup> United States' first written submission, para. 364; Mexico's first written submission, para. 367.

<sup>1142</sup> *2010 Application Qualifications and Procedures for Export Quota of Coke*, Article I(1)3 and I(II)2. (Exhibit CHN-317).

<sup>1143</sup> *2010 Application Qualifications and Procedures for Export Quota of Coke*, Article III(IV), (Exhibit CHN-317).

<sup>1144</sup> *2009 Coke Export Quota Application Procedures*, Article I(1)3 and Article I(2)2 and Article III(5), (Exhibits CHN-308, JE-85).

<sup>1145</sup> *2010 Application Qualifications and Procedures for Export Quota of Coke*, Article III(I) (Exhibit CHN-317).

<sup>1146</sup> *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*.<sup>1147</sup>

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 information<sup>1148</sup> 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.<sup>1149</sup> 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*.<sup>1150</sup>

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.<sup>1151</sup> Such information and documentation allows the authority to verify whether the exporter satisfies the minimum export performance requirement.<sup>1152</sup> 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*.<sup>1153</sup>

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.

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<sup>1147</sup> *2009 Coke Export Quota Application Procedure*, Articles I(1)1 and I(2)1, (Exhibits CHN-308, JE-85).

<sup>1148</sup> *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).

<sup>1149</sup> *2010 Second-Batch Bidding Qualifications and Review for Export Quotas*, Articles III(II)3 and III(II)4 (Exhibit CHN-307).

<sup>1150</sup> *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).

<sup>1151</sup> *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).

<sup>1152</sup> *2010 Second-Batch Bidding Qualifications and Review for Export Quotas*, Articles III(II)3 and III(II)4, (Exhibit CHN-307).

<sup>1153</sup> *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.<sup>1154</sup>

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.<sup>1155</sup> China explained that MOFCOM has not authorized a 2010 quota for zinc.<sup>1156</sup> 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.<sup>1157</sup>

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".<sup>1158</sup> The Panel considers that the decision by MOFCOM not to publish the zinc quota is a

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<sup>1154</sup> European Union's first written submission, para. 213.

<sup>1155</sup> 2010 Export Licensing Catalogue Article I(i), (Exhibit CHN-7).

<sup>1156</sup> 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.

<sup>1157</sup> China's response to Panel question No. 8 following the first substantive meeting para 37.

<sup>1158</sup> 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.<sup>1159</sup> 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.<sup>1160</sup> 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'."<sup>1161</sup> 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.<sup>1162</sup>

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 carbide<sup>1163</sup> 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

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<sup>1159</sup> *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).

<sup>1160</sup> Panel Report, *EC – IT Products*, para. 7.1026.

<sup>1161</sup> Panel Report, *EC – IT Products*, para. 7.1048.

<sup>1162</sup> China's response to Panel question No. 8 following the first substantive meeting para 37.

<sup>1163</sup> 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.<sup>1164</sup> 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*.<sup>1165</sup> 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.<sup>1166</sup>

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)<sup>1167</sup>, 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.<sup>1168</sup> China submits that the bid-winning price reflects what a bid winners is willing to pay for the right to export a particular quantity.<sup>1169</sup> In addition, China submits that a bid-winning system is the least trade-distorting means of quota allocation.<sup>1170</sup>

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.<sup>1171</sup> 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.<sup>1172</sup> 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

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<sup>1164</sup> United States' first written submission, paras. 315-330; Mexico's first written submission, paras. 318-333.

<sup>1165</sup> China's first written submission, para. 578.

<sup>1166</sup> China's second written submission, paras. 397-399.

<sup>1167</sup> China's first written submission, para. 577.

<sup>1168</sup> China's first written submission, paras. 577, 594.

<sup>1169</sup> China's first written submission, para. 598.

<sup>1170</sup> 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).

<sup>1171</sup> 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.

<sup>1172</sup> 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.<sup>1173</sup> 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.<sup>1174</sup> 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".<sup>1175</sup> 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.<sup>1176</sup> 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

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<sup>1173</sup> Complainants' responses to Panel question No. 2 following the second substantive meeting.

<sup>1174</sup> 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).

<sup>1175</sup> See GATT Panel Report, *US – Customs User Fee*, para. 69.

<sup>1176</sup> 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."<sup>1177</sup>

(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.<sup>1178</sup> 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".<sup>1179</sup> 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".<sup>1180</sup>

7.818 China argues that Article VIII:1(a) does not apply a "residual general prohibition on all fees and charges".<sup>1181</sup> 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.<sup>1182</sup> China argues that the phrase "of whatever character" was added to clarify the distinction between "fees and charges" and "duties".<sup>1183</sup> 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".<sup>1184</sup> China argues that this interpretation is supported by the reference to customs-related activities in Article VIII:3.<sup>1185</sup> China finds further support for this interpretation in more recent discussions on Article VIII.<sup>1186</sup>

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.<sup>1187</sup>

7.820 The Panel observes that the term "fee" is defined as "a fixed charge" or "a sum paid or charged for a service"<sup>1188</sup>, or "[a] recompense for an official or professional service or a charge or

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<sup>1177</sup> 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.

<sup>1178</sup> 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.

<sup>1179</sup> 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.

<sup>1180</sup> United States' first written submission, para. 319; Mexico's first written submission, para. 322.

<sup>1181</sup> China's first written submission, para. 579-580; China's second written submission, para. 386.

<sup>1182</sup> 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).

<sup>1183</sup> China's second written submission, para. 386.

<sup>1184</sup> China's first written submission, paras. 581-582, referring to GATT Panel Report, *US – Customs User Fee*, para. 76.

<sup>1185</sup> China's first written submission, para. 583.

<sup>1186</sup> See China's first written submission, paras. 589-590 and fns. 877-879.

<sup>1187</sup> 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".<sup>1189</sup> Definitions of "charge" include "pecuniary burden, cost", "expense", or "[a] price required or demanded for service rendered or goods supplied".<sup>1190</sup> 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.<sup>1191</sup> The term "whatever" is defined as "[a]nything that", and "[n]o matter what".<sup>1192</sup> The term "character" is defined as "a feature, trait, characteristic" or nature, sort, style".<sup>1193</sup> 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".<sup>1194</sup> 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)".<sup>1195</sup> The term "connection" is defined *inter alia* as "[a] causal or logical relationship or association"<sup>1196</sup>, and "connect" as a transitive verb is defined as "associate in occurrence or action".<sup>1197</sup>

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<sup>1188</sup> Merriam-Webster Online Dictionary.

<sup>1189</sup> Black's Law Dictionary, (Special Deluxe Fifth Edition), p. 553.

<sup>1190</sup> Shorter Oxford English Dictionary, 5th edn., L. Brown (ed.) (Oxford University Press, 2002), Vol. 1, p. 382.

<sup>1191</sup> Shorter Oxford English Dictionary, 5th edn., L. Brown (ed.) (Oxford University Press, 2002), Vol 1, p. 54.

<sup>1192</sup> Shorter Oxford English Dictionary, 5th edn., L. Brown (ed.) (Oxford University Press, 2002), Vol. 2, p. 3618.

<sup>1193</sup> Shorter Oxford English Dictionary, 5th edn., L. Brown (ed.) (Oxford University Press, 2002), Vol 1, p. 381.

<sup>1194</sup> Shorter Oxford English Dictionary, 5th edn., L. Brown (ed.) (Oxford University Press, 2002), Vol 1, p. 1331.

<sup>1195</sup> Shorter Oxford English Dictionary, 5th edn., L. Brown (ed.) (Oxford University Press, 2002), Vol. 2, p. 1996.

<sup>1196</sup> Shorter Oxford English Dictionary, 5th edn., L. Brown (ed.) (Oxford University Press, 2002), Vol 1, p. 489.

<sup>1197</sup> 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".<sup>1198</sup>

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.<sup>1199</sup>

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."<sup>1200</sup> 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;

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<sup>1198</sup> 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).

<sup>1199</sup> China's closing oral statement at the second substantive meeting, para. 9.

<sup>1200</sup> *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".<sup>1201</sup>

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.<sup>1202</sup>

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*<sup>1203</sup>, China refers to the *International Convention Relating to the Simplification of Customs Formalities*<sup>1204</sup> and the *Suggested Charter for an International Trade Organization of the United Nations*<sup>1205</sup>. 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".<sup>1206</sup> In addition, China refers to a 1989 background note of the GATT Negotiating Group on Non-Tariff Measures<sup>1207</sup> noting examples of charges for services rendered that are imposed in connection with imports, including port

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<sup>1201</sup> 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.").

<sup>1202</sup> 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.

<sup>1203</sup> GATT Panel Report, *US – Customs User Fee*, paras. 71, 75.

<sup>1204</sup> *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).

<sup>1205</sup> *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).

<sup>1206</sup> *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).

<sup>1207</sup> *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.<sup>1208</sup> No reference is made to systems or methods of quota or licensing allocation, other than that such allocation must be equitable.<sup>1209</sup> 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.<sup>1210</sup>

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<sup>1208</sup> 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).

<sup>1209</sup> Article 3(e).

<sup>1210</sup> 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.<sup>1211</sup> 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.<sup>1212</sup>

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".<sup>1213</sup> 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 auctions<sup>1214</sup> and permits trading partners to allocate quotas through auctions.<sup>1215</sup>

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

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<sup>1211</sup> See, e.g., China's first written submission, para. 591. China's closing oral statement at the second substantive meeting, para. 9.

<sup>1212</sup> China's first written submission, para. 591; China's closing oral statement at the second substantive meeting, para. 7.

<sup>1213</sup> China's closing oral statement at the second substantive meeting, para. 8, citing Appellate Body Report, *EC – Bananas III* (21.5 – US), para. 338.

<sup>1214</sup> China's second written submission, paras. 388-394.

<sup>1215</sup> China's second written submission, para. 395.

the quota may decide to export less or none of the allocated quota, if it desires.<sup>1216</sup> 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.<sup>1217</sup> 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.<sup>1218</sup> 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

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<sup>1216</sup> *Implementation Rules on Export Quota Bidding of Industrial Products*, Article 21 (Exhibit CHN-305); *Quota Bidding Implementation Rules*, Article 23 (Exhibit JE-78).

<sup>1217</sup> See China's first written submission, paras. 600-601.

<sup>1218</sup> 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.<sup>1219</sup> 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.<sup>1220</sup> 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.<sup>1221</sup>

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.<sup>1222</sup>

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."<sup>1223</sup>

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.<sup>1224</sup>

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.

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<sup>1219</sup> The Panel notes that this method of allocation is economically desirable and is not otherwise prohibited under the GATT 1994 or WTO Agreement.

<sup>1220</sup> United States' second written submission, para. 373; Mexico's second written submission, para. 378.

<sup>1221</sup> United State's first written submission, para. 330; Mexico's first written submission, para. 333.

<sup>1222</sup> China's first written submission, paras. 603-605.

<sup>1223</sup> Exhibit JE-2.

<sup>1224</sup> 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.<sup>1225</sup>

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.

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<sup>1225</sup> 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".<sup>1226</sup> They submit that China has itself conceded that its export licensing system amounts to an export restriction under GATT Article XI:1.<sup>1227</sup> The European Union submits that China's export licensing system as set forth in relevant measures is "non-automatic by law"<sup>1228</sup> 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."<sup>1229</sup> 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".<sup>1230</sup>

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".<sup>1231</sup> It submits that there is no limitation on the discretion on the part of the Ministry of Commerce to require undefined "other documents"<sup>1232</sup> or "documents of approval"<sup>1233</sup>, which allows China's export licence agencies to restrict, or altogether ban, exportation by certain companies.<sup>1234</sup>

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.<sup>1235</sup> In response, China contested the European Union's translation of the term, arguing the term should be translated as "business qualifications".<sup>1236</sup> 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

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<sup>1226</sup> United States' first written submission, paras. 338-339, 342.

<sup>1227</sup> 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).

<sup>1228</sup> European Union's first written submission, para. 317.

<sup>1229</sup> 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").

<sup>1230</sup> United States' first written submission, para. 340, fn. 415; Mexico's first written submission, para. 343, fn. 415.

<sup>1231</sup> European Union's first written submission, para. 319.

<sup>1232</sup> 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).

<sup>1233</sup> European Union's first written submission, para. 321; *2008 Export License Administration Measures*, Article 11 (Exhibits CHN-342, JE-74).

<sup>1234</sup> European Union's first written submission, paras. 319, 321.

<sup>1235</sup> European Union's first written submission, para. 320, referring to *2008 Export Licensing Working Rules*, Article 8.

<sup>1236</sup> 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.<sup>1237</sup> 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".<sup>1238</sup> (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"<sup>1239</sup>). 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"<sup>1240</sup> and prohibit China's imposition of "non-automatic export licensing and export restrictions" that are not justified.<sup>1241</sup>

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.<sup>1242</sup>

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.<sup>1243</sup>

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

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<sup>1237</sup> China's first written submission, paras. 786-787.

<sup>1238</sup> 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.

<sup>1239</sup> European Union's response to the Panel question No. 59, following the second substantive meeting para 83.

<sup>1240</sup> United States' first written submission, para. 343; Mexico's first written submission, para. 346.

<sup>1241</sup> 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.

<sup>1242</sup> European Union's first written submission, paras. 334-336.

<sup>1243</sup> China's first written submission, para. 67.

submission of a valid application and specified documents.<sup>1244</sup> 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."<sup>1245</sup>

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".<sup>1246</sup>

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.<sup>1247</sup> 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.<sup>1248</sup> 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.

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<sup>1244</sup> China's first written submission, paras. 771, 776; China's second written submission, para. 499.

<sup>1245</sup> China's first written submission, paras. 808, 881.

<sup>1246</sup> China's second written submission, paras. 477-478.

<sup>1247</sup> 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.

<sup>1248</sup> 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".<sup>1249</sup> The exportation of goods from China is unrestricted unless otherwise provided for by law or regulation.<sup>1250</sup> 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.<sup>1251</sup> Goods that are subject to restriction pursuant to Article 19 may be subject to licensing as "goods subject to ... export restriction".<sup>1252</sup>

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.<sup>1253</sup> Export licences are generally valid for up to six months and expire no later than 31 December each year.<sup>1254</sup> The period of validity may be extended if an export licence is not fully used.<sup>1255</sup> For those goods that are simultaneously subject to export quotas, applications for licences must be made within the period of validity of the quota.<sup>1256</sup>

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.<sup>1257</sup> 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.<sup>1258</sup> 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.<sup>1259</sup> Individuals working in licensing entities who issue licences without approval may also be subject to criminal and administrative penalties, including removal from employment, warning,

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<sup>1249</sup> *Regulation on Import and Export Administration*, Article 43 (Exhibit JE-73).

<sup>1250</sup> *Foreign Trade Law*, Article 14 (Exhibit JE-72); *Regulation on Import and Export Administration*, Article 4 (Exhibit JE-73).

<sup>1251</sup> *Foreign Trade Law*, Articles 15, 16, 17 (Exhibit JE-72).

<sup>1252</sup> *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).

<sup>1253</sup> *Regulation on Import and Export Administration*, Article 43 (Exhibit JE-73); *2008 Export Licence Administration Measures*, Article 6 (Exhibits CHN-342, JE-74).

<sup>1254</sup> *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."

<sup>1255</sup> *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).

<sup>1256</sup> *2008 Export Licence Administration Measures*, Article 28 (Exhibits CHN-342, JE-74).

<sup>1257</sup> *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).

<sup>1258</sup> *Foreign Trade Law*, Articles 61, 64 (Exhibit JE-72); *Regulation on Import and Export Administration*, Articles 64, 65 (Exhibit JE-73).

<sup>1259</sup> *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.<sup>1260</sup> MOFCOM may also punish the forging, altering without approval, buying and selling of export licences.<sup>1261</sup>

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.<sup>1262</sup> This catalogue is published annually at least 21 days before the list takes effect, which is on 1 January of each year.<sup>1263</sup> MOFCOM approves exportation of goods listed in this catalogue.<sup>1264</sup>

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.<sup>1265</sup>

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 form<sup>1266</sup>; relevant "export quota or other applicable approval documents"<sup>1267</sup>; 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.<sup>1268</sup>

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

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<sup>1260</sup> 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).

<sup>1261</sup> *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).

<sup>1262</sup> *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).

<sup>1263</sup> *Regulation on Import and Export Administration*, Article 35 (Exhibit JE-73), 2008 *Export Licence Administration Measures*, Article 3 (Exhibits CHN-342, JE-74).

<sup>1264</sup> *Foreign Trade Law*, Article 19 (Exhibit JE-72).

<sup>1265</sup> 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.

<sup>1266</sup> 2008 *Export Licence Administration Measures*, Article 8 (Exhibits CHN-342, JE-74).

<sup>1267</sup> 2008 *Export Licence Administration Measures*, Article 9 (Exhibits CHN-342, JE-74).

<sup>1268</sup> 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*<sup>1269</sup>, 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.<sup>1270</sup> 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.<sup>1271</sup>

7.888 In general, an export licence must be issued within three working days from the receipt of a completed application.<sup>1272</sup> China uses three types of export licences.<sup>1273</sup> 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 enterprises<sup>1274</sup> as well as for goods in the Catalogue for Goods Subject to the Administration of Export Licenses.<sup>1275</sup>

7.889 Article 8 of the *2008 Export Licensing Working Rules*<sup>1276</sup> 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.<sup>1277</sup>

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".<sup>1278</sup> The Appellate Body confirmed that "any act or omission attributable to a WTO Member can be a measure of that Member for purposes of

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<sup>1269</sup> Exhibits CHN-344, JE-97.

<sup>1270</sup> *2008 Export Licence Administration Measures*, Article 21 (Exhibits CHN-342, JE-74).

<sup>1271</sup> *2008 Export Licence Administration Measures*, Article 9 (Exhibits CHN-342, JE-74).

<sup>1272</sup> *2008 Export Licence Administration Measures*, Article 19 (Exhibits CHN-342, JE-74); *2008 Export Licensing Working Rules*, Article 10 (Exhibits CHN-344, JE-97).

<sup>1273</sup> *2008 Export Licence Administration Measures*, Article 22 (Exhibits CHN-342, JE-74).

<sup>1274</sup> *2009 Export Licensing Catalogue*, Article VII (Exhibit JE-22).

<sup>1275</sup> *2008 Export Licence Administration Measures*, Article 22 (Exhibits CHN-342, JE-74).

<sup>1276</sup> Exhibits CHN-344, JE-97.

<sup>1277</sup> *2008 Export Licensing Working Rules*, Article 9 (Exhibit CHN-344, JE-97).

<sup>1278</sup> China's response to question No. 2 from the European Union, para. 279.

dispute settlement proceedings."<sup>1279</sup> 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.<sup>1280</sup> 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."<sup>1281</sup> The panel thereafter concluded that "a discretionary or non-automatic import licensing requirement is a restriction prohibited by Article XI:1."<sup>1282</sup> 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".<sup>1283</sup>

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

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<sup>1279</sup> Appellate Body Report, *US – Corrosion Resistant Steel Sunset Reviews*, para. 81.

<sup>1280</sup> Panel Report, *Colombia – Ports of Entry*, para. 7.240.

<sup>1281</sup> Panel Report, *India – Quantitative Restrictions*, para. 5.128.

<sup>1282</sup> Panel Report, *India – Quantitative Restrictions*, para. 5.129.

<sup>1283</sup> 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.<sup>1284</sup> 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".<sup>1285</sup> 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.<sup>1286</sup> 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.<sup>1287</sup> 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.<sup>1288</sup>

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'".<sup>1289</sup> It argues that Article XI:1 has been found broadly to protect trading and competitive opportunities for both Members and traders.<sup>1290</sup> The European Union contends that a discretionary export licensing system "by its very nature limits such opportunities because certain exports may not be permitted".<sup>1291</sup>

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.<sup>1292</sup> 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.<sup>1293</sup>

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<sup>1284</sup> Panel Report, *India – Quantitative Restrictions*, para. 5.129, 5.137.

<sup>1285</sup> Panel Report, *India – Quantitative Restrictions*, para. 5.130.

<sup>1286</sup> United States' first written submission, paras. 332-333; Mexico's first written submission, paras. 334-335.

<sup>1287</sup> United States' opening oral statement at the second substantive meeting, para. 124.

<sup>1288</sup> United States' first written submission, paras 341; Mexico's first written submission, paras 344, referring to Panel Report, *India – Quantitative Restrictions*, para. 5.129.

<sup>1289</sup> European Union's first written submission, para. 316.

<sup>1290</sup> European Union's second written submission, paras. 90 and 103.

<sup>1291</sup> European Union's second written submission, para. 90.

<sup>1292</sup> China's first written submission, paras. 748-752; China's second written submission, paras. 482-484.

<sup>1293</sup> 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.<sup>1294</sup> 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.<sup>1295</sup>

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.<sup>1296</sup>

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.<sup>1297</sup>

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.<sup>1298</sup>

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.<sup>1299</sup> 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.

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<sup>1294</sup> China's first written submission, para. 753.

<sup>1295</sup> China's first written submission, paras. 754, 755.

<sup>1296</sup> China's first written submission, paras. 758-759; China's second written submission, paras. 488-489.

<sup>1297</sup> China's first written submission, paras. 754, 756 referring to Import Licensing Agreement, Article 2.2(a).

<sup>1298</sup> China's second written submission, para. 487.

<sup>1299</sup> 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 Arabia<sup>1300</sup>, 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.<sup>1301</sup> 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".<sup>1302</sup> 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".<sup>1303</sup>

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.<sup>1304</sup> 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]".<sup>1305</sup> 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.<sup>1306</sup> 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

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<sup>1300</sup> Third party written submission of Kingdom of Saudi Arabia, paras. 17-27.

<sup>1301</sup> See, e.g., China's response to Panel question No. 66 following the second substantive meeting, para. 337, fn. 392.

<sup>1302</sup> China's first written submission, para. 754.

<sup>1303</sup> China's second written submission, para. 487.

<sup>1304</sup> Third party written submission of Kingdom of Saudi Arabia, para. 18.

<sup>1305</sup> 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".

<sup>1306</sup> 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.<sup>1307</sup> Panels have assessed such measures by examining their design and structure to determine whether they have a "limiting" or "restrictive" effect.<sup>1308</sup>

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.

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<sup>1307</sup> See, e.g., discussion in paragraphs 7.205-7.206 above.

<sup>1308</sup> 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.<sup>1309</sup> 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.<sup>1310</sup> 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".<sup>1311</sup>

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.<sup>1312</sup> 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.<sup>1313</sup> 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".<sup>1314</sup> The United States and Mexico submit that China has itself conceded that its export licensing system amounts to an export restriction under

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<sup>1309</sup> Panel Report, *India – Quantitative Restrictions*, para. 5.130.

<sup>1310</sup> Panel Report, *Turkey – Rice*, paras. 7.128, 7.134.

<sup>1311</sup> Panel Report, *China – Publications and Audiovisual Products*, para. 7.324.

<sup>1312</sup> China's first written submission, paras. 803-804.

<sup>1313</sup> United States' first written submission, paras. 338-339, 342.

<sup>1314</sup> 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.<sup>1315</sup>

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.<sup>1316</sup> The European Union cites references in the *Regulation on Import and Export Administration*<sup>1317</sup> to goods "prohibited from exportation" and goods "limited in exportation"<sup>1318</sup>, including those goods that are "subject to the administration of licenses".<sup>1319</sup> It submits that these goods are subject to non-automatic export licences.<sup>1320</sup> 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.<sup>1321</sup>

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".<sup>1322</sup> 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".<sup>1323</sup> 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.<sup>1324</sup> 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".<sup>1325</sup> The European Union argues that the discretion inherent in these criteria allows

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<sup>1315</sup> 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)).

<sup>1316</sup> European Union's opening oral statement at the first substantive meeting, para. 9.

<sup>1317</sup> *Regulation on Import and Export Administration* (Exhibit CHN-152, Exhibit JE-73).

<sup>1318</sup> *Regulation on Import and Export Administration*, Articles 33 and 35 (Exhibit CHN-152, Exhibit JE-73).

<sup>1319</sup> *Regulation on Import and Export Administration*, Article 43 (Exhibit CHN-152, Exhibit JE-73).

<sup>1320</sup> European Union's first written submission, para. 317.

<sup>1321</sup> European Union's second written submission, para. 64.

<sup>1322</sup> European Union's first written submission, para. 317, referring to Notice 100/2008 (Exhibit JE-22).

<sup>1323</sup> European Union's first written submission, para. 319.

<sup>1324</sup> 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.

<sup>1325</sup> 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.<sup>1326</sup>

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.<sup>1327</sup> 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.<sup>1328</sup> 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.<sup>1329</sup>

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.<sup>1330</sup> 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.<sup>1331</sup> 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*<sup>1332</sup>, and Article 9 of the *2008 Export Licensing Working Rules*.<sup>1333</sup> 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".<sup>1334</sup>

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

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<sup>1326</sup> European Union's first written submission, paras. 319, 321; European Union's second written submission, para. 98.

<sup>1327</sup> 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.

<sup>1328</sup> China's first written submission, para. 798.

<sup>1329</sup> China's first written submission, paras. 758-759, 800.

<sup>1330</sup> China's first written submission, paras. 771, 776; China's second written submission, para. 499.

<sup>1331</sup> 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*.

<sup>1332</sup> China's first written submission, para. 775.

<sup>1333</sup> China's first written submission, para. 777.

<sup>1334</sup> 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.<sup>1335</sup> 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.<sup>1336</sup>

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.<sup>1337</sup> 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.<sup>1338</sup> If it were to do so, the European Union requests the Panel to state the consequence were China to repudiate these statements.<sup>1339</sup> 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".<sup>1340</sup>

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*.<sup>1341</sup> It submits that the *2008 Export Licensing Working Rules* include undefined terms.<sup>1342</sup> 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".<sup>1343</sup>

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

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<sup>1335</sup> 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.

<sup>1336</sup> 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.

<sup>1337</sup> European Union's second written submission, para. 55; European Union's opening oral statement at the first substantive meeting, para. 6.

<sup>1338</sup> European Union's opening oral statement at the first substantive meeting, para. 6; European Union's second written submission, para. 73.

<sup>1339</sup> European Union's second written submission, para. 73.

<sup>1340</sup> Panel Report, *US – Section 301 Trade Act*, para. 7.103.

<sup>1341</sup> European Union's second written submission, para. 76.

<sup>1342</sup> European Union's second written submission, para. 75.

<sup>1343</sup> 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.<sup>1344</sup> Absent modification or repeal of the Export Licensing Measures, the European Union argues that China has not removed the discretion enjoyed under this provision.<sup>1345</sup>

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.

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<sup>1344</sup> European Union's second written submission, para. 93.

<sup>1345</sup> 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 export<sup>1346</sup>; (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 export<sup>1347</sup>; (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 export<sup>1348</sup>; 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.<sup>1349</sup> Effectively, as clarified in statements by the Quota & License Administrative Bureau of MOFCOM<sup>1350</sup>, 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

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<sup>1346</sup> 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.

<sup>1347</sup> 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.

<sup>1348</sup> 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.

<sup>1349</sup> China's first written submission, para. 796, fn 1138.

<sup>1350</sup> 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.<sup>1351</sup>

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.<sup>1352</sup> 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.

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<sup>1351</sup> 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.

<sup>1352</sup> 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 exported<sup>1353</sup>; impose minimum price conditions<sup>1354</sup>; or reduce quotas, stop issuing licences, or withdraw export rights under Article 21 of the *CCCMC Coordination Measures*.<sup>1355</sup>

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".<sup>1356</sup>

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.

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<sup>1353</sup> 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).

<sup>1354</sup> 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).

<sup>1355</sup> United States' second written submission, para. 377; Mexico's second written submission, para. 382; see *CCCMC Coordination Measures*, Article 21 (Exhibit JE-107).

<sup>1356</sup> 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.<sup>1357</sup> 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

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<sup>1357</sup> 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."<sup>1358</sup> 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."<sup>1359</sup> 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"<sup>1360</sup> 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,

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<sup>1358</sup> China's first written submission, para. 808, referring to Panel Report, *EC – Salmon*, para. 7.636.

<sup>1359</sup> China's response to second set of Panel questions, question No. 66.

<sup>1360</sup> 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]<sup>1361</sup> or in previous GATT practice *requires* a panel to examine *all* legal claims made by the complaining party."<sup>1362</sup> 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."<sup>1363</sup>

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.

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<sup>1361</sup> 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."

<sup>1362</sup> 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.

<sup>1363</sup> 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.<sup>1364</sup> 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.<sup>1365</sup> 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.<sup>1366</sup> 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

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<sup>1364</sup> 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.

<sup>1365</sup> European Union's first written submission, para. 334.

<sup>1366</sup> 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.<sup>1367</sup>

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.'"<sup>1368</sup> 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"<sup>1369</sup> 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..."

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<sup>1367</sup> European Union's first written submission, para. 336.

<sup>1368</sup> China's first written submission, para. 811, referring to Panel Report, *EC – Salmon*, para. 7.636.

<sup>1369</sup> 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.<sup>1370</sup>

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."<sup>1371</sup> 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 zinc<sup>1372</sup> 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.<sup>1373</sup> 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.<sup>1374</sup> 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.<sup>1375</sup>

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<sup>1370</sup> Appellate Body Report, *China – Publications and Audiovisual Products*, para. 226.

<sup>1371</sup> Appellate Body Report, *India – Patents (US)*, para. 87.

<sup>1372</sup> 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.

<sup>1373</sup> 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.

<sup>1374</sup> 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.

<sup>1375</sup> 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 establishment<sup>1376</sup>, 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 2008<sup>1377</sup>, or that an alleged MEP requirement restricts export in a manner inconsistent with Article XI:1.<sup>1378</sup> 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.<sup>1379</sup> 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.<sup>1380</sup>

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.<sup>1381</sup> 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.<sup>1382</sup>

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

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<sup>1376</sup> China's first written submission, para. 838; China's response to Panel question No. 1, para. 20.

<sup>1377</sup> China's first written submission, paras. 842-853.

<sup>1378</sup> China's first written submission, paras. 854-865.

<sup>1379</sup> China's first written submission, para. 867.

<sup>1380</sup> China's first written submission, paras. 868-872.

<sup>1381</sup> See paragraphs 1.10 to 1.13 above; Annex F to these Reports.

<sup>1382</sup> 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.<sup>1383</sup> The complainants indicated which measures that they considered to be in the Panel's terms of reference.<sup>1384</sup>

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*<sup>1385</sup>; (2) *Regulations for Personnel Management of Chambers of Commerce*<sup>1386</sup>; (3) *1994 CCCMC Charter*<sup>1387</sup>; (4) *2001 CCCMC Charter*<sup>1388</sup>; (5) *Export Price Penalties Regulations*<sup>1389</sup>; and (6) *Measures for Administration of Licensing Entities*.<sup>1390</sup>

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.<sup>1391</sup> 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.<sup>1392</sup>

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

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<sup>1383</sup> Panel question No. 1(a) and (b).

<sup>1384</sup> See complainants' response to Panel question No. 1 following the first substantive meeting; United States' Attachment – Chart A re Question 1(a) & (b).

<sup>1385</sup> Exhibits CHN-313, JE-101.

<sup>1386</sup> Exhibits CHN-315, JE-102.

<sup>1387</sup> Exhibit JE-86.

<sup>1388</sup> Exhibits CHN-16, JE-87.

<sup>1389</sup> Exhibits CHN-350, JE-113.

<sup>1390</sup> Exhibits CHN-358, JE-75.

<sup>1391</sup> United States' second written submission, paras. 408-414.

<sup>1392</sup> United States' second written submission, para. 416.

have authority to proceed".<sup>1393</sup> 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 requests<sup>1394</sup>, 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.<sup>1395</sup>

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 submissions<sup>1396</sup> 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.<sup>1397</sup> 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.<sup>1398</sup>

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<sup>1393</sup> Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36.

<sup>1394</sup> 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).

<sup>1395</sup> 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.

<sup>1396</sup> 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).

<sup>1397</sup> 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).

<sup>1398</sup> 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.<sup>1399</sup> 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.<sup>1400</sup> 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.<sup>1401</sup> The complainants submit price data for bauxite and yellow phosphorus, in particular, to show that China set coordinated export prices for these two products.<sup>1402</sup> 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.<sup>1403</sup> 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.<sup>1404</sup> 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.<sup>1405</sup>

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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.

<sup>1399</sup> 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").

<sup>1400</sup> 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.

<sup>1401</sup> 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).

<sup>1402</sup> 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.

<sup>1403</sup> 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.

<sup>1404</sup> 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.

<sup>1405</sup> 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 MOFCOM<sup>1406</sup>, 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.<sup>1407</sup> 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.<sup>1408</sup> It considers that any outstanding measures that were not formally repealed became effectively "inapplicable".<sup>1409</sup> 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.<sup>1410</sup> China further submits that the complainants have not provided evidence – either through reference to events that occurred between 2001 and 2007<sup>1411</sup>, screenshots taken from the CCCMC website after 2008<sup>1412</sup> or price data on yellow phosphorus and bauxite taken in May 2008<sup>1413</sup> – 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".<sup>1414</sup> Through its intervention in a 2006 US court

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submission, paras. 448, 450; European Union's second written submission, para. 172; Mexico's first written submission, paras. 365, 368.

<sup>1406</sup> China's response to Panel question No. 1, para. 20.

<sup>1407</sup> China's first written submission, paras. 838-847; China's second written submission, para. 565; *Normal Export Price Provisions*, Article 5 (Exhibit CHN-50).

<sup>1408</sup> China's first written submission, para. 838.

<sup>1409</sup> China's second written submission, paras. 567-570; Exhibit CHN-438.

<sup>1410</sup> China's first written submission, paras. 47, 52, 57-67.

<sup>1411</sup> China's first written submission, paras. 842.

<sup>1412</sup> China's first written submission, paras. 839, 843.

<sup>1413</sup> China's first written submission, para. 851, Exhibits CHN-361, CHN-362, CHN-363.

<sup>1414</sup> 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).

proceeding<sup>1415</sup>, 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 Organizations<sup>1416</sup> and the Regulations for Personnel Management of Chambers of Commerce.<sup>1417</sup> 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".<sup>1418</sup> On this basis, the complainants consider that the CCCMC's export-price related functions and responsibilities are attributable to China.<sup>1419</sup>

7.1003 China has asserted that certain measures are not "sources of Chinese law".<sup>1420</sup> China admits that MOFCOM and the GAC delegated certain implementing authority to the CCCMC to coordinate export prices<sup>1421</sup>, but it explains that with the repeal of the PVC system in 2008, implementation authority granted to CCCMC terminated.<sup>1422</sup>

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."<sup>1423</sup> 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

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<sup>1415</sup> 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).

<sup>1416</sup> Exhibit JE-101, Article 14.

<sup>1417</sup> Exhibit JE-102.

<sup>1418</sup> 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.

<sup>1419</sup> 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).

<sup>1420</sup> China's response to Panel question No. 1, para. 14 following the first substantive meeting.

<sup>1421</sup> 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.

<sup>1422</sup> 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).

<sup>1423</sup> Appellate Body Report, *US – Corrosion Resistant Steel Sunset Reviews*, para. 81 (emphasis added).

those actions".<sup>1424</sup> 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.<sup>1425</sup>

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*<sup>1426</sup>; (2) *2001 CCCMC Charter*<sup>1427</sup>; (3) *CCCMC Export Coordination Measures*<sup>1428</sup>; (4) *CCCMC Brochure*<sup>1429</sup> and CCCMC website pages<sup>1430</sup>; (5) *CCCMC Bauxite Branch Coordination Measures*<sup>1431</sup>; and (6) *CCCMC Bauxite Branch*

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<sup>1424</sup> Panel Report, *Japan – Film*, para. 10.52.

<sup>1425</sup> 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.

<sup>1426</sup> Articles 3, 6, 14 (Exhibit JE-86).

<sup>1427</sup> Articles 3, 6, 14 (Exhibits CHN-16, JE-87).

<sup>1428</sup> Article 2, 4(3) and 18, 19, 20, 21 (Exhibit JE-107).

<sup>1429</sup> Exhibit JE-89, p.14.

<sup>1430</sup> Exhibit JE-88 pages 3-5.

*Charter*<sup>1432</sup> 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.<sup>1433</sup> The complainants refer to official statements by China's MOFCOM<sup>1434</sup> and documents submitted by exporters and members of the CCCMC to support their allegation that the CCCMC coordinates export prices.<sup>1435</sup> 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.<sup>1436</sup> 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."<sup>1437</sup>

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.<sup>1438</sup>

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<sup>1431</sup> Articles 1, 4, 7, 21 (Exhibit JE-108).

<sup>1432</sup> Articles 8, 20(3), 45 (Exhibit JE-112).

<sup>1433</sup> 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).

<sup>1434</sup> 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).

<sup>1435</sup> 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.

<sup>1436</sup> 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.

<sup>1437</sup> 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).

<sup>1438</sup> 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.<sup>1439</sup>

7.1013 In addition, China argues that it effectively abandoned price coordination on 9 January 2008<sup>1440</sup>, which was later formalized on 26 May 2008 through issuance of the *2008 PVC Notice*.<sup>1441</sup> Moreover, China argues that in a 2010 Resolution<sup>1442</sup> 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.<sup>1443</sup> At the request of the complainants<sup>1444</sup>, the Panel will only assess the WTO consistency of the 2009 measures while taking note that the 2010 measures.<sup>1445</sup> 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.<sup>1446</sup> 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.<sup>1447</sup> The Panel considers that the two Charters did not remain in force

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JE-126l; *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).

<sup>1439</sup> China's second written submission, paras. 562, 574.

<sup>1440</sup> *2008 Notice Ceasing the Work of PVC for Export Contract of 9 Types of Commodities* (Exhibit CHN-352).

<sup>1441</sup> *2008 PVC Notice* (Exhibits CHN-2, JE-125).

<sup>1442</sup> *CCCMC Resolution on Abolition of Coordination and Administration of Export Commodities* (Exhibit CHN-4).

<sup>1443</sup> 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.

<sup>1444</sup> 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.

<sup>1445</sup> 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.

<sup>1446</sup> 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.

<sup>1447</sup> 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 Notice<sup>1448</sup>, but states that these measures were repealed by resolution only on 28 July 2010.<sup>1449</sup>

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

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<sup>1448</sup> 2008 Notice Ceasing the Work of PVC for Export Contract of 9 Types of Commodities (Exhibit CHN-352).

<sup>1449</sup> 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.<sup>1450</sup>

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.<sup>1451</sup>

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.<sup>1452</sup>

(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*<sup>1453</sup>; (2) *CCCMC Export Coordination Measures*<sup>1454</sup>, (3) *CCCMC Bauxite Branch Coordination Measures*<sup>1455</sup>; and (4) statements by China's MOFCOM, including reference to the existence of a "system of self-

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<sup>1450</sup> 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).

<sup>1451</sup> *CCCMC Resolution on Abolition of Coordination and Administration of Export Commodities* (Exhibit CHN-4).

<sup>1452</sup> 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.

<sup>1453</sup> Articles 3, 4, 6 and 9 (Exhibit JE-113).

<sup>1454</sup> Article 4(3) (Exhibit JE-107).

<sup>1455</sup> Articles 7, 8 and 10 (Exhibit JE-108).



discipline"<sup>1456</sup> and the existence of a "collective contract"<sup>1457</sup> 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.<sup>1458</sup> 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.<sup>1459</sup> 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.<sup>1460</sup> At the request of the complainants<sup>1461</sup>, the Panel will only assess the WTO consistency of the 2009 measures while taking note of 2010 measures.<sup>1462</sup> 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.

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<sup>1456</sup> See, in particular, MOFCOM Statement *In re Vitamin C Antitrust Litigation* (August 31, 2009), para. 3 (Exhibit JE-111).

<sup>1457</sup> See *CCCMC Export Coordination Measures*, Article 21 (Exhibit JE-107).

<sup>1458</sup> 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.

<sup>1459</sup> *Order No. 2 of 2010 of MOFCOM*, 12 September 2010 (Exhibit CHN-448).

<sup>1460</sup> 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.

<sup>1461</sup> 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.

<sup>1462</sup> 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.<sup>1463</sup> 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*<sup>1464</sup> and *CCCMC Bauxite Branch Coordination Measures*<sup>1465</sup> 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.<sup>1466</sup> 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*<sup>1467</sup>, which was in turn repealed by the 2008 Measures for the Administration of License for

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<sup>1463</sup> See, in particular, Exhibit JE-111.

<sup>1464</sup> Article 40(3), 41 (Exhibits CHN-358, JE-75).

<sup>1465</sup> Articles 7, 8 and 10 (Exhibit JE-108).

<sup>1466</sup> 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.

<sup>1467</sup> Exhibit CHN-360.

the Export of Goods.<sup>1468</sup> 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.<sup>1469</sup>

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..<sup>1470</sup> At the request of the complainants<sup>1471</sup>, the Panel will only assess the WTO consistency of the 2009 measures while taking note that the 2010 measures.<sup>1472</sup> 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*.<sup>1473</sup> Notably, as the complainants point out<sup>1474</sup>, 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.<sup>1475</sup> 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.

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<sup>1468</sup> Exhibit CHN-342.

<sup>1469</sup> *2010 Amendment of Measures for Administration of Licensing Entities* (Exhibit CHN-449).

<sup>1470</sup> 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.

<sup>1471</sup> 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.

<sup>1472</sup> 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.

<sup>1473</sup> It should be noted that the content of the *2004 Export Licence Administration Measures* and *2008 Export Licence Administration Measures* is highly similar.

<sup>1474</sup> United States' second written submission, para. 463; European Union's second written submission, para. 172; Mexico's second written submission, para. 467.

<sup>1475</sup> 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.<sup>1476</sup> Prior to that date, China argues that this measure was declared inapplicable" through a 9 January 2008 Notice.<sup>1477</sup> Accordingly, the Panel considers this measure was "on the books" at the date of the Panel's establishment.<sup>1478</sup> 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*<sup>1479</sup>; (2) the 2002 *PVC Notice*<sup>1480</sup>; (3) the 2004 *PVC Notice*<sup>1481</sup>; (4) the 2008 *PVC Notice*<sup>1482</sup>; (5) *Online PVC Instructions*<sup>1483</sup>; (6) a screenshot of the CCCMC online PVC interface, dated 28 May 2008<sup>1484</sup>; (7) the *CCCMC PVC Rules*<sup>1485</sup>; (8) *Notice of the Rules on Price Reviews of Export Products by the Customs (Customs Export Price Review Rules)*<sup>1486</sup>; (9) *Rules for Coordination with Respect to Customs Price Review of Export Products (Customs Export Price Review Coordinating Rules)*<sup>1487</sup>; and (10) *Provisional Rules on Export Price Verification and Chop for Key Products Subject to Price Review (Provisional Rules*

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<sup>1476</sup> *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).

<sup>1477</sup> *2008 Notice Ceasing the Work of PVC for Export Contract of 9 Types of Commodities* (Exhibit CHN-352).

<sup>1478</sup> See the Panel's discussion in paragraphs 7.1022 to 7.1026 above.

<sup>1479</sup> Articles 2, 9 and 23 (Exhibit JE-68).

<sup>1480</sup> Exhibit JE-121, Article 4.

<sup>1481</sup> Paras. 2, 4 (Exhibits CHN-364, JE-122).

<sup>1482</sup> *2008 PVC Notice* (Exhibits CHN-2 JE-125).

<sup>1483</sup> Exhibit JE-123, Sections 1, 4, 9(2).

<sup>1484</sup> Exhibit JE-124, at pages 1-2 and 3-4.

<sup>1485</sup> Exhibit JE-127, Annex 3.

<sup>1486</sup> 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.

<sup>1487</sup> This measure was not submitted to the Panel. See United States' first written submission, para. 222.

on Export PVC)<sup>1488</sup> establish that China requires exporters to conform to coordinated export prices through application of the PVC export clearance process to exports of yellow phosphorus.<sup>1489</sup>

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.<sup>1490</sup> The exporter must then declare the export contract to Customs for clearance.<sup>1491</sup> Customs may deny any contract that does not bear the CCCMC PVC chop.<sup>1492</sup> Penalties may also be imposed against exporters that forge PVC chops.<sup>1493</sup> Exporters of yellow phosphorus may submit contract information electronically for verification.<sup>1494</sup> 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".<sup>1495</sup>

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.<sup>1496</sup> 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.<sup>1497</sup> 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.<sup>1498</sup> 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.<sup>1499</sup> 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

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<sup>1488</sup> This measure was not submitted to the Panel. See United States' first written submission, para. 222.

<sup>1489</sup> 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.

<sup>1490</sup> Exhibit JE-127, Annex 3.

<sup>1491</sup> *2004 PVC Notice*, para. 4 (Exhibit JE-122).

<sup>1492</sup> *2004 PVC Notice*, para. 2 (Exhibit JE-122).

<sup>1493</sup> *2004 PVC Notice*, para. 4 (Exhibit JE-122).

<sup>1494</sup> See *Online PVC Instructions* (Exhibit JE-123), Sections 1, 4.

<sup>1495</sup> *Online PVC Instructions* (Exhibit JE-123), Section 9(2).

<sup>1496</sup> United States' first written submission, para. 361; European Union's first written submission, paras. 365; Mexico's first written submission, para. 364.

<sup>1497</sup> 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.

<sup>1498</sup> CCCMC PVC Online Input Screen Shots (May 2008), at pages 1-4 (Exhibit JE-124).

<sup>1499</sup> 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.<sup>1500</sup>

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.<sup>1501</sup> 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.<sup>1502</sup> Regardless, China argues that the PVC system in China was confirmed to be repealed in its entirety by a 2010 Circular.<sup>1503</sup>

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.<sup>1504</sup>

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.<sup>1505</sup> 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.<sup>1506</sup>

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.<sup>1507</sup> The *2010 Circular*<sup>1508</sup> retroactively confirms the repeal of the PVC procedure in 26

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<sup>1500</sup> 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.

<sup>1501</sup> China's first written submission, para. 839.

<sup>1502</sup> China's first written submission, paras. 843.

<sup>1503</sup> *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).

<sup>1504</sup> China's first written submission, para. 851, Exhibits CHN-361, CHN-362.

<sup>1505</sup> United States' second written submission, para. 391; European Union's second written submission, para. 172; Mexico's first written submission, para. 394.

<sup>1506</sup> United States' second written submission, para. 394; European Union's second written submission, para. 172; Mexico's first written submission, para. 397.

<sup>1507</sup> 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.

<sup>1508</sup> *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.<sup>1509</sup> 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.<sup>1510</sup>

7.1057 The 2008 PVC Notice unequivocally repeals the *2004 PVC Notice* on 26 May 2008.<sup>1511</sup> 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.<sup>1512</sup>

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 complainants<sup>1513</sup> and

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<sup>1509</sup> United States' first written submission, para. 360; Exhibit JE-125; Exhibit CHN-2.

<sup>1510</sup> United States' first written submission, para. 361; European Union's first written submission, para. 365; Mexico's first written submission, para. 364.

<sup>1511</sup> 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."

<sup>1512</sup> China's first written submission, para. 60.

<sup>1513</sup> Exhibit JE-173.

China<sup>1514</sup> 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.<sup>1515</sup> 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

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<sup>1514</sup> Exhibits CHN-361 and CHN-362.

<sup>1515</sup> 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.<sup>1516</sup> 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.<sup>1517</sup> 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.<sup>1518</sup>

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.<sup>1519</sup>

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:

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<sup>1516</sup> CCCMC Resolution on Abolition of Coordination and Administration of Export Commodities (Exhibit CHN-4).

<sup>1517</sup> United States' second written submission, para. 396; European Union's second written submission, para. 172; Mexico's first written submission, para. 399.

<sup>1518</sup> Complainants' joint opening oral statement at the first substantive meeting, para. 32.

<sup>1519</sup> 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."<sup>1520</sup> 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".<sup>1521</sup>

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.<sup>1522</sup> 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)

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<sup>1520</sup> GATT Panel Report, *Japan – Semi-Conductors*, para. 106.

<sup>1521</sup> 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.

<sup>1522</sup> 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.<sup>1523</sup>

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.<sup>1524</sup>

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."<sup>1525</sup> 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."<sup>1526</sup>

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.<sup>1527</sup> 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.<sup>1528</sup>

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<sup>1523</sup> GATT Panel Report, *EEC – Minimum Import Prices*, para. 4.9.

<sup>1524</sup> 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.

<sup>1525</sup> Panel Report, *India – Quantitative Restrictions*, para. 5.128.

<sup>1526</sup> 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.

<sup>1527</sup> 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.

<sup>1528</sup> 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".<sup>1529</sup>

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.<sup>1530</sup> 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.<sup>1531</sup> 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.<sup>1532</sup>

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.

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<sup>1529</sup> *Shorter Oxford English Dictionary*, 5th edn., L. Brown (ed.) (Oxford University Press, 2002), Vol. 2, p. 2554.

<sup>1530</sup> 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.

<sup>1531</sup> 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.

<sup>1532</sup> 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.<sup>1533</sup> 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.<sup>1534</sup>

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.<sup>1535</sup> China argues that the Panel cannot make recommendations regarding the administration of measures that have ceased to exist.<sup>1536</sup>

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.<sup>1537</sup> 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 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*.

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<sup>1533</sup> The PVC procedure requires exporters of yellow phosphorus to submit their export contracts and special PVC forms to the CCCMC for verification.

<sup>1534</sup> United States' first written submission, para. 364, European Union's first written submission, para. 368; Mexico's first written submission para. 367.

<sup>1535</sup> China's first written submission, para. 867.

<sup>1536</sup> China's first written submission, para. 867.

<sup>1537</sup> 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.<sup>1538</sup> 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".<sup>1539</sup> 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.<sup>1540</sup>

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.<sup>1541</sup> 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".<sup>1542</sup> 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.<sup>1543</sup> 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.<sup>1544</sup>

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:

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<sup>1538</sup> See paragraphs 1.10 to 1.13 above; Annex F to these Reports.

<sup>1539</sup> 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.

<sup>1540</sup> Complainants' response to Panel question No. 68 following the second substantive meeting, para. 134.

<sup>1541</sup> China's second written submission, para. 580.

<sup>1542</sup> 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.

<sup>1543</sup> 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.

<sup>1544</sup> 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".<sup>1545</sup> 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."<sup>1546</sup> 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."<sup>1547</sup> 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.<sup>1548</sup>

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".<sup>1549</sup> 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".<sup>1550</sup>

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

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<sup>1545</sup> Panel Report, *EC – Selected Customs Matters*, para. 7.116.

<sup>1546</sup> Panel Report, *EC – IT Products*, para. 7.1026.

<sup>1547</sup> Panel Report, *US – Underwear*, para. 7.65.

<sup>1548</sup> Panel Report, *EC – IT Products*, para. 7.1047.

<sup>1549</sup> *2001 CCCMC Charter*, Article 6(1) (Exhibit JE-87).

<sup>1550</sup> *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*.<sup>1551</sup> 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*.<sup>1552</sup> 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.<sup>1553</sup> 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 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

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<sup>1551</sup> 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).

<sup>1552</sup> 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".

<sup>1553</sup> 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:<sup>1554</sup>

- (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 issue<sup>1555</sup>, 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:<sup>1556</sup>

- (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 issue<sup>1557</sup>, 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 issue<sup>1558</sup>, 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

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<sup>1554</sup> 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.

<sup>1555</sup> See discussion in Section VII.B.2 above.

<sup>1556</sup> 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.

<sup>1557</sup> See discussion in Section VII.C.3 above.

<sup>1558</sup> 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:<sup>1559</sup>

- (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 issue<sup>1560</sup>, 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 issue<sup>1561</sup>, 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:<sup>1562</sup>

- (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;

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<sup>1559</sup> 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.

<sup>1560</sup> See discussion in Section VII.E.1 above.

<sup>1561</sup> See discussion in Section VII.E.1 above.

<sup>1562</sup> 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:<sup>1563</sup>

- (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.

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<sup>1563</sup> 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:<sup>1564</sup>

- (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 issue<sup>1565</sup>, 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:<sup>1566</sup>

- (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 issue<sup>1567</sup>, 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 issue<sup>1568</sup>, 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

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<sup>1564</sup> 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.

<sup>1565</sup> See discussion in Section VII.B.2 above.

<sup>1566</sup> 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.

<sup>1567</sup> See discussion in Section VII.C.3 above.

<sup>1568</sup> 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:<sup>1569</sup>

- (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 issue<sup>1570</sup>, 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 issue<sup>1571</sup>, 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 issue<sup>1572</sup>, 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:<sup>1573</sup>

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<sup>1569</sup> 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.

<sup>1570</sup> See discussion in Section VII.E.1 above.

<sup>1571</sup> See discussion in Section VII.E.1 above.

<sup>1572</sup> See discussion in Section VII.E.2 above.

<sup>1573</sup> 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:<sup>1574</sup>

- (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

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<sup>1574</sup> 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:<sup>1575</sup>

- (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 issue<sup>1576</sup>, 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:<sup>1577</sup>

- (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 issue<sup>1578</sup>, 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 issue<sup>1579</sup>, 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

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<sup>1575</sup> 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.

<sup>1576</sup> See discussion in Section VII.B.2 above.

<sup>1577</sup> 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.

<sup>1578</sup> See discussion in Section VII.C.3 above.

<sup>1579</sup> 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:<sup>1580</sup>

- (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 issue<sup>1581</sup>, 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 issue<sup>1582</sup>, 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:<sup>1583</sup>

- (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;

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<sup>1580</sup> 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.

<sup>1581</sup> See discussion in Section VII.E.1 above.

<sup>1582</sup> See discussion in Section VII.E.1 above.

<sup>1583</sup> 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:<sup>1584</sup>

- (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.

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<sup>1584</sup> 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.

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

***Reports of the Panel***

Addendum

This addendum contains Annexes A to F to the Reports of the Panel to be found in documents WT/DS394/R, WT/DS395/R and WT/DS398/R.

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**SUBMISSIONS OF THE UNITED STATES**

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## ANNEX A-1

### EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES

#### I. INTRODUCTION

1. Despite China's commitments to limit or eliminate the use of export restraints during the course of its negotiations to accede to the WTO, China's export restraints have proliferated in number and kind. China now subjects over 600 items to non-automatic licensing and over 350 items to export duties. These export restraints have become increasingly restrictive over time; export quota amounts have decreased while export duty rates have increased.

2. The products subject to the export restraints at issue in this dispute are various forms of bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus, and zinc (together the "Raw Materials"). At issue in this dispute are four types of restraints that China imposes on the exportation of the Raw Materials: (1) export duties; (2) export quotas; (3) export licensing; and (4) minimum export price requirements. Each type of export restraint, including in some cases its administration, is inconsistent with China's obligations under the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and China's Protocol of Accession to the WTO ("Accession Protocol"), which incorporates commitments made by China in the Report of the Working Party on China's Accession to the WTO ("Working Party Report").

#### II. FACTUAL BACKGROUND

##### A. CHINA'S POLICIES FOR DEVELOPING AND PROMOTING ITS DOMESTIC INDUSTRY RELY ON RESTRAINING THE EXPORTATION OF RAW MATERIALS

3. China's economic development is guided and directed by various plans and policies formulated and issued by the central government, including the *Five Year Plans for National Economic and Social Development*. Over the period of the tenth and eleventh Five-Year Plans, spanning the years 2001 to the present, China has achieved remarkable progress in its industrial growth and development. This growth, however, comes at the expense of the rest of the world. China's production of industrial raw materials and processed goods has increased dramatically. China's exports of processed, value-added goods have also increased. However, China's exports of industrial raw materials have decreased.

4. These trends are the result of a deliberate strategy that China employs to optimize the conditions for realizing its economic and industrial ambitions. China's industrial strategy is to leverage and exploit the differences in the international and domestic markets for raw materials and downstream, processed products, using restraints on exports as the linchpin. The export restraints that China imposes on the Raw Materials are part of this industrial policy, which is predicated on advantaging China's domestic producers and industries, but distorts the international economic marketplace and is inconsistent with China's WTO obligations.

##### B. THE RAW MATERIALS

5. The nine industrial raw materials subject to the various export restraints imposed by China – bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus, and zinc – are either naturally occurring minerals or materials that have undergone some initial

processing. China is a leading global producer of all nine of these raw materials, which renders China's restraints on their exportation particularly distortive for non-Chinese consumers of these raw materials and of the products manufactured from them.

#### C. EXPORT DUTIES

6. China's obligations under paragraph 11.3 of Part I of the Accession Protocol require that China not impose export duties on products that are not listed in Annex 6 of the Accession Protocol. These obligations also require China to limit any export duties imposed on products that are listed in Annex 6 to the rates provided therein.

7. However, China imposes export duties on various forms of bauxite, coke, fluorspar, magnesium, manganese, silicon metal, and zinc,<sup>1</sup> even though none of these materials is listed in Annex 6. In addition, China also imposes export duties on yellow phosphorus (which is listed in Annex 6) at a rate that exceeds the maximum rate provided in Annex 6.

#### D. NON-AUTOMATIC EXPORT LICENSING FRAMEWORK

8. China restricts the exportation of various forms of bauxite, coke, fluorspar, manganese, silicon carbide, and zinc by subjecting their exportation to non-automatic export licensing.<sup>2</sup> MOFCOM, together with Customs, formulates, adjusts, and publishes a catalog listing all goods whose exportation is designated for restriction. Exportation of such goods requires approval by MOFCOM and is subject to export licensing that is, accordingly, not automatic.

9. Non-automatic export licensing (all references to "export licensing" hereinafter mean non-automatic export licensing) is the framework through which China imposes and administers the export quotas for bauxite, coke, fluorspar, silicon carbide, and certain forms of zinc, as discussed below. For these products, the non-automatic export licensing requirements function as a restriction on exportation additional to the restriction effected by the export quotas. Manganese and certain forms of zinc are subject to non-automatic licensing, but not quotas.

#### E. EXPORT QUOTAS

10. China restricts the exportation of various forms of bauxite, coke, fluorspar, silicon carbide, and zinc by subjecting the exportation of these materials to export quotas or prohibitions.<sup>3</sup> China maintains two systems for allocating export quotas: direct allocation or a quota bidding system. The export quotas on coke and zinc are allocated "directly". The export quotas on bauxite, fluorspar, and silicon carbide are allocated through a bidding system.

11. MOFCOM is responsible for setting the total amount of export quotas of the following year no later than October 31 of each year, distributing export quotas, evaluating applications for export quotas, determining whether to grant quotas, and in collaboration with Customs, is responsible for

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<sup>1</sup> For purposes of the discussion of China's export duties, the terms "bauxite", "coke", "fluorspar", "magnesium", "manganese", "silicon metal", "yellow phosphorus", and "zinc" cover the forms of each of these Raw Materials listed in Chart of Raw Materials Subject to Export Duties (Exhibit JE-5).

<sup>2</sup> For purposes of the discussion of China's non-automatic export licensing, the terms "bauxite", "coke", "fluorspar", "manganese", "silicon carbide", and "zinc" cover the forms of each of these Raw Materials listed in Chart of Raw Materials Subject to Export Licensing and Quotas (Exhibit JE-6).

<sup>3</sup> For purposes of the discussion of China's export quotas, the terms "bauxite", "coke", "fluorspar", "silicon carbide," and "zinc" cover the forms of each of these Raw Materials listed in Chart of Raw Materials Subject to Export Licensing and Quotas (Exhibit JE-6).

formulating, adjusting, and publishing a catalog listing all goods subject to export quota. MOFCOM must approve the exportation of the goods listed in the catalog as subject to quota before they can be exported. Entities that are approved to export under the quotas are issued a certificate of quota. Only after an exporter obtains a certificate of quota can that exporter export the relevant products.

12. While China publishes the annual quota amounts for most products subject to quota, China did not publish the annual quota amount for coke. China instead publishes notices during the year announcing that MOFCOM is distributing the export quota on coke to specific enterprises. China has not published any quota amount in relation to the export quota on zinc in 2009.

13. **Coke Export Quota Application Process.** China requires enterprises to apply to receive an allocation of coke under the export quota for a given year in October of the previous year. As part of that application process, China requires enterprises to satisfy certain criteria in order to be eligible to receive an allocation under the quota. Those criteria include having exported a certain amount of coke in previous years, and in the case of certain enterprises, having a certain minimum registered capital. Applicant enterprises who do not satisfy the requisite criteria are not permitted to export coke under the quota. China also requires enterprises applying to export coke under the quota to submit a number of documents including prior export invoices.

14. China empowers the CCCMC with responsibility for reviewing and evaluating the applications of enterprises seeking to export coke under the quota. Ultimately, MOFCOM publishes the list of all companies that satisfy the eligibility criteria on the basis of the CCCMC's advice.

15. In addition, MOFCOM administers different application processes for Chinese enterprises and foreign-invested enterprises. While the 2009 application procedures for foreign-invested enterprises do not appear to be published, the measures allocating portions of the quotas to foreign-invested enterprises in 2009 make clear that such enterprises are subject to an application and approval process for the coke export quota.

16. While China also imposes export quotas on zinc, China has not published any measures in 2009 announcing the quantities of zinc that may be exported under the quota or any measures setting forth application procedures for enterprises seeking to export under the quota.

17. **Export Quota Bidding.** China allocates the export quotas on bauxite, fluorspar, and silicon carbide through a bidding process. Enterprises seeking to export the materials subject to the bidding procedure are required to satisfy certain eligibility criteria in order to participate in the bidding process including criteria relating to minimum registered capital and prior export experience. The enterprises that satisfy such criteria and participate in the bidding process must submit a bid price and bid quantity for the material they are seeking to export. China then awards portions of the quota beginning with the bidding enterprise that submits the highest bid price. The enterprises that are awarded a portion of the quota must pay a "total award price" (*i.e.*, the enterprise's bid price multiplied by its bid quantity) in order to export.

18. MOFCOM has established Bidding Offices composed of *inter alia* representatives of the CCCMC to administer aspects of the bidding process. The Bidding Office's – and therefore the CCCMC's – responsibilities include reviewing the applications of bidding enterprises to determine whether they satisfy the requisite eligibility criteria. Applicant enterprises are also required to submit certain documents including a balance sheet and income statement, and information including registered capital, net profit, and prior export volumes and values.

F. EXPORT LICENSING ADMINISTRATION AND REQUIREMENTS

19. China controls and restricts the exportation of bauxite, coke, fluorspar, manganese, silicon carbide, and zinc through an export licensing system that conditions the issuance of licenses and the usage of those licenses in various ways.<sup>4</sup>

20. There are three types of export licenses, which determine where and how many times a particular license can be declared and used. Licenses must be obtained from particular license issuing entities depending on the product being exported and/or the type of exporter applicant. Export license issuing entities review applications based on a variety of factors and documents including documents of approval issued by MOFCOM in addition to the export contracts, exporter management qualifications, and other materials to be submitted, none of which are further identified or defined in the *Export Licensing Rules* or related licensing measures. Export licensing entities and individual staff members of such entities are subject to sanctions for violating the rules and regulations applicable to export license issuance.

G. MINIMUM EXPORT PRICE REQUIREMENT

21. China restrains the exportation of bauxite, coke, fluorspar, magnesium, silicon carbide, yellow phosphorus, and zinc by imposing a minimum price requirement on their exportation.<sup>5</sup> China implements this restraint through a non-transparent system. Based on statements made by China and documents submitted by Chinese exporters in US courts, it appears that export prices that are set by the CCCMC are observed by exporters through an official "system of self-discipline" and further reinforced through the availability of penalties imposed by MOFCOM, and through China's licensing authorities and Customs.

III. LEGAL DISCUSSION

A. CHINA'S EXPORT DUTIES ARE INCONSISTENT WITH CHINA'S OBLIGATIONS UNDER PART I PARAGRAPH 11.3 OF THE ACCESSION PROTOCOL

22. Paragraph 11.3 of the Accession Protocol contains a commitment by China to "eliminate all taxes and charges applied to exports" except in two specific situations: (1) where the taxes and charges are covered by Article VIII and applied consistently with the requirements of Article VIII; and (2) where the taxes and charges are imposed on products listed in Annex 6 at a rate less than or equal to the *ad valorem* percentage specified for those products in Annex 6.

23. China imposes "temporary" export duties at *ad valorem* rates ranging from 10 to 40 per cent on various forms of bauxite, coke, fluorspar, magnesium, manganese, silicon metal, and zinc. These duties are charges applied to exports that are termed "export duties" in China's measures. The export duties resulting from the application of these duty rates are not applied "in conformity with the provisions of Article VIII of the GATT 1994" because export duties do not fall within the scope of that Article. Furthermore, none of the products on which these export duties are imposed is listed in Annex 6. Accordingly, China's maintenance of these temporary export duties is inconsistent with China's commitment under paragraph 11.3 of the Accession Protocol.

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<sup>4</sup> As set forth above, for purposes of the discussion of China's non-automatic export licensing, the terms "bauxite", "coke", "fluorspar", "manganese", "silicon carbide", and "zinc" cover the forms of each of these Raw Materials listed in Chart of Raw Materials Subject to Export Licensing and Quotas (Exhibit JE-6).

<sup>5</sup> See Chart of Raw Materials Subject to Minimum Export Prices (Exhibit JE-7) for products subject to minimum export price requirements.

24. China also imposes a "regular" *ad valorem* export duty at a rate of 20 per cent on yellow phosphorus. In addition to this regular export duty, China imposes a "special" export duty rate for yellow phosphorus to 50 per cent, resulting in a total export duty rate of 70 per cent effective 1 January 2009. The export duty resulting from the application of these duty rates to exports of yellow phosphorus is explicitly excluded from the coverage of Article VIII of the GATT 1994. The maximum *ad valorem* export duty rate permitted to be applied to yellow phosphorus under Annex 6 is 20 per cent. Accordingly, the export duty rate of 70% applied to the exportation of yellow phosphorus is inconsistent with China's commitment under paragraph 11.3 of the Accession Protocol.

**B. CHINA'S EXPORT QUOTAS ARE INCONSISTENT WITH CHINA'S OBLIGATIONS UNDER ARTICLE XI:1 OF THE GATT 1994**

25. Article XI:1 of the GATT 1994 explicitly prohibits Members from instituting or maintaining a restriction or prohibition made effective through a quota on the exportation of any product. However, China subjects the exportation of various forms of bauxite, coke, fluorspar, silicon carbide, and zinc to quotas. These export quotas are therefore in breach of China's obligations under Article XI:1 of the GATT 1994. As China subjects the exportation of zinc to a quota, but does not publish any export quota for zinc, China effectively sets the export quota for zinc at zero. As a result, China prohibits the exportation of zinc, in contravention of Article XI:1 of the GATT 1994.

26. China's export quotas on bauxite, coke, fluorspar, silicon carbide, and zinc are also inconsistent with paragraphs 162 and 165 of the Working Party Report, which contain enforceable commitments with respect to the elimination of export restrictions.

**C. CHINA'S ADMINISTRATION AND ALLOCATION OF ITS EXPORT QUOTAS IS INCONSISTENT WITH CHINA'S OBLIGATIONS UNDER THE ACCESSION PROTOCOL, THE WORKING PARTY REPORT, AND THE GATT 1994**

27. **Trading Rights.** China's commitments under paragraph 5.1 of Part I of the Accession Protocol and paragraphs 83 and 84 of the Working Party Report (commonly referred to as China's "trading rights" commitments), require China to give all foreign enterprises and individuals, as well as all enterprises in China, the right to export most products. Furthermore, China explicitly committed to eliminate its examination and approval system and to eliminate certain eligibility criteria for obtaining or maintaining the right to export including criteria relating to prior export experience and minimum registered capital. However, in its administration of the quotas for coke, which is directly allocated, and the quotas for bauxite, fluorspar, and silicon carbide, which are allocated through a bidding process, China breaches these commitments by impermissibly requiring exporters to satisfy certain criteria in order to be eligible to receive an allocation of the coke quota or participate in the quota bidding process.

28. **Partial and Unreasonable Administration.** China's administration of its export quotas is also inconsistent with Article X:3(a) of the GATT 1994, which requires Members to administer certain measures described in Article X:1 in a "uniform, impartial and reasonable manner."

29. China empowers a private party – the CCCMC – to have direct involvement in the administration of the export quota on coke, which is allocated directly, and the export quotas on bauxite, fluorspar, and silicon carbide, which are allocated through the bidding system. The CCCMC evaluates enterprises' applications to export under the quota and determines whether they satisfy the relevant eligibility criteria. In that role, the CCCMC also obtains access to sensitive and confidential information, including past export invoices in the case of the coke quota, and balance sheets and income statements in the case of the export quotas allocated through bidding. The involvement of the

CCCMC – an association of private commercial participants in a common industry – renders China's administration of these export quotas partial and unreasonable in contravention with Article X:3(a) of the GATT 1994.

30. **Total Award Price.** Article VIII:1(a) of the GATT 1994 prohibits "fees and charges of whatever character . . . imposed . . . on or in connection with exportation" where such fees are not "limited in amount to the approximate cost of services rendered..." Enterprises that are awarded a portion of the export quota for materials subject to quota bidding are required to pay a total award price in order to export the materials. The total award price therefore constitutes a "fee or charge of whatever character . . . imposed . . . in connection with . . . exportation" within the meaning of Article VIII:1(a). The total award price is also not limited to the approximate cost of services rendered. Thus, the total award price is inconsistent with China's obligations under Article VIII:1(a) of the GATT 1994. The total award price is also inconsistent with paragraph 11.3 of the Accession Protocol as a "tax or charge" imposed on the exportation of products that are not listed in Annex 6.

D. CHINA'S EXPORT LICENSING FOR PRODUCTS SUBJECT TO RESTRICTED EXPORTATION IS INCONSISTENT WITH CHINA'S OBLIGATIONS UNDER ARTICLE XI:1 OF THE GATT 1994 AND PARAGRAPHS 162 AND 165 OF THE WORKING PARTY REPORT

31. China uses licensing to subject the exportation of designated products to restriction. China identifies such goods on a positive list of products subject to export licensing published annually. The list that China published for 2009 includes various forms of bauxite, coke, fluorspar, manganese, silicon carbide, and zinc, indicating that the exportation of these products is designated by the state as restricted. Furthermore, the export licensing required to export these restricted products is not automatic. In contrast, China also maintains an automatic export licensing system. Article 15 of the *Foreign Trade Law* instructs MOFCOM and its partner institutions to grant approval whenever exporters seeking to export the unrestricted goods subject to automatic licensing apply for the automatic licenses. However, for goods whose exportation is designated for restriction, MOFCOM is not required to grant its approval to applicant exporters and is authorized to impose various conditions on their exportation.

32. Export licensing is thus a measure that restricts the exportation of these products in breach of China's obligations under Article XI:1 of the GATT 1994. Paragraphs 162 and 165 of the Working Party Report contain enforceable commitments with respect to the elimination of non-automatic export licensing. China's export licensing is also inconsistent with paragraphs 162 and 165 of the Working Party Report and paragraph 1.2 of China's Accession Protocol.

E. CHINA'S MINIMUM EXPORT PRICE REQUIREMENT IS INCONSISTENT WITH CHINA'S OBLIGATIONS UNDER THE GATT 1994

33. China's minimum export price requirement for bauxite, coke, fluorspar, magnesium, silicon carbide, yellow phosphorus, and zinc, as described above, prohibits the exportation of these products if the export price does not meet a designated minimum. This constitutes a restriction on the exportation of these materials in contravention of China's obligations under Article XI:1 of the GATT 1994.

34. Furthermore, China administers the minimum export price requirement for yellow phosphorus through an enhanced enforcement mechanism known as the Price Verification and Chop ("PVC") procedure. The PVC procedure involves the participation of the CCCMC in the customs clearance process for yellow phosphorus. The CCCMC's participation permits the flow of exporters' sensitive commercial information to representatives of parties with interests that are in conflict with the

exporters. 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.

35. Finally, China's failure to publish its laws, regulations, decisions, and rulings pertaining to the minimum export price requirement for these Raw Materials, is inconsistent with China's obligations under Article X:1 of the GATT 1994.

#### **IV. CONCLUSION**

36. For the reasons set forth in this submission, the United States respectfully requests the Panel to find that China's measures, as set out above, are inconsistent with China's obligations under the GATT 1994 and the Accession Protocol. The United States further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that China bring its measures into conformity with the GATT 1994 and the Accession Protocol.

## ANNEX A-2

### EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF THE COMPLAINANTS AT THE FIRST SUBSTANTIVE MEETING

#### I. INTRODUCTION

1. On behalf of the complainants, we would like to begin by thanking the Panel and the Secretariat staff for taking on this task. Our delegations look forward to working with you, and with the delegation of China, as you carry out your work. The complainants have attempted to consolidate their views in a joint statement, to be read by the three complaining parties. This statement will be supplemented by statements by individual complaining parties.

2. The measures at issue in this dispute restrain the exportation of nine types of industrial raw materials from China. These raw materials are important inputs for the manufacture of steel, aluminum, and chemicals – and their downstream products. China's export restraints are barriers to trade that severely distort the conditions of competition in the global marketplace.

#### II. CHINA'S EXPORT RESTRAINTS

3. **Export Duties.** In contravention of its obligations in paragraph 11.3 of its Accession Protocol, China imposes export duties on the exportation of various forms of bauxite, coke, fluorspar, magnesium, manganese, silicon metal, and zinc, even though China did not reserve the right to impose export duties on any of these products. For yellow phosphorus, China did reserve the right to impose export duties up to 20%. However, as of the date of filing of the consultations request in this dispute, China's frequently changing export duties on yellow phosphorus stood at 70%.

4. **Export Quotas.** The second form of export restraint we have asked you to examine is an export quota. Article XI:1 of the GATT 1994 prohibits such export quotas. Yet China subjects the exportation of bauxite, coke, fluorspar, silicon carbide, and zinc to quotas. China has made these quotas more and more restrictive over time.

5. **Non-Automatic Export Licensing.** Contrary to Article XI:1 of the GATT 1994, China subjects the exportation of bauxite, coke, fluorspar, manganese, silicon carbide, and zinc – to export licensing that is not automatic.

6. **Minimum Export Prices.** China subjects the exportation of bauxite, coke, fluorspar, manganese, magnesium, silicon carbide, yellow phosphorus, and zinc to a minimum export pricing system that constitutes an impermissible export restriction under Article XI:1. Specifically, exportation of these raw materials is subject to a system that prevents exportation unless the seller meets or exceeds the minimum export price.

7. **Administration of the Export Restraints.** The complainants have also asked the Panel to examine a number of requirements China imposes in the administration of its export restraints in light of China's obligations under the trading rights commitments in China's Accession Protocol and Working Party Report, and with China's obligations under Article X of the GATT 1994. These administration-related claims address China's imposition of eligibility criteria on enterprises seeking to export products subject to export quota, impartial or unreasonable administration of the minimum



export pricing and of the application process for products subject to export quota, and failure to publish measures related to minimum export pricing.

**III. THE MEASURES WITHIN THE PANEL'S TERMS OF REFERENCE ARE THOSE SET OUT IN THE PANEL REQUESTS, WHICH FRAME THE "MATTER" REFERRED TO THE PANEL BY THE DSB**

8. Next, we would like to address the issue of the "identity of the measures at issue" in this dispute. Contrary to China's arguments, all of the 2009 measures were very much at issue when consultations were requested and when the Panel was established, on 21 December 2009. The matter that the DSB referred to the Panel, and thus the Panel's terms of reference, is the consistency of those 2009 export restraint measures with China's WTO obligations. The complainants are therefore entitled to findings and recommendations on these measures. In addition, failure to examine and make findings regarding the 2009 measures would effectively create a "moving target" for both the complainants and the Panel in this dispute.

**IV. CHINA'S PROFFERED JUSTIFICATIONS FOR ITS IMPOSITION OF EXPORT DUTIES AND EXPORT QUOTAS ON THE RAW MATERIALS**

9. *Export Duties.* China does not contest that the export duties being challenged are imposed inconsistently with its obligations in paragraph 11.3 of the Accession Protocol, or that these export duties fall outside of the exceptions explicitly provided in paragraph 11.3. Instead, China invokes the exceptions in Article XX of the GATT 1994 as justifications. However, Article XX is not available as a justification for a breach of China's obligations in paragraph 11.3 of the Accession Protocol.

10. By its terms, Article XX applies strictly to the GATT 1994. The referenced "Agreement" in the *chapeau* of Article XX is the GATT 1994. In *China – Publications and Audiovisual Products*, the issue was whether the Article XX exceptions applied to China's trading rights commitment in paragraph 5.1 of the Accession Protocol. The Appellate Body's finding that Members agreed to apply the Article XX exceptions to paragraph 5.1 was based on the specific language of paragraph 5.1. This language is not found in and is in sharp contrast to paragraph 11.3. Additional relevant context also supports the conclusion that Article XX is not available as a defense for a breach of the export duty commitment.

11. *Export Quotas.* China does not deny that the export quotas being challenged contravene the obligation in Article XI:1 of the GATT 1994. Instead, China claims that the export quotas on coke and silicon carbide are justified under Article XX(b) of the GATT 1994 and that the export quota on refractory grade bauxite is justified pursuant to Article XI:2(a) or, failing that, Article XX(g) of the GATT 1994.

**V. CHINA HAS FAILED TO ESTABLISH THAT ITS MEASURES FULFILL THE CRITERIA SET OUT IN ARTICLE XX OF THE GATT 1994**

12. *China's Export Quota on Fluorspar and Refractory-Grade Bauxite Is Not Justified by Article XX(g) of the GATT 1994.* China's duties on fluorspar exports and China's quota on refractory grade bauxite exports fail to satisfy the requirements of Article XX(g). First, China provides no argument or support for the assertion that these export restraints "relate to" the conservation of these raw materials, which has been interpreted as meaning "primarily aimed at" the conservation of a natural resource and having a "close and substantial relationship of means and ends" between the means presented by the measure at issue and the ends of conservation.

13. Rather than directly address the question of whether the measures at issue are made effective in conjunction with restrictions on domestic production or consumption of fluorspar and refractory grade bauxite, China merely asserts that it has "adopted a comprehensive set of measures relating to the conservation" of fluorspar and refractory grade bauxite. Many of these measures came into effect in 2010. Of the remaining measures, China fails to address how these measures constitute "restrictions" on domestic production or consumption of fluorspar or refractory grade bauxite. China also characterizes its purported right to adopt these export restraints as an issue of "sovereignty" over its natural resources, and also purports to find support in the principles of "conservation" and "sustainable development". The sovereignty of a WTO Member over its natural resources is not at issue under Article XX(g). Regarding the requirements of the *chapeau* of Article XX, China has made no serious attempt in its first submission to satisfy its burden. Accordingly, China has failed to meet its burden under the *chapeau*.

14. ***China's Export Duties on Magnesium, Manganese, and Zinc, and Export Quotas on Bauxite and Silicon Carbide Are Not Justified by Article XX(b)***. China contends that certain of its export duties and export quotas are justified pursuant to Article XX(b), because the export restraints result in less production of the products, and therefore, less environmental pollution. However, the measures do not satisfy the elements of Article XX(b). As the Appellate Body has stated, "a 'necessary measure is...located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to' ". The exportation of the products at issue is entirely unrelated to environmental pollution. As China itself argues, it is the production of these products, not their export, that causes pollution. Thus, restraints on the export of the products at issue bear no direct relationship to China's environmental goals. The restraints, however, do have a direct economic effect in terms of providing a competitive advantage to China's industrial users of raw materials. China's arguments under Article XX(b) also raise serious systemic concerns, because under China's approach, Article XX(b) would justify a WTO-inconsistent export restriction on any product whose production causes pollution, or on any economically advantageous or energy efficient product.

15. With respect to scrap, China has failed to establish that the export duties are contributing to, let alone necessary to, accomplishing increased secondary production. China's model is instead based on unsubstantiated assumptions regarding supposed increases in secondary production. In addition, China's estimates of increased secondary production that supposedly could result from the export duties is decidedly modest. Much of the production and trade data presented by China's own economist also contradicts China's reasoning. Finally, there are a number of reasonably available, WTO-consistent measures that China could take to more directly address its stated health objectives. China also fails to satisfy its burden to demonstrate that these measures satisfy the elements of the *chapeau* of Article XX.

16. With respect to the metals, coke, and silicon carbide, China also significantly downplays the effects of China's policies downstream and the environmental damage that results from increased downstream production using the raw materials as inputs. In addition, primary production of the metals at issue has increased in recent years. Finally, there are a number of reasonably-available, WTO-consistent measures that China could take to more directly address its health objectives. China also fails to satisfy its burden to demonstrate that these measures satisfy the elements of the *chapeau* of Article XX.

## **VI. CHINA'S EXPORT QUOTA ON BAUXITE IS NOT JUSTIFIED UNDER ARTICLE XI:2(A) OF THE GATT 1994**

17. As a threshold matter, as the party invoking the defense under Article XI:2(a), China bears the burden of establishing that its export quota on refractory-grade bauxite satisfies all of the elements of

the exception. China has failed to do so. China's interpretation of the terms in Article XI:2(a) is also flawed, and relies heavily on the measures of other Members, which are not in the Panel's terms of reference and are irrelevant to this dispute.

18. China's arguments also depend heavily on the supposed methodology employed by "criticality" assessments developed by the United States and the European Union. These studies do not purport to address the requirements of Article XI:2(a) of the GATT 1994 and in fact are not relevant – let alone authoritative – as to the question of whether China's measures satisfy the requirements of Article XI:2(a). This fact renders much of China's discussion of the export quota on refractory-grade bauxite beside the point as it relates to Article XI:2(a).

19. China's assertion that refractory-grade bauxite is essential to China appears to be based in large part on the assertion that refractory-grade bauxite is indispensable for the production of iron and steel, as well as other products such as glass, ceramics, and cement. This line of reasoning is untenable as it would suggest that any input into large-scale industrial operations would qualify as an essential product under Article XI:2(a). With respect to "critical shortage," China neglects to meaningfully analyze that term, and instead merely collapses the "essential products" and "critical shortage" inquiries in Article XI:2(a). China also relies heavily on assertions that refractory-grade bauxite is "finite" or "limited" in its availability. This is not sufficient to establish a "critical shortage." Finally, China's export quota is not "temporarily applied."

## **VII. CONCLUSION**

20. Having taken on obligations as part of its negotiated accession to the WTO, China now, for reasons that do not appear to be anything other than industrial policy, appears to want to forego those obligations. We ask the Panel to help ensure that China abides by its commitments.

**ANNEX A-3**

**CLOSING ORAL STATEMENT OF THE UNITED STATES  
AT THE FIRST SUBSTANTIVE MEETING**

1. Mr. Chairman and members of the Panel, on behalf of the United States, we would like to comment on a few matters in our closing statement.
2. We would like to take this opportunity to reiterate that there are two different sets of terms of reference issues raised by China. The first set relates to China's preliminary ruling request submitted on March 30, 2010, and on which the complainants and China have provided submissions to the Panel and participated in an oral hearing. We understand the Panel reserved its decision with respect to two matters raised by that preliminary ruling request and that the Panel seeks to resolve those two issues promptly.
3. With respect to the issues raised in the preliminary ruling request, China's only remaining argument from that request in its first written submission is in Section II.B of China's submission. In that section, and throughout the panel meeting, China simply reasserted its arguments from the preliminary ruling process as it relates to Section III of the complainants' Panel requests. However, those arguments are without merit for the reasons discussed in our submissions to the Panel during the preliminary ruling process. We recall that the Panel stated in its preliminary ruling that the Panel would wait to make its final ruling on certain matters after having a chance to review the parties' first written submissions. This is consistent with the reasoning that under Article 6.2, a responding party's argument that there is an alleged defect in the panel request may be examined in light of the claims advanced in the first submission. China has failed to and indeed cannot show any defect.
4. In this regard, in an attempt to keep its Article 6.2 claims from the preliminary ruling process alive, China continues to argue that the Panel requests at issue fail to satisfy the requirement in Article 6.2 that in stating a claim, a panel request must set forth a plain connection between the measures at issue and the legal obligations that they breach. However, China misstates the standard as articulated in past disputes. The panel requests satisfy the requisite standards of Article 6.2.
5. The second set relates to China's terms of reference objections under Article 6.2 of the *Understanding on the Rules and Procedures Governing the Settlement of Disputes* ("DSU") raised in China's first written submission, and for which China did not request a preliminary ruling. With respect to this set of issues, we note that China attempted during the panel meeting to blur the lines between the preliminary ruling issues and the new terms of reference issues in China's first written submission. Those terms of reference issues raised in China's first written submission are not within the scope of the preliminary ruling request. While the complainants have coordinated to prepare an oral statement responding to a number of China's arguments in its first written submission, we will respond to China's remaining arguments including those relating to terms of reference in our rebuttal submission and in responding to the Panel's questions.
6. We would also like to respond to a few more points raised by China. We have heard a lot from China about its sovereignty over natural resources and its economic policies. These statements merely confirm that the export restraints at issue are designed to serve China's economic goals and are not related to protection of the environment or conservation. Furthermore, the sovereignty of China is not at issue in this dispute.

7. China repeatedly invokes its supposed status as a developing country. This is an issue that was discussed at the time of China's accession to the WTO as reflected at paragraphs 8 and 9 of the Working Party Report. Members of the Working Party did not agree to give China the benefit of special provisions as a developing country Member in the context of China's export restraint commitments. Nor are there special provisions for China in relation to Articles XI or XX of the GATT 1994. Indeed, we find China's argument particularly striking in this context, where it is seeking an exemption from its obligations on the basis of its supposed developing country status in relation to raw material inputs, even in spite of the fact that China is now the world's largest steel producer.

8. In a similar vein, China also repeatedly invokes Article XXXVI in yet another attempt to evade its obligations. In addition to the fact that Article XXXVI contains no commitments or obligations, there is no basis to support the notion that this provision weakens China's obligations under Article XI of GATT 1994 or paragraph 11.3 of China's Accession Protocol or, in any way, affects the standard under GATT 1994 Article XX or Article XI:2(a).

9. The "update" that China provided in its opening statement regarding an 16 August 2010, measure repealing three 1997 measures, brings us back to our point on the Panel's terms of reference. China has demonstrated that its measures can appear and disappear with ease. The measures that the complainants challenged in our panel requests are those export restraints in effect in 2009. The Panel should make findings and recommendations on the 2009 export restraints to prevent China from continually moving the target and shielding its measures from review.

10. With respect to China's "right to regulate" arguments, an overarching problem emerges. China is seeking exemptions from obligations without any basis in the text of the WTO Agreement. Just as other WTO Members are not permitted to breach their obligations unless an exception is explicitly provided for in the WTO Agreement and unless the conditions for that exception are met, so too China, as another Member of the WTO, has taken commitments to which it must adhere. Otherwise, the rules-based trading system would cease to exist.

11. With respect to China's proffered defenses, we offer the following comments. On China's defense under Article XX(g) of the GATT 1994, we note that Article XX(g) requires that a measure must be "related to conservation," and Article XX(g) contains an "even-handedness" requirement. China has not come close to meeting these requirements.

12. With respect to China's defense under Article XX(b) of the GATT 1994, we note that in China's discussion of Article XX(b) in its oral statement, China suggests that a measure may be justified under Article XX(b) if the measure contributes to sustainable development. This assertion is without merit.

13. Finally, regarding China's defense under Article XI:2(a) of the GATT 1994, we observe that China's interpretation of Article XI:2(a) would bring every production input within the coverage of Article XI:2(a). This is inconsistent with the text and purpose of Article XI:2(a). Additionally, China's arguments regarding the requirement of a "critical shortage" in Article XI:2(a) boil down to reading out from that provision the word "critical".

14. These are the issues we addressed in our oral statement and at this first substantive meeting of the Panel with the parties. As we look ahead, we will be addressing all of these issues in greater detail. In particular, we will be responding to China's factual assertions, legal arguments, and economic theories advanced in support of its justifications for imposing its export duties and export quotas. We will also be addressing issues that we did not have the opportunity to touch on at this meeting, including China's arguments regarding the consistency of its non-automatic export licensing,

minimum export price regime, quota administration, as well as China's responses to our trading rights and transparency claims under the GATT 1994, China's Accession Protocol, and Working Party Report.

15. We look forward to re-convening with the Panel and the other parties at the second substantive meeting. Thank you.

## **ANNEX A-4**

### **EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES**

#### **I. INTRODUCTION**

1. At the heart of the dispute are the export duties and export quotas that China maintains on these products. China fails to rebut the complainants' claims that the export restraints are inconsistent with China's commitments in its Protocol of Accession to the WTO, which incorporates commitments made by China in the Report of the Working Party on China's Accession to the WTO, and its obligations under the GATT 1994. In fact, China largely concedes the inconsistency of the export restraints with the relevant obligations.

2. China invokes Article XX(b) in an attempt to portray certain of the discriminatory export restraints as necessary for protection of health. But, a review of the facts confirms that China's defense does not withstand scrutiny. Similarly, China's invocation of the exception related to conservation in Article XX(g) to justify certain of the export restraints also fails. Finally, China has also failed to demonstrate that one of its export quotas for which it invokes Article XI:2(a) is justified pursuant to that provision. China's statements in the course of this dispute have confirmed that the export restraints have the objective of ensuring China's continued economic growth. As China states: "The imposition of export restrictions will allow China to develop its economy in the future . . ." This, and other statements that we will discuss, belie China's arguments in support of its defenses.

3. Finally, China administers its export restraints in a WTO-inconsistent manner through the use of export licensing, restrictions on the right to export, and minimum export pricing. China has also failed to rebut these claims.

#### **II. CHINA'S EXPORT DUTIES ARE INCONSISTENT WITH CHINA'S OBLIGATIONS UNDER PARAGRAPH 11.3 OF THE ACCESSION PROTOCOL**

4. The export duties China imposes on bauxite, coke, fluorspar, magnesium, manganese, silicon metal, yellow phosphorus and zinc are inconsistent with China's obligations under paragraph 11.3 of the Accession Protocol. China does not attempt to defend the duties that it imposes on bauxite, silicon metal, and one form of manganese (ores and concentrates) or the special export duties it imposes on yellow phosphorus. Instead, China attempts only to justify the export duties it imposes on coke and fluorspar (which it imposes in combination with export quotas), magnesium scrap, manganese scrap, and zinc scrap, and magnesium metal, and manganese metal, under exceptions provided in Article XX of the GATT 1994.

5. For the reasons set forth in the complainants' first oral statement, the exceptions in Article XX are not available as a defense to a breach of the export duty commitments in paragraph 11.3 of the Accession Protocol. Therefore, China's reliance on the exceptions contained in Article XX of the GATT 1994 to justify its export duties on coke, fluorspar, magnesium and manganese metal, and magnesium, manganese, and zinc scrap is unavailing. An analysis of the text of paragraph 11.3, the Appellate Body's reasoning in *China – Audiovisual Products*, and the relevant context of China's export duty commitment all support the conclusion that Article XX is not applicable to paragraph 11.3 of the Accession Protocol.

6. Even aside from the fact that Article XX of the GATT 1994 is not available as a justification for breaches of the commitment in paragraph 11.3 of the Accession Protocol, China would not meet the conditions required by Article XX(g) and Article XX(b).

7. In order to justify these inconsistent export restraints, it is China's burden to demonstrate that each measure at issue satisfies the specific conditions set out in sub-paragraph (g) or sub-paragraph (b) of Article XX, and that each measure also satisfies the requirements of Article XX's chapeau.

8. China's export duties on scrap products are not justified under Article XX(b) of the GATT 1994. First, China has presented no evidence that the export duties on scrap products have made any contribution, let alone a material contribution, to increased levels of secondary production. China relies instead on projections of supposed increases in secondary production in the future. Second, Dr. Olarreaga's economic analysis setting forth such projections is fundamentally flawed and therefore unreliable. Third, even if Dr. Olarreaga's analysis were taken on its own terms, the increases in secondary production that would supposedly result from the export duties are modest and belie China's contention that the measures can make a "material contribution" to the stated environmental objective. Fourth, many of China's arguments are premised on factual inaccuracies regarding the products themselves. Fifth, China's assertion of supposed supply constraints – to the extent they are relevant to an analysis under Article XX(b) – fail to support China's defense. Sixth, primary production of magnesium metal, manganese metal, and zinc continue to expand in China further undercutting China's assertion that it seeks to shift to increased secondary production. Seventh, there are a number of WTO-consistent reasonably available alternatives that China could employ to more directly address China's stated environmental objectives.

9. China's export duties on magnesium metal, manganese metal, and coke are also not justified under Article XX(b). First, China has presented no evidence that the export duties on magnesium metal, manganese metal, or coke have made any contribution, let alone a material contribution, to decreased levels of production of those products. China relies instead on projections of supposed increases in secondary production in the future. Second, primary production of the metals has in fact increased, and these products continue to be exported at significant levels in the form of downstream, higher-value added products. Third, Dr. Olarreaga's economic analysis setting forth such projections is fundamentally flawed and therefore unreliable. Fourth, there are a number of WTO-consistent reasonably available alternatives that China could employ to more directly address China's stated environmental objectives. Thus, China's defense under Article XX(b) relating to magnesium metal, manganese metal, and coke should not be sustained.

10. In examining whether China's export duty on fluorspar relates to conservation of fluorspar, the operative question is whether there is a close and genuine relationship of ends and means between the goal of fluorspar conservation and the means presented by the export duty. The answer to this question is no.

11. China also fails to demonstrate that its export duty on fluorspar is "made effective in conjunction with restrictions on domestic production or consumption." China asserts that it has a "conservation policy" consisting of a number of measures "to manage the supply, production, and use of fluorspar." As discussed below, these measures do not constitute "restrictions on domestic production or consumption." The export duty on fluorspar therefore is not "made effective in conjunction with" such restrictions. Even if China had demonstrated the existence of restrictions on domestic production or consumption, China would still not have demonstrated the requisite even-handedness to justify its export duty on fluorspar under Article XX(g).



12. The United States sets forth its arguments regarding the measures within the Panel's terms of reference and the appropriate measures on which the Panel's findings and recommendations should be made below. Should the Panel, *arguendo*, review the export restraints as applied by China in 2010, and should the Panel consider the measures China implemented over the course of this proceeding's pendency through the summer of 2010 relevant to that review *arguendo*, the United States addresses the export duty on fluorspar applied in 2010 in light of those measures below. As the United States demonstrates, the measures China has introduced over the course of 2010 do not alter the fact that China's export duty on fluorspar is not justified under Article XX(g) of the GATT 1994.

13. The burden of establishing conformity with the relevant subparagraph and the chapeau lie with the party invoking the defense. Even if the export duties at issue were consistent with the particular paragraph of Article XX that China invokes, the export duties also fail to satisfy the *chapeau* of Article XX.

14. In China's first written submission and its oral statement to the Panel at the first meeting, China made no serious attempt to satisfy its burden of establishing that the export duties satisfy the *chapeau*. China has articulated the incorrect legal standard for "arbitrary or unjustifiable discrimination" under the *chapeau*. This renders China's statement that the export duties at issue do not discriminate between export destinations insufficient to satisfy its burden. China also asserts that the export duties do not constitute a disguised restriction on international trade because they are "not applied in a manner that constitutes a *concealed* or *unannounced* restriction or discrimination in international trade." China fails to present any evidence or argumentation to substantiate this assertion. This is insufficient to satisfy China's burden of demonstrating that its measures satisfy the requirements of the *chapeau*.

### **III. CHINA'S EXPORT QUOTAS ARE INCONSISTENT WITH CHINA'S OBLIGATIONS UNDER ARTICLE XI:1 OF THE GATT 1994 AND PARAGRAPHS 162 AND 165 OF THE WORKING PARTY REPORT**

15. As the United States set forth in its first written submission, China subjects the exportation of various forms of bauxite, coke, fluorspar, silicon carbide, and zinc to quotas. China has confirmed that it maintains a prohibition on the exportation of zinc. These export quotas and the export prohibition on zinc are inconsistent with Article XI:1 of the GATT 1994 and paragraphs 162 and 165 of the Working Party Report and paragraph 1.2 of China's Accession Protocol. China has failed to establish that its export quota on one subset of one form of bauxite is justified pursuant to Article XI:2(a) or Article XX(g) of the GATT 1994. China has also failed to establish that its export quotas on coke and silicon carbide are justified pursuant to Article XX(b) of the GATT 1994.

16. China has attempted to justify the export quota on bauxite only as it applies to a particular product that China calls "refractory grade bauxite." The product that China calls "refractory grade bauxite," is actually a subset of "refractory clay" (2508.3000) and not a product considered to be within "aluminum ores and concentrates" (2606.0000). Because of the confusion engendered by the fact that a product that falls within "aluminum ores and concentrates" (2606.0000) with high alumina content is also commonly referred to as "refractory grade bauxite," the United States will, for purposes of clarity and precision, refer to the product for which China asserts its defense, as "high alumina clay."

17. China's selective defense of the export quota imposed on "bauxite" only insofar as the quota applies to "high alumina clay" highlights the fact that China's efforts are focused essentially on defending a non-existent or fictional measure. There is no export quota on high alumina clay. Because China does not defend the export quota on "bauxite" as a whole, China has already

effectively conceded the inconsistency of that quota. The export statistics China cites raise the possibility and the serious concern that, through China's allocation of the export quota on "bauxite," China may be effecting an export prohibition on "aluminum ores and concentrates."

18. Even if there were a measure imposing an export quota on "high alumina clay," China's defense under Article XI:2(a) as it relates to high alumina clay is without merit. First, China advocates an exceptionally broad meaning of the term "essential" products in Article XI:2(a) that would permit any industrial input to satisfy the meaning of "essential." This is an incorrect reading of the term "essential." Even if China's reading of "essential" were correct, however, China's argument is based on several factual inaccuracies regarding the role of high alumina clay in steel production. These factual inaccuracies confirm that China's defense is unavailing. Second, China fails to properly analyze the meaning of the term "critical shortage," and instead bases its defense under Article XI:2(a) merely on the limited availability of high alumina clay. By doing so, China reads the term "critical" out of Article XI:2(a) altogether. This approach is inconsistent with the text of Article XI:2(a). Third, the export quota is not "temporarily applied" within the meaning of Article XI:2(a). Finally, contrary to China's arguments, Article XI:2(a) is an affirmative defense, for which China bears the burden of adducing evidence and argumentation to establish the defense. Article XI:2(a) sets out an exception to the obligation in Article XI:1, not a separate obligation.

19. In examining whether China's export quota on bauxite, as applied to high alumina clay, relates to the conservation of high alumina clay, the operative question is whether there is a close and genuine relationship of ends and means between the goal of high alumina clay conservation and the means presented by that part of the export quota that applies to exports of high alumina clay. As above in the case of fluorspar, the answer to this question is also no.

20. China also fails to demonstrate that its export quota for bauxite, as it applies to high alumina clay, is "made effective in conjunction with restrictions on domestic production or consumption." China asserts that it has a "conservation policy" consisting of a number of measures "to manage the supply, production, and use of [high alumina clay]." As discussed below, these measures do not constitute "restrictions on domestic production or consumption." The export quota, which applies to the raw material category "bauxite" including both "refractory clay" (2508.3000/2508.300000) and "aluminum ores and concentrates" (2606.0000/2606000000), is not "made effective in conjunction with" such restrictions on "high alumina clay" and therefore is not imposed "even-handedly" as Article XX(g) requires. Even if China had demonstrated the existence of restrictions on domestic production or consumption, China would still not have demonstrated the requisite even-handedness to justify its export quota, as applied to high alumina clay, under Article XX(g).

21. The United States sets forth its arguments below regarding the measures within the Panel's terms of reference and the appropriate measures on which the Panel's findings and recommendations should be made. Should the Panel, *arguendo*, review the export restraints as applied by China in 2010, and should the Panel consider the measures China implemented over the course of this proceeding's pendency through the summer of 2010 relevant to that review, *arguendo*, the United States addresses the export quota on bauxite, as it is applicable to high alumina clay, applied in 2010 in light of those measures below. As the United States demonstrates, the measures China has introduced over the course of 2010 do not alter the fact that China's export quota on bauxite, as applied to high alumina clay, is not justified under Article XX(g) of the GATT 1994.

22. China contends that the export quotas on coke and silicon carbide are justified pursuant to Article XX(b) of the GATT 1994. China's arguments in support of this defense are the same as those advanced in the context of China's export duties on coke, magnesium metal, and manganese metal. In other words, China argues that the production of coke and silicon carbide result in environmental

pollution. The export quotas, according to China, are "necessary" to reduce production of these materials in China, and therefore reduce pollution. China's defense fails for the same reasons as discussed above in the context of the export duties on magnesium metal, manganese metal, and coke.

23. For the same reasons China fails to demonstrate that the export duties it attempts to justify satisfy the *chapeau* of Article XX, China also fails to demonstrate that the export quotas it attempts to justify satisfy the *chapeau* of Article XX.

#### **IV. TERMS OF REFERENCE ISSUES RELATED TO CHINA'S EXPORT DUTIES AND EXPORT QUOTAS**

24. Both with regard to its theory that measures within the Panel's terms of reference may be disregarded, and in its reliance on the 2010 measures to defend the measures within the Panel's terms of reference, China's arguments and assertions are misguided or simply incorrect. China's claim that the Panel should exercise its "discretion" not to make findings on the measures within its terms of reference is without merit, unsupported by the provisions of the DSU.

25. Contrary to China's suggestion, the Panel is authorized and charged by the DSU to make findings and recommendations on the measures in its terms of reference – which includes the export quotas and export duties applied through the legal instruments that are listed in the panel request.

26. The legal instruments that took effect on January 1, 2010 (the January 1, 2010 Measures), *i.e.*, after panel establishment, are outside the Panel's terms of reference. These legal instruments "changed the essence" of the legal instruments that were in effect at the time of panel establishment, and thus are not sufficiently similar to the measures that are within the Panel's terms of reference to be considered in this dispute. Were the Panel to consider the January 1, 2010 Measures and the 2010 Fluorspar and High Alumina Clay Measures adopted in January, March, April, May, and June of 2010, this would permit China, by changing the parameters of the Panel's review, to shield aspects of its measures from proper review.

#### **V. CHINA'S ADMINISTRATION AND ALLOCATION OF ITS EXPORT QUOTAS ARE INCONSISTENT WITH CHINA'S OBLIGATIONS UNDER THE ACCESSION PROTOCOL, THE WORKING PARTY REPORT, AND THE GATT 1994**

27. As the United States explained in its first written submission, China's administration and allocation of its export quotas are inconsistent with China's obligations under the Accession Protocol, the Working Party Report, and the GATT 1994. China has failed to rebut the U.S. showing that China's measures restricting access to the export quotas, China's administration of its export quotas in a partial and unreasonable manner, and China's total award price under the export quota bidding regime are inconsistent with China's WTO obligations

#### **VI. EXPORT LICENSING**

28. The United States demonstrated in its first written submission that China subjects the exportation of bauxite, coke, fluorspar, manganese, silicon carbide, and zinc to export licensing that is non-automatic, in breach of the requirements of Article XI:1 of the GATT 1994. China itself considers its export licensing for products designated for restricted exportation pursuant to Article 19 of the *Foreign Trade Law* to be a restriction on exportation inconsistent with Article XI:1 of the GATT 1994. China has proffered no arguments or facts to justify its export licensing system. Accordingly, China has not demonstrated that its export licensing on the products at issue can be justified under the GATT 1994.

## VII. MINIMUM EXPORT PRICE

29. The United States has demonstrated that China imposes a minimum export price requirement for bauxite, coke, fluorspar, magnesium, silicon carbide, yellow phosphorus and zinc that restricts the exportation of these products in contravention of Article XI:1 of the GATT 1994. China has failed to rebut that showing. In its first written submission, the United States demonstrated that China failed to publish important measures and provisions relating to its minimum export price requirement. China's only response is that these measures are no longer in effect. However, a measure no longer being in effect is not a defense for the failure to publish under GATT Article X:1.

30. In its first written submission, the United States also demonstrated that China's administration of the minimum export price system through the involvement of the CCCMC in the Price Verification and Chop (PVC) Procedure was partial and unreasonable in breach of China's obligations under Article X:3(a) of the GATT 1994. China has failed to rebut that showing.

31. On October 1, 2010, the Panel issued the "Second Phase of the Preliminary Ruling" (Second Preliminary Ruling). The Second Preliminary Ruling included findings on issues not subject to any request for a preliminary ruling. In particular, the Panel made findings on arguments of China in its first written submission that certain minimum export price (MEP) measures addressed by the United States should be outside the Panel's terms of reference under Article 6.2 of the DSU. Because these findings in the Second Preliminary Ruling were not made in response to a preliminary ruling request, they cannot be part of a preliminary ruling, and instead, pursuant to the DSU and Working Procedures, must be considered as findings that the Panel will reexamine *de novo* after considering all of the evidence and arguments submitted in the dispute. Accordingly, the United States sets forth a written response to China's arguments in its first written submission. The United States respectfully requests that the Panel consider these responses before making findings with regard to China's MEP terms-of-reference arguments.

32. There are three additional measures that China fails to identify that are within the Panel's terms of reference by virtue of being included in both the consultations and panel requests: *Measures for the Administration of Trade Social Organizations; Regulations for Personnel Management of Chambers of Commerce*; and *CCCMC Charter*. In addition, four measures are in the Panel's terms of reference even though they were not identified in both the U.S. consultations request and the U.S. panel request: *CCCMC Export Coordination Measures; Bauxite Branch Coordination Measures; Bauxite Branch Charter*; and the "*System of self-discipline*." These measures are within the Panel's terms of reference because they implement the coordination mandate of the *1994 CCCMC Charter* and the *2001 CCCMC Charter* in the manner described by the Appellate Body in *Japan – Film*. Three measures that were specifically identified in the panel request but not listed in the consultations request are nevertheless included within the Panel's terms of reference: *Notice of the Rules on Price Reviews of Export Products by the Customs; CCCMC PVC Rules; Online PVC Instructions*. These measures are all part of the same PVC procedure of which the *2002 PVC Notice* and the *2004 PVC Notice*, which were consulted on, form a part. The inclusion of these three measures in the panel request did not, "expand the scope of the dispute" as the Appellate Body described in *US – Continued Zeroing*. These measures are therefore also properly within the panel's terms of reference.

33. China also asked the Panel to refrain from making findings on measures because those measures have "expired" and findings would "serve no purpose." China also asserted that the Panel has no authority to make recommendations on these measures. The Panel has the authority and obligation to make findings and recommendations on certain measures which, contrary to China's arguments and assertions, continue to be in effect. The Panel has the authority and obligation to make

findings and recommendations on the other measures in order to secure a positive solution to this dispute.

## **VIII. CONCLUSION**

34. For the reasons set forth in this submission, the United States respectfully requests the Panel to find that China's measures, as set out above, are inconsistent with China's obligations under the GATT 1994 and the Accession Protocol. The United States further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that China bring its measures into conformity with the GATT 1994 and the Accession Protocol.

## ANNEX A-5

### EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF THE UNITED STATES AT THE SECOND SUBSTANTIVE MEETING

1. China maintains a number of restraints on the exportation of important raw materials for which China is one of the world's leading producers. The export restraints that China maintains on these raw materials are inconsistent with paragraph 11.3 of China's Accession Protocol and Article XI:1 of the GATT 1994 respectively. Although China has asserted no defense with respect to several of the export restraints, China does invoke exceptions under Article XX of the GATT 1994 in relation to certain of the restraints. None of China's defenses withstands scrutiny.

2. **Article XX Exceptions of the GATT 1994 Are Not Applicable to China's Commitments in Paragraph 11.3 of the Accession Protocol:** The exceptions in Article XX of the GATT 1994 are not available as a defense to a breach of the commitments in paragraph 11.3 of the Accession Protocol. The non-applicability of Article XX is plain from the text of paragraph 11.3, read in its context. The application of the Appellate Body's reasoning in *China – Audiovisual Products* further shows that Article XX cannot be used in an attempt to justify a breach of paragraph 11.3.

3. **China's Export Duties on Coke, Magnesium, Manganese, and Zinc and Its Export Quotas on Coke and Silicon Carbide Do Not Satisfy the Criteria Set Out in Article XX(b):** The evidence is abundant that China's export restraints are not environmental measures, but instead were adopted to support China's industries that use the raw materials covered in this dispute. Even China's statements prepared for presentation to this Panel betray that the export restraints at issue are in place to promote China's economic advancement. China relies heavily on high-level government policy documents that express a goal of "controlling" or "restricting" the export of high-energy-consumption, highly polluting, or resource-intensive products. But, other high-level Chinese government documents place the intention to control the export of highly-polluting products in the context of China's economic policies. The structure of China's measures also shows that their objectives are the promotion of the export of higher value-added downstream products, not environmental protection. China's measures are restraints on exports of raw materials, but the export of the materials at issue is unrelated to environmental pollution. Thus, there is no environmental justification for discriminating against users of the raw materials outside China vis-a-vis users inside China. At best, the export restraints at issue may have indirect, incidental environmental benefits. China's argument that an indirect relationship between the measure and the stated objective is irrelevant is illogical and unpersuasive. Each claimed Article XX defense must be examined on its own merits, in light of the facts and circumstances of the particular dispute. The fact that a measure could, at best, make an indirect contribution to the stated objective, is quite relevant to the question of whether the measure at issue satisfies the requirements of Article XX(b).

4. The *post hoc* environmental justification presented by the consultants that China has retained for the purposes of this dispute provides further confirms that China's defense under Article XX(b) is without merit. An examination of those arguments shows that China has presented no evidence that the export restraints are making a material contribution to China's stated environmental objective. The economic model by Dr. Olarreaga is flawed and unreliable. China also fails to submit evidence that the export duties on scrap products have resulted in increased levels of secondary production of magnesium metal, manganese metal and zinc. China's consultant, Dr. Humphreys, has also made a number of additional assertions that are unsupported by any evidence or are highly speculative. China also has no legitimate response to the fact that if China is concerned with the environmental impacts of raw material production, China has reasonably available alternatives that would directly address

China's supposed environmental concerns. As a result, China cannot meet its burden of establishing that its measures are "necessary" for the protection of human life or health. China has also not met its burden of establishing that environmental controls on production would likewise not meet China's goals. China's reliance on *Brazil – Tyres* in this regard is also misplaced. With respect to the *chapeau* of Article XX, China has not even made a serious attempt to show that its measures meet the *chapeau*'s requirements, despite the fact that China has the burden to do so.

5. Finally, the Panel might consider the serious negative systemic implications of a contrary finding. As it relates to the export restraints on the metals, coke, and silicon carbide, China's defense would permit a WTO-inconsistent export restriction on any product whose production causes pollution, simply because the export restriction could lead to reduced production of the product at issue. With respect to scrap products, China's defense suggests that a WTO-inconsistent export restraint may be imposed on any industrial input on the grounds that it is more environmentally friendly than other industrial inputs.

6. **China Has Not Established that Its Export Duties and Export Quotas on Fluorspar and Bauxite Satisfy the Requirements of Article XX(g):** China's Article XX(g) arguments only apply to export duties on fluorspar and that portion of its export quota on bauxite covering high alumina clay – which is only one of the several forms of bauxite covered by China's bauxite quota. These export restraints are not conservation measures under the Article XX(g) exception. China has attempted to bolster its Article XX(g) arguments by taking actions over the course of 2010 – indeed, while this matter is under the Panel's consideration – to reduce the number of export restraints imposed on fluorspar and bauxite and to introduce a number of measures directed at the production of fluorspar and high alumina clay (the 2010 Fluorspar and High Alumina Clay Measures). China's efforts to make these export restraints appear more like conservation measures in 2010 are also unavailing.

7. The focus of "conservation" is protective oversight exercised to benefit the state, use, or amount of the natural resource. The export restraints on fluorspar and high alumina clay benefit China's domestic users of fluorspar and high alumina clay by providing them with an important advantage over their foreign competitors. China strains to incorporate into the term "conservation" the concept of self-interested economic and social gain. China's interpretation of the term "conservation" must be rejected because it would subvert the GATT 1994's disciplines on export restraints and non-discrimination.

8. The second clause of Article XX(g) requires that an otherwise non-conforming measure be "made effective in conjunction with restrictions on domestic production or consumption," which is "a requirement of *even-handedness* in the imposition of restrictions." The pre-2010 measures China has proffered as constituting components of a conservation program are not domestic restrictions and even in China's own view, are not sufficient to establish a defense under Article XX(g). The 2010 Fluorspar and High Alumina Clay Measures also are not restrictions under Article XX(g) because the mining and production targets are set at levels higher than actual mining and production, showing that they are not intended to restrict the amount of fluorspar produced in 2010. Additionally, China's measures are not even-handed. The facts here, as in *Canada – Herring and Salmon*, present an easy case under Article XX(g): the export restraints on fluorspar high alumina clay are imposed primarily to benefit China's domestic processors – at the expense of foreign processors. Using an example, China argues that its export restraints work together with production restrictions to create domestic consumption restrictions on fluorspar and high alumina clay, making them even-handed. China's hypothetical is fundamentally flawed in at least four important ways. Its measures are not even-handed.

9. **China's Export Quota on Bauxite as Applied to High Alumina Clay Is Not Justified by Article XI:2(a):** China's defense under Article XI:2(a) as it relates to a subset of one of the products subject to an export quota on bauxite does not withstand scrutiny. *First*, China's defense only relates to one subset of one of the products on which China imposes its export quota. *Second*, China's assertion that the complaining party bears the burden of establishing that the conditions of Article XI:2 are not met is without merit. The Appellate Body's clear statement in *US – Shirts and Blouses* confirms the US position that Article XI:2(a) is an affirmative defense. And, contrary to China's suggestion, the Appellate Body's reasoning in that dispute is not "obsolete." *Third*, while China's argument regarding "essentialness" requirement places great weight on the supposed lack of substitutes for high alumina clay in steel production, there are a number of substitutes, including certain of the other forms of bauxite on which China maintains its export quota. Moreover, China's reading of "essential" would severely weaken the disciplines in Article XI:1. *Fourth*, China's arguments regarding the supposed "critical shortage" of high alumina clay reflect an improper reading of the relevant terms. The mere limited amount of reserves of a product is not sufficient to amount to a critical shortage. Similarly, the existence of supply constraints does not establish a "critical shortage" for purposes of Article XI:2(a). While China has failed to establish that its export quota as applied to high alumina clay satisfies the requirements of Article XI:2(a), China's statements in this dispute do confirm that the objective of the export quota on bauxite is the rapid and dramatic growth of China's steel industry.

10. **The United States Is Entitled to Findings and Recommendations on the Export Quotas, Duties, and Export Licensing Requirements Effective in 2009:** The United States is entitled to findings and recommendations on the fluorspar export quota, the bauxite export duties, and the yellow phosphorus special export duties. China has not conceded the WTO inconsistency of these export restraints and they are susceptible to quick and easy re-imposition by China. Accordingly, findings and recommendations on these measures are critical to securing a positive solution to this dispute.

11. **China's Argument that the Panel Should Make Findings and Recommendations Only on the Export Restraints Effective in 2010 Must Be Rejected:** The changes that China made to the scope of its export quotas and export duties in 2010 changed the essence of the measures in the Panel's terms of reference (i.e., the ones imposed in 2009). Reviewing the export restraints only as they were modified and maintained in 2010 would shield from review aspects of the export restraints and permit China to create a "moving target" that impinges on the rights under the DSU afforded to complainants. Furthermore, it is not consideration of China's defenses that would be untimely if the Panel limited its review to the measures within its terms of reference, what is untimely is China's belated efforts to introduce measures that it considers helpful in satisfying the requirements of the defenses it has invoked in this dispute. Finally, making findings and recommendations on 2010 measures because 2009 measures have "expired" is clearly not the correct approach – logically or practically – for the settlement of disputes at the WTO, and it is not one that finds support in the text of the DSU.

12. **China's Measures Administering and Allocating the Export Quotas Are Inconsistent with China's Obligations Article X:3(a) of the GATT 1994:** China argues, citing language from the Appellate Body Report in *US – OCTG Sunset Review* that the United States has not substantiated this claim "through 'solid evidence.'" The nature of this Article X:3(a) claim is distinct from the one made in *US - OCTG Sunset Review* and is similar to the one made in *Argentina – Leather*. The United States has adduced arguments and evidence that are more than sufficient, in quantity and quality, to substantiate these claims.

13. **Export Licensing:** Whether China wishes to call its export licensing requirements "automatic" or "non-automatic," export licensing maintained under Articles 16 and 19 of the *Foreign*



*Trade Law* provides China with the authority, the ability, and the discretion to control and restrict the exportation of the subject products. China's invocation of the Import Licensing Agreement is inapposite to this claim regarding its export licensing. Finally, the Article XI:1 prohibition on import and export restrictions extends to more than just limits on the quantity of imports and exports. Article XI:1 has been consistently interpreted by GATT 1947 and WTO panels to cover restrictions on importation and exportation that are not limited to "quantitative" restrictions.

14. **The Minimum Export Price Requirement Is Inconsistent with Article XI:1 of the GATT 1994:** With respect to China's argument that no single MEP-related measure appears to impose a minimum export price requirement, the United States observes that an export restraint, like any other measure, can consist of a number of separate and distinct legal instruments that work together to affect trade. Furthermore, in relation to the terms of reference issues, to the extent that MEP-related legal instruments set forth in the US submissions are considered not to be within the Panel's terms of reference, those legal instruments are nevertheless evidence of the existence of a minimum export price system that must be considered in the Panel's review of this claim under Article XI:1.

15. **Conclusion:** As a final note, China asserts in its second written submission that the United States has abandoned certain claims. This is not correct. To clarify any confusion, the United States is also providing, as Exhibit US-1, a chart of the US claims in this dispute.

## ANNEX A-6

### CLOSING ORAL STATEMENT OF THE UNITED STATES AT THE SECOND SUBSTANTIVE MEETING

1. Mr. Chairman, members of the Panel, we would like to thank you and the Secretariat staff assisting you for your efforts during this panel meeting and throughout this proceeding. As this is our last opportunity to address you in person, we would like to take a few moments to touch on some of the issues raised in this dispute.

#### I. ARTICLE VIII:1 OF GATT 1994

2. To begin, we would like to address a few arguments presented by China regarding the US claim that China's total award price requirement maintained as part of China's administration of the export quotas on bauxite, fluorspar, and silicon carbide is inconsistent with China's obligations in Article VIII:1 of the GATT 1994, because it constitutes a fee or charge imposed in connection with exportation and is not limited to the approximate cost of services rendered. We would like to make four points in response to the arguments China has raised in its submissions.

3. First, China's oral statement yesterday confirms that nothing remains of China's contention that the total award price falls outside the scope of Article VIII. As the United States has set forth, the total award price is a fee or charge imposed in connection with exportation that is not limited to the cost of services rendered. And, China has no response to this. Therefore, we urge the Panel to find that the total award price is inconsistent with Article VIII:1(a). Having no valid textual argument, China proceeds to offer distractions in the form of example mis-characterizations of the measures of other Members, and statements about the supposed implications of the Panel's finding.

4. Second, China contends without proper basis that the United States is a keen supporter of the use of auctions to allocate quotas. Even beyond the fact that US measures are not at issue here, none of the supposed examples presented by China in paragraphs 388-95 of its second written submission involve the use of auctions to allocate a quota – import or export. Accordingly, these "examples" – even if they were relevant to the Panel's assessment of China's measures – bear no relationship to the use of auctions to allocate a quota.

5. Third, China contends that the GATT 1994 does not prescribe a specific means of allocating a quota. But, this is beside the point. Even if China were correct that the GATT does not prescribe a particular means of allocating a quota, GATT 1994 Article VIII:1(a) prohibits a fee or charge imposed in connection with exportation that is not limited to the cost of services rendered. As the total award price requirement imposed by China is such a fee or charge, it is prohibited by the GATT 1994.

6. Fourth, while China had asserted in its second written submission that the WTO covered agreements neither prescribe nor condone any specific means of quota allocation, China contended in yesterday's oral statement that WTO Members have agreed on rules that discipline how quotas must be allocated, presumably in order to establish a basis for invoking Article XIII:2 of the GATT 1994 as context. China's reliance on Article XIII:2 is, in any event, misplaced. Not only is Article XIII:2 limited to import restrictions, it is silent on the question of fees. Furthermore, Article XIII:2 does not work even by analogy since it does not – to use China's terms – prescribe or condone any specific means of quota allocation.

## **II. ARTICLE XX(B) OF GATT 1994**

7. Turning to China's defense under Article XX(b), China wants to rewrite Article XX(b) to allow GATT-inconsistent measures that are necessary for economic growth. But, that is not what Article XX(b) provides. Article XX(b) permits a GATT-inconsistent measure that is "necessary to protect human, animal or plant life or health." And, to respond to the point that China has both economic and environmental goals, we agree with China and the passage from the European Union document that China cites that these goals are not necessarily competing goals. However, that tells us nothing about whether China is acting in conformity with its WTO obligations. As we stated in our second written submission, the WTO rules provide a firm foundation for international trade and development; contrary to China's argumentation, China's pursuit of its economic objectives neither justifies China's breach of those rules nor provides a basis for reading the WTO Agreement so as to weaken or nullify those rules.

8. To briefly summarize another point in relation to the Article XX(b) defense, China's failure to analyze the downstream effects highlights our main point that a measure restricting only foreign users of raw materials is not in fact an environmental measure at all. Rather, it is a measure intended to benefit its domestic industry that uses the raw materials.

9. If China were concerned about the environmental effects of raw material production, it would adopt measures – such as production controls or pollution controls – that directly affect environmental effects of raw material production.

10. China's assertions of a comprehensive regulatory framework for environmental protection are not supported by the evidence. The export restraints are not part of any such framework. Furthermore, the existence of domestic environmental regulations – the effects and effectiveness of which China was not able to tell us today – is not sufficient to establish that such measures are not available as alternatives for purposes of Article XX(b). And, China's arguments to the contrary reflect a mis-reading of the Appellate Body report in *Brazil – Tyres*.

## **III. ARTICLE XX(G) OF GATT 1994**

11. Our sessions yesterday and today were helpful in crystallizing important issues on Article XX(g).

12. China has conceded that its restrictions on fluorspar and bauxite prior to the introduction of the 2010 fluorspar and high alumina clay measures (2010 Measures) was not justified under Article XX(g). Accordingly, we heard China say that:

- The quota on fluorspar and the duties on bauxite were "withdrawn" in recognition of their WTO-inconsistency; and
- The duties on fluorspar and the quota on bauxite – as it is applied to high alumina clay – were WTO-inconsistent until the 2010 Measures took effect.

This means that the Panel's Article XX(g) review is limited now only to an examination of whether the 2010 Measures satisfy the requirements of Article XX(g).

13. This implicates the question of the Panel's terms of reference and how the 2010 Measures relate to the measures challenged by the complainants in this dispute. We have made our views clear today that the 2010 Measures may be considered as evidence to the extent they are relevant for

findings on the challenged measures as they existed on the date the DSB established this Panel.<sup>6</sup> We also made clear our view that the Panel could examine the 2010 Measures for purposes of making in-the-alternative or *arguendo* findings that the 2010 Measures do not, in any event, satisfy the requirements of Article XX(g).

14. The United States would like to focus on China's representation today that its 2010 Measures are the measures addressed to the conservation of resources while its export restraints are addressed at "allocating" those resources, once they have been produced. This underlies an important flaw in China's Article XX(g) argument: China focuses on presenting the question as one of allocating the shares of the resources. However, the disciplines at issue are addressed to the terms of trade in those resources, which must be non-discriminatory.

15. This also raises the issue of China's chapeau argument in the context of Article XX(g), which China articulated for the first time in its Second Oral Statement yesterday. We would like to make two points in response.

16. First, China tries to distinguish the Appellate Body's clear statement in *US – Gasoline* that the non-discrimination in the Article XX chapeau applies on not only an MFN basis but also a national treatment basis. China argues that *US – Gasoline* should be distinguished on the grounds that the measure at issue in *US – Gasoline* was an import restriction while the measures at issue in this dispute are export restraints. This is not a basis for making such a distinction.

17. Second, China argues that any resulting discrimination from the application of its measures is not unjustifiable discrimination because it is uniquely positioned as a "resource-endowed country that enjoys a sovereign right over natural resources found within its territory."<sup>7</sup> We would all be in trouble if it were true that China were unique in this way. But it is not true. And because it is not true, it would be detrimental to the multilateral trading system to endorse China's arguments on Article XX(g).

#### IV. CONCLUSION: CHINA'S LITIGATION STRATEGY

18. In concluding, the United States notes that, earlier today, China imputed to the United States a particular litigation "strategy." In fact, to the extent that we have a litigation "strategy," it is very straightforward:

- The United States did not bring this case lightly.

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<sup>6</sup> See *EC – Customs (AB)*, para. 186 ("We agree with the conclusion of the Panel that 'the steps and acts of administration that pre-date or post-date the establishment of a panel may be relevant to determining *whether or not a violation of Article X:3(a) of the GATT 1994 exists at the time of establishment.*'") (italics added); para. 187 ("[T]he Panel's review should therefore have focused on these legal instruments *as they existed and were administered at the time of establishment of the Panel.*") (italics added); para. 254 ("As we explained above, had the Panel properly identified the measures at issue, its task would have been to determine whether the measures at issue had been administered collectively in a uniform manner *at the time the Panel was established*, that is to say, in March 2005. In order to make this determination, the Panel could rely on evidence that pre-dated or post-dated the time of the Panel's establishment *to the extent that it was evidence relevant for the assessment of whether the European Communities acted consistently with Article X:3(a) at the time of the Panel's establishment.*") (third set of italics added; footnotes omitted); para. 259 ("In any event, although Exhibits EC-167, EC-168, and EC-169 might have arguably supported the view that uniform administration had been achieved by the time the Panel Report was issued, *we fail to see how these exhibits showed uniform administration at the time of the establishment of the Panel.*") (italics added).

<sup>7</sup> China's opening oral statement at the second panel meeting, para. 223.

- US industries using these resources have struggled under China's export restraints.
- We have raised our serious concerns regarding these export restraints with China many times, over many years.
- We devoted serious time and energy to trying to resolve our differences and concerns and to researching and reviewing China's measures – both the export restraints and any production measures – to try to understand the situation.
- When we could not resolve our concerns, we initiated a formal dispute at the WTO on these export restraints.

19. It is China that has deployed a clever litigation "strategy" here. By manipulating its export measures and introducing new measures, China has arranged a matrix of restraints and defenses to maximize its ability to find the one formula that will provide it with a roadmap to justify *all* of its export restraints – both the ones at issue in this dispute and the myriad export restraints China imposes that are not within the scope of this dispute. China has asserted:

- An Article XI:1 defense for a quota;
- An Article XX(g) defense for a quota;
- An Article XX(g) defense for a duty;
- An Article XX(b) defense for duties;
- An Article XX(b) defense for quotas; and
- An Article XX(b) defense for the combination of both a quota and a duty.

20. This strategy reinforces the *post hoc* nature of China's defenses. These restraints have existed for a long time. These defenses have existed in the GATT 1994 for a long time. And the goals served by these defenses have been present for an even longer time. However, China's efforts to justify these measures and to connect particular measures to particular defenses and goals are new – and presented for the purpose of this litigation. China has expressly acknowledged this today in the context of Article XX(g).

21. The United States asks the Panel to *see China's efforts for what they are* and to find accordingly. We thank you for your attention.

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**ANNEX B**

**SUBMISSIONS OF THE EUROPEAN UNION**

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## **ANNEX B-1**

### **EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE EUROPEAN UNION**

1. China subjects the exportation of the Raw Materials to four types of restrictions: (a) export quotas; (b) export duties; (c) export licenses; and (d) minimum export price requirements. These export restrictions are incompatible with a number of provisions of the GATT and of China's Accession Protocol.

#### **1. Export Quotas**

2. China imposes export quotas on a number of Raw Materials. These export quotas are imposed through a number of measures, including China's Foreign Trade Law, Regulation on the Administration of the Import and Export of Goods, Measures for the Administration of Export Quotas, Measures on Export Quota Bidding and a number of administrative decisions, notices and announcements which, among other things, list the particular Raw Materials that are subject to export quotas each year, list the conditions for the allocation of the export quotas and describe the allocation of export quotas to particular enterprises.

3. The European Union considers that these export quotas are inconsistent with Article XI of the GATT. The European Union also considers that these export quotas are inconsistent with Article 1.2 of China's Accession Protocol, in combination with paragraphs 162 and 165 of the Working Party Report.

4. In addition, China fails to publish the total export quota amount for Zinc ores and concentrates, the conditions for the allocation of these export quotas and invitations for applicants interested to obtain such export quotas. The European Union considers that, through this practise, China effectively sets an export quota of zero quantity for Zinc ores and concentrates and, therefore, prohibits the exportation of Zinc ores and concentrates. The European Union considers that this is inconsistent with Article XI of the GATT and with Article 1.2 of China's Accession Protocol in combination with paragraphs 162 and 165 of the Working Party Report. If China allocates such export quotas to some enterprises, then China's failure to properly and timely publish the rules for the allocation and the invitation for applications is inconsistent with Article X:1 of the GATT.

5. China also fails to publish the total amount of the export quota for Coke. The European Union considers that this is inconsistent with Article X:1 of the GATT.

#### **2. Allocation of quotas**

6. The European Union considers that a number of conditions that China imposes on applicant enterprises in order to grant them export quotas are inconsistent with the GATT and China's Accession Protocol. These conditions include the following.

7. First, applicants must have achieved a certain volume of exports during the previous years. The European Union considers that this condition is inconsistent with Article 5.1 and Article 1.2 of China's Accession Protocol, in combination with paragraphs 83(a) and 83(d) of the Working Party Report. These provisions expressly provide that China should eliminate the "prior experience" requirement as a condition for the grant to enterprises of the trading right to export goods from China, including the Raw Materials.

8. In addition, this condition has the effect of preventing new applicants from obtaining an export quota (because new applicants would not have the requisite prior exportation experience). Foreign companies are more likely to be "new applicants", than Chinese companies. As a result, this condition restricts the foreign companies' trading rights to export the Raw Materials. For these reasons, the European Union considers that this condition is inconsistent with Article 5.2 and Article 1.2 of China's Accession Protocol in combination with paragraphs 84(a) and 84(b) of the Working Party Report.

9. Second, applicants must have a minimum registered share capital. The European Union considers that this condition is inconsistent with Article 5.1 and Article 1.2 of China's Accession Protocol, in combination with paragraphs 83(b), 83(d) and 84(a) of the Working Party Report. These provisions require China to eliminate the minimum registered share capital requirement, together with the examination and approval system for the grant of the trading right to export goods (including the Raw Materials) at the end of the "phase-in" period, i.e., the end of 2004.

10. Third, applicants must possess "business management capacity". China's authorities have the right to refuse the grant of export quotas to enterprises which, in the Chinese authorities' view, do not possess such "business management capacity". There is no definition of "business management capacity" in Chinese legislation. This condition is vague and opaque and allows the Chinese authorities unfettered 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 which is not consistent with GATT Article X:3(a).

### **3. Export duties**

11. Article 11.3 of China's Accession Protocol provides that China would not impose any duties, taxes or other type of charges on the exportation of goods, with two exceptions: (a) export duties up to a certain expressly defined duty rate on a list of goods included in Annex 6 of China's Accession Protocol or (b) if such taxes and charges are applied in conformity with the provisions of Article VIII of the GATT 1994.

12. Despite these commitments, China imposes export duties on a number of Raw Materials which are not included in Annex 6 of China's Accession Protocol. By their very nature, these export duties do not fall within the scope of Article VIII of the GATT. For these reasons, the European Union considers that those export duties are inconsistent with Article 11.3 of China's Accession Protocol.

13. In addition, China imposes export duties on Yellow Phosphorus. This is one of the raw materials which is included in Annex 6 of China's Accession Protocol. However, the rate of export duty imposed on it exceeds the maximum rate of duty provided for in Annex 6. For this reason, the European Union considers that this export duty imposed by China on yellow phosphorous is inconsistent with Article 11.3 of China's Accession Protocol.

### **4. Export Licensing**

14. China subjects the exportation of a number of Raw Materials to a non-automatic licensing obligation. The European Union considers that this non-automatic export licensing obligation is inconsistent with Article XI of the GATT and with Article 1.2 of China's Accession Protocol, in combination with paragraphs 162 and 165 of the Working Party Report.



15. In addition, China may refuse the grant of export licenses to particular enterprises on the basis of a number of criteria and conditions. These criteria and conditions include the Chinese authorities' assessment of the applicants' "management qualifications", as well as "other documents of approval" issued by China's Ministry of Commerce at its sole discretion. The Chinese authorities also have the discretion to require applicants to produce undefined "other documents" in support of their application. These criteria and conditions allow the Chinese authorities excessive discretion to accept or refuse applications for export licenses on the basis of non-objective justifications. This is why the European Union considers that these criteria and conditions are inconsistent with Article 5.1 and Article 1.2 of China's Accession Protocol, in combination with 83(d), 84(a) and 84(b) of the Working Party Report.

16. In the alternative to the previous claim, the European Union considers that China's failure to publish sufficient definitions and explanations on the interpretation of these criteria and conditions is inconsistent with GATT Article X:1.

17. Moreover and again in the alternative, the European Union considers that this nexus of vague and opaque criteria and conditions, together with the corresponding discretion allowed to the Chinese authorities, make China's administration of its export licensing system inconsistent with GATT Article X:3(a).

## **5. Minimum Export Price Requirement**

18. China has set up a system whereby it controls the prices at which the Raw Materials are exported and ensures that exportation takes place only at a price equal or above a set minimum export price. This system is imposed through a number of measures, including the rules of operation of the relevant Chinese Chamber of Commerce, China's rules on export licensing and China's customs laws and regulations. The minimum export price system is enforced through (a) "*self-discipline*" among exporters, within the context of the operation of the relevant Chinese Chamber of Commerce; (b) penalties imposed by China's Ministry of Commerce; (c) China's export license issuing entities; and (d) China customs' authorities.

19. The existence of the minimum export price system has been confirmed by China's Ministry of Commerce in statements made and documents submitted in various court proceedings in the United States. It has also been confirmed by Chinese exporters and members of the relevant Chinese Chamber of Commerce in court proceedings in the United States. However, the operation of the minimum export price system is largely opaque, because it is based on rules that are not published.

20. China's legal framework on the minimum export price system is highly non-transparent. Although evidence demonstrates that certain measures related to the establishment and functioning of the minimum export price requirement do exist, they remain unpublished or were not published promptly. For example, the *2001 CCCMC Charter* was published only eight years after it came into effect. The European Union considers that China's failure to publish its laws, regulations, decisions and administrative rulings pertaining to the minimum export price requirement is inconsistent with Article X:1 of the GATT.

21. In addition, China administers the minimum export price system for yellow phosphorus through the enhanced enforcement procedure known as the "Price Verification and Chop" procedure. This procedure requires the participation of the CCCMC in the export clearance process. The European Union considers that CCCMC's role in verifying export contracts in the Customs clearance process and the danger of inappropriate flow of sensitive business information constitute unreasonable and partial administration which is inconsistent with Article X:3(a) of the GATT.

22. For the reasons set forth in this submission, the European Union respectfully requests the Panel to find that China's measures, as set out above, are inconsistent with China's obligations under the GATT 1994 and the Accession Protocol. The European Union further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that China bring its measures into conformity with the GATT 1994 and the Accession Protocol.

## **ANNEX B-2**

### **OPENING ORAL STATEMENT OF THE EUROPEAN UNION AT THE FIRST SUBSTANTIVE MEETING**

1. In addition to our views on the issues addressed in the joint oral statement, the European Union would like to clarify a few points of fact. These are points of fact underpinning both the European Union's claims and China's defence in the fields of Export Licenses and Export Quotas.

#### **I. CHINA'S ASSERTIONS IN RELATION TO ITS EXPORT LICENCES**

2. We begin with China's assertions in relation to its export licenses.

##### **A. ARE CHINA'S EXPORT LICENSES AUTOMATIC OR NON-AUTOMATIC?**

3. China asserts vigorously that its export licensing system is "automatic" (in paragraph 783). China includes in its first written submission official statements issued by the competent Chinese authorities and confirming that Chinese law does not allow its license issuing agencies any discretion to reject applications for export licenses (in paragraph 777). Official statements of the Chinese authorities confirm that Chinese law extends this "automaticity" to all goods subject to an export licensing requirement, irrespective of whether they are also subject to an export quota or not (in paragraphs 773 and 774).

4. China also provides official statements from its competent authorities stating that Chinese law allows its export license issuing agencies to perform only a review of a purely procedural nature (in paragraph 771). If the required documents are there, Chinese law obliges the agencies to grant the export license automatically. China asserts that its authorities have always granted all export licenses applied for, provided that the required documents were duly submitted together with the application (in paragraph 776).

5. China also asserts that Chinese law provides for an exhaustive list of documents that must be submitted together with the application (in paragraph 793) and that Chinese law does not allow its license issuing agencies any discretion to request additional documents (in paragraph 795).

6. The European Union welcomes these unequivocal official statements, issued by the competent Chinese authorities and interpreting the Chinese legislation and regulation in relation to China's export licenses. The European Union invites the Panel to incorporate these statements in its final Report to the DSB. The European Union notes that these statements have a legal importance, which was confirmed in the report of the panel in case DS152, known as *US – Section 301 Trade Act*.

7. If this was indeed the proper interpretation of China's regulation of its export licensing system, then the European Union would not have raised claims against it in the present dispute. The European Union has engaged in this dispute settlement procedure in good faith and with a view to resolve the dispute, as required by the DSU.

8. However, there are a few points of fact that seem to indicate that the story may not be as China presents it in its first written submission. The European Union would be most interested in hearing, together with the Panel and the other participants, China's explanations on the following points.

9. The first point is the relation between the provisions of Article 15 and Article 19 of China's Foreign Trade Law. These provisions draw a distinction between, on the one hand, "freely exported goods", which may be subject to automatic export licenses and, on the other hand, goods "subject to export restriction" through an export license. The only logical interpretation of these provisions is that the export licenses imposed on the second category of goods are not automatic. Otherwise, why would such a second category of goods exist?

10. China tries to argue that the word "restriction" in its legislation should not be interpreted as a "restriction" in the sense of the GATT. But we are not discussing the interpretation of the GATT at this stage. We are exploring a simple point of fact. Does the Chinese legislation treat differently the goods "subject to export restriction", from the goods that are "freely exported"? Are the export licenses provided for in Article 19 of the Foreign Trade Law as "automatic" as the export licenses provided for in Article 15 of the Law? Do the Chinese license issuing agencies have the discretion to refuse the grant of Article 19 licenses for different reasons than the Article 15 licenses? And, most importantly: the export licenses imposed on the Raw Materials at issue in this case, are they based on Article 15 or on Article 19 of the Law? We would be most interested to hear China's responses to these questions.

11. The second point that we would like to discuss is what is required by applicants in order to get an export license. China asserts in paragraph 816 of its first written submission that its law provides for an exhaustive list of documents to be submitted together with the application. But is this list of documents really exhaustive?

12. China provides a list of these documents in paragraphs 793 and 794 of its first written submission. The footnotes in these paragraphs refer to Article 11 of the Measures for the Administration of Export Licenses. They cover paragraphs 1 to 4 of Article 11. But, there is no reference to paragraph 7 of Article 11. And what does paragraph 7 say? It says that "for other goods subject to export licensing, the export licenses shall be issued on the basis of the documents of approval issued by the Ministry of Commerce".

13. The "other goods" are goods that are not subject to an export quota. In the present case this would cover Manganese and certain types of Zinc, as China acknowledges in paragraph 817 of its first written submission. But, what are these other "documents of approval issued by the Ministry of Commerce"?

14. China asserts in paragraphs 817 and 822 of its first written submission that none were required for Manganese and unwrought Zinc in 2010. But, which provision of Chinese law imposes a restriction on the Ministry of Commerce's discretion to expand that list of documents of approval for specific goods or for specific time periods, through the issuance of a new "Catalogue of goods subject to export licensing"? The European Union would welcome China's explanations on these points.

15. The third point that we would like to discuss is the discretion enjoyed by the Chinese export license issuing agencies in accepting or refusing to grant an export license. China asserts that Chinese law imposes on the licensing issuing agencies the obligation to perform a simple procedural review of the application materials. But, is this review really only procedural?

16. China accepts in paragraph 786 of its first written submission that the export license issuing agencies have the discretion to reject applicants that do not possess "business qualifications". The European Union had suggested a translation of that term as "management qualifications", but is happy to accept for purposes of our discussion today the translation offered by China.

17. China, in paragraphs 786 and 820, asserts that the only thing an applicant must do in order to satisfy the requirement for a showing of "business qualification" is to provide its business license and/or the document proving that it is authorised to perform import-export activities. Nothing else and nothing more.

18. The European Union has not seen an official statement from the competent Chinese authorities, publicly acknowledging that this is the interpretation to be given to the requirement for a showing of "business qualifications", or "management qualifications", or however China wishes to translate that term. If such a statement is made and incorporated into the report of the Panel, the European Union would be prepared to take it into consideration in good faith and in an effort to resolve the dispute.

**B. CHINA'S ASSERTION IN FOOTNOTE 1111 OF ITS WRITTEN SUBMISSION**

19. Another small point which we wish to clarify is China's statement in footnote 1111 of its first written submission. There, China states that the European Union has acknowledged in its first written submission the "fact" that "export licenses for all products at issue in this dispute have always been granted and within three days".

20. China's statement is evidently not correct. The European Union has never acknowledged and does not acknowledge today that China has always granted all requested export licenses.

21. China bases its statement on paragraph 162 of the European Union's first written submission. A simple read of that paragraph shows that the European Union is describing the provisions of China's Measures for the Administration of Export Licenses, which provide the time generally required for the issuance of an export license. There is no reference to the actual practice followed by the Chinese export license issuing authorities and no reference to their having always granted all requested export licenses.

**II. CHINA'S ASSERTIONS IN RELATION TO ITS EXPORT QUOTAS**

**A. THE SITUATION WITH ZINC ORES**

22. We now turn to China's assertions in relation to its export quotas. A first, small point of fact which we wish to clarify is the situation with Zinc ores and concentrates. China states in paragraphs 559, 641 and 740 of its first written submission that it has not "made effective" that export quota in 2010, or that "MofCom has not authorized for 2010 any quota for zinc".

23. The European Union would be grateful if China could explain the meaning of these statements. What does it mean not to have "made effective" an export quota? Does it mean that the exportation of the good is free and without restrictions? Or, does it mean that China acknowledges that it has imposed an export ban on Zinc ores and concentrates?

24. The European Union has raised a claim under Article X:1 of the GATT, because China has not published the export quota for Zinc ores and concentrates. China responds that it has not "omitted to publish the quota for zinc", because there is no quota for Zinc. The EU welcomes clarification from China regarding whether China has imposed an export ban on zinc ores and concentrates.

B. CHINA'S CLAIMS IN PARAGRAPHS 346 TO 349 OF ITS WRITTEN SUBMISSION

25. A more interesting point is raised by China's assertion that the European Union has not identified the Chinese measures which impose the export quotas (in paragraphs 346 to 349).

26. These assertions of China are probably the result of a misunderstanding. The European Union has provided in the Facts section of its first written submission a number of references to the Chinese laws, regulations, decisions, notices and announcements that subject the relevant Raw Materials to export quotas and regulate the administration, management and allocation of these export quotas.

27. The European Union's first written submission presents the facts relating to China's export quotas in 3 sections: first a general overview of the Chinese rules on the management of export quotas (in paragraphs 62 to 70), then a presentation of the Chinese rules for the management of the export quotas allocated directly (in paragraphs 71 to 90) and finally a presentation of the Chinese rules for the management of the export quotas allocated through bidding (in paragraphs 91 to 115). Throughout these sections there are numerous references to specific provisions of China's Foreign Trade Law; Regulation on the Administration of the Import and Export of goods; Measures for the Administration of Export Quotas; Measures on export quota bidding; and Implementation rules on export quota bidding. As mentioned in paragraph 199, the European Union challenges the consistence of all these provisions with the WTO Agreements.

28. But this is not all. The European Union's first written submission contains subsections for each Raw Material subject to an export quota. In each such subsection, there are references to the various Chinese Notices, Announcements and Communications through which the export quota is imposed and managed for each Raw Material. We shall spare the Panel and the parties and third parties from the torture of a recitation of all the footnotes in the European Union's first written submission and the numbers and titles of the corresponding Chinese legal provisions. A simple read of the relevant parts of the Facts section of the submission shows that the measures at issue in this dispute are clearly identified. Again, as mentioned in paragraph 199, the European Union challenges the consistency of all these provisions with the WTO Agreements.

29. However, if China considers that it has issued even more measures imposing export quotas on the Raw Materials, which the European Union has not mentioned in its submission, we would be happy if China could provide the Panel with a complete list. This list would be useful for the Panel's analysis of China's compliance with Article X:1 of the GATT.

C. THE SITUATION WITH COKE

30. Finally, a clarification is required on the facts relating to the Coke export quota. The European Union would like to thank China for clarifying the fact that it does not apply to Coke the general Measures for the Administration of Export Quotas (in paragraphs 737 and 738). The European Union would be grateful if China could provide copies of the provisions of Chinese law that govern the procedure for the determination of the total quantity of the Coke export quota.

31. China states that it does not determine the total amount of the Coke export quotas, before it invites interested enterprises to submit their application for an export quota. China states that it does not publish the total amount of Coke export quota before such invitation, because there is no total amount of Coke export quota to be published.

32. China has not provided copies of its legal provisions, or official statements from its competent authorities confirming the facts as described in its first written submission. If China provides such documentation, the European Union would be prepared to take it into consideration.

33. On a different point, the European Union notes that China raised an objection against that claim in paragraphs 31 to 35 of its written submission. China asserts that the European Union "did not include any statement in its Panel Request that could serve to identify the alleged omission to publish the amount for the export quota for Coke".

34. The European Union considers that these statements of China are probably the result of a misunderstanding. The European Union invites China to read the first paragraph of the European Union's Panel Request, where it is clearly stated that China "does not publish certain measures pertaining to the requirements, restrictions or prohibitions on exports". We consider that this language sufficiently shows that the European Union was raising a claim of non-publication of measures. The specific mention of zinc in the fourth paragraph of the Panel Request, for illustrative purposes, cannot be interpreted as an exclusion of all the other goods that are the subject of the current proceedings.

### **III. CONCLUSION**

35. Mr. Chairman, members of the Panel, the European Union thanks you for your attention and patience.

**ANNEX B-3**

**CLOSING ORAL STATEMENT OF THE EUROPEAN UNION  
AT THE FIRST SUBSTANTIVE MEETING**

1. The European Union would like to thank the Panel and the WTO Secretariat for the opportunity to put its views forward in this dispute and to have a good discussion which we have enjoyed.
2. Further to agreeing with and supporting the views expressed by the United States of America in their closing statement, the European Union would like to make some brief comments on two points.
3. The first point relates to Article 6.2 of the DSU. The underlying theme or *leitmotiv* of this Article is to guarantee procedural fairness. This means in essence that the defendant should get a reasonable notice in the Panel Request about the claims in the dispute in order to allow for a proper preparation of the case. It became very clear that China did not suffer any prejudice in this case and was perfectly able to prepare its case properly. In the past, both the Appellate Body and Panels have been very generous and not thrown out claims in the absence of prejudice. The European Union thus urges this Panel to follow past practice and not to throw out any claims made in this dispute, as there has been no prejudice caused to the respondent in this case.
4. The second point that the European Union would like to make is to repeat the importance and systemic implications which is the subject of Question 8 in the set of questions put by the Panel to the parties in this dispute today.
5. The European Union cautions against an extended application of exceptions in the GATT 1994, specifically those found in Article XX of the GATT 1994, to non-GATT obligations. This will open the door to an extremely slippery slope. Thank you.



## **ANNEX B-4**

### **EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE EUROPEAN UNION**

#### **I. GENERAL ISSUES**

1. China has acknowledged the WTO inconsistency of its export quotas on zinc ores and concentrates and most forms of bauxite, as well as of its export duties on manganese ores and silicon metal. China asserts that it has not imposed export quotas on fluorspar and export duties on bauxite and yellow phosphorus in 2010. The European Union considers that the Panel should make findings and issue recommendations on the WTO inconsistency of the export restrictions imposed on these goods too.

2. In addition, the European Union considers that the Panel should not exercise judicial economy on the claims based on China's Accession Protocol.

#### **II. THE EUROPEAN UNION HAS ESTABLISHED *PRIMA FACIE* ALL ITS CLAIMS**

##### **A. EXPORT QUOTAS**

3. Both objections raised by China against the European Union's claims on export quotas should be rejected. First, the European Union has properly identified in its first written submission the challenged export quotas and the Chinese legislative instruments which evidence the existence of the challenged export quotas. Second, Article XI:2(a) of the GATT is an affirmative defence, which China (and not the European Union) must invoke and establish.

##### **B. EXPORT LICENSING**

4. As a matter of fact, China's export licenses are non-automatic and discretionary. The export licenses are non-automatic because they are based on Article 19 and not on Article 15 of China's Foreign Trade Law. They are also discretionary, because of the provisions of Article 11(7) of the *Measures for the administration of export licenses* and Article 5(5) of the *Working rules on issuing export licenses*. A detailed analysis of the relevant Chinese legal provisions supports the European Union's arguments.

5. China's export licenses are incompatible with GATT Article XI and the provisions of China's Accession Protocol, because they are non-automatic and discretionary. The existence of that discretion is *by itself* the quantitative restriction, because it produces additional transaction costs and uncertainties that hinder trade. Therefore, there is no need to show that China has actually exercised the discretion.

6. In addition, China's failure to publish the definition and list of the documents provided for in Article 5(5) of the *Working Rules* and of the documents provided for in Article 11(7) of the *Measures* is inconsistent with Article X:1 of the GATT.

7. China's administration of its export licensing system is not consistent with Article X:3(a) of the GATT. First, the identified Chinese legislative instruments are administrative in nature and, therefore, can be challenged under Article X:3(a).

8. Second, the identified provisions create the *possibility* and the *danger* of an administration that is not uniform, impartial and reasonable. In accordance with the report of the panel in *Argentina – Hides*, an inherent *possibility*, or *danger* of a prejudice to some traders that *might* create a negative impact on traders is sufficient to establish *prima facie* a violation of Article X:3(a) of the GATT. This possibility and risk result from the absence of any definition of the conditions on the basis of which MOFCOM may require additional materials, or may issue special documents of approval in administering China's export licenses. This creates the inherent *danger* that different "other materials" may be required and different other "documents of approval" may be issued in relation to applicants that otherwise are in the same situation. Such administration does not satisfy the requirement of uniformity. The same set of facts result in an administration which does not satisfy the requirements of impartiality and reasonableness.

C. ADMINISTRATION OF EXPORT QUOTAS

9. First, China's administration of its export quota allocation system is inconsistent with China's Accession Protocol. China continues to impose as a prerequisite for participating in export quota allocation procedures the achievement of certain "levels of prior exports" and the existence of a certain "minimum registered share capital". China's Accession Protocol expressly provides that China must abolish these requirements. In addition, these requirements prevent foreign enterprises from participating in export quota allocation procedures: no foreign enterprise was awarded an export quota in 2009.

10. Second, China's administration of its system for the direct allocation of export quotas is inconsistent with Article X:3(a) of the GATT. China's authorities can reject applicants for lack of "operation capacity". This administration has been applied to Zinc ores and concentrates until 2005. However, the Panel should make findings on that administration's consistency with Article X:3(a) of the GATT for a number of reasons.

11. The Panel should also find that this administration is not consistent with Article X:3(a) GATT, because the notion of "operation capacity" has not been defined and, therefore, there is a danger that different export quota allocation authorities may apply it differently to applicants in identical situations. Such administration does not meet the requirements of uniformity, impartiality and reasonableness in the sense of Article X:3(a) of the GATT.

**III. CHINA'S DEFENCES SHOULD BE REJECTED**

A. GATT ARTICLE XI:2(A) DEFENCE

12. China's export quota on "refractory grade bauxite/high alumina clay" does not meet the conditions for the application of Article XI:2 (a) of the GATT. First, from a WTO law point of view, China's examples are irrelevant. They do not constitute subsequent practice of the signatories to an international agreement in the meaning of Article 31(3)(b) of the Vienna Convention. Second, China's interpretation of the notion of "essential products" is too broad and if accepted would render Article XX(j) of the GATT redundant. Third, China's interpretation of the notion of "critical shortage" is too broad and if accepted would render Article XX(g) of the GATT redundant. For the purposes of Article XI:2(a), a shortage is "critical" when it can be relieved or prevented through the application of temporary measures, pending the return to normal market conditions. The limited reserves of a good, by themselves, are not an element that can support a finding of "critical shortage", because such shortages cannot be prevented or relieved through temporary measures. Likewise, there is no evidence that China's regulatory framework, or potential but unrealised risks of technological problems or social unrest, have created a "critical shortage" in the sense of Article XI:2(a) of the

GATT. Fourth, China's measures are not "temporarily applied" and cannot "prevent or relieve" the "critical shortage". They cannot "prevent or relieve" the critical shortage from occurring, because they cannot stop the exhaustion of the reserves.

**B. GATT ARTICLE XX DEFENCE**

**1. GATT Article XX cannot be invoked for violations under paragraph 11.3 Accession Protocol**

13. China cannot justify violations of its obligations under paragraph 11.3 of its Accession Protocol by invoking Article XX GATT, because the defence is only available for GATT violations or if it has been incorporated by reference in the constituent part of another agreement. Contrary to paragraph 5.1, paragraph 11.3 of China's Accession Protocol does not contain such a reference but has its own exception clause in Annex 6 of the Accession Protocol instead. Also, paragraph 170 of the Working Party Report neither explicitly nor implicitly refers to any GATT exceptions or flexibilities. The fact that Article XX GATT cannot serve as a justification for violations outside GATT has most recently been confirmed by the Panel in *US – Poultry (China)*.

**2. China's export duties and quotas are not justified by Article XX(g) of the GATT**

14. The European Union maintains that China has not demonstrated that its export duties on fluorspar and its export quotas on bauxite satisfy the criteria of Article XX(g) of the GATT.

15. In relation to its export duties on fluorspar, China has not shown, firstly, that its measures were related to the conservation of natural resources; secondly, that they form part of a comprehensive set of measures relating to the conservation of fluorspar; and, finally, that they were made effective in conjunction with restrictions on domestic production or consumption as envisaged by Article XX(g) of the GATT.

16. In the opinion of the European Union, the export duties that China maintains on fluorspar do not satisfy the "relating to" requirement envisaged in the text of Article XX(g) of the GATT. Moreover, the *Notice Regarding the 2009 Tariff Implementation Program* which imposes the export duties on fluorspar does not contain any evident causal link to the objective of the conservation of "exhaustible natural resources".

17. The European Union also maintains that the challenged export duties on fluorspar do not form part of a "*comprehensive set of measures relating to the conservation of fluorspar*", and that China's export duties are not made effective in conjunction with restrictions on domestic production or consumption. The only measures which specifically relate to fluorspar in the list of thirteen measures which China considers to "*manage the supply, production and use*" of fluorspar, came into being only after this Panel was established. Also, China's interpretation of "*even-handedness*" (i.e. treatment of domestic and foreign users of the raw materials in an "*even-handed*" manner) is not in line with the interpretation of this term by the Appellate Body in *US – Gasoline* and *US – Shrimp*.

18. Consequently, the European Union maintains that China has not established that the export duties it imposes on fluorspar satisfy the requirements of Article XX(g) of the GATT.

19. In relation to the export quota on bauxite, China fails to establish, firstly, that its measures relate in any way to the conservation of exhaustible resources; and, secondly, that they form part of a comprehensive set of measures relating to the conservation of bauxite; and, finally, that they are taken in conjunction with restrictions on domestic production and consumption.

20. Firstly, the specific Chinese measure which sets the export quotas for bauxite in 2009, that is the "Ministry of Commerce Announcement Regarding 2009 Agricultural and Industrial Products Export Quota Amounts (Announcement No. 83 of 2008)" merely announces the fact that the 2009 quota figures for agricultural and industrial product exports have been released, and that MOFCOM will accept applications for these quotas. There is no reference made, directly or indirectly, that the quotas imposed on bauxite relate in any way to the objective of conservation of a natural resource.

21. Secondly, the European Union maintains that most of the thirteen measures which China presents as its "*conservation policy for refractory-grade bauxite*" are of a general regulatory or fiscal character having no link to the export quotas that China imposes on bauxite.

22. Thirdly, some measures which China considers as forming part of its "*conservation policy for refractory-grade bauxite*" were enacted after this Panel's establishment. In the opinion of the European Union, China's export quotas on bauxite are not "*made effective in conjunction with restrictions on domestic production or consumption*", and thus do not satisfy the requirements of Article XX(g) of the GATT.

### **3. Export duties and quotas are not justified by Article XX(b)**

23. In the opinion of the European Union, China's export duties on zinc scrap, magnesium metal scrap and manganese metal scrap, its export duties on coke, magnesium metal and manganese metal, and its export quotas on coke and silicon carbide cannot be justified under Article XX(b) of the GATT. Firstly, these restrictions do not meet the "*necessity*" test as established by panels and the Appellate Body in relation to Article XX(b) of the GATT, as they make no "material contribution" nor are they "apt to make a material contribution to the protection of human, animal or plant life or health". The European Union also maintains that there are reasonably available WTO-consistent alternative measures that China could have taken to protect health.

24. With regard to export duties on zinc scrap, magnesium metal scrap and manganese metal scrap, there is no evidence that China's objective for the imposition of the export duties was really that of reducing health risks which are associated with pollution. In particular, the asserted policy to increase secondary production through a "tax" on scrap cannot support or even make a "material contribution" towards China's supposed health objective.

25. Likewise, the European Union maintains that the export duties on coke, magnesium metal and manganese metal do not result in a decrease in the production of these raw materials and, on that basis, any reductions in pollution associated with their production, as China argues. Thus these measures are not "necessary" within the meaning of Article XX(b) of the GATT.

26. The European Union also submits that China's export quotas on coke and silicon carbide are not "*necessary*" to protect human, animal, plant life or health within the meaning of Article XX(b) of the GATT. The European Union challenges China's assertions that the export quotas on coke and silicon carbide "*make a material contribution*", or "*are apt to make a material contribution*" to the objective of health protection in China. It is also of the opinion that they are not based on any hard evidence, but merely on economic hypothesis which can be easily disproven.

### **4. Export duties and quotas do not satisfy the criteria of the *chapeau* of Article XX GATT**

27. Finally, in the opinion of the European Union, China has not established that it meets the criteria for any of the elements of the *chapeau* and, thus it believes that China has failed to meet its burden under the *chapeau* of Article XX of the GATT.

## ANNEX B-5

### EXECUTIVE SUMMARY OF THE OPENING AND CLOSING ORAL STATEMENTS OF THE EUROPEAN UNION AT THE SECOND SUBSTANTIVE MEETING

#### I. GENERAL POINTS RAISED BY CHINA'S SECOND WRITTEN SUBMISSION

##### A. "ABANDONED CLAIMS"

1. The fact that a complaining party does not repeat a claim at a particular stage of the proceedings does not mean that the party has withdrawn that claim (*EC - Selected Customs Matters*, para. 7.42).

##### B. THE BURDEN OF ESTABLISHING THE CONDITIONS OF ARTICLE XI:2(A)

2. China bears the burden of establishing the conditions of Article XI:2(a). In the past the Appellate Body and the panels have never required that a complainant needed to plead and prove Article XI:2(a) nor considered that e.g. XI:2(b) and XI:2(c) must be invoked and proven by the complaining party in order to establish a *prima facie* violation of Article XI:1 GATT. It is up to the defendant to plead and prove Article XI:2(a) GATT, if he so wishes.

##### C. THE IRRELEVANCE OF THE BOP-UNDERSTANDING FOR THE INTERPRETATION OF ARTICLE XI:2(A) GATT

3. The important difference in the scope of the *Understanding* and Article XI:2(a) is that Article XI:2(a) allows the *imposition* of trade restrictions, while Articles XII:3 and XVIII:10 GATT together with the *Understanding* allow the *removal* of trade restrictions. Therefore, the *Understanding* and Article XI:2(a) pursue opposing objectives. A broader definition of "essential products" in Article XI:2(a) leads to *more* restriction on trade, a broader definition of "essential products" in the *Understanding* leads to *fewer* restrictions on trade. Consequently, a potential common definition of "essential products" would lead to an incoherent application of the GATT.

##### D. THE IRRELEVANCE OF ARTICLE XXXVI:5 GATT FOR THE INTERPRETATION OF ARTICLE XI:2(A) GATT

4. The European Union (EU) does not express any view on whether China qualifies as a developing country. The use of Article XXXVI:5 as relevant context for the interpretation of Article XI would create a systemic problem: Article XI applies to all WTO Members, whereas Article XXXVI:5 relates only to developing countries. If Article XXXVI:5 could serve as "relevant context" for the interpretation of Article XI, this would lead to a different level of obligations under Article XI GATT depending on the classification of the Member in question. China cannot rely on a 1989 GATT Secretariat note circulated during the Uruguay Round Negotiations in the light of note TN/CTD/W/33 circulated on June 8, 2010.

##### E. THE PROPER INTERPRETATION OF ARTICLE X:3(A) GATT

5. The EU challenges China's "administration" of its export quota allocation system and export licensing system, i.e., the application by China of its relevant laws and regulations. E.g., the EU challenges the broad and unfettered discretion enjoyed by China's authorities in interpreting the notion of "operating capacity", when they select the enterprises that will be directly allocated an export

quota. The Appellate Body in *EC – Selected Customs Matters* does not require a complaining party to show that the elements of the defending party's "administration of laws" and regulations, such as those identified by the EU, must "*necessarily*" lead to an administration which is non-uniform, partial or unreasonable, in order to establish a violation of Article X:3(a) of the GATT.

## II. CHINA'S GATT ARTICLE XX DEFENCES

### A. APPLICABILITY OF THE ARTICLE XX GATT EXCEPTIONS TO PARAGRAPH 11.3 ACCESSION PROTOCOL

6. Paragraph 11.3 of China's Accession Protocol does not contain any direct or indirect incorporation of Article XX GATT, therefore violations by China of its obligations pursuant to paragraph 11 of the Accession Protocol cannot be justified by recourse to Article XX GATT.

### B. CHINA'S DEFENCE UNDER ARTICLE XX(G)

7. Export restraints are not "*part and parcel*" of China's other measures which limit the supply of bauxite and fluorspar. The measures imposing the export duties on fluorspar and the quotas on refractory-grade bauxite, do not "*relate to*" conservation. The meaning of the phrase "*relating to*", has been interpreted by the Appellate Body as meaning 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). China's measures imposing export restrictions on fluorspar and bauxite are not targeted or "*primarily aimed at*" the goal of conservation of natural resources.

8. References to the Preamble of the WTO Agreement, the principle of sustainable development, as well as to other references and statements made in various international environmental fora, declarations or agreements have no relevance to the issue of whether the disputed measures satisfy the criteria established by Article XX(g) GATT. Chinese export restrictions were not made "*in conjunction with*" domestic restrictions on extraction or production. The "*timing*" of the domestic restrictions makes it obvious that the exclusive motivation has always been to pursue certain industrial policy objectives. China's "*conservation policies*" are made up of a number of unconnected measures, taken over a number of years, the majority of which do not even make a reference to fluorspar or bauxite. The only measures specifically referring to fluorspar and bauxite are the 2010 domestic restrictions on the mining and processing of fluorspar and "*refractory-grade bauxite*", introduced well after the establishment of this panel.

9. The EU's interpretation of the "even-handedness" requirement genuinely reflects the Appellate Body's interpretation in *US - Gasoline*.

10. China is not presenting any evidence on the quantitative effects of its measures on export and domestic consumption, which would allow an assessment of "even-handedness". The export duty on fluorspar constitutes an extra burden, as no export duty is paid by fluorspar users in China. Article XXXVI:5 and its Ad Note have no relevance to the correct interpretation of GATT Article XX(g).

### C. CHINA'S DEFENCE UNDER ARTICLE XX(B)

11. The different environmental protection laws and regulations listed by China do not form a "*comprehensive environmental protection framework*" and have no causal link with, or relevance to, the export duties and quotas. They are made-up of *post-hoc* "environmental defences".

12. Statistics prove that production of the raw materials at issue in China has actually increased over the last five years. China is basing its ("*but-for*") defence on economic theories, developed or adjusted for this dispute which are flawed in many ways. China's whole case rests on the attempt to convince the Panel that because some economic studies say so, the export duties and quotas imposed do actually make (or "are apt to make") a "material contribution" towards China's goal of health protection - and that therefore they are "necessary" within the meaning of GATT Article XX(b). It remains unclear why actual data from the years in which China's export restrictions were already in place was completely ignored for the studies presented. The European Commission document cited by China actually states that "*scrap recovery for manganese was negligible*". The 12-25% range quoted is in reality the percentage content of manganese found in "old scrap" of steel slag.

D. REASONABLY AVAILABLE ALTERNATIVES

13. The alternatives proposed by the co-complainants do not carry any of the risks mentioned in *Brazil – Retreaded Tyres*. There are more effective ways in which China can achieve its desired goal of protection of animal or plant life or health. The pollutants emitted from the processing of raw materials do not differentiate between raw materials intended for export or for domestic use.

E. THE REQUIREMENTS OF THE CHAPEAU OF GATT ARTICLE XX ARE NOT MET BY CHINA

14. The requirements of the Article XX *chapeau* must not be confused with those of Article XXXVI:5 of the GATT, with the customary norm of sovereignty over natural resources or with China's position as a "*developing country*" and "long-term economic growth" aims. China has failed to demonstrate that it meets the requirements of the *chapeau* and of sub-articles (b) and (g) of GATT Article XX.

### III. CLOSING STATEMENT AND CONCLUSION

A. POINTS OF FACT

15. Several points of fact raised by China over the course of the hearing required further comment: The administration of China's export quota allocation system for zinc ores and concentrates until 2006 involved the application of the "operating capacity" criterion (para. 329 opening statement). Through this admission, China in essence acknowledges that it administered its laws and regulations as challenged by the EU under X:3(a) GATT. In *EC-Biotech* the panel confirmed that panels have the authority to make findings relating to measures expired even before the establishment of the panel (para. 7.1306). Contrary to China's statement (para. 339 opening statement) exhibit JE-82 lists the "foreign-invested enterprises" that received a coke quota in 2009. They are not "foreign companies", in the sense of paragraph 5.2 of the Accession Protocol and paragraphs 84(a) and 84(b) of the Working Party Report. Thus, no foreign company or individual has been allocated a Raw Material export quota. Further documents (para. 346 opening statement) in connection with a note to Appendix 1 of the 2010 Catalogue of goods subject to export licences call upon the panel to make the requested findings.

B. CHINA'S LEGAL INTERPRETATIONS

16. Regarding the legal interpretation presented by China over the course of the hearing it has to be clarified that the terms of Article XI:2(a) GATT must not be interpreted in a manner that would diminish the fundamental principles of Article XI:1 to nullity. An exception cannot be applied as to "frustrate or defeat" the basic rights and obligations set out in the substantive rules of the GATT (*US - Gasoline*, WT/DS2/AB/R, p. 22). The SPS Agreement is not relevant for the interpretation of

Article XI:2(a) GATT. Important differences between the texts of the SPS Agreement and Article XI:2(a) make it impossible to transpose principles of the former to the interpretation of the latter.

17. The EU did not state, as China alleged, that other WTO Members have a right to a share of China's natural resources. According to Article XX(g) GATT non-Chinese users have a right to be treated in an equitable, fair or even-handed manner when *trading* with China in these raw materials. Finally, regarding the "necessity" standard required by the Appellate Body under Article XX(b) GATT China has failed to prove that the export restrictions it has imposed have made a material contribution to the alleged decline of pollution levels resulting from EPR production (para. 277 opening statement).

18. The *leitmotiv* which could be drawn from China's replies to the Panel questions was that it gave unspecific, speculative, even random-sounding answers to the questions raised.

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**ANNEX C**

**SUBMISSIONS OF MEXICO**

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## ANNEX C-1

### EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF MEXICO

#### I. INTRODUCTION

1. Despite China's commitments to limit or eliminate the use of export restraints during the course of its negotiations to accede to the WTO, China's export restraints have proliferated in number and kind. China now subjects over 600 items to non-automatic licensing and over 350 items to export duties. These export restraints have become increasingly restrictive over time; export quota amounts have decreased while export duty rates have increased.

2. The products subject to the export restraints at issue in this dispute are various forms of bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus, and zinc (together the "Raw Materials"). At issue in this dispute are four types of restraints that China imposes on the exportation of the Raw Materials: (1) export duties; (2) export quotas; (3) export licensing; and (4) minimum export price requirements. Each type of export restraint, including in some cases its administration, is inconsistent with China's obligations under the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and China's Protocol of Accession to the WTO ("Accession Protocol"), which incorporates commitments made by China in the Report of the Working Party on China's Accession to the WTO ("Working Party Report").

#### II. FACTUAL BACKGROUND

##### A. CHINA'S POLICIES FOR DEVELOPING AND PROMOTING ITS DOMESTIC INDUSTRY RELY ON RESTRAINING THE EXPORTATION OF RAW MATERIALS

3. China's economic development is guided and directed by various plans and policies formulated and issued by the central government, including the *Five Year Plans for National Economic and Social Development*. Over the period of the tenth and eleventh Five-Year Plans, spanning the years 2001 to the present, China has achieved remarkable progress in its industrial growth and development. This growth, however, comes at the expense of the rest of the world. China's production of industrial raw materials and processed goods has increased dramatically. China's exports of processed, value-added goods have also increased. However, China's exports of industrial raw materials have decreased.

4. These trends are the result of a deliberate strategy that China employs to optimize the conditions for realizing its economic and industrial ambitions. China's industrial strategy is to leverage and exploit the differences in the international and domestic markets for raw materials and downstream, processed products, using restraints on exports as the linchpin. The export restraints that China imposes on the Raw Materials are part of this industrial policy, which is predicated on advantaging China's domestic producers and industries, but distorts the international economic marketplace and is inconsistent with China's WTO obligations.

##### B. THE RAW MATERIALS

5. The nine industrial raw materials subject to the various export restraints imposed by China – bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus, and zinc – are either naturally occurring minerals or materials that have undergone some initial processing. China is a leading global producer of all nine of these raw materials, which renders

China's restraints on their exportation particularly distortive for non-Chinese consumers of these raw materials and of the products manufactured from them.

#### C. EXPORT DUTIES

6. China's obligations under paragraph 11.3 of Part I of the Accession Protocol require that China not impose export duties on products that are not listed in Annex 6 of the Accession Protocol. These obligations also require China to limit any export duties imposed on products that are listed in Annex 6 to the rates provided therein.

7. However, China imposes export duties on various forms of bauxite, coke, fluorspar, magnesium, manganese, silicon metal, and zinc<sup>1</sup>, even though none of these materials is listed in Annex 6. In addition, China also imposes export duties on yellow phosphorus (which is listed in Annex 6) at a rate that exceeds the maximum rate provided in Annex 6.

#### D. NON-AUTOMATIC EXPORT LICENSING FRAMEWORK

8. China restricts the exportation of various forms of bauxite, coke, fluorspar, manganese, silicon carbide, and zinc by subjecting their exportation to non-automatic export licensing.<sup>2</sup> MOFCOM, together with Customs, formulates, adjusts, and publishes a catalog listing all goods whose exportation is designated for restriction. Exportation of such goods requires approval by MOFCOM and is subject to export licensing that is, accordingly, not automatic.

9. Non-automatic export licensing (all references to "export licensing" hereinafter mean non-automatic export licensing) is the framework through which China imposes and administers the export quotas for bauxite, coke, fluorspar, silicon carbide, and certain forms of zinc, as discussed below. For these products, the non-automatic export licensing requirements function as a restriction on exportation additional to the restriction effected by the export quotas. Manganese and certain forms of zinc are subject to non-automatic licensing, but not quotas.

#### E. EXPORT QUOTAS

10. China restricts the exportation of various forms of bauxite, coke, fluorspar, silicon carbide, and zinc by subjecting the exportation of these materials to export quotas or prohibitions.<sup>3</sup> China maintains two systems for allocating export quotas: direct allocation or a quota bidding system. The export quotas on coke and zinc are allocated "directly". The export quotas on bauxite, fluorspar, and silicon carbide are allocated through a bidding system.

11. MOFCOM is responsible for setting the total amount of export quotas of the following year no later than October 31 of each year, distributing export quotas, evaluating applications for export quotas, determining whether to grant quotas, and in collaboration with Customs, is responsible for formulating, adjusting, and publishing a catalog listing all goods subject to export quota. MOFCOM

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<sup>1</sup> For purposes of the discussion of China's export duties, the terms "bauxite", "coke", "fluorspar", "magnesium", "manganese", "silicon metal", "yellow phosphorus", and "zinc" cover the forms of each of these Raw Materials listed in Chart of Raw Materials Subject to Export Duties (Exhibit JE-5).

<sup>2</sup> For purposes of the discussion of China's non-automatic export licensing, the terms "bauxite", "coke", "fluorspar", "manganese", "silicon carbide", and "zinc" cover the forms of each of these Raw Materials listed in Chart of Raw Materials Subject to Export Licensing and Quotas (Exhibit JE-6).

<sup>3</sup> For purposes of the discussion of China's export quotas, the terms "bauxite", "coke", "fluorspar", "silicon carbide", and "zinc" cover the forms of each of these Raw Materials listed in Chart of Raw Materials Subject to Export Licensing and Quotas (Exhibit JE-6).

must approve the exportation of the goods listed in the catalog as subject to quota before they can be exported. Entities that are approved to export under the quotas are issued a certificate of quota. Only after an exporter obtains a certificate of quota can that exporter export the relevant products.

12. While China publishes the annual quota amounts for most products subject to quota, China did not publish the annual quota amount for coke. China instead publishes notices during the year announcing that MOFCOM is distributing the export quota on coke to specific enterprises. China has not published any quota amount in relation to the export quota on zinc in 2009.

13. **Coke Export Quota Application Process.** China requires enterprises to apply to receive an allocation of coke under the export quota for a given year in October of the previous year. As part of that application process, China requires enterprises to satisfy certain criteria in order to be eligible to receive an allocation under the quota. Those criteria include having exported a certain amount of coke in previous years, and in the case of certain enterprises, having a certain minimum registered capital. Applicant enterprises who do not satisfy the requisite criteria are not permitted to export coke under the quota. China also requires enterprises applying to export coke under the quota to submit a number of documents including prior export invoices.

14. China empowers the CCCMC with responsibility for reviewing and evaluating the applications of enterprises seeking to export coke under the quota. Ultimately, MOFCOM publishes the list of all companies that satisfy the eligibility criteria on the basis of the CCCMC's advice.

15. In addition, MOFCOM administers different application processes for Chinese enterprises and foreign-invested enterprises. While the 2009 application procedures for foreign-invested enterprises do not appear to be published, the measures allocating portions of the quotas to foreign-invested enterprises in 2009 make clear that such enterprises are subject to an application and approval process for the coke export quota.

16. **Zinc.** While China also imposes export quotas on zinc, China has not published any measures in 2009 announcing the quantities of zinc that may be exported under the quota or any measures setting forth application procedures for enterprises seeking to export under the quota.

17. **Export Quota Bidding.** China allocates the export quotas on bauxite, fluorspar, and silicon carbide through a bidding process. Enterprises seeking to export the materials subject to the bidding procedure are required to satisfy certain eligibility criteria in order to participate in the bidding process including criteria relating to minimum registered capital and prior export experience. The enterprises that satisfy such criteria and participate in the bidding process must submit a bid price and bid quantity for the material they are seeking to export. China then awards portions of the quota beginning with the bidding enterprise that submits the highest bid price. The enterprises that are awarded a portion of the quota must pay a "total award price" (*i.e.*, the enterprise's bid price multiplied by its bid quantity) in order to export.

18. MOFCOM has established Bidding Offices composed of *inter alia* representatives of the CCCMC to administer aspects of the bidding process. The Bidding Office's – and therefore the CCCMC's – responsibilities include reviewing the applications of bidding enterprises to determine whether they satisfy the requisite eligibility criteria. Applicant enterprises are also required to submit certain documents including a balance sheet and income statement, and information including registered capital, net profit, and prior export volumes and values.

F. EXPORT LICENSING ADMINISTRATION AND REQUIREMENTS

19. China controls and restricts the exportation of bauxite, coke, fluorspar, manganese, silicon carbide, and zinc through an export licensing system that conditions the issuance of licenses and the usage of those licenses in various ways.<sup>4</sup>

20. There are three types of export licenses, which determine where and how many times a particular license can be declared and used. Licenses must be obtained from particular license issuing entities depending on the product being exported and/or the type of exporter applicant. Export license issuing entities review applications based on a variety of factors and documents including documents of approval issued by MOFCOM in addition to the export contracts, exporter management qualifications, and other materials to be submitted, none of which are further identified or defined in the *Export Licensing Rules* or related licensing measures. Export licensing entities and individual staff members of such entities are subject to sanctions for violating the rules and regulations applicable to export license issuance.

G. MINIMUM EXPORT PRICE REQUIREMENT

21. China restrains the exportation of bauxite, coke, fluorspar, magnesium, silicon carbide, yellow phosphorus, and zinc by imposing a minimum price requirement on their exportation.<sup>5</sup> China implements this restraint through a non-transparent system. Based on statements made by China and documents submitted by Chinese exporters in US courts, it appears that export prices that are set by the CCCMC are observed by exporters through an official "system of self-discipline" and further reinforced through the availability of penalties imposed by MOFCOM, and through China's licensing authorities and Customs.

III. LEGAL DISCUSSION

A. CHINA'S EXPORT DUTIES ARE INCONSISTENT WITH CHINA'S OBLIGATIONS UNDER PART I PARAGRAPH 11.3 OF THE ACCESSION PROTOCOL

22. Paragraph 11.3 of the Accession Protocol contains a commitment by China to "eliminate all taxes and charges applied to exports" except in two specific situations: (1) where the taxes and charges are covered by Article VIII and applied consistently with the requirements of Article VIII; and (2) where the taxes and charges are imposed on products listed in Annex 6 at a rate less than or equal to the *ad valorem* percentage specified for those products in Annex 6.

23. China imposes "temporary" export duties at *ad valorem* rates ranging from 10 to 40 per cent on various forms of bauxite, coke, fluorspar, magnesium, manganese, silicon metal, and zinc. These duties are charges applied to exports that are termed "export duties" in China's measures. The export duties resulting from the application of these duty rates are not applied "in conformity with the provisions of Article VIII of the GATT 1994" because export duties do not fall within the scope of that Article. Furthermore, none of the products on which these export duties are imposed is listed in Annex 6. Accordingly, China's maintenance of these temporary export duties is inconsistent with China's commitment under paragraph 11.3 of the Accession Protocol.

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<sup>4</sup> As set forth above, for purposes of the discussion of China's non-automatic export licensing, the terms "bauxite", "coke", "fluorspar", "manganese", "silicon carbide", and "zinc" cover the forms of each of these Raw Materials listed in Chart of Raw Materials Subject to Export Licensing and Quotas (Exhibit JE-6).

<sup>5</sup> See Chart of Raw Materials Subject to Minimum Export Prices (Exhibit JE-7) for products subject to minimum export price requirements.

24. China also imposes a "regular" *ad valorem* export duty at a rate of 20 per cent on yellow phosphorus. In addition to this regular export duty, China imposes a "special" export duty rate for yellow phosphorus to 50 per cent, resulting in a total export duty rate of 70 per cent effective 1 January 2009. The export duty resulting from the application of these duty rates to exports of yellow phosphorus is explicitly excluded from the coverage of Article VIII of the GATT 1994. The maximum *ad valorem* export duty rate permitted to be applied to yellow phosphorus under Annex 6 is 20 per cent. Accordingly, the export duty rate of 70% applied to the exportation of yellow phosphorus is inconsistent with China's commitment under paragraph 11.3 of the Accession Protocol.

**B. CHINA'S EXPORT QUOTAS ARE INCONSISTENT WITH CHINA'S OBLIGATIONS UNDER ARTICLE XI:1 OF THE GATT 1994**

25. Article XI:1 of the GATT 1994 explicitly prohibits Members from instituting or maintaining a restriction or prohibition made effective through a quota on the exportation of any product. However, China subjects the exportation of various forms of bauxite, coke, fluorspar, silicon carbide, and zinc to quotas. These export quotas are therefore in breach of China's obligations under Article XI:1 of the GATT 1994. As China subjects the exportation of zinc to a quota, but does not publish any export quota for zinc, China effectively sets the export quota for zinc at zero. As a result, China prohibits the exportation of zinc, in contravention of Article XI:1 of the GATT 1994.

26. China's export quotas on bauxite, coke, fluorspar, silicon carbide, and zinc are also inconsistent with paragraphs 162 and 165 of the Working Party Report, which contain enforceable commitments with respect to the elimination of export restrictions.

**C. CHINA'S ADMINISTRATION AND ALLOCATION OF ITS EXPORT QUOTAS IS INCONSISTENT WITH CHINA'S OBLIGATIONS UNDER THE ACCESSION PROTOCOL, THE WORKING PARTY REPORT, AND THE GATT 1994**

27. **Trading Rights.** China's commitments under paragraph 5.1 of Part I of the Accession Protocol and paragraphs 83 and 84 of the Working Party Report (commonly referred to as China's "trading rights" commitments), require China to give all foreign enterprises and individuals, as well as all enterprises in China, the right to export most products. Furthermore, China explicitly committed to eliminate its examination and approval system and to eliminate certain eligibility criteria for obtaining or maintaining the right to export including criteria relating to prior export experience and minimum registered capital. However, in its administration of the quotas for coke, which is directly allocated, and the quotas for bauxite, fluorspar, and silicon carbide, which are allocated through a bidding process, China breaches these commitments by impermissibly requiring exporters to satisfy certain criteria in order to be eligible to receive an allocation of the coke quota or participate in the quota bidding process.

28. **Partial and Unreasonable Administration.** China's administration of its export quotas is also inconsistent with Article X:3(a) of the GATT 1994, which requires Members to administer certain measures described in Article X:1 in a "uniform, impartial and reasonable manner."

29. China empowers a private party B the CCCMC B to have direct involvement in the administration of the export quota on coke, which is allocated directly, and the export quotas on bauxite, fluorspar, and silicon carbide, which are allocated through the bidding system. The CCCMC evaluates enterprises' applications to export under the quota and determines whether they satisfy the relevant eligibility criteria. In that role, the CCCMC also obtains access to sensitive and confidential information, including past export invoices in the case of the coke quota, and balance sheets and income statements in the case of the export quotas allocated through bidding. The involvement of the

CCCMC – an association of private commercial participants in a common industry – renders China's administration of these export quotas partial and unreasonable in contravention with Article X:3(a) of the GATT 1994.

30. **Total Award Price.** Article VIII:1(a) of the GATT 1994 prohibits "fees and charges of whatever character . . . imposed . . . on or in connection with exportation" where such fees are not "limited in amount to the approximate cost of services rendered...". Enterprises that are awarded a portion of the export quota for materials subject to quota bidding are required to pay a total award price in order to export the materials. The total award price therefore constitutes a "fee or charge of whatever character . . . imposed . . . in connection with . . . exportation" within the meaning of Article VIII:1(a). The total award price is also not limited to the approximate cost of services rendered. Thus, the total award price is inconsistent with China's obligations under Article VIII:1(a) of the GATT 1994. The total award price is also inconsistent with paragraph 11.3 of the Accession Protocol as a "tax or charge" imposed on the exportation of products that are not listed in Annex 6.

D. CHINA'S EXPORT LICENSING FOR PRODUCTS SUBJECT TO RESTRICTED EXPORTATION IS INCONSISTENT WITH CHINA'S OBLIGATIONS UNDER ARTICLE XI:1 OF THE GATT 1994 AND PARAGRAPHS 162 AND 165 OF THE WORKING PARTY REPORT

31. China uses licensing to subject the exportation of designated products to restriction. China identifies such goods on a positive list of products subject to export licensing published annually. The list that China published for 2009 includes various forms of bauxite, coke, fluorspar, manganese, silicon carbide, and zinc, indicating that the exportation of these products is designated by the state as restricted. Furthermore, the export licensing required to export these restricted products is not automatic. In contrast, China also maintains an automatic export licensing system. Article 15 of the *Foreign Trade Law* instructs MOFCOM and its partner institutions to grant approval whenever exporters seeking to export the unrestricted goods subject to automatic licensing apply for the automatic licenses. However, for goods whose exportation is designated for restriction, MOFCOM is not required to grant its approval to applicant exporters and is authorized to impose various conditions on their exportation.

32. Export licensing is thus a measure that restricts the exportation of these products in breach of China's obligations under Article XI:1 of the GATT 1994. Paragraphs 162 and 165 of the Working Party Report contain enforceable commitments with respect to the elimination of non-automatic export licensing. China's export licensing is also inconsistent with paragraphs 162 and 165 of the Working Party Report and paragraph 1.2 of China's Accession Protocol.

E. CHINA'S MINIMUM EXPORT PRICE REQUIREMENT IS INCONSISTENT WITH CHINA'S OBLIGATIONS UNDER THE GATT 1994

33. China's minimum export price requirement for bauxite, coke, fluorspar, magnesium, silicon carbide, yellow phosphorus, and zinc, as described above, prohibits the exportation of these products if the export price does not meet a designated minimum. This constitutes a restriction on the exportation of these materials in contravention of China's obligations under Article XI:1 of the GATT 1994.

34. Furthermore, China administers the minimum export price requirement for yellow phosphorus through an enhanced enforcement mechanism known as the Price Verification and Chop ("PVC") procedure. The PVC procedure involves the participation of the CCCMC in the customs clearance process for yellow phosphorus. The CCCMC's participation permits the flow of exporters' sensitive commercial information to representatives of parties with interests that are in conflict with the



exporters. 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.

35. Finally, China's failure to publish its laws, regulations, decisions, and rulings pertaining to the minimum export price requirement for these Raw Materials, is inconsistent with China's obligations under Article X:1 of the GATT 1994.

#### **IV. CONCLUSION**

36. For the reasons set forth in this submission, Mexico respectfully requests the Panel to find that China's measures, as set out above, are inconsistent with China's obligations under the GATT 1994 and the Accession Protocol. Mexico further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that China bring its measures into conformity with the GATT 1994 and the Accession Protocol.

**ANNEX C-2**

**ADDITIONAL OPENING ORAL STATEMENT OF MEXICO AT THE FIRST  
SUBSTANTIVE MEETING**

1. As a final remark to be added to our views and conclusions expressed in the joint oral statement, Mexico would like to stress one additional point on China's first written submission.
2. In its submission, China tries to justify its export restraints, and even differentiate itself from other WTO Members, by considering itself a developing country in the need for industrialization and growth.<sup>1</sup>
3. However, China is not the only developing country in the need for industrialization and growth. In spite of China's developing country status, China is considered the second economy in the World and the main producer of many of the raw materials at issue in this dispute.
4. Furthermore, China's steel industry – a highly developed industry benefiting from its export restraints – contributed in 2009 to approximately 45% of the world's steel production, whereas Mexico, for example, contributed to less than 1.2% of that world's production. Thus, China's industrialization policy comes at the expense of other WTO Members and has a potentially more harmful effect against developing countries like Mexico.
5. Any Member benefiting from the WTO trading system must abide by the WTO rules, regardless of being considered as a developing or a developed country.
6. Mexico, as any other developing country in the WTO, seeks to create the most adequate policies to promote industrialization and growth, taking into consideration WTO flexibilities provided for developing countries. However, while seeking those policies, all WTO Members must abide by the WTO rules. Thus, like all other developing country members, China must also abide by WTO rules, including the flexibility limits and checks and balances provided therein.
7. Mr. Chairman and Members of the Panel and the Secretariat, this concludes Mexico's oral statement. We thank you for your attention, and would be pleased to respond to any questions you might have.

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<sup>1</sup> See for example, China's first written submission, paras.128-130 and 480.

**ANNEX C-3**

**CLOSING ORAL STATEMENT OF MEXICO  
AT THE FIRST SUBSTANTIVE MEETING**

Mr. Chairman, we would just like to thank you, the Members of the Panel, the Secretariat and our counterparts, for your attention to our interventions throughout this hearing, and also thank you in advance for an additional and final comment we would like to make, specifically on China's opening statement, as it refers in many ways to political and conceptual positions towards the rights of China as a developing country and its sovereignty rights.

We might agree with the political discourse or the concepts, but unfortunately, those are far related or impossible to read as legal rights or obligations of a WTO Member. We have come here not to discuss the systemic concerns of a Member on how the WTO functions but to discuss the rights and obligations of Members under the WTO, and in this particular dispute, the application of the exceptions to those obligations, exceptions clearly contained in the GATT Agreement, including how they were legally reflected in China's Accession Protocol.

## **ANNEX C-4**

### **EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF MEXICO**

#### **I. INTRODUCTION**

1. At the heart of the dispute are the export duties and export quotas that China maintains on these products. China fails to rebut the complainants' claims that the export restraints are inconsistent with China's commitments in its Protocol of Accession to the WTO, which incorporates commitments made by China in the Report of the Working Party on China's Accession to the WTO, and its obligations under the GATT 1994. In fact, China largely concedes the inconsistency of the export restraints with the relevant obligations.

2. China invokes Article XX(b) in an attempt to portray certain of the discriminatory export restraints as necessary for protection of health. But, a review of the facts confirms that China's defense does not withstand scrutiny. Similarly, China's invocation of the exception related to conservation in Article XX(g) to justify certain of the export restraints also fails. Finally, China has also failed to demonstrate that one of its export quotas for which it invokes Article XI:2(a) is justified pursuant to that provision. China's statements in the course of this dispute have confirmed that the export restraints have the objective of ensuring China's continued economic growth. As China states: "The imposition of export restrictions will allow China to develop its economy in the future . . ." This, and other statements that we will discuss, belie China's arguments in support of its defenses.

3. Finally, China administers its export restraints in a WTO-inconsistent manner through the use of export licensing, restrictions on the right to export, and minimum export pricing. China has also failed to rebut these claims.

#### **II. CHINA'S EXPORT DUTIES ARE INCONSISTENT WITH CHINA'S OBLIGATIONS UNDER PARAGRAPH 11.3 OF THE ACCESSION PROTOCOL**

4. The export duties China imposes on bauxite, coke, fluorspar, magnesium, manganese, silicon metal, yellow phosphorus and zinc are inconsistent with China's obligations under paragraph 11.3 of the Accession Protocol. China does not attempt to defend the duties that it imposes on bauxite, silicon metal, and one form of manganese (ores and concentrates) or the special export duties it imposes on yellow phosphorus. Instead, China attempts only to justify the export duties it imposes on coke and fluorspar (which it imposes in combination with export quotas), magnesium scrap, manganese scrap, and zinc scrap, and magnesium metal, and manganese metal, under exceptions provided in Article XX of the GATT 1994.

5. For the reasons set forth in the complainants' first oral statement, the exceptions in Article XX are not available as a defense to a breach of the export duty commitments in paragraph 11.3 of the Accession Protocol. Therefore, China's reliance on the exceptions contained in Article XX of the GATT 1994 to justify its export duties on coke, fluorspar, magnesium and manganese metal, and magnesium, manganese, and zinc scrap is unavailing. An analysis of the text of paragraph 11.3, the Appellate Body's reasoning in *China - Audiovisual Products*, and the relevant context of China's export duty commitment all support the conclusion that Article XX is not applicable to paragraph 11.3 of the Accession Protocol.

6. Even aside from the fact that Article XX of the GATT 1994 is not available as a justification for breaches of the commitment in paragraph 11.3 of the Accession Protocol, China would not meet the conditions required by Article XX(g) and Article XX(b).

7. In order to justify these inconsistent export restraints, it is China's burden to demonstrate that each measure at issue satisfies the specific conditions set out in sub-paragraph (g) or sub-paragraph (b) of Article XX, and that each measure also satisfies the requirements of Article XX's chapeau.

8. China's export duties on scrap products are not justified under Article XX(b) of the GATT 1994. First, China has presented no evidence that the export duties on scrap products have made any contribution, let alone a material contribution, to increased levels of secondary production. China relies instead on projections of supposed increases in secondary production in the future. Second, Dr. Olarreaga's economic analysis setting forth such projections is fundamentally flawed and therefore unreliable. Third, even if Dr. Olarreaga's analysis were taken on its own terms, the increases in secondary production that would supposedly result from the export duties are modest and belie China's contention that the measures can make a "material contribution" to the stated environmental objective. Fourth, many of China's arguments are premised on factual inaccuracies regarding the products themselves. Fifth, China's assertion of supposed supply constraints to the extent they are relevant to an analysis under Article XX(b) – fail to support China's defense. Sixth, primary production of magnesium metal, manganese metal, and zinc continue to expand in China further undercutting China's assertion that it seeks to shift to increased secondary production. Seventh, there are a number of WTO-consistent reasonably available alternatives that China could employ to more directly address China's stated environmental objectives.

9. China's export duties on magnesium metal, manganese metal, and coke are also not justified under Article XX(b). First, China has presented no evidence that the export duties on magnesium metal, manganese metal, or coke have made any contribution, let alone a material contribution, to decreased levels of production of those products. China relies instead on projections of supposed increases in secondary production in the future. Second, primary production of the metals has in fact increased, and these products continue to be exported at significant levels in the form of downstream, higher-value added products. Third, Dr. Olarreaga's economic analysis setting forth such projections is fundamentally flawed and therefore unreliable. Fourth, there are a number of WTO-consistent reasonably available alternatives that China could employ to more directly address China's stated environmental objectives. Thus, China's defense under Article XX(b) relating to magnesium metal, manganese metal, and coke should not be sustained.

10. In examining whether China's export duty on fluorspar relates to conservation of fluorspar, the operative question is whether there is a close and genuine relationship of ends and means between the goal of fluorspar conservation and the means presented by the export duty. The answer to this question is no.

11. China also fails to demonstrate that its export duty on fluorspar is "made effective in conjunction with restrictions on domestic production or consumption." China asserts that it has a "conservation policy" consisting of a number of measures "to manage the supply, production, and use of fluorspar." As discussed below, these measures do not constitute "restrictions on domestic production or consumption." The export duty on fluorspar therefore is not "made effective in conjunction with" such restrictions. Even if China had demonstrated the existence of restrictions on domestic production or consumption, China would still not have demonstrated the requisite even-handedness to justify its export duty on fluorspar under Article XX(g).

12. Mexico sets forth its arguments regarding the measures within the Panel's terms of reference and the appropriate measures on which the Panel's findings and recommendations should be made below. Should the Panel, *arguendo*, review the export restraints as applied by China in 2010, and should the Panel consider the measures China implemented over the course of this proceeding's pendency through the summer of 2010 relevant to that review *arguendo*, Mexico addresses the export duty on fluorspar applied in 2010 in light of those measures below. As Mexico demonstrates, the measures China has introduced over the course of 2010 do not alter the fact that China's export duty on fluorspar is not justified under Article XX(g) of the GATT 1994.

13. The burden of establishing conformity with the relevant subparagraph and the chapeau lie with the party invoking the defense. Even if the export duties at issue were consistent with the particular paragraph of Article XX that China invokes, the export duties also fail to satisfy the *chapeau* of Article XX.

14. In China's first written submission and its oral statement to the Panel at the first meeting, China made no serious attempt to satisfy its burden of establishing that the export duties satisfy the *chapeau*. China has articulated the incorrect legal standard for "arbitrary or unjustifiable discrimination" under the *chapeau*. This renders China's statement that the export duties at issue do not discriminate between export destinations insufficient to satisfy its burden. China also asserts that the export duties do not constitute a disguised restriction on international trade because they are "not applied in a manner that constitutes a *concealed* or *unannounced* restriction or discrimination in international trade." China fails to present any evidence or argumentation to substantiate this assertion. This is insufficient to satisfy China's burden of demonstrating that its measures satisfy the requirements of the *chapeau*.

### **III. CHINA'S EXPORT QUOTAS ARE INCONSISTENT WITH CHINA'S OBLIGATIONS UNDER ARTICLE XI:1 OF THE GATT 1994 AND PARAGRAPHS 162 AND 165 OF THE WORKING PARTY REPORT**

15. As Mexico sets forth in its first written submission, China subjects the exportation of various forms of bauxite, coke, fluorspar, silicon carbide, and zinc to quotas. China has confirmed that it maintains a prohibition on the exportation of zinc. These export quotas and the export prohibition on zinc are inconsistent with Article XI:1 of the GATT 1994 and paragraphs 162 and 165 of the Working Party Report and paragraph 1.2 of China's Accession Protocol. China has failed to establish that its export quota on one subset of one form of bauxite is justified pursuant to Article XI:2(a) or Article XX(g) of the GATT 1994. China has also failed to establish that its export quotas on coke and silicon carbide are justified pursuant to Article XX(b) of the GATT 1994.

16. China has attempted to justify the export quota on bauxite only as it applies to a particular product that China calls "refractory grade bauxite". The product that China calls "refractory grade bauxite," is actually a subset of "refractory clay" (2508.3000) and not a product considered to be within "aluminum ores and concentrates" (2606.0000). Because of the confusion engendered by the fact that a product that falls within "aluminum ores and concentrates" (2606.0000) with high alumina content is also commonly referred to as "refractory grade bauxite," Mexico will, for purposes of clarity and precision, refer to the product for which China asserts its defense, as "high alumina clay."

17. China's selective defense of the export quota imposed on "bauxite" only insofar as the quota applies to "high alumina clay" highlights the fact that China's efforts are focused essentially on defending a non-existent or fictional measure. There is no export quota on high alumina clay. Because China does not defend the export quota on "bauxite" as a whole, China has already effectively conceded the inconsistency of that quota. The export statistics China cites raise the

possibility and the serious concern that, through China's allocation of the export quota on "bauxite," China may be effecting an export prohibition on "aluminum ores and concentrates."

18. Even if there were a measure imposing an export quota on "high alumina clay," China's defense under Article XI:2(a) as it relates to high alumina clay is without merit. First, China advocates an exceptionally broad meaning of the term "essential" products in Article XI:2(a) that would permit any industrial input to satisfy the meaning of "essential." This is an incorrect reading of the term "essential." Even if China's reading of "essential" were correct, however, China's argument is based on several factual inaccuracies regarding the role of high alumina clay in steel production. These factual inaccuracies confirm that China's defense is unavailing. Second, China fails to properly analyze the meaning of the term "critical shortage," and instead bases its defense under Article XI:2(a) merely on the limited availability of high alumina clay. By doing so, China reads the term "critical" out of Article XI:2(a) altogether. This approach is inconsistent with the text of Article XI:2(a). Third, the export quota is not "temporarily applied" within the meaning of Article XI:2(a). Finally, contrary to China's arguments, Article XI:2(a) is an affirmative defense, for which China bears the burden of adducing evidence and argumentation to establish the defense. Article XI:2(a) sets out an exception to the obligation in Article XI:1, not a separate obligation.

19. In examining whether China's export quota on bauxite, as applied to high alumina clay, relates to the conservation of high alumina clay, the operative question is whether there is a close and genuine relationship of ends and means between the goal of high alumina clay conservation and the means presented by that part of the export quota that applies to exports of high alumina clay. As above in the case of fluorspar, the answer to this question is also no.

20. China also fails to demonstrate that its export quota for bauxite, as it applies to high alumina clay, is "made effective in conjunction with restrictions on domestic production or consumption." China asserts that it has a "conservation policy" consisting of a number of measures "to manage the supply, production, and use of [high alumina clay]." As discussed below, these measures do not constitute "restrictions on domestic production or consumption." The export quota, which applies to the raw material category "bauxite" including both "refractory clay" (2508.3000/2508.300000) and "aluminum ores and concentrates" (2606.0000/2606.000000), is not "made effective in conjunction with" such restrictions on "high alumina clay" and therefore is not imposed "even-handedly" as Article XX(g) requires. Even if China had demonstrated the existence of restrictions on domestic production or consumption, China would still not have demonstrated the requisite even-handedness to justify its export quota, as applied to high alumina clay, under Article XX(g).

21. Mexico sets forth its arguments below regarding the measures within the Panel's terms of reference and the appropriate measures on which the Panel's findings and recommendations should be made. Should the Panel, *arguendo*, review the export restraints as applied by China in 2010, and should the Panel consider the measures China implemented over the course of this proceeding's pendency through the summer of 2010 relevant to that review, *arguendo*, Mexico addresses the export quota on bauxite, as it is applicable to high alumina clay, applied in 2010 in light of those measures below. As Mexico demonstrates, the measures China has introduced over the course of 2010 do not alter the fact that China's export quota on bauxite, as applied to high alumina clay, is not justified under Article XX(g) of the GATT 1994.

22. China contends that the export quotas on coke and silicon carbide are justified pursuant to Article XX(b) of the GATT 1994. China's arguments in support of this defense are the same as those advanced in the context of China's export duties on coke, magnesium metal, and manganese metal. In other words, China argues that the production of coke and silicon carbide result in environmental pollution. The export quotas, according to China, are "necessary" to reduce production of these

materials in China, and therefore reduce pollution. China's defense fails for the same reasons as discussed above in the context of the export duties on magnesium metal, manganese metal, and coke.

23. For the same reasons China fails to demonstrate that the export duties it attempts to justify satisfy the chapeau of Article XX, China also fails to demonstrate that the export quotas it attempts to justify satisfy the chapeau of Article XX.

#### **IV. TERMS OF REFERENCE ISSUES RELATED TO CHINA'S EXPORT DUTIES AND EXPORT QUOTAS**

24. Both with regard to its theory that measures within the Panel's terms of reference may be disregarded, and in its reliance on the 2010 measures to defend the measures within the Panel's terms of reference, China's arguments and assertions are misguided or simply incorrect. China's claim that the Panel should exercise its "discretion" not to make findings on the measures within its terms of reference is without merit, unsupported by the provisions of the DSU.

25. Contrary to China's suggestion, the Panel is authorized and charged by the DSU to make findings and recommendations on the measures in its terms of reference B which includes the export quotas and export duties applied through the legal instruments that are listed in the panel request.

26. The legal instruments that took effect on January 1, 2010 (the January 1, 2010 Measures), i.e., after panel establishment, are outside the Panel's terms of reference. These legal instruments "changed the essence" of the legal instruments that were in effect at the time of panel establishment, and thus are not sufficiently similar to the measures that are within the Panel's terms of reference to be considered in this dispute. Were the Panel to consider the January 1, 2010 Measures and the 2010 Fluorspar and High Alumina Clay Measures adopted in January, March, April, May, and June of 2010, this would permit China, by changing the parameters of the Panel's review, to shield aspects of its measures from proper review.

#### **V. CHINA'S ADMINISTRATION AND ALLOCATION OF ITS EXPORT QUOTAS ARE INCONSISTENT WITH CHINA'S OBLIGATIONS UNDER THE ACCESSION PROTOCOL, THE WORKING PARTY REPORT, AND THE GATT 1994**

27. As Mexico explained in its first written submission, China's administration and allocation of its export quotas are inconsistent with China's obligations under the Accession Protocol, the Working Party Report, and the GATT 1994. China has failed to rebut Mexico's showing that China's measures restricting access to the export quotas, China's administration of its export quotas in a partial and unreasonable manner, and China's total award price under the export quota bidding regime are inconsistent with China's WTO obligations.

#### **VI. EXPORT LICENSING**

28. Mexico demonstrated in its first written submission that China subjects the exportation of bauxite, coke, fluorspar, manganese, silicon carbide, and zinc to export licensing that is non-automatic, in breach of the requirements of Article XI:1 of the GATT 1994. China itself considers its export licensing for products designated for restricted exportation pursuant to Article 19 of the Foreign Trade Law to be a restriction on exportation inconsistent with Article XI:1 of the GATT 1994. China has proffered no arguments or facts to justify its export licensing system. Accordingly, China has not demonstrated that its export licensing on the products at issue can be justified under the GATT 1994.



## VII. MINIMUM EXPORT PRICE

29. Mexico has demonstrated that China imposes a minimum export price requirement for bauxite, coke, fluorspar, magnesium, silicon carbide, yellow phosphorus and zinc that restricts the exportation of these products in contravention of Article XI:1 of the GATT 1994. China has failed to rebut that showing. In its first written submission, Mexico demonstrated that China failed to publish important measures and provisions relating to its minimum export price requirement. China's only response is that these measures are no longer in effect. However, a measure no longer being in effect is not a defense for the failure to publish under GATT Article X:1.

30. In its first written submission, Mexico also demonstrated that China's administration of the minimum export price system through the involvement of the CCCMC in the Price Verification and Chop (PVC) Procedure was partial and unreasonable in breach of China's obligations under Article X:3(a) of the GATT 1994. China has failed to rebut that showing.

31. On October 1, 2010, the Panel issued the "Second Phase of the Preliminary Ruling" (Second Preliminary Ruling). The Second Preliminary Ruling included findings on issues not subject to any request for a preliminary ruling. In particular, the Panel made findings on arguments of China in its first written submission that certain minimum export price (MEP) measures addressed by Mexico should be outside the Panel's terms of reference under Article 6.2 of the DSU. Because these findings in the Second Preliminary Ruling were not made in response to a preliminary ruling request, they cannot be part of a preliminary ruling, and instead, pursuant to the DSU and Working Procedures, must be considered as findings that the Panel will reexamine de novo after considering all of the evidence and arguments submitted in the dispute. Accordingly, Mexico sets forth a written response to China's arguments in its First Written Submission. Mexico respectfully requests that the Panel consider these responses before making findings with regard to China's MEP terms-of-reference arguments.

32. There are three additional measures that China fails to identify that are within the Panel's terms of reference by virtue of being included in both the consultations and panel requests: Measures for the Administration of Trade Social Organizations; Regulations for Personnel Management of Chambers of Commerce; and CCCMC Charter. In addition, four measures are in the Panel's terms of reference even though they were not identified in both Mexico's consultations request and Mexico's panel request: CCCMC Export Coordination Measures; Bauxite Branch Coordination Measures; Bauxite Branch Charter; and the "System of self-discipline". These measures are within the Panel's terms of reference because they implement the coordination mandate of the 1994 CCCMC Charter and the 2001 CCCMC Charter in the manner described by the Appellate Body in *Japan – Film*. Three measures that were specifically identified in the panel request but not listed in the consultations request are nevertheless included within the Panel's terms of reference: Notice of the Rules on Price Reviews of Export Products by the Customs; CCCMC PVC Rules; Online PVC Instructions. These measures are all part of the same PVC procedure of which the 2002 PVC Notice and the 2004 PVC Notice, which were consulted on, form a part. The inclusion of these three measures in the panel request did not, "expand the scope of the dispute" as the Appellate Body described in *US – Continued Zeroing*. These measures are therefore also properly within the panel's terms of reference.

33. China also asked the Panel to refrain from making findings on measures because those measures have "expired" and findings would "serve no purpose." China also asserted that the Panel has no authority to make recommendations on these measures. The Panel has the authority and obligation to make findings and recommendations on certain measures which, contrary to China's arguments and assertions, continue to be in effect. The Panel has the authority and obligation to make

findings and recommendations on the other measures in order to secure a positive solution to this dispute.

## **VIII. CONCLUSION**

34. For the reasons set forth in this submission, Mexico respectfully requests the Panel to find that China's measures, as set out above, are inconsistent with China's obligations under the GATT 1994 and the Accession Protocol. Mexico further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that China bring its measures into conformity with the GATT 1994 and the Accession Protocol.

## **ANNEX C-5**

### **OPENING ORAL STATEMENT OF MEXICO AT THE SECOND SUBSTANTIVE MEETING**

#### **I. INTRODUCTION**

1. Mr. Chairman and members of the Panel. I would first like to thank the Panel and the Secretariat Staff for the opportunity given to Mexico to present its views in this dispute.

2. Since the other co-complainants have already presented their arguments, which Mexico fully supports and incorporates into this opening statement<sup>1</sup>, Mexico will only raise some additional issues that it considers of great importance in this dispute.

3. As Mexico has already explained, the export restraints imposed by China are designed to advance its economy through the promotion of the production of high-value added downstream products, and thus, pursue economic interests rather than environmental or conservationist interests. However in order to justify those restraints, throughout the proceedings of this dispute, China has presented arguments and suggested interpretations of the relevant exceptions within the WTO framework that not only should be rejected in the context of this dispute, but should also be rejected as they pose a potential systemic threat to the export framework within the WTO trading system.

#### **II. THE PANEL SHOULD NOT ACCEPT CHINA'S REQUEST TO REFRAIN FROM RULING ON THE 2009 MEASURES**

4. China argues that the Panel has the discretion to make findings concerning certain expired measures which were in effect during 2009 but ceased to exist on 2010, but encourages the Panel not to make findings on those expired measures.<sup>2</sup> As a practical matter, this means that China is requesting the Panel to refrain from ruling on the special export duty on yellow phosphorus, the export duty on bauxite, and the export quota on fluorspar.

5. However, contrary to China's argument, Mexico has explained that the Panel is not only authorized, but also charged by the DSU to make recommendations on the measures within its terms of reference, which include the special export duty on yellow phosphorus, the export duty on bauxite and the export quota on fluorspar.<sup>3</sup> Thus, the Panel should not accept China's request.

6. If the Panel accepts China's request and refrains from ruling on the consistency of the special export duty on yellow phosphorus, the export duty on bauxite and the export quota on fluorspar, it will be giving China the possibility to reinstate those measures at any time in the future, and the Panel will have not completely secured a positive solution to this dispute.

7. This reasoning, if applied on a general basis, could open the door to any defending Party to remove the inconsistent measure during the time of the WTO proceeding in order to avoid a ruling on the measure, and thereafter, reinstate the measure at any time. This will be to the detriment of the aim

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<sup>1</sup> Including Exhibit JE- 176 presented by the United States in its oral statement, containing the Revised Chart B in Response to Question 2 from the Panel.

<sup>2</sup> China's second written submission, paras. 6-18.

<sup>3</sup> Mexico's second written submission, paras. 322-348.

of the dispute settlement mechanism of securing a positive solution to a dispute,<sup>4</sup> the aim of the recommendations and rulings made by the DSB of achieving a satisfactory settlement of the matter,<sup>5</sup> and the function of the panel of assisting the DSB in discharging its responsibilities under the DSU and the covered agreements.<sup>6</sup>

8. As already explained,<sup>7</sup> regarding this situation, the Appellate Body in *Chile – Price Band System* stated:

We emphasize that we do not condone a practice of amending measures during dispute settlement proceedings if such changes are made with a view to shield a measure from scrutiny by a panel or by us .... [Generally] speaking, the demands of due process are such that a complaining Party should not have to adjust its pleading throughout the dispute settlement proceedings in order to deal with a disputed measure as a "moving target".<sup>8</sup>

9. Accordingly, Mexico requests the Panel to consider the potential systemic risk that the type of reasoning that China is requesting the Panel to apply would pose to the WTO trading system.

### **III. THE PANEL SHOULD REJECT CHINA'S ARGUMENT THAT ARTICLE XX EXCEPTIONS ARE AVAILABLE TO BREACHES OF ITS EXPORT DUTIES COMMITMENTS CONTAINED IN PARAGRAPH 11.3 OF THE ACCESSION PROTOCOL**

10. China argues that the GATT article XX defenses are available to breaches of its export duties commitments contained in paragraph 11.3 of the Accession Protocol. In this dispute, this reasoning would mean that article XX defenses are available to the export duties imposed by China on coke, fluorspar, magnesium, manganese metal, and magnesium, manganese, and zinc scrap.

11. However, China is incorrect in its legal interpretation. As the co-complainants have explained, the article XX defenses are not available to breaches by China of its export duties commitments contained in paragraph 11.3 of the Accession Protocol<sup>9</sup> and the Panel should reject China's superficial reasoning.

12. In principle, article XX defenses, according to its chapeau, which states "nothing in this agreement" - and not any other language - , are available to breaches of the obligations contained in the GATT 1994. However, according to the reasoning of the Appellate Body in *China – Audiovisual Products*,<sup>10</sup> the article XX defenses can be available to breaches of obligations contained in provisions outside from the GATT 1994, but only if there is a textual basis within the provision containing that obligation, indicating that article XX defenses are available to it. In the case at issue, article XX defenses are not available to breaches of the export duties commitments contained in paragraph 11.3 of the Accession Protocol, in principle, because those commitments are outside from the GATT 1994, and also because there is no textual basis in paragraph 11.3 of the Accession Protocol, indicating the availability of the Article XX defenses.

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<sup>4</sup> Article 3.7 of the DSU

<sup>5</sup> Article 3.4 of the DSU

<sup>6</sup> Article 11 of the DSU

<sup>7</sup> Mexico's second written submission, para. 346

<sup>8</sup> Appellate Body Report in *Chile – Price Band System*, para. 144.

<sup>9</sup> Mexico's Second Written Submission, paras. 10 – 29.

<sup>10</sup> Appellate Body Report in *China – Audiovisual Products*, paras. 218 – 233.

13. However, in order to demonstrate that article XX defenses are available, China has offered various arguments:

- (a) That according to China's interpretation of the Appellate Body's reasoning in *China – Audiovisual Products*, when ruling with respect to paragraph 5.1 of the Accession Protocol, China has an inherent right to regulate trade that allows it to breach any of its export duties commitments.<sup>11</sup> This argument has evolved throughout China's submissions to the argument that China has an inherent right to regulate trade that makes article XX exceptions available to breaches of its export duties commitments contained in paragraph 11.3 of the Accession Protocol.<sup>12</sup>
- (b) That, at least with respect to goods related obligations, the WTO covered Agreements apply together as a single treaty instrument, as a single undertaking accepted by all the WTO Members, namely, the WTO Agreement, and thus, the covered agreements, read together as a single treaty framework, allow China to apply export duties, provided it complies with the requirements of the relevant exception in article XX, and its chapeau.<sup>13</sup>
- (c) That paragraph 170 of the Working Party Report provides a language similar to the language of paragraph 5.1 of the Accession Protocol, that gives China the text in which to base the availability of article XX to the commitments in paragraph 11.3 of the Accession Protocol.<sup>14</sup>

14. China's first reasoning, if applied on a general basis, would mean that any defending party could claim that the article XX defenses are available for them to breaches of any commitment outside of the GATT 1994, because all the WTO Members have an inherent right to regulate trade that makes article XX available for them to any breach of any covered agreement or Accession Protocol.

15. China's second reasoning, if applied on a general basis, would mean that all the obligations related to trade in goods contained in all the covered agreements, could have available to them the defenses contained in the GATT 1994, regardless of the language of the obligation and the covered agreement in which that obligation is contained.

16. Finally, China's third reasoning, if applied on a general basis, would mean that the textual basis in which to base the availability of article XX could be inferred from other provisions, and not clearly indicated in the specific provision at issue.

17. Mexico again requests the Panel to consider the potential systemic risk that the type of reasoning that China is requesting the Panel to apply in order to make available for its export duties the article XX defenses would pose to the WTO trading system.

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<sup>11</sup> China's first opening statement, paras. 61 – 83.

<sup>12</sup> China's second written submission, paras. 154-178.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

**IV. THE PANEL SHOULD REJECT THE INTERPRETATION OF ARTICLE XI:2(A) SUGGESTED BY CHINA TO JUSTIFY ITS EXPORT QUOTA ON BAUXITE, AS IT APPLIES TO HIGH ALUMINA CLAY**

18. China has suggested an interpretation of article XI:2(a) in order to demonstrate that the export quota applied to bauxite, as it applies to high alumina clay, is justifiable under the exception contained in that provision.

19. Firstly, China argues that the burden of proof lies on the complaining Party with respect to the applicability of article XI:2(a), which China does not see as an affirmative defense.<sup>15</sup>

20. Contrary to China's assertions, the language of paragraph Article XI:(2)(a) demonstrates that this provision constitutes an exception to the obligations contained in article XI, an affirmative defense whose burden of proof lies on the defending party choosing to use this exception.

21. China's reasoning is legally flawed and, if accepted, will create a legal absurdity in which the complaining Party will have to predict the defense that the defending Party will use in its argument, and prove that those predicted arguments are not applicable for that defense. In the case at issue here, the co-complainants would have had to predict that China was going to use this exception to defend its export quota on bauxite, and then prove that the quota is not applied temporarily by China to prevent or relieve critical shortages of an essential product. This line of reasoning would present an absurd result.

22. Regarding the interpretation of the language of article XI:(2)(a), China offers an interpretation of the terms "temporary", "essential" and "critical shortage" that can be summarized as follows:

- (a) The export quota applied to refractory grade bauxite is "temporarily applied" within the meaning of article XI:(2)(a) even though it is permanently applied, because the refractory grade bauxite will cease to exist in the future and the measure is periodically reviewed.<sup>16</sup>
- (b) The export quota applied to refractory grade bauxite is "essential" within the meaning of article XI:(2)(a) because it is of value as an input for downstream processors of a powerful industry in China.<sup>17</sup>
- (c) The export quota applied to refractory grade bauxite is applied to prevent or relieve a "critical shortage" because some day the refractory grade bauxite will cease to exist.<sup>18</sup>

23. Yet again, China failed to offer a correct interpretation of these terms. If this interpretation is accepted, it would allow Members to impose export restrictions or prohibitions on any product which some day might cease to exist because they would be automatically considered as temporarily applied", and imposed to prevent or relieve a "critical shortage". Also, the term "essential" would become almost self-judging. This situation will basically render null the terms "temporary", "essential" and "critical shortage".

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<sup>15</sup> China's second written submission paras. 29 – 36.

<sup>16</sup> See, for example, China's first written submission, paras. 490 – 492.

<sup>17</sup> See, for example, China's first written submission, paras. 431 – 461.

<sup>18</sup> See, for example, China's first written submission, paras. 462 – 489.

24. It will also allow any WTO Member to impose export restrictions on any exhaustible natural resource, without the need to comply with the even handedness requirement of article XX(g), and the requirements of the chapeau.

25. Here again, Mexico requests the Panel to consider the potential systemic risk that the type of reasoning that China is requesting the Panel to apply would pose on the WTO trading system.

**V. THE PANEL SHOULD REJECT THE INTERPRETATION OF ARTICLE XX:(G) SUGGESTED BY CHINA TO JUSTIFY ITS EXPORT QUOTA ON BAUXITE, AS IT APPLIES TO HIGH ALUMINA CLAY, AND ITS EXPORT DUTY ON FLUORSPAR**

26. In order to justify its export quota on bauxite, as it applies to high alumina clay, and its export duty on fluor spar under article XX(g), China has offered an interpretation of the requirement of even handedness, suggesting that as long as some form of restriction is imposed on domestic users the requirement will be met, and that no particular distribution of the burden is required.<sup>19</sup>

27. China's suggested interpretation, if applied on a general basis, would mean that any minor requirement imposed on the domestic users, in contrast with a burdensome restriction imposed on the foreign users, will meet the requirement that the restriction is made effective in conjunction with domestic restrictions on production or consumption.

28. This interpretation is flawed and should be rejected by the Panel because it makes the even handedness requirement not even-handed.

**VI. THE PANEL SHOULD REJECT THE INTERPRETATION OF ARTICLE XX(B) OFFERED BY CHINA TO JUSTIFY ITS EXPORT DUTIES ON COKE, MAGNESIUM METAL AND MANGANESE METAL, AND MAGNESIUM METAL, MANGANESE METAL AND ZINC SCRAP AND ITS EXPORT QUOTAS ON COKE AND SILICON CARBIDE**

29. China has also suggested an interpretation of article XX(b) to justify its export duties on coke, magnesium metal, manganese metal, zinc, and magnesium metal, manganese metal and zinc scrap, and its export quotas on coke and silicon carbide that the Panel should reject.

30. China argues that its export duties on coke, magnesium metal, manganese metal, and its export quotas on coke and silicon carbide, are justified under article XX(b) because the production of these products is environmentally harmful and the export duties will lead to a reduction of production, and therefore, a reduction on the pollution associated with their production. China also argues that its export duties on magnesium metal, manganese metal and zinc scrap, are justified under article XX(b) because secondary production is less environmentally harmful and the export duties ensure a steady supply on scrap and facilitate a shift from primary production to secondary production.<sup>20</sup>

31. If the interpretation offered by China is accepted, and applied on a general basis, it would allow any WTO Member to freely impose export restraints on any product whose production causes pollution. The fact that most industries pollute at some level makes this interpretation even more dangerous.

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<sup>19</sup> China's second written submission, paras. 195-198.

<sup>20</sup> See, for example, China's second written submission, paras. 278 -289.

32. Also, since it is the production of those products that causes pollution and not their exports, accepting this interpretation would render the necessity requirement of article XX(b) null. It will make it so broad that any small contribution to the reduction of pollution could be considered as "necessary" for purposes of article XX(b).

33. Therefore, Mexico requests the Panel to consider the potential systemic risk that this type of reasoning might pose.

## **VII. THE PANEL SHOULD REFRAIN FROM EXERCISING JUDICIAL ECONOMY IN THIS DISPUTE**

34. Finally, in order to secure a positive solution to this dispute, Mexico requests the panel to consider carefully whether the exercise of judicial economy could pose a risk to securing a positive solution to this dispute.

## **VIII. CONCLUSION**

35. For the reasons set forth, Mexico requests this Panel to reject China's arguments and suggested interpretations, as they pose a serious risk to the WTO trading system.

36. Mexico insists that every Member of the WTO must comply with its obligations in good faith, and adjust its development policies to those rules, instead of trying to adjust those rules, through overly expansive interpretations of its exceptions, to its development policies, to the detriment of a rules based system. The Panel should not forget that the measures at issue are designed to serve China's economic advancement goals at the expense of the rest of the World.



## ANNEX C-6

### CLOSING ORAL STATEMENT OF MEXICO AT THE SECOND SUBSTANTIVE MEETING

1. Mr. Chairman and members of the Panel.
2. Mexico is here today as a co-complainant because the WTO inconsistent export restraints imposed by China not only are harmful for its relevant industries today, but also because China's economic advancement policy, based on those WTO inconsistent export restraints, represents a serious threat to their existence in the future.
3. Mexico has also systemic concerns that should be taken into account. China has presented defenses in this case that raise substantial systemic concerns for the WTO trading system. By distorting different legal standards of the law governing this dispute, China is attempting to accommodate the WTO Covered Agreements and its acceding commitments to its own economic interests. This Panel simply cannot side with China.
4. The systemic concerns raised in this dispute are the direct consequence of a defense designed to adjust the rules to China's economic advancement policies –based on the production of high value added downstream products- , and not the policies to the rules.
5. In its opening statement, Mexico enlisted some of the systemic negative implications that may arise if the Panel decides to side with China in this case.
6. For example, Mexico explained why the Panel shall make recommendations on the 2009 Measures. Under Art 19.1 of the DSU, Panels "*... shall recommend that the Member concerned bring the measure into conformity...*" when it finds a WTO violation. It is not a discretion but an obligation for this panel to make such recommendations if it finds the 2009 measures WTO inconsistent. Unlike in this dispute, in *US - Certain Products* the measure at issue was terminated before the panel request was filed and before the DSB established the panel, fixing the panel's terms of reference.
7. Mexico also explained the Panel the negative implications that the interpretations offered by China will bring to the terms "temporarily applied", "critical shortage" and "essential" in GATT article XI:2(a), the term "made effective in conjunction with restrictions on domestic production or consumption" in GATT article XX(g), the term "necessary" in GATT article XX(b), and the term "nothing in this Agreement" in the Chapeau of GATT article XX. Those terms do mean something and cannot be interpreted so broadly so as to be rendered null.
8. Not only China's interpretations go against the text of the GATT 1994, but also they go against previous Panel and Appellate Body Decisions unless, of course, they are taken out of context and misinterpreted.
9. For example, the Appellate Body in *Korea — Various Measures on Beef*, explained that the term "necessary" contained in article GATT XX(b): "*refers to a range of degrees of necessity. At one end of this continuum lies 'necessary' understood as 'indispensable'; at the other end, 'necessary' taken to mean as 'making a contribution to'.*" The Appellate Body then explained that "*a 'necessary' measure is, in this continuum, located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'.*" China's offered interpretation goes against this decision of the Appellate Body.

10. Also, the Appellate Body in *US – Gasoline*, explained that the term "*made effective in conjunction with restrictions on domestic production or consumption*" in GATT article XX(g) is "*a requirement of evenhandedness in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources.*" Again, China's offered interpretation goes against the Appellate Body's interpretation of the existence of a requirement of evenhandedness.

11. Once again, Mexico would like to request this Panel to reject China's arguments and suggested interpretations.

12. China is not the only WTO Member trying to seek the adequate policies that will ensure economic advancement in a short and long term. Every WTO Member wants economic growth, and developing the adequate policies is not an easy task. For any WTO Member, this task requires to take into account its WTO obligations and adjust those policies to the rules, and not to adjust the interpretation of those already agreed rules to those policies.

13. Mr. Chairman, finally, Mexico would only like to thank you, the other Members of the Panel, and the Members of the WTO secretariat, for your time during this hearing.

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**ANNEX D**

**SUBMISSIONS OF CHINA**

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## ANNEX D-1

### EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF CHINA

#### I. TERMS OF REFERENCE

1. The first written submissions of the Complainants aggravate problems concerning the Panel's terms of reference. *First*, just *two* of the *fifteen* measures relating to the alleged minimum export price ("MEP") requirement can appropriately be considered within the Panel's terms of reference. *Second*, the Complainants continue to fail to present the problems in Section III of the Panel requests clearly, as there remain no concrete linkages between the measures at issue, the products they concern and the treaty provisions with which the measures are alleged to be inconsistent. *Third*, the European Union makes an argument relating to an alleged failure to publish the export quota on coke in its FWS, which was not mentioned in its Panel request. *Fourth*, the Complainants challenge several expired measures that should also be considered outside the Panel's terms of reference. *Finally*, the Complainants fail to seek sufficiently precise recommendations and rulings in respect of their claims in Section III of the Panel requests.

#### II. THE PRODUCTS AT ISSUE

2. Descriptions of the products at issue are included in Exhibits CHN-9, CHN-10, CHN-11, and CHN-12.

#### III. THE EXPORT DUTIES ALLEGEDLY INCONSISTENT WITH PARA. 11.3 OF THE ACCESSION PROTOCOL

3. The Complainants allege that the China violates Paragraph 11.3 of the *Accession Protocol* by: (i) imposing temporary duties on exports of bauxite, coke, fluorspar, magnesium, manganese, silicon metal, and zinc, which are not listed in Annex 6 to the *Accession Protocol*; and, (ii) subjecting exports of yellow phosphorus to a duty in excess of the *ad valorem* rate listed for item No. 11 in Annex 6 to the *Accession Protocol*. The European Union further claims that China has violated the obligation assumed under the note to Annex 6 to consult "with other affected WTO Members prior to the imposition" of the export duties on bauxite, coke, fluorspar, magnesium, manganese, silicon metal, and certain forms of zinc.

4. Before justifying the export duties pursuant to the GATT 1994, China recalls its concern that certain claims pertaining to export duties fall outside the Panel's terms of reference. *First*, the claims are based on the 2009 *Tariff Implementation Plan*, and other measures that have now expired or have been repealed. The Panel cannot make recommendations with respect to the repealed 2009 export duties. *Second*, as of 1 January 2010, China no longer subjects exports of bauxite to duties. *Third*, China does not impose an export duty on yellow phosphorus in excess of the rate specified in Annex 6. The Tariff Commission repealed the special export duty applicable to yellow phosphorus, as of 1 July 2009, prior to the Complainants' Panel requests. Under the 2010 *Tariff Implementation Plan*, consistent with Annex 6, exports of yellow phosphorus are subject solely to the regular duty rate of 20 per cent.

5. In addition, China acknowledges, as asserted by the European Union, that it failed, under the note to Annex 6 to the *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 certain forms of zinc.

#### **IV. THE EXPORT DUTIES APPLIED TO EXPORTS OF FLUORSPAR, COKE, MAGNESIUM, MANGANESE, AND CERTAIN FORMS OF ZINC ARE JUSTIFIED PURSUANT TO THE GATT 1994**

##### **A. THE EXPORT DUTY APPLIED TO FLUORSPAR IS JUSTIFIED PURSUANT TO ARTICLE XX(G) OF THE GATT 1994**

6. The export duty of 15 per cent applied to fluorspar is justified pursuant to Article XX(g) because it is a measure relating to the *conservation* of an exhaustible non-renewable mineral resource, and is applied together with restrictions on domestic production and consumption.

##### **1. Interpretation of Article XX(g) of the GATT 1994**

7. Under Article XX(g), Members taking conservation-related measures to restrict the supply of a mineral resource must ensure that restrictions are imposed on domestic supply. Thus, Article XX(g) ensures that the burden of conservation-related measures is not imposed solely on foreign trade, but applies also to domestic trade. Article XX(g) must be interpreted in a manner that recognizes WTO Members' sovereign rights over their own natural resources. Pursuant to this well-recognized principle of international law, resource-endowed countries may manage the supply and use of their natural resources through conservation-related measures that foster the sustainable development of their own peoples. These rights must be exercised in the interests of a Member's *own* social and economic development. 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 their resources.

##### **2. Application of Article XX(g) to the export duty imposed on fluorspar**

8. Fluorspar is a non-renewable mineral with finite natural reserves that are susceptible to depletion, in quantity and quality, mostly as a result of human activity. It is a natural resource in high demand for a variety of industrial applications. Given the importance of fluorspar to China's economy, and given that China's reserves of this resource are limited, it has adopted a variety of measures that manage the supply and use of fluorspar over time. The need to do so is clear: while China's reserves of fluorspar constitute just nine per cent of estimated world resources, China accounts for almost two-thirds of world production. These measures ensure that this resource provides social and economic benefits over a longer period than would otherwise be the case; they are also an integral part of China's sustainable minerals policy to rely mainly on its own mineral resources to develop its economy. China's coherent policy includes elements such as a mineral resources tax and compensation fee, environmental standards, caps on extraction and initial processing, and an export duty. In particular, the extraction and processing caps manage the supply and use of fluorspar over time, by restricting the volume of fluorspar ore that may be taken from the ground, and also by restricting the volume of basic tradable fluorspar that may be produced.

9. There would be no point in China authorizing the limited extraction of fluorspar, in the exercise of its sovereign rights, if the benefits derived from China's use of the extracted resource were not optimized. Thus, measures balancing the *maintenance* and *use* of fluorspar resources, through *effective supply management*, are essential to ensuring China's optimal use over time of the available quantity of the resource. Such measures must be developed in tandem. From the perspective of Article XX(g), all of these measures aim at controlling supply and managing the use of the resource over time; that is, *conserving* the resource. Without 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.

10. Having established that the export duty on fluorspar is provisionally justified pursuant to Article XX(g), China also establishes that the export duty complies with the *chapeau* of Article XX.

B. THE 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) OF THE GATT 1994

11. China raises a defence under Article XX(b) to claims against export duties applied to: (i) zinc, magnesium metal, and manganese metal scrap, or "non-ferrous metal scrap products"; and, (ii) coke, magnesium metal and manganese metal, or EPR products.

## **1. Interpretation of Article XX(b) of the GATT 1994**

12. Article XX(b) protects WTO Members' inherent right to regulate, *inter alia*, for the purpose of protecting human, animal or plant life or health. Panels and the Appellate Body have shown a degree of deference to a WTO Member's policy designed to "protect 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. 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 the measure's objective; and, (iii) the trade restrictiveness of the measure.

13. A measure can contribute to the stated objective in different ways, *i.e.*, (i) the measure can bring about a material contribution to the achievement of its objective; and, (ii) the measure can be apt to produce a material contribution to the objective pursued, even if the contribution is not "immediately observable".

14. In assessing the "necessary" character of a measure, the Appellate Body in *Brazil – Retreaded Tyres* stressed 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 policies, the Appellate Body in *Brazil – Retreaded Tyres* found that a "necessary" measure could contribute, in the short- or long-term, to one of the objectives protected in Article XX(b), as part of a policy framework comprising different measures, resulting in possible synergies between those measures.

## **2. Application of Article XX(b) to the export duties applied to non-ferrous metal scrap of zinc, magnesium metal, and manganese metal, and to coke, magnesium metal, and manganese metal**

15. China has adopted a comprehensive strategy for reducing risks to human, animal, and plant life and health resulting, directly or indirectly, from the high energy-consuming and polluting production of non-ferrous metals and other EPR products, or "health risks relating to metals production". This strategy is a core component of China's environmental policy, which has three key objectives, namely: (i) pollution reduction; (ii) energy conservation; and, (iii) transformation into a "circular economy", or "recycle economy". The key tenets of this policy are described in detail in Annex A to China's first written submission.

16. China identifies, in Annex B to its first written submission, the health risks related to the production, from crude ores, of magnesium, manganese, and zinc, due to high levels of pollution and energy intensity connected with that production. The production of ferrous and non-ferrous metals using recycled scrap, or so-called "secondary production", is significantly less polluting and more

energy efficient, thereby reducing risks related to non-ferrous metals production using crude ores. Secondary production from scrap metal consumes a fraction of the energy required for primary products, produces less noxious off-gases during the production processes, and reduces pollution relating to waste disposal once consumer products have reached the end of their lives.

17. The non-ferrous metal scrap products make a present 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.

18. For China to achieve its objective of successful substitution of secondary production for primary production, it must control and manage its limited scrap resources. Export restraints on the products at issue are necessary to avoid domestic supply bottlenecks, and to ensure that scrap metal is retained in the domestic reprocessing cycle. Evidence presented by China supports the conclusion that export duties applied to the non-ferrous metal scrap products at issue make a material contribution to the objective of reducing risks to human, animal, and plant life or health.

19. The export duties applied to the non-ferrous scrap products, provisionally justified pursuant to sub-paragraph (b), satisfy the requirements of the *chapeau* of Article XX.

C. THE EXPORT DUTIES APPLIED TO COKE, MAGNESIUM METAL, AND MANGANESE METAL ARE JUSTIFIED PURSUANT TO ARTICLE XX(B) OF THE GATT 1994

20. The export duties applied to coke, magnesium metal, and manganese metal are justified pursuant to Article XX(b) because they are necessary for the protection of human, animal, and plant life or health by virtue of their contribution to the reduction of the polluting and energy-intensive production of coke, magnesium metal, and manganese metal.

21. The production of coke, magnesium metal, and manganese metal is harmful to human, animal, and plant life and health, due to high levels of pollution emission and energy-use. Most countries, including the Complainants, have chosen not to extract and produce sufficient quantities. Coke, magnesium metal and manganese metal are by all standards "dirty" products. For a long time, the worldwide production of EPR products operated to a large extent unregulated. That has changed significantly over the past three decades, such that strict environmental standards, especially in the European Union and the United States, have imposed considerable costs on industrial and mining activity in the industrialized world, which have, as a result, experienced a steady decline. Basic industrial producers in the European Union and the United States began to specialize in "sophisticated" goods that are high-tech, high value-added, and, importantly, less polluting than basic materials, minerals, and metals. Manufacturing these sophisticated products requires considerable amounts of basic materials, minerals, and metals. Heightened reliance by the Complainants on imports of these "dirty" products does not require China to be the source of first resort. The economies of many developed countries have the full technical capacity to produce these "dirty" products in their own domestic markets and in a far less polluting manner than China, as explained in Exhibit CHN-12.

22. The export duties on coke, magnesium metal, and manganese metal are an integral part of China's comprehensive environmental policy aimed at reducing the health risks related to the production of these products. China currently is in a transition phase, from an export-driven economy focused largely on rapid industrialization and growth led by exports of basic materials and



unsophisticated low-tech goods, to an economy that develops at a scale and pace that is environmentally, socially, and economically sustainable. The export duties at issue bring about a present material contribution to the objective of reducing the health risks resulting from the high levels of pollution and energy use connected with the production of coke, magnesium metal, and manganese metal. Under normal economic conditions, export duties reduce foreign demand, and therewith exports. This, in turn, decreases overall production. For heavily-polluting products, this immediately leads to important reductions in air, water, and soil pollution. The export duties signal Chinese manufacturers to slow down production and to lower output to sustainable levels. In industries characterized by slack responses to price changes, such a credible signal has a more immediate effect on producers and manufacturers than changes in market prices. Unrestrained exports would result in levels of production in China which exacerbate the very pollution effects China has determined are dangerous to human, animal, plant life and health. Export duties are an intervention tool that effectively addresses "production leakage" and the overproduction it entails, fully in line with Article XX(b). The export duties also are apt to make a material contribution to the reduction of health risks that result from high levels of pollution and energy use connected with the production of coke, magnesium metal, and manganese metal. These export duties are a WTO-consistent and efficient tool to speed up industry restructuring.

23. The export duties applied to coke, magnesium metal, and manganese metal, provisionally justified pursuant to sub-paragraph (b), satisfy the requirements of the *chapeau* of Article XX.

**V. THE EXPORT QUOTAS ALLEGEDLY INCONSISTENT WITH ARTICLE XI:1 OF THE GATT 1994 AND PARAGRAPHS 162 AND 165 OF THE WORKING PARTY REPORT**

A. THE COMPLAINANTS' FAILURE TO MAKE A *PRIMA FACIE* CASE THAT THE EXPORT QUOTAS ARE INCONSISTENT WITH ARTICLE XI OF THE GATT 1994

24. The Complainants allege that China's export quotas applied to refractory-grade bauxite, aluminium ores and concentrates, coke, fluorspar, silicon carbide, and zinc ores and concentrates are quantitative restrictions under Article XI:1.

25. The Complainants have not established a violation of Article XI, for two reasons. *First*, the European Union has not identified the measures allegedly imposing export quotas on bauxite, aluminium ores and concentrates, fluorspar, silicon carbide, and zinc ores and concentrates, and that are the subject of its Article XI:1 claims. Where the specific measures challenged are not identified, neither the Panel nor the DSB can make sufficiently precise recommendations under Article 19.1 of the DSU. *Second*, the *chapeau* to Article XI:2 states that the obligation in Article XI:1 shall "not extend to" types of export restrictions listed in Articles XI:2(a)-(c). The potential application of Article XI:2(a) of the GATT 1994 is clear, especially in light of the arguments raised by the Complainants in their first written submission, and the steps they have taken to secure access to supply-restricted products that they deem essential to the functioning of their own economies .

26. To the extent that the Panel finds the export quotas to be inconsistent with Article XI:1 and not justified under Articles XX(g) and/or XX(b), China asks the Panel to exercise judicial economy with respect to the Complainants' claims under paragraphs 162 and 165 *Working Party Report*, which solely confirm, and are duplicative of, the obligation assumed under Article XI:1.

- B. ARTICLE XI:1 OF THE GATT 1994 DOES NOT APPLY TO THE EXPORT QUOTA APPLIED TO REFRACTORY-GRADE BAUXITE, BY VIRTUE OF ARTICLE XI:2(A)

**1. Interpretation of Article XI:2(a) of the GATT 1994**

27. Article XI:2(a) removes from the scope of Article XI:1 those export prohibitions or restrictions that, *inter alia*, are limited in application to the period of time required to remedy or avoid a situation in which the supply of a product that is important to the economic vitality of a Member is constrained to a degree that imperils the ability of that product to serve the purpose that gives it its importance. The Complainants have interpreted Articles XI:1 and XI:2(a) to permit, for periods exceeding 30-40 years, the maintenance of export prohibitions and restrictions on products that they deem essential for downstream domestic industries, and for which supply is or has the potential to be restricted, by virtue of strong foreign demand, physical exhaustibility, and/or domestic regulatory limits on access. These examples are compelling, as they reflect views concerning the proper interpretation of Articles XI:1 and XI:2(a) expressed *outside* the context of this litigation.

**2. The export quota on refractory-grade bauxite is temporarily applied to prevent or relieve a critical shortage of this essential product**

28. Refractory-grade bauxite is a product essential to China because it is indispensable for the production of iron and steel, and of other products such as glass, ceramics, and cement. While bauxite is a widely-occurring mineral, most deposits of bauxite available globally are insufficient for use as a refractory-grade product. China's bauxite reserves, however, are principally of high quality refractory-grade bauxite.

29. Consistent with the interpretation of the term "essential", minerals economists have developed methodologies to measure both the *importance in use* of a given product to an economy, and the *supply constraints* that put a brake on the ability of an economy to enjoy that use. Such "criticality assessments" help assess appropriate policy solutions to ensure access to scarce and exhaustible raw materials. Building on these standard criteria, China submits similar evidence in Exhibit CHN-10, which assesses the criticality of refractory-grade bauxite to China.

30. China imposes an export quota on refractory-grade bauxite to prevent or relieve a critical shortage. Measuring "shortage" requires comparing anticipated future demand, in light of the importance in use of the product, with future supply, in light of, *inter alia*, geological, commercial, and regulatory constraints. At current reserve and production rates, this comparison suggests a 16-year reserve life for China's refractory-grade bauxite. The very short remaining life span of this essential and exhaustible natural resource demonstrates the occurrence or risk of a critical shortage. Apart from the risk of a physical shortage, other constraints may disrupt the flow of a material through the value chain, including: (i) conservation measures to manage China's raw materials in a sustainable manner so as to ensure their long-term availability and benefits; (ii) the regulatory framework governing the industries that extract and process the product; (iii) the development and use of technologies aimed at efficient extraction and production, exploration of mineral resources, recovery of minerals, and maintenance of existing mining and processing industries; (iv) local or regional communities' acceptance of mining; (v) other WTO Members' appetite for China's refractory-grade bauxite; and, (vi) the difficulty experienced in the exploitation of reserves of high-quality bauxite with refractory characteristics elsewhere outside China. As part of China's effort to manage constrained supply and to prevent or relieve a critical shortage, which would deny it sufficient supply of this essential product, China applies a quota to exports of refractory-grade bauxite. Absent any export restriction, China's severely constrained supply of refractory-grade bauxite would be further diminished.

31. The export quota applied to bauxite is also applied temporarily, as evidenced by: (i) the annual publication of the *Export License Catalogue*; (ii) the annual determination of the amount of the quota, evidenced by a methodology paper submitted as Exhibit CHN-283; and, (iii) the biannual publication of notices announcing the specific bidding rules for each batch of bauxite. The adoption of these measures demonstrates that the quota is reviewed and assessed on an annual basis.

C. THE EXPORT QUOTA APPLIED TO REFRACTORY GRADE BAUXITE IS JUSTIFIED PURSUANT TO ARTICLE XX(G) OF THE GATT 1994

32. In the event that the Panel finds that the export quota on refractory-grade bauxite is inconsistent with Article XI:1, China demonstrates that the export quota is justified pursuant to Article XX(g). At paragraph 7, China summarized its interpretation of Article XX(g).

33. Refractory-grade bauxite is an exhaustible natural resource with qualities that make it essential to the production of, *inter alia*, iron and steel. China has already explained the importance in use of Chinese refractory-grade bauxite for producing iron and steel, etc., thereby contributing to China's economic and social development. For these reasons, China must conserve its own refractory-grade bauxite to enable the unique benefits of this natural resource to be preserved and enjoyed for future generations. As a result, China has adopted a comprehensive conservation policy for refractory-grade bauxite, comprising closely intertwined measures. Through these measures, China promotes the sustainable use and husbanding of its refractory-grade bauxite resources by restricting or burdening the current exploitation, production, and use of its own refractory-grade bauxite resources, thus ensuring that future generations can also enjoy the social and economic benefits resulting from the industrial applications of refractory-grade bauxite.

34. China has subjected the extraction and processing of refractory-grade bauxite to quantitative caps, imposing limits on the volumes of the product that are available for use. These measures, along with other burdens imposed on extraction and processing, form an integral part of China's conservation policy for refractory-grade bauxite. China, thus, conserves its own resources of refractory-grade bauxite through a comprehensive policy aimed at balancing preservation of refractory-grade bauxite against its use. The quota applied to exports of refractory-grade bauxite is an integral part of that policy.

35. The export quota on refractory-grade bauxite, provisionally justified pursuant to Article XX(g), complies with the *chapeau* of Article XX.

D. THE EXPORT QUOTAS APPLIED TO COKE AND SILICON CARBIDE ARE JUSTIFIED PURSUANT TO ARTICLE XX(B) OF THE GATT 1994

36. The export quotas applied to coke and silicon carbide are justified pursuant to Article XX(b) because they are necessary to reduce health risks resulting from the high levels of pollution and energy-use in connection with the production of both products. The export quotas at issue make a material contribution to the reduction of health risks resulting from high levels of pollution and energy use connected with the production of both products. At Exhibit CHN-124 and CHN-147, China estimates the effects of the export quotas on coke and silicon carbide on the domestic production in China. This evidence demonstrates that a significant decrease of air pollutants resulting from export quotas on coke and silicon carbide contributes to an improvement in air quality across China and, in particular, in the densely-populated areas surrounding the manufacturing plants. In addition to the *immediate* beneficial effects on human, animal, and plant life or health, China's export quotas are apt to make a material contribution to the reduction of health risks resulting from high levels of pollution and energy use connected with the production of both products. If China were to *eliminate* the export

quotas on coke and silicon carbide, this would seriously impact the efficacy of *other* important measures, geared at sustainably reducing pollution in these two industries, thus jeopardizing China's long-term environmental strategy as a whole.

37. The export quotas applied to coke and silicon carbide, provisionally justified pursuant to subparagraph (b), satisfy the requirements of the *chapeau* of Article XX.

E. THE EXPORT QUOTA ON ZINC ORES AND CONCENTRATES HAS NOT BEEN MADE EFFECTIVE FOR EXPORTS IN 2010

38. China has not made effective the export quota for zinc ores and concentrates in 2010.

F. THE PANEL SHOULD EXERCISE JUDICIAL ECONOMY WITH RESPECT TO THE CLAIMS UNDER PARAGRAPHS 162 AND 165 OF THE *WORKING PARTY REPORT* PERTAINING TO THE EXPORT QUOTAS APPLIED TO BAUXITE, COKE, SILICON CARBIDE, AND ZINC ORES AND CONCENTRATES

39. If the Panel does not accept the consistency with or justification of the export quotas pursuant to the GATT 1994, China asks the Panel to restrict its analysis to findings that the export quotas are inconsistent with Article XI:1, and to exercise judicial economy with respect to the same claim under paragraphs 162 and 165 *Working Party Report*. The obligation to eliminate export restrictions, assumed by China under Paras. 162 and 165, merely confirms the obligation assumed by all WTO Members under Article XI:1.

## **VI. THE ADMINISTRATION OF CHINA'S WTO-CONSISTENT EXPORT QUOTAS**

A. THE BID-WINNING PRICE FALLS OUTSIDE THE SCOPE OF THE OBLIGATION ASSUMED UNDER ARTICLE VIII:1(A) GATT 1994 AND PARA. 11.3 *ACCESSION PROTOCOL*

40. The Panel should reject claims that the bid-winning price is inconsistent with Article VIII:1(a) and Para. 11.3 *Accession Protocol*. Article VIII:1(a) does not include a *residual general prohibition* on all fees and charges. The words used in Article VIII, in light of the surrounding circumstances, demonstrate that this provision relates to fees and formalities *in connection with the processing of customs entries*. Allocation of a quota through bidding is not a step in the process of customs clearance and transit. The bidding process takes place at a much earlier point in time, *even before exporters have made any binding commitments to export*.

41. Moreover, a Member's chosen method of allocating a WTO-consistent quota is part of the *administration* of that quota, subject, therefore, to the provisions of the GATT 1994 that discipline a Member's administration of its quotas and other measures of general application. In Exhibit CHN-306, China demonstrates that quota auctions have no effect on the total amount exported, or on the final export price. A quota-winning bid does not restrict trade flows over and above the initial quota volume that the auction is designed to allocate.

42. Finally, the bid-winning price is not a "tax" or "charge" "applied to exports"; thus, paragraph 11.3 does not apply.

B. CLAIMS PERTAINING TO THE ELIGIBILITY OF AN EXPORTER FOR QUOTA ALLOCATION

43. The minimum export performance and capital requirements are eligibility criteria for allocating WTO-consistent export quotas applied to bauxite, coke, and silicon carbide. So long as China complies with all WTO disciplines governing the administration of a WTO-consistent quota

with respect to these eligibility criteria, China does not restrict trading rights in a manner prohibited by paragraph 5.1 of the *Accession Protocol*, and paragraphs 83 and 84 of the *Working Party Report*. Also, the European Union has not established its claim under paragraph 5.2 of the *Accession Protocol* and paragraphs 84(a) and 84(b) of the *Working Party Report*, with respect to its assertion that "foreign enterprises are more likely to be new applicants for export quotas than Chinese companies".

44. The "operation capacity" of the applicant is its capacity to undertake commodity exports, or in other words, 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 achieve quota fill. Moreover, the European Union points to no evidence concerning the application of the "operation capacity" requirement. It does not state a claim concerning the administration of the measure that is cognizable under Article X:3(a).

45. With respect to the CCCMC involvement in the administration of export quota allocation, Mexico and the United States have offered an improper legal characterization of the facts. The CCCMC Secretariat, and not CCCMC members, are involved in the administrative process leading to quota allocation. Even were the involvement of the CCCMC Secretariat to present an inherent risk of impartial and unreasonable administration, effective safeguards are in place to prevent or remedy the risks of conflict of interest described by Mexico and the United States.

#### C. CLAIMS PERTAINING TO THE PUBLICATION OF QUOTAS

46. With respect to the quota on certain zinc products, the MOFCOM has not authorized any quota for zinc for 2010. Accordingly, China has not omitted to publish the quota for zinc, and rules governing its allocation, under Article X:1.

47. With respect to the publication of the quota for coke, the EU has neglected to include this matter in its Panel request. In any event, China has published on time the amount of the quota for coke.

### VII. CHINA'S AUTOMATIC EXPORT LICENSE REQUIREMENT AND ITS ADMINISTRATION

48. WTO Members have the right to decide how to regulate goods, provided they exercise that right in a manner consistent with their WTO obligations. Pursuant to Article XI:1, in regulating imports and exports, Members cannot *restrict the quantity* of imports or exports. As a result, a claim under Article XI:1 requires proof that an otherwise permissible regulation has an impermissible "*limiting effect*" on the *quantity* of imports or exports. An import or export license issued *automatically*, that is, in all cases, has *no limiting effect on the quantity of exports*, and is instead permissible regulation. Indeed, WTO Members recognize in the *Import Licensing Agreement* that automatic licensing is not only permissible, but affirmatively useful for certain purposes.

49. China's export license requirement is automatic, because, under Chinese law, an export license is automatically granted within three days of submitting an application, provided a valid and complete set of documents is submitted with the application – and irrespective of whether exports of the product are subject to a quota. As a result, the export license requirement does not limit the quantity of exports of bauxite, coke, manganese, silicon carbide, and zinc, and does not violate Article XI:1.

50. To the extent the Panel finds China's export license requirement to be inconsistent with Article XI:1, China requests that the Panel exercise judicial economy with respect to the Complainants' claims under Para. 5.1 *Accession Protocol*, and paragraphs 83(d), 84(a), 84(b), 162, and 165 of the *Working Party Report*.

51. Consistent with Article X:1, China has published the list of documents that must be submitted to obtain an export license, and the definition and method of verification of the "business qualification" of an applicant.

52. Finally, the Panel must reject the European Union's Article X:3(a) claim relating to the administration of China's export licensing system, alleging "based on a nexus of ... vague and opaque provisions and requirements", because the European Union provided neither interpretative argument nor evidence.

### **VIII. CHINA'S ALLEGED MEP REQUIREMENT AND ITS ADMINISTRATION**

53. Leaving aside terms of reference issues, the Complainants' factual assertions regarding the alleged MEP requirement are incorrect, *because China no longer operates an export price coordination system*. The Complainants have failed to establish that: (i) following the repeal of export price coordination, China continued to impose and enforce an MEP; (ii) no exports of yellow phosphorus and bauxite occurred below the alleged coordinated prices; and, (iii) the alleged requirement constitutes a restriction on exportation under Article XI:1.

54. The Panel should not make findings regarding the claim that the administration of the MEP requirement through the chop system violates Article X:3(a), because the chop system was – as the Complainants recognize – formally repealed in May 2008, long before this dispute commenced. As a result, there no longer exists any MEP to administer. In any event, the Panel cannot make recommendations regarding the administration of measures that have ceased to exist.

55. Apart from those alleged MEP-related measures that no longer apply or have been formally repealed and therefore require no publication pursuant to Article X:1, China has published the 2010 CCCMC Charter.

## **ANNEX D-2**

### **EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT BY CHINA AT THE FIRST SUBSTANTIVE MEETING**

#### **I. INTRODUCTION**

1. In Section II, China provides an update on the status of certain measures concerning the alleged MEP, requirement, as it relates to China's arguments concerning the Panel's terms of reference. In Sections III and IV, China places the matters at issue in a broader public international law context, and demonstrates that this relevant context confirms China's interpretation of Articles XI and XX GATT 1994. In Section V, China responds to specific questions raised by the third parties concerning Article XI:2(a) GATT 1994. Finally, in Section VI, China addresses the availability of Article XX in defense of claims under Paragraph 11.3 of the *Accession Protocol*.

#### **II. TERMS OF REFERENCE – MEP MEASURES**

2. China objects to the inclusion in the Panel's terms of reference of all but two measures related to China's alleged MEP requirement, because these measures were not included in the Complainants' Panel Requests and/or Consultation Requests. At paragraph 39 of its first written submission, China listed these measures in Table 1. Many of the measures listed in Table 1 have also expired, or were superseded or formally repealed. For the avoidance of doubt, on 16 August 2010, MOFCOM and the General Administration of Customs formally repealed two of the measures listed in Table 1, namely: (i) the 1997 *Circular on Printing and Circulating Relevant Provisions regarding Price Review of Export Commodities by the Customs*, including its annexes (also not listed in the Consultation Requests); (ii) the 2002 *Circular on the Adjustment of the Catalogue of Export Commodities Subject to Price Review by the Customs* (also not listed in the Panel Requests). Making findings with respect to these, and other, expired measures serves no purpose, even assuming, *quod non*, that they fall within the Panel's terms of reference. Moreover, the Panel may not make recommendations regarding these measures.

#### **III. THE SOVEREIGN RIGHT OF A WTO MEMBER TO EXPLOIT ITS NATURAL RESOURCES TO ACHIEVE SUSTAINABLE DEVELOPMENT THROUGH ECONOMIC DIVERSIFICATION**

3. What is fundamentally at stake in these disputes is the sovereign right of a developing country Member of the WTO to chart a course, over time, towards sustainable development through the exploitation of its natural resources. Consistent with international law, the WTO covered agreements allow a Member to use a range of policy tools, including export policy, to pursue these objectives, with the ultimate goal of enabling its sovereign natural resource endowment to deliver development that is sustainable. Indeed, the principle of sovereignty over natural resources; the objective of sustainable development; and, the objective of economic diversification beyond trade in raw materials, set forth in Article XXXVI:5 GATT 1994, support China's interpretation of Articles XI and XX GATT 1994.

4. *First*, pursuant to the customary international norm of permanent sovereignty over natural resources, a State has the inherent right "freely to use and exploit their natural wealth and resources wherever deemed desirable by them for their own progress and economic development", as recognized in U.N. G.A. Resolution 626 (VII). WTO Members have accepted the relevance of this customary norm to WTO disciplines. Notably, the Complainants have expressed their view that the principle is fully compatible with, and indeed an inherent part of, WTO disciplines. In accordance

with Article 31(3)(c) VCLT, the customary norm of sovereignty over natural resources is a relevant rule of international law, applicable to all States, to be taken into account in interpreting the WTO covered agreements.

5. *Second*, it is well-established in international law that a State's sovereign right to exploit its own natural resources is intimately linked to its "progress and economic development" – a link rarely as evident as it is in these disputes. Although China's economy is large, according to the IMF's 2010 *World Economic Outlook*, when assessed on a per capita basis, and adjusted for purchasing power parity, China's 2009 gross domestic product ranked 100<sup>th</sup> out of 183 countries. It is, therefore, critical for China to leverage its natural resource endowments to secure its own "progress and economic development", through the production and export of more sophisticated, technologically-advanced processed products. The Preamble to the *WTO Agreement* underscores the Members' commitment to use trade to, for example, "raise[e] standards of living" and "ensur[e] full employment". Those same objectives are expressed in Article XXXVI:1(a) of the GATT 1994. The Preamble also records WTO Members' explicit recognition of the role that the exploitation of natural resources plays in achieving not only development, but development that is *sustainable*. Exploiting natural resources "in accordance with the objective of sustainable development" requires resource-rich Members to reconcile competing goals. In other words, also highlighted by the Brundtland Commission, achieving development that is sustainable requires a resource-rich State to confront a delicate balance: while natural resources hold the potential to drive development, uncontrolled use will lead to irreversible resource depletion and environmental degradation, to the detriment of future generations, and at the expense of the State's long-term capacity to develop.

6. *Third*, the WTO's commitment to development is reflected throughout the covered agreements, including in Part IV GATT 1994 on "Trade and Development". At the very same time that the principle of sovereignty over natural resources became accepted as a norm of customary international law, the Contracting Parties amended the GATT 1947 to introduce Part IV. Article XXXVI:5 of the GATT 1994 encourages resource-rich developing country Members to use their sovereign natural resources to enhance their own economic development, confirming the customary norm. Specifically, it calls upon developing countries to diversify economic activity beyond the export of "unsophisticated" primary products such as the natural resources at issue in these disputes. It constitutes relevant context for interpreting Articles XI:2(a) and XX of the GATT 1994, and has been described by the Secretariat as a "GATT provision[] relating to export restrictions and charges".

#### **IV. THE INTERPRETATION OF ARTICLES XI AND XX OF THE GATT 1994 IN LIGHT OF THE PRINCIPLE OF SOVEREIGNTY OVER NATURAL RESOURCES AND THE OBJECTIVES OF SUSTAINABLE DEVELOPMENT AND ECONOMIC DIVERSIFICATION**

##### **A. THE MEANING OF ARTICLE XI:2(A) OF THE GATT 1994 IN LIGHT OF THE PRINCIPLE OF SOVEREIGNTY OVER NATURAL RESOURCES AND THE OBJECTIVES OF SUSTAINABLE DEVELOPMENT AND ECONOMIC DIVERSIFICATION**

7. Article XI:2(a) applies to export restrictions or prohibitions on "foodstuffs or other products essential to the exporting [Member]". The sole limitation on the type of product covered by Article XI:2(a) is that it must be "essential to the exporting [Member]". Context, in the form of the term "other products", demonstrates that the provision is not limited to products essential to ensure food security. Under Article XI:2(a), a product may be essential for reasons other than subsistence. Paragraph 4 to the *BOP Understanding* confirms this reading, defining an "essential product" to include one that serves as an "input[] needed for production". Article XXXVI:5 and its *Ad Note*



provide additional context confirming 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. Specifically, the provision confirms that measures designed by developing country Members to foster the "processing of primary products and the development of manufacturing industries" are not only legitimate, but encouraged by the WTO Membership. Finally, this reading is also consistent with the customary norm of sovereignty over natural resources, which was developed *in recognition of* the "essential" role of natural resources.

B. THE MEANING OF ARTICLE XX(G) OF THE GATT 1994 IN LIGHT OF THE PRINCIPLE OF SOVEREIGNTY OVER NATURAL RESOURCES AND THE OBJECTIVES OF SUSTAINABLE DEVELOPMENT AND ECONOMIC DIVERSIFICATION

8. Article XX(g) protects a Member's right to take measures relating to the conservation of exhaustible natural resources, provided they apply in conjunction with restrictions on domestic production or consumption.

9. The phrase "relating to conservation" encompasses measures that have an objective and discernible connection or relationship to conservation. In the case of non-renewable natural resources that are exploited commercially, conservation aims to manage human use of a resource over time, balancing its exploitation today with its preservation for tomorrow. A key component of conservation is, therefore, controlling and managing the supply of the resource to achieve this balance – which is the function of China's restrictions on domestic and export supply of refractory-grade bauxite and fluorspar. These measures preserve a portion of the resources for exploitation tomorrow, and they manage the limited supply available for exploitation today. Such management of the resources is fully consistent with the authority of a State to use its own resources for its own progress and development.

10. Under Article XX(g), measures "relating to conservation" must be taken "in conjunction with restrictions on domestic production or consumption". As such, conservation-related measures imposed on foreign trade must be applied along with domestic restrictions. As the Appellate Body in *US - Gasoline* confirmed, the text of Article XX(g) does not require that the domestic and foreign supply of a resource be burdened in an identical manner. This interpretation is confirmed by the principle of sovereignty over natural resources. As already stated at paragraph 4 above, pursuant to that principle, States are entitled to use their own resources "for their own progress and economic development". Therefore, States are not required to subject foreign supply of a resource to identical restrictions as those imposed on domestic supply. If Article XX(g) were interpreted otherwise, it would depart from the customary norm with no textual basis to support that incursion on sovereignty.

11. Article XXXVI:5 and its *Ad Note* also confirm that Article XX(g) does not require identity between the restrictions on domestic and foreign supply of natural resources. As noted, in Article XXXVI:5, WTO Members recognize the objective of achieving economic diversification of developing country economies through the development of industries to process primary products.

C. THE MEANING OF ARTICLE XX(B) OF THE GATT 1994 IN LIGHT OF THE OBJECTIVE OF SUSTAINABLE DEVELOPMENT

12. The objective of sustainable development informs that Article XX(g) allows WTO Members to "protect and preserve the environment" while at the same time achieving social and economic development goals. For this reason, pursuant to Article XX(b), China has the right to protect the health of its citizens and environment at its chosen level of protection now and into the future. Consistent with the objective of sustainable development, Article XX affirms the right to adopt trade

measures, as part of a comprehensive set of interacting policy instruments, to internalize costs of environmental pollution and contribute to reducing pollution and energy consumption.

D. THE MEANING OF THE *CHAPEAU* TO ARTICLE XX OF THE GATT 1994 IN LIGHT OF ARTICLE XXXVI GATT 1994 AND THE OBJECTIVE OF ECONOMIC DIVERSIFICATION

13. Finally, measures taken in the exercise of a Member's sovereign right over natural resources, to promote sustainable development through "economic diversification", are not a "disguised restriction on international trade", under the *chapeau* to Article XX. Such measures are taken, pursuant to a customary norm of international law, to pursue objectives *explicitly* sanctioned by the covered agreements – either in the Preamble to the *WTO Agreement* or in Article XXXVI:5. Hence, they cannot constitute a disguised or otherwise illegitimate restriction that would be rendered impermissible under the *chapeau*.

V. THIRD PARTIES' INTERPRETATION OF ARTICLE XI:2(A) OF THE GATT 1994

14. In their third party submissions, Canada and Korea addressed the meaning and relevance of Article XI:2(a).

15. *First*, China is puzzled by Canada's statement that "the test is quite different" in Article XI:2(a) than it is in Article XX(g).<sup>1</sup> In particular, Canada observes that "there are no *chapeau* requirements" in Article XI:2(a), in contrast to Article XX(g),<sup>2</sup> meaning that there is a "heightened need to be attentive" in interpreting and applying Article XI:2(a).<sup>3</sup> If Canada's suggestion is that the Panel should ignore the text of Article XI:2(a), interpreting it to *include* requirements that the drafters decided to *exclude*, its suggestion is inconsistent with the principles of interpretation.

16. *Second*, China disagrees with Canada's statement that China "effectively argue[s] that 'temporary' in Article XI:2(a) actually means 'permanently'".<sup>4</sup> Instead, in its first written submission, China stated that "[t]he discipline imposed by the word 'temporarily' is not absolute, but is instead relative" – to be specific, relative to the amount of time required to prevent or relieve a critical shortage of an essential product.<sup>5</sup> This is a question that can only be judged in light of the relevant facts.

17. *Third*, China notes that Korea and Canada misunderstand the purpose to which China puts examples illustrating the Complainants' interpretation of Articles XI:1 and XI:2(a).<sup>6</sup> These examples demonstrate how the Complainants interpret and apply Articles XI:1 and XI:2(a) for *their own* export prohibitions and restrictions, *outside the heat of litigation*. The Complainants have interpreted Articles XI:1 and XI:2(a) to permit, for 30 to 40 years at a time, the maintenance of export prohibitions on products that they deem essential for downstream domestic industries, and for which supply is potentially restricted, by virtue of strong foreign demand, physical exhaustibility, and domestic regulatory limits on access. The Panel should be alert for any opportunistic attempts by the Complainants to argue in these disputes that Articles XI:1 and XI:2(a) should be interpreted differently, when applied to *China's* export restrictions, than when applied to their own, more potent, export *prohibitions*.

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<sup>1</sup> Canada's third party submission, para. 17.

<sup>2</sup> Canada's third party submission, para. 17.

<sup>3</sup> Canada's third party submission, para. 17.

<sup>4</sup> Canada's third party submission, para. 18.

<sup>5</sup> China's first written submission, para. 374.

<sup>6</sup> Korea's third party submission, para. 22; Canada's third party submission, paras. 18 and 19. *See also* China's first written submission, paras. 404 to 429.

18. *Fourth*, China disagrees with Canada's assertion that China relies on Australia's export restriction on merino sheep "as evidence of practice related to the 'temporary' question", under Article XI:2(a).<sup>7</sup> In fact, China's citation to the Australian measure falls in the section of its submission addressing the meaning of the term "essential products",<sup>8</sup> and it is used as context within the meaning of Article 31(2) VCLT. In agreeing that Article XI:2(a) would apply to Australia's export ban, Australia's negotiating partners expressed no concern that the "essential" character of merino sheep derived from the *value of the product to downstream domestic users* (live merino sheep are prized for their economic value in the production of premium wool).

## **VI. THE AVAILABILITY TO CHINA OF ARTICLE XX OF THE GATT 1994 TO JUSTIFY MEASURES FOUND TO BE INCONSISTENT WITH PARAGRAPH 11.3 OF THE ACCESSION PROTOCOL**

19. China, like any other State, enjoys the right to regulate. As the Appellate Body in *China – Publications and Audiovisual Products*, this is "an inherent power enjoyed by a Member's government", not a "right bestowed by international treaties such as the *WTO Agreement*". The WTO covered agreements affirm this "inherent power" of each WTO Member, through, among others, Articles XX and XXI of the GATT 1994, Articles XIV and XIVbis of the GATS, and the entirety of the *SPS Agreement* and the *TBT Agreement*. These provisions reflect the basic principle that the obligations assumed in relation to trade do not prevent Members from taking measures that promote other fundamental societal interests recognized in the covered agreements. The Preamble to the *WTO Agreement* affirms Members' inherent right to regulate, stating that the WTO "preserve[s] the basic principles and ... further[s] the objectives underlying this multilateral trading system".

20. In regulating trade, WTO Members must act in conformity with the provisions of the WTO covered agreements. As the Appellate Body in *China – Publications and Audiovisual Products* has explained, "the *WTO Agreement* and its Annexes ... operate to, among other things, discipline the exercise of each Member's inherent power to regulate by requiring WTO Members to comply with the obligations that they have assumed thereunder". To act "in a manner consistent with the *WTO Agreement*" implies either that a WTO Member's exercise of regulatory powers "[does] not contravene any WTO obligation" or, if it does, that it "be justified under an applicable exception".<sup>9</sup>

21. When a WTO Member exercises the right to regulate through instruments affecting trade in goods, the disciplines found in the GATT 1994 apply, in addition to any relevant disciplines set out in other Annex 1A agreements, as well as any disciplines contained in the Member's accession commitments, which are incorporated into the *WTO Agreement*. It is well-established that the *WTO Agreement* and the other covered agreements form an "inseparable package of rights and disciplines which have to be considered in conjunction".<sup>10</sup>

22. Consistent with China's interpretation, the text of Paragraph 11.3 of the *Accession Protocol* explicitly recognizes that China has not abandoned its "inherent power" to regulate export trade. In particular, Annex 6 authorizes China, upon consultation with other WTO Members, to depart from the export duty commitments assumed in Paragraph 11.3 *if there are "exceptional circumstances"*. Thus,

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<sup>7</sup> Canada's third party submission, para. 20.

<sup>8</sup> China's first written submission, paras. 385 to 387.

<sup>9</sup> Appellate Body Report, *China – Audiovisual Products*, para. 223.

<sup>10</sup> Appellate Body Report, *Argentina – Footwear (EC)*, para. 81; Appellate Body Report, *Brazil – Desiccated Coconut*, pp. 178 and 179; Appellate Body Report, *US – Shrimp (Thailand)/US – Customs Bond Directive*, para. 233; Appellate Body Report, *US – Lamb*, para. 69; Appellate Body Report, *US – Steel Safeguards*, para. 275.

China's export duty commitments are, by their own terms, not inflexible obligations that prohibit regulation to promote interests such as conservation and public health. However, like Paragraph 5.1, the language in Annex 6 is not necessary to secure China's "inherent power" to regulate its export trade. Rather, the language in Annex 6 simply illustrates the drafters' recognition that China's "inherent power" remains. (With respect to Annex 6, China accepts that it has, so far, omitted to consult with other Members regarding the exceptional circumstances justifying the export duties at issue, but it intends to do so.)

23. This interpretation of Paragraph 11.3 is also consistent with Paragraph 170 of the *Working Party Report*, which notes China's commitment that, upon accession, "its laws and regulations relating to all ... *taxes levied on imports and exports would be in full conformity with its WTO obligations*".<sup>11</sup> This language is similar to Paragraph 5.1 of the *Accession Protocol*. Such disciplines preserve a balance between allowing the right to regulate trade and subjecting the exercise of that right to obligations that attach to exceptions, such as the requirements set forth in Article XX. In other words, the right to regulate is not unfettered, but is subject to appropriate constraints.

24. China recognizes that, under Paragraph 11.3, it has assumed obligations regarding export duties that have not been assumed by other WTO Members. However, China finds repugnant the argument that it has not only assumed uniquely onerous obligations, but also that it is denied its "inherent power" to take measures in relation to these uniquely onerous obligations to promote other fundamental interests, such as conservation and public health. If this argument were accepted, China would be subject to uniquely onerous obligations and would be deprived, again uniquely, of its "inherent power" to regulate trade. In China's view, such an interpretation fails to respect the balance that is otherwise struck throughout the covered agreements.

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<sup>11</sup> *Working Party Report*, Paragraph 170.

### ANNEX D-3

## EXECUTIVE SUMMARY OF THE CLOSING ORAL STATEMENT OF CHINA AT THE FIRST SUBSTANTIVE MEETING

### I. INTRODUCTION

1. In this Closing Statement, China addresses three issues: (1) the Panel's terms of reference, which the Chairman has suggested that the Panel will rule upon shortly; (2) the need for the Panel to rule on the 2010 measures to resolve the dispute; and, (3) the applicability of Article XX of the GATT 1994 to Paragraph 11.3 of China's *Accession Protocol*. Other issues will be developed in China's remaining submissions.

### II. TERMS OF REFERENCE

2. China has made a series of arguments regarding the Panel's terms of reference:

- *first*, Section III of the Panel requests does not comply with Article 6.2 of the DSU because the Complainants have not presented the problem clearly, given their failure to connect the narrative paragraphs in Section III with the 37 listed measures and 13 treaty provisions;
- *second*, the European Union has failed to identify China's omission to publish the coke quota as a measure at issue; and,
- *third*, 13 of the 15 measures referenced in the Complainants' first written submissions regarding the alleged MEPs, are not identified in either the Consultations requests, or the Panel request, or both; these 13 measures are, therefore, not part of the terms of reference.

3. On the first issue, China recalls that Section III of the Panel requests provides a series of narrative paragraphs, together with a list of 37 measures and 13 treaty provisions. The narrative paragraphs indicate that subsets of claims, regarding subsets of the 13 treaty provisions, are made with respect to subsets of the 37 measures. However, the Panel requests fail to present the problem clearly, because they do not identify *which specific claims* are made, under *which specific treaty provisions*, with respect to *which specific measures*.<sup>1</sup> The Complainants respond that there is no need for connections to be made between the narrative paragraphs and the 37 measures and 13 treaty provisions, because claims are made under *all* 13 listed treaty provisions with respect to *all* 37 of the listed measures.<sup>2</sup> The Panel's preliminary ruling accepted that the Complainants' explanation of the Panel requests "*seems to contradict*" the terms of those Requests.<sup>3</sup> The Panel took note that the Complainants committed that "*all possible concerns over the undefined scope of their challenge*" would be answered in the Complainants' first written submissions.<sup>4</sup> However, those submissions have simply emphasized continuing and significant concerns regarding the Panel Requests.

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<sup>1</sup> See China's Comments of 23 April 2010, paras. 48 to 63.

<sup>2</sup> See Joint Response of the Co-Complainants of 21 April 2010, paras. 26 to 30.

<sup>3</sup> Panel's Preliminary Ruling of 18 May 2010, para. 36.

<sup>4</sup> Panel's Preliminary Ruling of 18 May 2010, para. 38.

4. China recalls that a first written submission cannot cure *defects* in a panel request, although it may clarify *ambiguities in the wording* of a panel request.<sup>5</sup> In this case, the Panel is not faced with a situation in which a first written submission clarifies ambiguities in the wording of a panel request. Rather, the wording of the Panel requests fails to meet a basic element of Article 6.2 DSU – specifically, the Panel requests do not present the problem clearly, because they make no connections between the narrative paragraphs and the listed measures and treaty provisions. Indeed, far from presenting the problem "clearly", the Panel requests are internally contradictory.

5. The Complainants' first written submissions simply emphasize the deficiencies in the Panel Requests. In particular, their submissions demonstrate that the Complainants do *not* make all claims regarding all measures, as they asserted in a bid to save their Panel requests. As a result, the Complainants' arguments in defense of their Panel requests are contradicted by both the terms of the Panel requests and the submissions. Furthermore, the Complainants' first written submissions do not state which subset of claims is made with respect to which subset of measures. Indeed, in its opening statement, the European Union offered an insight into how China and the Panel should go about identifying which specific measures are subject to which specific claims. The European Union said that the measures at issue could be identified through "the *torture* of a recitation of all the *footnotes* in the European Union's first written submission".<sup>6</sup> It added that "a simple read of the *relevant parts of the Facts section of the submission* shows that the measures at issue in this dispute are clearly identified".<sup>7</sup>

6. Thus, to identify the measures at issue, the European Union asks the Panel to read the *factual portion of its first written submission*. Moreover, the Panel should identify the measures by undertaking the "tortured" process of sifting through the "footnotes". China, in fact, has already said that, to identify which specific measures are subject to which specific claims in Section III, it had resorted to sifting through the "footnotes" in the Complainants' first written submissions to find every "passing reference" to a measure that *might* be at issue.<sup>8</sup> Article 6.2 of the DSU prevents the uncertainty inherent in this "tortured" process. This provision requires a panel to read the *panel request*, and not the footnotes in the first written submission, to identify which measures are subject to particular claims. Neither China nor the Panel is expected to undertake the "tortured" process of sifting through footnotes to comprehend the scope of the dispute. The Complainants have, therefore, failed to comply with the basic requirement in Article 6.2 of the DSU to present the problem clearly in their Panel requests.

7. On the second issue, China can be briefer. The European Union argues that China failed to publish its quota for coke. However, its Panel Request does not identify this omission as a specific measure at issue. The European Union asserts that it identified this measure through a *general statement*, in the first paragraph of Section III, that China "*does not publish certain measures pertaining to requirements, restrictions, or prohibitions on exports*". However, this general assertion

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<sup>5</sup> Appellate Body Report, *EC – Bananas III*, paras. 142 and 143; also Appellate Body Report, *US – Carbon Steel*, para. 127; Appellate Body Report, *EC – Computer Equipment*, para. 72, footnote 49; Panel Report, *China – Publications and Audiovisual Products*, para. 7.23; Panel Report, *US – Continued Zeroing*, para. 7.63; Panel Report, *Japan – DRAMS (Korea)*, para. 7.9; Panel Report, *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, para. 7.51; Panel Report, *US – Softwood Lumber V*, para. 7.25; Panel Report, *US – Line Pipe*, para. 7.125; Panel Reports, *Canada/US – Continued Suspension*, para. 6.34; Panel Report, *US – Corrosion Resistant Steel Sunset Review*, para. 7.47; Panel Report, *Chile – Price Band System*, para. 7.150.

<sup>6</sup> European Union's opening statement of 31 August 2010, para. 28.

<sup>7</sup> European Union's opening statement of 31 August 2010, para. 28.

<sup>8</sup> China's first written submission, paras. 22 (including footnote 13), 23, and 25.

regarding "certain measures" relating to a variety of legal instruments is too vague to identify the alleged omission regarding coke as a specific measure.

8. A complainant must identify the measures at issue with sufficient precision to enable the respondent and Panel to ascertain the particular matter that has been referred to adjudication.<sup>9</sup> For example, in the fourth paragraph of Section III, the European Union identified a specific omission at issue by referencing the type of measure not published (*i.e.*, a quota) and the product for which a quota was not published (*i.e.*, zinc). This formulation is sufficient to identify the failure to publish a quota for zinc as a measure.

9. If the *general statement* in the first paragraph of Section III, quoted a moment ago, were sufficient to identify any omission to publish "requirements, restrictions, or prohibitions on exports", there would have been no need for the European Union to identify *specifically* the omission regarding the zinc quota. Indeed, the European Union's decision to identify an omission to publish the zinc quota simply confirms that it has failed to specify a similar omission regarding the coke quota.

10. The third issue that China has raised is the Complainants' failure to include 13 of the 15 alleged MEP measures in their Consultations and/or Panel requests. Today's discussion of that issue confirms that the 13 measures cannot form part of the Panel's terms of reference.

### **III. THE PANEL SHOULD RULE ON THE 2010 MEASURES TO RESOLVE THE DISPUTE, AND SHOULD NOT RULE ON THE 2009 MEASURES**

11. China turns now to the Panel's consideration of the 2009 and 2010 measures. As explained in paragraphs 53 to 70 of China's first written submission, the Complainants' Panel requests identify a number of measures that were withdrawn before the Panel was established, as well as measures that were withdrawn after that date. In some cases, the measures were replaced by new measures, and in some cases they were not. China accepts that the expired measures all form part of the Panel's terms of reference to the extent they were included in both the Panel and Consultation requests. In that event, they may be the subject of findings, although they cannot be the subject of recommendations.

12. Where withdrawn measures have *not* been replaced, China has encouraged the Panel *not* to make findings on the expired measures, because doing so does not help to resolve a dispute that has already been settled by the withdrawal of the measure.<sup>10</sup> This argument applies to: the special export duty on yellow phosphorous; the export duty on bauxite; and, the export quota on fluorspar. In any event, as the Appellate Body has held, the Panel cannot make a recommendation regarding measures that have been withdrawn, because there is nothing further China can do to bring the withdrawn measure into compliance. Where withdrawn measures have been replaced, China is *not* seeking to evade scrutiny of its measures. The Complainants have challenged a series of annual measures, such as annual measures announcing quotas and export duties. In most cases, they included the measures

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<sup>9</sup> See, e.g., Appellate Body Report, *EC – Bananas III*, para. 142; Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 120; Appellate Body Report, *US – Carbon Steel*, paras. 125 and 171. On the due process objective of panel requests, see Appellate Body Report, *US – Carbon Steel*, para. 126; Appellate Body Report, *US – Continued Zeroing*, para. 161; Appellate Body Report, *EC – Bananas III*, para. 142; Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 108; Appellate Body Report, *EC – Selected Customs Matters*, para. 130; Appellate Body Report, *EC – Chicken Cuts*, para. 155; Appellate Body Report, *EC – Computer Equipment*, para. 70; Appellate Body Report, *Korea – Dairy*, paras. 126 and 127; Appellate Body Report, *Brazil – Desiccated Coconut*, p. 22; Appellate Body Report, *India – Patents (US)*, para. 87; Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 143; Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.28.

<sup>10</sup> China's first written submission, paras. 63 to 67.

that applied in 2009 in the Panel Requests ("2009 measures"), although for export quotas, including on bauxite, the measure that applies in 2010 was adopted before establishment and was also specifically identified by name ("2010 measure").<sup>11</sup> The Complainants also expressly included "replacement" measures in the Panel Requests,<sup>12</sup> and the Panel expressly ruled that "replacement" measures are part of its terms of reference.<sup>13</sup> There is, therefore, no question that the 2010 replacement measures *are* all within the Panel's terms of reference.

13. Although the Panel requests include the replacement measures, sometimes by name, and although the Complainants insisted as recently as the hearing on 23 April 2010 that the replacement measures were included in the terms of reference, they now appear to urge the Panel to refrain from ruling on the 2010 measures. This appears to be nothing more than an attempt to prevent the Panel from ruling on China's defenses, including under Article XX(g) GATT 1994, which involves extraction and production caps adopted in 2010. China submits that, to resolve these disputes – the standard the Complainants have urged the Panel to adopt in deciding on which measures to rule – the Panel must rule on the 2010 measures, which are currently in force, together with the defenses relevant to them. These measures are the source of the dispute today, and the source of the alleged ongoing nullification or impairment of benefits. The Panel would fail to discharge its responsibility to resolve this dispute if it declined to rule on the measures currently applied. It would also fail to resolve the dispute if it failed to address China's assertion that certain of its measures are justified by Article XX(g). Furthermore, the Panel would fail to resolve the dispute if it ruled solely on the 2009 measures, which have been replaced and are, therefore, no longer the source of the dispute. In sum, the prompt resolution of this dispute calls for the Panel to address the 2010 measures, and not the 2009 measures.

14. China wishes to emphasize one further crucial point. If the Panel decides to rule on the 2009 measures, it cannot make recommendations regarding these measures because they have ceased to exist.<sup>14</sup> Without recommendations, there will be no requirement for China to adopt "measures taken to comply". The Complainants will have secured no recommendations requiring China to bring its quotas and export duties on the products at issue into conformity.

15. As a result, the Complainants cannot *elect* to pursue solely the 2009 measures in these proceedings, thereby *evading* China's defenses regarding the 2010 measures, and then pursue *compliance* proceedings regarding the 2010 or other subsequent replacement measures. To permit such a litigation strategy would deprive China of timely consideration of its defenses and – should the need arise – its right to revise the quota and duty measures during an implementation period that would follow original proceedings, but that would *not* follow compliance proceedings that assessed China's defenses for the first time. In China's view, the prompt settlement of disputes must be fair and balanced in its treatment of complainants and respondents at all procedural stages.

16. Accordingly, the Complainants face a choice. If they wish the Panel to decline to examine the current 2010 measures, and instead to examine only the now-replaced 2009 measures, they must

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<sup>11</sup> Notice Regarding Announcement of the 2010 Export Quota Amounts for Agricultural and Industrial Products (Ministry of Commerce, Notice (2009) No. 88, October 29, 2009) (Exhibit CHN-8).

<sup>12</sup> See final bullet point of list of measures in each Section of *China – Measures Related to the Exportation of Various Raw Materials* – Request for the Establishment of a Panel by the European Communities, WT/DS395/7 (9 November 2009); *China – Measures Related to the Exportation of Various Raw Materials* – Request for the Establishment of a Panel by Mexico, WT/DS398/6, (9 November 2009); *China – Measures Related to the Exportation of Various Raw Materials* – Request for the Establishment of a Panel by the United States, WT/DS394/7 (9 November 2009).

<sup>13</sup> Panel's Preliminary Ruling of 18 May 2010, para. 20.

<sup>14</sup> Appellate Body Report, *US – Certain EC Products*, para. 81.



forego recommendations regarding the 2009 measures, with the inherent consequences that will bring in any implementation proceedings in these disputes.

#### **IV. ARTICLE XX OF THE GATT 1994 APPLIES TO CHINA'S COMMITMENTS UNDER PARAGRAPH 11.3 OF THE *ACCESSION PROTOCOL***

17. The final issue that China will address is the applicability of Article XX of the GATT 1994 to China's commitments under Paragraph 11.3 of the *Accession Protocol*. In its opening statement, China explained that the right to regulate is "an inherent power enjoyed by a Member's government", not a "right bestowed by international treaties such as the *WTO Agreement*".<sup>15</sup> China also noted that this "inherent right" is affirmed throughout the covered agreements, showing it is among the basic principles of the multilateral trading system. The Preamble to the *WTO Agreement* – of which China's *Accession Protocol* forms part – recognizes that the covered agreements "preserve the basic principles" underlying the multilateral trading system.

18. In the case of China's export duties, Paragraph 11.3 and Annex 6 *Accession Protocol*, and Paragraph 170 of the *Working Party Report*, confirm that China may impose export duties that violate its commitments, among others in "exceptional circumstances", provided that China respects the "obligations" that attach to relevant exceptions, such as Article XX of the GATT 1994.<sup>16</sup>

19. Today, the Panel asked what boundaries circumscribe China's "inherent right" to regulate trade. The boundaries circumscribing China's right to regulate trade are the *same* as the boundaries circumscribing other Members' right to regulate trade. Those boundaries are found in the *obligations* that attach to relevant exceptions. For example, just like other WTO Members, China's right to regulate trade in goods for conservation-related reasons is disciplined by the requirements set forth in Article XX(g) and the *chapeau* of Article XX. The significant difference for China is that, as a result of Paragraph 11.3, it bears the burden to establish its adherence to the obligations attached to applicable exceptions, in order to regulate trade through the maintenance of export duties. In sum, the covered agreements do not deprive Members of the right to regulate, but set "boundaries" for, and thereby discipline, the manner in which that right is exercised.

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<sup>15</sup> China's Opening Statement of 31 August 2010, para. 67. *See also* Appellate Body Report, *China – Publications and Audiovisual Products*, para. 222. *See also* Panel Report, *Argentina – Hides and Leather*, para. 11.98 ("The government also has a relevant legal interest in the transaction based on the sovereign right to regulation ...").

<sup>16</sup> China's opening statement of 31 August 2010, para. 73.

## **ANNEX D-4**

### **EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF CHINA**

#### **I. INTRODUCTION**

1. These disputes involve the sovereign right of the China to chart a course, over time, towards sustainable development through the exploitation of a series of natural resources and resource-based products that the Complainants have characterized as "*critical* inputs for the most basic industries of modern society", as "*essential* to" and "*indispensable* for" the production of basic commodities, and as "*necessary* for the manufacturing of a very broad array of goods".

#### **II. THE PANEL SHOULD RULE ON THE 2010 MEASURES TO RESOLVE THE DISPUTES, AND SHOULD NOT RULE ON THE 2009 MEASURES**

2. The Complainants have asked the Panel to make findings and recommendations concerning a number of 2009 measures, which were withdrawn before, or since, the Panel's establishment, or replaced by 2010 measures.

3. China emphasizes that ruling on the expired 2009 measures serves no purpose, as they are already withdrawn; in any event, the Panel may not make recommendations regarding those expired measures. Additionally, the prompt, positive resolution of these disputes calls for the Panel to rule on measures currently in force, including the 2010 replacement measures that *prolong* or *adjust* the 2009 measures. It would not constitute a fair and balanced settlement of these disputes, if the Complainants could elect to pursue solely the 2009 measures, thereby evading China's defenses regarding the 2010 measures, based on changes it has made to its regulatory environment concerning its natural resources. Moreover, as noted above, were the Panel to make findings solely on the 2009 measures, it could not make any recommendations, since those measures have ceased to exist. Without recommendations, there will be no requirement for China to adopt "measures taken to comply".

4. Finally, the 2010 measures are within the Panel's terms of reference. The Complainants expressly included "replacement" measures in the Panel requests, and the Panel expressly ruled, in the first part of its preliminary ruling, that "replacement" measures are part of its terms of reference. There is, therefore, no question that the 2010 replacement measures, including measures that prolong and/or adjust the product category of the 2009 measures, are all within the Panel's terms of reference.

#### **III. THE COMPLAINANTS HAVE FAILED TO ESTABLISH THAT THE EXPORT QUOTAS, INCLUDING ON REFRACTORY BAUXITE, ARE INCONSISTENT WITH ARTICLE XI:1 OF THE GATT 1994 AND PARAGRAPHS 162 AND 165 OF THE WORKING PARTY REPORT**

5. At the outset, China recalls the European Union's failure to identify the measures imposing the export quotas subject to its Article XI:1 claim. In the first part of its preliminary ruling, the Panel found that it can only make recommendations with respect to "specific provisions of specific measures and therefore may need to consider and examine the specific situation of specific challenged instruments as they apply to specific products or group of products". With respect to the European Union claims, the Panel remains unable to make findings "sufficiently precise" to enable the DSB to make recommendations that will allow prompt and effective resolution of these disputes.

6. The Complainants have also failed to demonstrate that Article XI:1 applies to China's export quotas. The Complainants assert that China bears the burden of showing that its measures fall under Article XI:2(a) because Article XI:2(a) contains "defenses" or "exceptions". However, the Appellate Body has clarified that complainants may have to prove a responding Member's non-compliance even with "positive obligations" imposing "conditions", particularly where, as here, there was a reasonable basis, given the Complainants' own arguments concerning the products at issue, to understand that the quotas might not violate Article XI:1, in light of Article XI:2(a).

7. The Parties disagree on the meaning of the phrase "other products essential for the exporting [Member]" in Article XI:2(a). Article XI:2(a) does not *a priori* prescribe or exclude any criterion to determine essentialness. China refers to the ordinary meaning of the term, the *WTO Agreement's* Preamble, Article XXXVI:5 of the GATT 1994, Paragraph 4 of the *BOP Understanding*, and the drafters' agreement on the application of Article XI:2(a) to Australia's export ban on merino sheep to establish that a product must be essential to the *exporting Member*. China has demonstrated that refractory bauxite is essential because it is an exhaustible and rapidly depleting product with unique chemical and physical characteristics that stand at the base of a value chain collectively constituting 50% of China's GDP, with a host of attendant benefits for social and economic growth and development. The Complainants' critique of the approach used by China's expert must fail, because this approach directly addresses the degree of shortage and the degree of essentialness of refractory bauxite. Moreover, the Complainants themselves rely on similar approaches, in formulating their own trade measures on the same category of product.

8. The Parties further disagree on the meaning of the phrase "critical shortage". Contrary to the Complainants' assertions, the phrase's immediate context confirms that a shortage may be critical even when remediable through an export *restriction*, as opposed to an export *ban*. Moreover, Article XI:2(a) provides that Members can impose export quotas to *prevent* any risk of a critical shortage that they perceive, as a result of their *own risk evaluation and appreciation*. The Complainants, therefore, err in considering that such restrictions can only be imposed to cure a "sudden" "exogenous shock". Factors that may be taken into account in determining the existence of a critical shortage or risk thereof are various, and include limited geological or physical availability, conservation measures that limit extraction and production, the development and use of technology, the absence of available substitutes, local and regional communities' acceptance of production practices (mining for instance), the level of domestic and international demand and the level of access to foreign supply.

9. Article XI:2(a) also requires that export restrictions be "temporarily applied", that is, be limited to the time required to prevent or relieve critical shortages of products essential to the exporting Member. In relation to the measure at issue, China limits its temporal application and reviews the quota on an *annual basis*.

10. Accordingly, the export quota on refractory bauxite satisfies Article XI:2(a), and therefore falls outside the scope of application of Article XI:1. Measures consistent with Article XI:1 are also consistent with Paragraphs 162 and 165 of the *Working Party Report*.

#### **IV. THE AVAILABILITY OF ARTICLE XX OF THE GATT 1994 IN DEFENSE OF A CLAIM UNDER PARAGRAPH 11.3 OF THE ACCESSION PROTOCOL**

11. China can resort to Article XX of the GATT 1994 in defense of a claim that it imposes export duties contrary to Paragraph 11.3 of the *Accession Protocol*. The basis for China's right to apply export duties, provided it complies with obligations attaching to the relevant subparagraphs and the *chapeau* of Article XX, is found in the text of the covered agreements, read as a whole. The covered

agreements affirm the inherent right of every WTO Member to regulate trade, which the Appellate Body in *China – Audiovisual Products* described as "an inherent power enjoyed by a Member's government", rather than a "right bestowed by international treaties such as the *WTO Agreement*".

12. The text of Paragraph 11.3 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. Indeed, as Annex 6 demonstrates, the export duty commitments in Paragraph 11.3 are, by their own terms, not inflexible obligations that prohibit regulation to promote interests such as conservation and public health.

13. Paragraph 170 of the *Working Party Report* also offers important additional support for China's interpretation of the covered agreements. The text of Paragraph 170, which falls under the heading "*Taxes and Charges Levied on Imports and Exports*", confirms China's commitment to "ensure that its laws and regulations relating to all fees, charges or taxes levied on imports and exports [are] in full conformity with its WTO obligations, *including* Articles I, III:2 and 4, and XI:1 of the GATT 1994". The heading of this provision demonstrates that it applies to export taxes or duties, such as those at issue. 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. This provision, therefore, confirms the application of *all* commitments assumed under the GATT 1994 to China's laws and regulations relating to export duties, such as the commitment to apply WTO-inconsistent measures for conservation and health objectives only in so far as they are consistent with obligations attaching to the relevant subparagraphs and the *chapeau* of Article XX.

14. China recalls that the GATT 1994 and the *Accession Protocol*, together with the other covered agreements, form an integral part of the WTO Agreement. They apply together as part of a single treaty instrument, the WTO Agreement – a single undertaking accepted by all WTO Members. Within this single treaty framework, the Appellate Body has noted that the function of exceptions, such as Article XX of the GATT 1994, is, with respect to goods-related obligations, "to permit important state interests – including the protection of human health, as well as the conservation of exhaustible natural resources – to find expression". In other words, the pursuit of non-trade interests may, in certain circumstances, prevail over the pursuit of trade interests. In pursuing non-trade interests, the Appellate Body confirmed that Article XX protects WTO Members' "large measure of autonomy" to regulate. As also confirmed by the Appellate Body, the source of that autonomy is "an inherent power enjoyed by a Member's government", rather than a "right bestowed by international treaties such as the WTO Agreement". Insofar as trade measures are used to give effect to policies enshrined in Article XX, the Appellate Body has confirmed that Members' "autonomy is circumscribed only by the need to respect the requirements of the General Agreement and the other covered agreements".

15. This background is critical to the Panel's consideration of the Complainants' attempt to deprive China, and China alone, of its inherent right to regulate trade, and its autonomy to determine its own environmental, health and conservation policies, within the bounds of Article XX. Against this background, China finds repugnant the suggestion that it has not only assumed uniquely onerous obligations, like the obligation under Paragraph 11.3 regarding export duties on goods, but that it is also denied its "inherent power" and "autonomy" to take measures in relation to those obligations to promote other fundamental interests, such as conservation and public health, where it satisfies the conditions required of such measures. The suggestion that an "inherent power" reserving for all Members the "autonomy" to take measures in relation to these most fundamental of interests can be denied unless expressly re-affirmed in artificially parsed constituent parts of a single undertaking is distinctly contrary to the harmonious interpretation of the covered agreements required by the

Appellate Body. To do so would be to turn inherent rights into acquired rights, autonomy into heteronomy, and the single undertaking into a series of detached agreements. Any such suggestion must fail, in particular where, as here, the text confirms the availability of Article XX as a defense to claims under Paragraph 11.3.

**V. THE EXPORT RESTRAINTS APPLIED TO REFRACTORY BAUXITE AND FLUORSPAR ARE JUSTIFIED PURSUANT TO ARTICLE XX(G) OF THE GATT 1994**

16. The export duty on fluorspar and the export quota on refractory bauxite are justified pursuant to Article XX(g) of the GATT 1994 because they "relat[e] to the conservation of exhaustible natural resources" and are "made effective in conjunction with restrictions on domestic production or consumption." The Complainants have not addressed China's factual arguments and evidence. Relying on well-established principles of treaty interpretation, China therefore limits its response to the Complainants' interpretive arguments.

17. The phrase "relating to conservation of exhaustible natural resources" must be read in light of the objective of sustainable development, stated in the Preamble to the *WTO Agreement* – an objective the Complainants erroneously discard as interpretively irrelevant. Sustainable development requires that economic development and conservation be aligned through the effective management of scarce resources. In light thereof, the term "conservation" refers to the management of the limited supply of exhaustible natural resources over time. In that sense, the export restraints at issue "relat[e] to conservation" because they are part and parcel of China's measures that manage the limited supply of refractory bauxite and fluorspar, which are exhaustible natural resources.

18. All Parties accept, in principle, the Appellate Body's interpretation of the phrase "made effective in conjunction with domestic restrictions on production or consumption" as meaning that identical treatment of foreign and domestic trade is not required. Nevertheless, the European Union asserts that domestic users cannot permissibly be subject to "less burdens" than foreign users, and foreign users cannot be subject to "more burdens" than domestic users – meaning that identical treatment of domestic and foreign users is required. This position must be rejected because (i) the Appellate Body has recognized that no particular distribution of the burden is required; (ii) Article XXXVI:5 of the GATT 1994 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; and, (iii) consistent with the customary norm of sovereignty over natural resources, Article XX(g) does not oblige a resource-endowed WTO Member to ensure that other user-countries benefit equally or identically from the exploitation of its resources – after all, the *WTO Agreement* is not a commodity-sharing agreement.

19. Finally, the Parties also disagree on the meaning of the *chapeau* to Article XX. China clarifies its earlier argument that applying measures consistently with legitimate objectives recognized in the covered agreements cannot form the basis for an assertion that China's export restraints are a "disguised restriction on international trade". An export restriction that is applied in a manner consistent with the objectives of sustainable development and Article XXXVI:5, and with the customary norm of sovereignty over natural resources, cannot be impermissible under the *chapeau* of Article XX, simply because the Complainants contest the particular share of China's resources that they have been allocated.

**VI. THE EXPORT DUTIES AND QUOTAS APPLIED TO THE EPR PRODUCTS',  
MAGNESIUM METAL SCRAP, MANGANESE METAL SCRAP, AND ZINC SCRAP  
ARE JUSTIFIED PURSUANT TO ARTICLE XX(B) OF THE GATT 1994**

**A. COMPLAINANTS HAVE NOT REBUTTED CHINA'S DEMONSTRATION THAT EXPORT MEASURES  
ON THE EPR PRODUCTS SATISFY THE CRITERIA SET OUT IN ARTICLE XX(B) OF THE  
GATT 1994**

20. The Complainants have yet to rebut China's factual argument and evidence that export duties and quotas on coke, magnesium and manganese metals, silicon carbide, magnesium and manganese metal scrap, and zinc scrap are justified under Article XX(b) of the GATT 1994.

21. *First*, the Complainants improperly argue that China's stated objective is a *post hoc* rationalization. China has provided contemporaneous evidence showing that its export measures on EPR products have always and explicitly been linked to those objectives, long before these disputes. Moreover, China has demonstrated that these measures are not standalone initiatives to curb pollution, but are key components of a comprehensive regulatory framework aimed at reducing pollution and, thereby, reducing risks to human, animal and plant life and health.

22. *Second*, the Complainants' allegation that China's export restrictions on the products at issue "severely distort the conditions of competition in the global marketplace" must also be rejected, because it is based on an assessment of the effect of the measures imposed on the products collectively, and fails to isolate the trade effect of those measures *themselves* from other economic and regulatory factors having a greater impact than China's restrictions on the availability of the products at issue. China also recalls that the trade restrictiveness of its measures is limited. In fact, China's measures are likely to have trade *stimulating* effects in the medium to long term.

23. *Third*, the Complainants have failed to rebut China's showing that its export restrictions make a material contribution to Article XX(b) objectives, making them "necessary" under that provision. China's export restrictions contribute to a decrease in domestic production of the highly polluting products at issue; they constitute a key element of a comprehensive strategy aimed at restructuring China's industry towards sustainable environmental protection. China has provided expert statements showing that production of EPR products, and not their use by downstream industries, is the most polluting process. Moreover, a decrease in availability of EPR products is more likely to impact the *quality* of the finished products than their *quantity*; also, pollution resulting from downstream processes will be counterbalanced by pollution savings *upstream* (less mining, refining, transportation).

24. *Fourth*, none of the alternative measures proposed by the Complainants are available to China because they are all already in place. The Appellate Body in *Brazil – Retreaded Tyres* established that less restrictive alternatives must be reasonably available, must not already be in place, and must permit achievement of the same level of protection. As part of its comprehensive strategy to address risks resulting from production of EPR products, China implements pollution controls in the form of emission standards, energy consumption caps per unit of EPR product, pollutant discharge fees and industry entrance standards and impact assessments. China also requires industry to shift to less environmentally harmful production, through the prohibition of polluting techniques and technologies, the elimination of outdated production capacity, or incentives to use recycling equipment. Finally, China imposes compliance with environmental regulations that control the polluting effect of the production processes.

- B. CHINA HAS SUCCESSFULLY DEMONSTRATED THAT ITS EXPORT MEASURES ON MAGNESIUM METAL SCRAP, MANGANESE METAL SCRAP, AND ZINC SCRAP ("METAL SCRAP PRODUCTS") SATISFY THE CRITERIA SET OUT IN ARTICLE XX(B) OF THE GATT 1994

25. China's export duties on metal scrap products are aimed at reducing risks to human, animal and plant life and health and are apt to make a material contribution to China's environmental and public health objectives. Contrary to the Complainants' allegations, pronouncements of the Chinese government on the purpose of export duties on scrap, as well as the overall design of the measures, which evidence a holistic regulatory effort to develop a recycling industry, show that export duties on metal scrap products serve environmental and health goals.

26. Furthermore, China has shown that its export duties on metal scrap products are "apt to" make a material contribution to the objective recognized under subparagraph (b) because, by securing a continuous and reliable flow of supply of metal scrap in China, they are a key element of a comprehensive strategy aimed at developing a recycling industry in China – a strategy that the European Union and the United States themselves previously adopted, through their own export prohibitions and restrictions on metal scrap products. To assess the necessity of China's measures, account should also be taken of their limited trade distorting effect (due to limited supplies in China, which imports the majority of its scrap products), a fact acknowledged by the Complainants.

27. Finally, none of the alternative measures proposed by the Complainants are reasonably available to China, to the extent they are not already in place. China already imposes pollution controls on primary production, and promotes recycling of consumer goods. These measures complement rather than substitute for China's export duties. The Complainants' suggestion that China require producers to shift from primary to secondary production is not a measure reasonably available to China. Given the infancy of China's recycling industry, such a requirement would result in bankruptcies and closures which would impose prohibitive costs on the Chinese economy.

- C. CHINA'S MEASURES SATISFY THE REQUIREMENTS OF THE *CHAPEAU* TO ARTICLE XX OF THE GATT 1994

28. The Complainants incorrectly assert that China has failed to demonstrate compliance with the *chapeau* of Article XX, and that the application of export measures results in arbitrary or unjustifiable discrimination where the same conditions prevail. The evidence demonstrates that China has applied its export measures in a good faith attempt to meet its objectives of reducing environmental pollution and therewith the risk to human, animal, and plant life and health. China has thoroughly demonstrated the close and contemporaneous links between its export measures and its environmental policy framework to address pollution caused by the production of EPR products. Additionally, China has shown that the export measures materially contribute to, or are apt to contribute to, reduced pollution from EPR products. Finally, the Complainants fail to acknowledge that the bulk of the burden resulting from China's environmental policies has been shouldered by domestic industries, rather than by foreign importers.

## VII. THE ADMINISTRATION OF CHINA'S WTO-CONSISTENT EXPORT QUOTAS

- A. THE BID-WINNING PRICE FALLS OUTSIDE THE SCOPE OF THE OBLIGATION IN ARTICLE VIII:1(A) OF THE GATT 1994

29. Mexico and the United States challenge, under Article VIII:1(a) of the GATT 1994, China's use of auctions as a means for quota allocation, but have abandoned their claim under Paragraph 11.3 of the *Accession Protocol*. They have not rebutted China's demonstration that an auction is the most

efficient means of quota allocation, and that WTO law neither *a priori* prescribes nor condones any means of quota allocation. The terms of Article VIII:1(a) cannot be read as prohibiting auctions as a means of quota allocation. The phrase "in connection with [exportation]" may indicate that Article VIII:1(a) applies to a broader category of fees and charges than solely those charged at the exact moment when the good leaves the territory of the exporting Member. However, the sole fact that the use of the phrase "in connection with [exportation]" connotes a broader category of fees and charges than those imposed "on exportation" does not contradict China's interpretation.

30. Apart from the fact that this claim is based on an inapplicable provision of the GATT 1994, China is also surprised by the United States' strong opposition to China's use of auctions, in light of its own support for the use of auctions outside the context of this litigation. For example, the President of the United States has the right to allocate import licenses through auctions; the United States approves of the use of auctions to allocate parts of the export tariff-rate quota for rice destined for the European Union; and, the United States negotiates free trade agreements that confirm that WTO-consistent quota administration may include use of auctions.

B. CLAIMS PERTAINING TO THE ELIGIBILITY OF AN EXPORTER FOR QUOTA ALLOCATION

31. To the extent the Complainants' claims with respect to eligibility criteria that apply to the quotas at issue, whether allocated directly or through bidding, are within the Panel's terms of reference, China notes that the Complainants have failed to address China's rebuttals, except as regards the European Union's additional arguments concerning the alleged "operation capacity" criterion. In response, China notes, *first*, that the "operation capacity" requirement is not applied to any of the export quotas on products at issue in these disputes, because Article 19 of the *Measures for the Administration of Export Commodities Quotas* does not apply to any of the products at issue. *Second*, 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) of the GATT 1994. The European Union argues that the WTO-inconsistency arises because China has not *foreclosed* (but rather "allows") administration that *might* ("potentially") be discriminatory. However, 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.

C. CLAIMS PERTAINING TO THE INVOLVEMENT OF THE CCCMC IN THE DIRECT ALLOCATION OF THE QUOTA FOR COKE AND THE ALLOCATION THROUGH BIDDING OF THE QUOTA FOR BAUXITE AND SILICON CARBIDE

32. Mexico and the United States assert that the involvement of CCCMC in the direct allocation of the quota for coke and the allocation through bidding of the quota for bauxite and silicon carbide constitutes partial and unreasonable administration within the meaning of Article X:3(a) of the GATT 1994. China previously rebutted this claim by adducing argument and evidence that: (i) MOFCOM delegates governmental authority in the administrative process leading to quota allocation, whether allocated directly or through bidding, to the *CCCMC Secretariat*, and *not the CCCMC membership*; (ii) solely the CCCMC Secretariat's Minerals & Metals and Bidding Departments play a role in the administrative processes leading to quota allocation, and receive access to any documents submitted by exporters wishing to obtain part of the quota for coke, bauxite, and silicon carbide; (iii) 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*; and, (iv) CCCMC members do not play any role, let alone a decision-making role, in the bidding process.



33. Because Mexico and the United States have failed to provide *any* evidence demonstrating that the delegation of certain quota administration tasks to the CCCMC Secretariat has led to, or necessarily leads to, a conflict of interest and WTO-inconsistent administration, China is not obliged, pursuant to Article X:3(a), to adopt "safeguards" to ensure that the CCCMC Secretariat remains impartial and reasonable. Nonetheless, as demonstrated in previous submissions, effective safeguards are in place to ensure that no business confidential information flows from the CCCMC Bidding and Minerals & Metals Departments to its 4,000 members or the general public.

34. Mexico and the United States also erroneously argue that because the "chain of command" extends from the CCCMC Secretariat employees in the Minerals & Metals and Bidding Departments, through several levels of hierarchy, to CCCMC's 4,000 members, the delegation of certain quota administration tasks to the CCCMC Secretariat is irretrievably partial and unreasonable. China submits that the chain of command alleged by Mexico and the United States is based on a false premise, which is that a body that meets once every four years dissolves all distinction between divisions of the CCCMC Secretariat involved in quota administration, and the CCCMC's 4,000 members. China further notes that the chain of command set out by Mexico and the United States lists at least six degrees of separation between the CCCMC Secretariat employees directly involved in quota administration, and the CCCMC membership. Mexico and the United States ask the Panel to *assume*, without *any* evidence, that these multiple degrees of separation are of *no* relevance in preventing the transmission of confidential information from the Secretariat employees to the CCCMC's 4,000 members. In addition to examples of WTO Members' delegation of the exercise of regulatory authority to private industry, offered in previous submissions, China provides additional examples from the United States and Mexico.

D. CLAIM PERTAINING TO CHINA'S ALLEGED FAILURE TO PUBLISH QUOTAS FOR ZINC

35. In previous submissions, China already responded that it did not authorize any quota for zinc, and, accordingly, China has not omitted to publish the total quota amount and the rules governing the allocation of the zinc quota. As a result, the European Union's claim under Article X:1 of the GATT 1994 is without merit.

**VIII. CHINA'S EXPORT LICENSE REQUIREMENT**

36. At the outset, China notes that Mexico and the United States have abandoned their claims that China's export license requirement is inconsistent with Paragraphs 162 and 165 of the *Working Party Report*, based on their response to the Panel's Question 2, as noted in footnote 77 of the Panel's Preliminary Ruling of 1 October 2010.

A. CHINA'S EXPORT LICENSE REQUIREMENT IS CONSISTENT WITH ARTICLE XI:1 OF THE GATT 1994

37. Under the proper interpretation of Article XI:1, China's export licensing requirement does not restrict exports. Whether labelled "automatic" or "non-automatic", the result under Article XI:1 is the same: an analysis of the relevant measures demonstrates that export licenses for the products at issue shall be granted within three days, upon receipt of a valid and complete set of application documents, a list of which is specified in those measures. The Complainants have failed to establish that China's export licensing requirement imposes a limitation on the quantity of exports, and have therefore failed to demonstrate that export licenses for the products at issue constitute export restrictions within the meaning of Article XI:1.

38. The mere fact that an export is subject to a regulatory "condition" does not mean that the "condition" violates Article XI:1. In the case of licensing requirements, the *Import Licensing Agreement* provides context to identify the dividing line, under Article XI:1, between permissible regulation, and regulation that has a quantitative limiting effect. The very fact that the *Import Licensing Agreement* disciplines licensing, without prohibiting it, underscores that licensing requirements are not *a priori* impermissible regulation. The definition of "licensing" in Article 1.1 *Import Licensing Agreement* offers further relevant context demonstrating that the requirement of valid and complete *documentation* as a condition for receipt of a license does not convert an otherwise valid licensing requirement into a prohibited restriction on the quantity of exports.

39. China further notes that, as a matter of fact, the Complainants confirm that they have no evidence establishing that an export license for the listed products has ever been refused – which corresponds with China's showing, in a statement by MOFCOM's Quota & License Administrative Bureau, that export licenses for the listed products have been granted in all cases, and within three days, upon the submission of a valid and complete set of application documents.

B. THE EUROPEAN UNION'S CLAIM REGARDING THE ALLEGED "VERY BROAD AND UNFETTERED DISCRETION" OF LICENSE-ISSUING AUTHORITIES UNDER ARTICLE XI:1 OF THE GATT 1994

40. Contrary to the European Union's allegation, Chinese license-issuing authorities do not enjoy the discretion to apply an undefined "business qualifications" criterion for export license applicants. Requiring applicants to submit the relevant forms that demonstrate business qualifications enables the licensing-issuing authorities to verify whether the applicant is qualified and registered to do business in China, meaning that it is a legal entity, established and recognized under Chinese law, with the necessary capacity to undertake business activity. The license-issuing authority has no discretion to decide for itself whether a particular applicant that has presented the business qualifications documents lacks business qualifications.

41. Contrary to the European Union's assertion, nor do Chinese license-issuing authorities enjoy the discretion to require an applicant to provide unspecified "other materials" or "documents of approval". Even assuming the European Union had demonstrated any discretion to require an applicant to provide unspecified "other materials" or "approval documents" (*quod non*), it has failed to demonstrate that such discretion has led to, or would necessarily lead to, WTO-inconsistent conduct. The existence of such discretion, on its own, is not WTO-inconsistent.

42. Assuming the European Union asserts that it is the licensing-issuing authorities who allegedly enjoy "very broad and unfettered discretion" to require unspecified "other materials" or "approval documents" from a particular applicant, it confounds alleged discretion of the license-issuing authorities to impose unspecified documentary requirements of a specific applicant for a license, with the discretion of Chinese legislators and MOFCOM, as the entity issuing implementing regulations pursuant to legislative acts, to change the list of export license application documents required of all applicants. Moreover, the European Union has not cited a single example in which an applicant presenting a valid and complete set of application documents has been denied a license for the covered products. Assuming the European Union is challenging the legislative and regulatory discretion to change the list of documents required of all applicants for export licenses, China fails to see how this "discretion" could possibly constitute a limit on the quantity of exports. The "failure" to foreclose the discretion to change domestic law does not constitute a violation of WTO obligations, including Article XI:1.

## IX. THE ADMINISTRATION OF CHINA'S EXPORT LICENSE REQUIREMENT

### A. THE EUROPEAN UNION'S ARTICLES X:1 AND X:3(A) CLAIMS REGARDING EXPORT LICENSING FALL OUTSIDE THE PANEL'S TERMS OF REFERENCE

43. The European Union claims under Articles X:1 and X:3(a) of the GATT 1994 regarding export license administration are not within the Panel's terms of reference. In Section III of its Panel Request, the European Union included clear claims under those provisions concerning other issues, but not concerning export licenses. For reasons identical to those underlying the Panel's decision, at paragraphs 74 to 77 of its Preliminary Ruling of 1 October 2010, to exclude from its terms of reference the European Union's publication claim regarding the coke quota, the Panel must exclude from its terms of reference the European Union's claims under Articles X:1 and X:3(a) regarding export license administration.

### B. ARTICLE X:1 OF THE GATT 1994 DOES NOT OBLIGE CHINA TO PUBLISH REGULATIONS AND ADMINISTRATIVE RULINGS OF GENERAL APPLICATION THAT DO NOT EXIST UNDER CHINESE LAW

44. In response to the European Union's Article XI:1 claims regarding the publication of certain Chinese measures, China previously responded that: (i) the list of documents to be submitted is publicly available in Chapter II of the *Measures for the Administration of Licenses for the Export of Goods*, aptly titled "Documents to be submitted for the application of Export Licenses" (Exhibit CHN-342); (ii) the list of documents to be submitted, for exports of unwrought zinc and manganese, is publicly available in the 2010 *Catalogue of Goods Subject to Export Licensing Administration* (Exhibit CHN-7); (iii) the list of document relied upon to examine "whether the operator has business qualification" is publicly available in Article 6 of the *Working Rules on Issuing Export Licenses Rules* (Exhibit CHN-344); and, (iv) the so-called "documents of approval of the Ministry of Commerce" required to obtain export licenses for exports of unwrought zinc and manganese are published in the 2010 *Catalogue of Goods Subject to Export Licensing Administration*.

### C. THE EUROPEAN UNION'S CLAIM UNDER ARTICLE X:3(A) OF THE GATT 1994 LACKS MERIT

45. China has previously objected that the European Union has failed to provide any evidence of the *application* of this alleged "broad discretion", any evidence that such application constituted WTO-inconsistent administration, or any evidence establishing that this "broad discretion" will *necessarily* lead to WTO-inconsistent administration. Moreover, to the extent the European Union considers the requirements for export license 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). Additionally, China demonstrated that the European Union has not stated a *prima facie* claim of violation of Article X:3(a), because asserting that a Member *might* take action that *could potentially*, depending on the specific but as-yet-unknown character of that action, violate Article X:3(a), is not sufficient to establish a violation of that provision.

46. The sole new argument made by the European Union is an assertion that "China accepts ... that the export license issuing agencies have the discretion to reject applicants that do not possess 'business qualifications'". This is incorrect. China stated that the licensing-issuing authorities may only reject an application that does not include the "business qualification" documents specifically enumerated in Article 6 *Working Rules on Issuing Export License*.

**X. CLAIMS RELATING TO CHINA'S ALLEGED MEP REQUIREMENT, AND ITS ADMINISTRATION**

47. Following the Panel's Preliminary Ruling of 1 October 2010, the Panel's terms of reference are limited to six MEP-related measures. Out of these six alleged MEP-related measures, two measures have been formally repealed and two other measures have been replaced. As a result, the Panel may not make recommendations regarding these expired measures; and findings with respect to expired measures would serve no purpose.

48. In any event, *none* of the alleged MEP-related measures that is within the Panel's terms of reference imposes an MEP requirement or violates Article XI:1 of the GATT 1994. The Complainants have failed to provide any evidence to demonstrate that China has engaged in export price coordination since May 2008. China also reiterates that when asked by the Panel to substantiate their claims and provide evidence, none of the Complainants adduced any evidence to rebut China's evidence, provided in Exhibits CHN-361, CHN-362, and CHN-363. This failure to submit evidence is explained solely by the fact that China has abandoned export price coordination.

49. Finally, China notes that the *CCCMC Charter* (i) does not concern the administration of a non-existing MEP requirement for yellow phosphorus in a manner that is inconsistent with Article X:3(a) of the GATT 1994; and, (ii) is publicly available, even assuming that it is a measure requiring publication, pursuant to Article X:1 of the GATT 1994.

## ANNEX D-5

### EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF CHINA AT THE SECOND SUBSTANTIVE MEETING

#### I. THE PANEL SHOULD MAKE FINDINGS AND RECOMMENDATIONS ON THE 2010 MEASURES

1. The prompt and effective resolution of these disputes requires findings and recommendations on the 2010 measures, which currently apply. There is no question that the Panel has jurisdiction to make findings and recommendations regarding the 2010 replacement measures, including measures that prolong and/or adjust the product category of the 2009 measures and measures that were expressly listed by name in the Complainants' panel requests. The Panel *can*, but *should not*, make findings on the 2009 measures that were withdrawn and not replaced, and, in any event, the Panel *cannot* make recommendations regarding the 2009 measures that have ceased to exist.

2. The European Union also asks the Panel to recommend that China repeal the legal basis to impose measures that China is permitted, in certain circumstances, to impose under the covered agreements. There is *no* basis in the covered agreements, or indeed in common sense, to deny a Member, in advance and under all circumstances, the legal basis for exercising its right to apply quotas and duties consistently with or justified under the covered agreements.

#### II. CHINA'S REQUEST THAT THE PANEL EXERCISE JUDICIAL ECONOMY WITH RESPECT TO CERTAIN CLAIMS MADE UNDER THE *ACCESSION PROTOCOL* AND THE *WORKING PARTY REPORT*

3. The Complainants challenge the consistency of certain measures on the products at issue, such as export quotas and export license requirements, under the GATT 1994 as well as the *Accession Protocol* and the *Working Party Report*. If these measures are found to be inconsistent with the GATT 1994, China requests that the Panel exercise judicial economy with respect to the claims made under corresponding obligations under the *Accession Protocol* and the *Working Party Report*. Contrary to the European Union's suggestion, there is no textual basis for requiring that a panel demonstrate "exceptional circumstances" before properly exercising judicial economy. Instead, a panel may decline to make a finding on the WTO-inconsistency of a measure with a particular provision, where doing so is unnecessary to assist the DSB in making recommendations and rulings to resolve the dispute.<sup>1</sup>

#### III. THE EXPORT QUOTA ON REFRACTORY BAUXITE IS NOT INCONSISTENT WITH ARTICLE XI OF THE GATT 1994 AND PARAGRAPHS 162 AND 165 OF THE *WORKING PARTY REPORT*

##### A. THE PROPER INTERPRETATION OF ARTICLE XI:2(A) OF THE GATT 1994

4. The word "essential" should be read in light of the immediate context of the phrase "for the exporting [Member]", such that considering essentialness may involve assessing the quantitative

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<sup>1</sup> Appellate Body Report, *US – Zeroing (EC)*, para. 147; Appellate Body Report, *Lamb – Safeguards*, paras. 189 to 195; Panel Report, *Japan – Apples*, para. 8.303; Panel Report, *EC – Sardines*, paras. 7.147 to 7.152; Panel Report, *China – Publication and Audiovisual Products*, paras. 7.378, 7.417, 7.706, 7.1412, and 7.1428.

contribution of the product throughout the particular Member's entire value chain, as well as qualitative criteria capturing the importance of the product for that Member. The broader context of the term "essential", which includes Article XXXVI:5 of the GATT 1994, Paragraph 4 of the *BOP Understanding*, and the drafters' agreement on the application of Article XI:2(a) to Australia's export ban on merino sheep, also supports this interpretation. This interpretation of Article XI:2(a) does not affect the meaning of Article XX(i), because Article XX(i) only applies in very particular circumstances in principle not implicated by Article XI:2(a). That a given set of facts may satisfy the requirements of both Articles XI:2(a) and XX(i) does mean that one or the other provision is deprived of an effective interpretation or rendered redundant.<sup>2</sup>

5. The phrase to "prevent or relieve", read within its immediate context, means that Article XI:2(a) applies to *anticipatory* export prohibitions or restrictions, taken to prevent the occurrence of a critical shortage, and demonstrates that a shortage can be *foreseen*. The use of the verb "to prevent" shows that a Member may find it necessary to take action, based on objective considerations, to address the risk, uncertainty, or fear that a shortage will become critical.

6. Article XI:2(a) also requires that the export restriction be "temporarily applied" in the sense that the permissible duration be defined *in relation to the achievement of a stated goal* – to prevent or relieve a critical shortage. No absolute threshold for the temporal limitation or bounding applies.

7. Additionally, Mexico and the United States consider that export restrictions on exhaustible natural resources are *a priori* excluded from the scope of Article XI:2(a). This line of argument appears to rest entirely on the misguided assumption that the *only* cause of a critical shortage of an exhaustible natural resource is that resource's exhaustibility. The Complainants overlook that a critical shortage of an exhaustible natural resource is likely to be caused by a number of factors, of which exhaustibility is but one.

**B. THE EXPORT QUOTA ON REFRACTORY BAUXITE IS NOT INCONSISTENT WITH ARTICLE XI:1 OF THE GATT 1994**

8. China has demonstrated that the export quota on refractory bauxite is temporarily applied to prevent or relieve a critical shortage of this essential product. Refractory bauxite, defined according to the physical and chemical characteristics agreed upon by the Parties and their experts, is the product covered by China's arguments under Article XI:2(a). Refractory bauxite is essential to China because, contrary to the Complainants' assertions, it is not readily substitutable, as it features specific technical (physical and chemical) and economic properties. China also demonstrates that it is experiencing a critical shortage of refractory bauxite and risk thereof due to a range of factors, of which limited available reserves is but one. Dr Humphreys' criticality assessment confirms this conclusion. Moreover, data cited by the Complainants and their expert do not establish the alleged increase of China's production or export of refractory materials produced from refractory bauxite, and are based on erroneous assumptions.

**IV. THE AVAILABILITY OF ARTICLE XX OF THE GATT 1994 IN DEFENSE OF A CLAIM UNDER PARAGRAPH 11.3 OF THE ACCESSION PROTOCOL**

9. China can, like any other WTO Member, regulate trade using export duties for legitimate objectives recognized under Article XX of the GATT 1994, provided it complies with obligations attaching to Article XX. Numerous provisions of the covered agreements, including the Preamble to

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<sup>2</sup> See Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 99; see also Appellate Body Report, *US – Zeroing (Japan)*, para. 133.

the *WTO Agreement*, reflect the basic principle that the international trade obligations Members have assumed do not prevent them from taking measures to promote other fundamental societal interests recognized in the covered agreements. The text of the *Accession Protocol* and the *Working Party Report* confirms that this balance is maintained in the WTO obligations that China has assumed. In particular, Paragraph 170 of the *Working Party Report* confirms that China may impose export duties conforming to WTO disciplines.

10. The European Union complains that China's reliance on Article XX is based on "nebulous references to a mingle-mangle of political instruments and statements made outside of the WTO". The European Union makes this complaint in addressing China's argument about the *availability of Article XX*, though China relies on the supposedly "nebulous" "mingle-mangle" of instruments in showing, as a matter of substance, that its measures *conform fully to the disciplines of Articles XI and XX*. In any event, China regrets the European Union's dismissive approach to customary international law, the Preamble to the *WTO Agreement*, and the text of Article XXXVI:5 of the GATT 1994, all of which are relevant means of interpretation recognized under customary principles of treaty interpretation.

11. Finally, WTO Members cannot be presumed to have abandoned their "inherent right" to regulate trade in a manner that promotes conservation and public health. If China had consented to *abandoning* its "inherent" right to regulate trade in this way, it would have done so through explicit language in the text of the *Accession Protocol*. The Panel and the Complainants need not fear that China will escape its uniquely onerous obligations regarding export duties if Article XX applies. To the contrary, while other Members can use export duties without justification, China alone must demonstrate that its export duties are applied consistently with the obligations in Article XX.

## **V. THE EXPORT RESTRAINTS APPLIED TO REFRACTORY BAUXITE AND FLUORSPAR ARE JUSTIFIED PURSUANT TO ARTICLE XX(G) OF THE GATT 1994**

### **A. THE PROPER INTERPRETATION OF ARTICLE XX(G) OF THE GATT 1994**

12. The phrase "relating to conservation" in Article XX(g) means that measures must have an objective and discernible connection to the control and management of supply and use of non-renewable natural resources that are exploited commercially. The second element of Article XX(g) requires that the measures be made effective in conjunction with restrictions on domestic consumption or production. The burden put on foreign and domestic consumption need not be identical. The *WTO Agreement* is not a commodity-sharing agreement; reliance on Article XX(g) does not compel the equitable sharing of natural resources subject to conservation measures.

13. When dealing with an export restriction, the requirement in the *chapeau* of Article XX of no "arbitrary or unjustifiable discrimination" means that the respondent cannot discriminate between different importing Members, unless relevant differences exist between the importing Members that justify the differential treatment. In order to avoid a charge of discrimination, China is not compelled to ensure that other WTO Members have an equal or non-discriminatory share of China's natural resources. Regarding the requirement of no "disguised restrictions on international trade", when a measure pursues policy goals that are expressly recognized by the covered agreements, its application does not give rise to any restrictions on trade that can be regarded as an "abuse" of WTO rights.

B. THE APPLICATION OF ARTICLE XX(G) TO THE EXPORT RESTRAINTS ON REFRACTORY BAUXITE AND FLUORSPAR

14. China's export restrictions applied to refractory bauxite and fluorspar relate to conservation because they, together with other measures forming part of China's mineral resources conservation policy, ensure that the limited supplies of these resources are used efficiently over time, by industries that are properly adapted to the available supply, with a view to conserving the resources over time. The combined effect of the export restraints and extraction caps restricts domestic production, and domestic and international consumption, of these resources. Moreover, China has met its burden of proving, on a *prima facie* basis, that these measures are applied consistently with the *chapeau* of Article XX.

**VI. THE EXPORT RESTRAINTS APPLIED TO NON-FERROUS METAL SCRAP PRODUCTS AND EPR PRODUCTS ARE JUSTIFIED PURSUANT TO ARTICLE XX(B) OF THE GATT 1994**

15. The export restraints' objective to reduce and prevent risks to human, animal, and plant life or health resulting from pollution generated by the production of EPR products is not a *post hoc* rationalization. Numerous Chinese measures establish an *explicit* link between the export tariffs, and the expressed objective. The fact that *one effect* of export restraints on EPR products is to foster the growth of higher-value-added and less polluting downstream industries is unavailing. China has established that the export measures on EPR products make a material contribution today and are apt to make a material contribution in the future. Ample evidence demonstrates that many alternative measures are already in place to curb pollution connected with EPR production.

16. The objective of export restrictions on metal scrap products is to replace *to the maximum amount possible* secondary production for primary metals production, because secondary production entails significant environmental and, consequently, health benefits. The export duties, part of a broader comprehensive regulatory recycling framework, ensure that, once liberated and collected, supply of the metal scrap products at issue is available to the nascent Chinese recycling industry.

**VII. THE ADMINISTRATION OF CHINA'S WTO-CONSISTENT EXPORT QUOTAS**

17. China asks the Panel to reject the claim that the use auctions to allocate quotas is inconsistent with Article VIII:1(a) of the GATT 1994. China reiterates that, in no provision of the covered agreements, have WTO Members agreed to outlaw the use of auctions. To the contrary, WTO Members have agreed in Article XIII:2 of the GATT 1994 that quotas should be allocated in the least trade-distorting manner.

18. The Panel should also reject the European Union's claim under Article X:1 regarding the alleged failure to publish the quotas for zinc ores and concentrates. China has published notice that these products can only be exported if a quota is secured. China has not opened a quota amount and, thus, there are no further general rules that could be published.

19. China further submits that the Complainants err in their interpretation of the legal standard under Article X:3(a). 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".<sup>3</sup> In the absence of evidence of

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<sup>3</sup> Appellate Body Report, *US – OCTG Sunset Reviews*, para. 217.



specific instances of WTO-inconsistent administration, solid evidence must show that the measure "necessarily leads to" WTO-inconsistent administration.<sup>4</sup>

20. Mexico and the United States have failed to demonstrate that the CCCMC's involvement in quota administration presents an inherent conflict of interest that necessarily results in partial and unreasonable administration. In any event, China has shown that effective safeguards ensure that no confidential information flows from the Bidding Department and Minerals & Metals Department to the CCCMC's 4,000 members or the general public.

21. The European Union's Article X:3(a) claim that the "operation capacity" criterion under Article 19 of the *Measures for the Administration of Export Commodities Quotas* must also fail, because the criterion is not applied to the products at issue, and because the European Union has provided no evidence of a single instance in which the alleged danger or possibility of WTO-inconsistent administration has materialized. The European Union has also not provided evidence showing that, under Chinese law, this term must be interpreted such that it compels WTO-inconsistent action by Chinese authorities. In those circumstances, China is due the same presumption of good faith performance of its obligations under Article X:3(a) that is accorded to all Members.<sup>5</sup>

22. The claims pertaining to quota eligibility must also be rejected. Given that Paragraph 5.1 of the *Accession Protocol* is without prejudice to China's right to adopt quotas in certain circumstances, it follows necessarily that this provision is also without prejudice to the adoption of rules enabling quota allocation. Whatever the content of such quota allocation rules, China's obligations are without prejudice to these rules. If China were not entitled to adopt quota allocation rules, this would entirely frustrate its right to regulate trade through quotas expressly preserved in Paragraph 5.1.

23. Regarding the European Union's claim under Paragraph 5.2 of the *Accession Protocol*, and Paragraphs 84(a) and 84(b) of the *Working Party Report*, China refers to the list in Exhibit JE-82.

### **VIII. CHINA'S EXPORT LICENSE REQUIREMENT AND ITS ADMINISTRATION**

24. The Complainants allege that the export licenses for coke, bauxite, silicon carbide, zinc, and manganese are not issued automatically, but acknowledge that they have no evidence that an export license for the listed products has ever been refused. This confirms China's showing, based on the explicit text of the relevant Chinese measures, that export licenses for the listed products are granted in all cases, and within three days, upon the submission of a valid and complete set of application documents.

25. The European Union has also failed to establish that China's export license requirement is discretionary and, for this reason, inconsistent with both Articles XI:1 and X:3(a). In any event, the European Union's Article X:3(a) claim falls outside the Panel's terms of reference. Even assuming that the European Union had demonstrated that Chinese license-issuing authorities have discretion to require unspecified "other materials" (*quod non*), it has not explained why the existence of this discretion violates Articles XI:1 or X:3(a). In this dispute, the alleged discretion can be exercised in a WTO-consistent manner; in those circumstances, China is due the same presumption of good faith

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<sup>4</sup> Appellate Body Report, *EC – Selected Customs Matters*, paras. 201 and 226; Panel Report, *Argentina – Hides and Leather*, paras. 10.11, 11.100, and 11.101; Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.906.

<sup>5</sup> Appellate Body Report, *US – OCTG Sunset Reviews*, para. 173; Appellate Body Report, *US – Section 211 Appropriations Act*, para. 259; Appellate Body Report, *Chile – Alcoholic Beverages*, para. 74.

performance of its obligations that is accorded to all Members.<sup>6</sup> The European Union also alleges that China violates Articles XI:1 and X:3(a) by "not remov[ing] permanently" MOFCOM's discretion to amend, for future applicants, the list of goods subject to the export license requirement, or the list of documents required to support an application. The existence of such "discretion" on the part of the legislator or regulator does not contravene China's WTO obligations; again, China is due the presumption of good faith performance of its obligations.

26. Finally, the European Union's claim under Article X:1 regarding the publication of export license measures falls outside the Panel's terms of reference and, in any event, lacks merit, because all of China's general rules concerning export licensing have, as a matter of fact, been published.

## **IX. CLAIMS RELATING TO CHINA'S ALLEGED MEP REQUIREMENT**

27. The Complainants have not formulated any new rebuttal arguments regarding their claims under Articles XI:1, X:1, and X:3(a) regarding an alleged MEP requirement and its administration. Therefore, China refers the Panel to its second written submission, setting out China's arguments regarding the claims made with respect to the six MEP-related measures falling within the Panel's terms of reference.

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<sup>6</sup> Appellate Body Report, *US – OCTG Sunset Reviews*, para. 173; Appellate Body Report, *US – Section 211 Appropriations Act*, para. 259; Appellate Body Report, *Chile – Alcoholic Beverages*, para. 74.

## ANNEX D-6

### EXECUTIVE SUMMARY OF THE CLOSING ORAL STATEMENT OF CHINA AT THE SECOND SUBSTANTIVE MEETING

#### I. THE PROPER INTERPRETATION OF ARTICLE X OF THE GATT 1994

1. China's first set of remarks concerns the Complainants' misguided approach to the legal standard and evidence required under Article X of the GATT 1994. To begin, China fails to see how a complainant can substantiate a claim of violation without "solid evidence", as the United States argued in its opening statement yesterday with respect to claims under Article X:3(a).<sup>1</sup> In no case is a complainant liberated from the requirement to provide "solid evidence" to establish a claim. This Panel, like all panels, must insist on solid evidence in support of a claim under any provision of the covered agreements.

2. Moreover, as the European Union has noted, a complainant is entitled to bring different types of claims under Article X:3(a). *First*, it may raise a claim concerning instances of application of a measure covered by Article X:1 in a manner that constitutes WTO-inconsistent administration. *Second*, it may challenge "the substantive content of a legal instrument that regulates the administration of a legal instrument of the kind described in Article X:1",<sup>2</sup> or "[t]he features of an administrative process that govern the application of a legal instrument of the kind described in Article X:1".<sup>3</sup> The European Union's Article X:3(a) claims against the "operation capacity" criterion in the context of quota administration, as well as the "very broad and unfettered discretion" allegedly retained by Chinese authorities under certain export license-related measures, are of necessity examples 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 and/or "very broad and unfettered discretion" have been applied.

3. The European Union proposes that, in the case of this second type of Article X:3(a) challenge, it need only show that the "operation capacity" criterion and/or the alleged "very broad and unfettered discretion" *are likely to cause* the non-uniform application of the legal instrument at issue",<sup>4</sup> or that they raise the "possibility" or "danger" of WTO-inconsistent administration.<sup>5</sup>

4. This is an improper reading of Article X:3(a). As underscored by the Appellate Body in *EC – Selected Customs Matters*, the European Union must instead demonstrate that the "operation capacity" criterion and/or the alleged "very broad and unfettered discretion" will, if applied, "necessarily lead to" WTO-inconsistent administration.<sup>6</sup> In this dispute, the European Union has not established that the "operation capacity" criterion or the alleged "very broad and unfettered discretion" will "necessarily lead to" WTO-inconsistent administration. Instead, because China may apply the "operation capacity" criterion or the alleged "very broad and unfettered discretion" in a

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<sup>1</sup> US' opening statement of 22 November 2010, paras. 116 and 117; *see also* Mexico's opening statement of 22 November 2010, para. 2.

<sup>2</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 200.

<sup>3</sup> Appellate Body Report, *EC – Selected Customs Matters*, para. 225.

<sup>4</sup> EU's opening statement of 22 November 2010, para. 37 (original emphasis).

<sup>5</sup> EU's second written submission, paras. 119 and 120.

<sup>6</sup> Appellate Body Report, *EC – Selected Customs Matters*, paras. 201 and 226.

WTO-consistent manner, China is due the same presumption of good faith performance of its obligations under Article X:3(a) that is accorded all Members.<sup>7</sup>

## **II. AUCTIONS ARE NOT INCONSISTENT WITH ARTICLE VIII OF THE GATT 1994**

5. China now turns to the United States' closing remarks regarding Article VIII of the GATT 1994. The United States argues that the bid-winning price is a fee or charge imposed on or in connection with exportation and, therefore, is inconsistent with Article VIII.

6. The first interpretive question is whether the phrase "on or in connection with exportation" applies to a bid-winning price. In China's view, this phrase refers to fees or charges that have a *sufficiently proximate connection to exportation*, which is not the case for the bid-winning price. Through bidding, potential exporters obtain a right to export. However, at that stage, the bidder has not entered into a contract to export or even decided to export. The bidding process simply confers a right to undertake further steps that may lead to exportation; however, exportation may never occur. The bid-winning price is, therefore, insufficiently proximate to exportation to be imposed "on or in connection with exportation".

7. This is confirmed by China's evidence, which shows that the bid-winning fee does not reduce the volume, or increase the price, of exports.<sup>8</sup> China recalls that the evidence demonstrates that auctions are one of the least trade-distorting means of quota allocation. Auctions are, therefore, consistent with Article XIII:2 of the GATT 1994, which "stipulates a principle regarding the distribution of the tariff quota *in the least trade-distorting manner*".<sup>9</sup> Article VIII cannot be read in a manner that would prevent WTO Members from using one of the least trade-distorting quota allocation methods as it would run counter to Article XIII:2.

8. Moreover, 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.

## **III. CHINA'S DEFENSES UNDER ARTICLE XX OF THE GATT 1994**

9. China now turns to a few remarks on its defenses under Article XX. The Complainants seem to make an issue of the fact that China does not offer a defense for each export quota and export duty at issue. However, China has avoided bringing frivolous defenses. Instead, China pursues defenses that it considers are warranted by the law and the facts. In an effort to resolve this dispute promptly, China asks the Panel to consider these defenses carefully.

10. In its closing statement, Mexico recognized the right of all WTO Members to adopt environmental policies, but it stressed that these policies must be adjusted as necessary to meet WTO rules, and that WTO rules should not be adjusted to fit domestic policies. China fully agrees. Indeed, in the past decade, China has made very significant efforts to adjust its domestic policies to the needs of WTO rules.

11. In this dispute, although Mexico argues that domestic policy must be adjusted to meet WTO rules, the Complainants nonetheless accuse China of "manipulating" its conservation policy to meet

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<sup>7</sup> Appellate Body Report, *US – OCTG Sunset Reviews*, para. 173; Appellate Body Report, *US – Section 211 Appropriations Act*, para. 259; Appellate Body Report, *Chile – Alcoholic Beverages*, para. 74.

<sup>8</sup> Exhibit CHN-306: Expert Statement by Professor M. Olarreaga on *Export Quota Auctions as Optimal Allocation Mechanisms* (July 2010); see also Exhibit CHN-463: USDA, *Economic Analysis of TRQ Administrative Methods* (TB-1893).

<sup>9</sup> Appellate Body Report, *EC – Bananas III (21.5 – US)*, para. 338.

the WTO rules at issue in this dispute.<sup>10</sup> It is true that China's conservation policy continues to evolve. However, the changes in question were not made for purposes of this dispute. China's conservation policy was first introduced in 1986.<sup>11</sup> Like many other countries, it has adjusted its policy progressively, making it more stringent over time. This is not long-term "manipulation", but instead recognition that additional steps need to be taken.

12. On 31 December 2008, and thus before consultations in this dispute, China strengthened its conservation policy by adopting the *Mineral Resources Plan (2008-2015)*, which, *inter alia*, envisaged the imposition of extraction and production caps.<sup>12</sup> The introduction of extraction and production caps was not, therefore, fabricated for these disputes, but was part of a process of enhancing China's conservation policy. The fact that caps were introduced with effect from 1 January 2010 was, therefore, in implementation of a pre-existing policy, and was not fabrication.<sup>13</sup>

13. Contrary to the Complainants' suggestion, these are *not challenged measures* that must form part of the Panel's terms of reference. Instead, they are evidence in assessing China's defenses. The fact that some of these measures post-date the Panel's establishment does not preclude the Panel from taking them into account as evidence. China notes that, in *Brazil – Retreaded Tyres*, for example, the panel relied on evidence that came into existence during the panel proceedings for purposes of an Article XX(b) defense. The Appellate Body rejected the European Union's appeal that this evidence should have been rejected because of its timing. The Appellate Body confirmed that "[i]t is well settled that a panel may consider a piece of evidence that post-dates its establishment".<sup>14</sup>

14. In making its objective assessment, with a view to settling this dispute promptly, the Panel cannot ignore any fact before it, including evidence regarding the extraction and production caps on refractory bauxite and fluorspar.

#### **IV. THE LACK OF TEXTUAL BASIS FOR THE COMPLAINANTS' CLAIMS, UNDER ARTICLE XX(G) OF THE GATT 1994, TO A SHARE OF CHINA'S NATURAL RESOURCES**

15. China closes with some remarks on the Complainants' attempts to secure a share of China's natural resources – an issue that lies at the heart of this dispute. In its closing statement, the European Union complained that China wrongly states that the Complainants seek "equitable access" to, or an "equitable share" of, China's mineral resources. Instead, it says that it seeks "equitable treatment" by China.<sup>15</sup> China does not understand what the European Union means by "equitable treatment", as opposed to "equitable access" or an "equitable share".

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<sup>10</sup> US' closing statement of 23 November 2010, para. 19.

<sup>11</sup> See further China's first written submission, para. 167.

<sup>12</sup> Exhibit CHN-80: *Notice of the Ministry of Land and Resources on Promulgating and Implementing the National Mineral Resources Plan (2008-2015)*, Section IV (II).

<sup>13</sup> See Exhibit CHN-87: *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*; Exhibit CHN-97: *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*, Articles I and III(V); Exhibit CHN-98: *Circular on Passing Down the Controlling Quota of the 2010 Total Production Quantity of High-alumina Refractory-Grade Bauxite and Fluorspar*, Article VI. The caps are stated to apply for the entire year and have been so applied.

<sup>14</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 193.

<sup>15</sup> EU's closing statement of 23 November 2010, para. 23.

16. In any event, the European Union has argued that it does seek "equitable access" to China's natural resources. For example, in its second written submission, it stated that "Article XX(j) ... affirms the *principle of equitable access that is addressed by 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'*".<sup>16</sup>

17. China has already mentioned earlier today that the United States also asserts an entitlement to access to China's natural resources. It recalls that the Preamble to the *WTO Agreement* refers to:

" 'the world's resources' – as opposed to a particular Member's resources. The Preamble thus speaks to the shared need of all Members to have access to the trade in those resources."<sup>17</sup>

18. Thus, for the United States, this Preamble transforms each Member's own natural resources into shared resources belonging to all Members under a commodity-sharing agreement. It adds that a resource-endowed Member cannot "leverage its access to natural resources ... to the detriment of other Members' access".<sup>18</sup> The United States also said that Article XX(g) raises the "complex question ... as to whether the relative amounts [of a natural resource] made available to the domestic and foreign markets corresponded in an even-handed way to their *relative demands*", emphasizing that access is driven by "*demand*".<sup>19</sup>

19. To be clear, China and other WTO Members have not agreed, in acceding to the WTO, to grant the Complainants an equitable share of the natural resources located within their respective territories, much less have they granted the Complainants a share of those resources that is determined by the "demand" of the Complainants' domestic industries.

20. The text of Article XX(g) does not enshrine – to borrow the European Union's word – any "principle" of equitable access to natural resources derived from Article XX(j) or elsewhere. Article XX(j) establishes "the principle that all Members are entitled to an equitable share *of the international supply*" of products. This provision does *not* affirm an alleged principle of "an equitable share *of all supply*", including domestic and international supply – which is what the Complainants seek. Instead, the provision establishes that Members are entitled to "an equitable share" *of the portion of "supply" made available for "international" markets*. In this dispute, China offers all WTO Members an equitable and non-discriminatory share of the "*international supply*" of its natural resources.

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<sup>16</sup> EU's second written submission, para. 254 (emphasis added) (original underlining).

<sup>17</sup> US' opening statement of 22 November 2010, para. 70.

<sup>18</sup> US' opening statement of 22 November 2010, para. 72.

<sup>19</sup> US' opening statement of 22 November 2010, para. 93.



**ANNEX E**

**SUBMISSIONS OF THE THIRD PARTIES**

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## ANNEX E-1

### EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF ARGENTINA

#### I. INTRODUCTION

1. Argentina has expressed the wish to participate as a third party in these proceedings as this case concerns the interpretation of central provisions of the GATT 1994, in particular in relation to the use of export duties as a trade policy instrument. It also wishes to take a stand opposing the idea that the criteria applicable to this issue can be reinterpreted as a result of specific provisions in accession agreements. To allow more efficient use of the time available, this submission will focus on the use of export duties under WTO rules in the light of Articles I, II, VII, VIII, X and XI of the GATT 1994.

#### II. LEGAL ARGUMENTS

##### A. GENERAL PRINCIPLES CONCERNING EXPORT DUTIES

2. Much has been said and written about the nature and practice of export duties in the GATT acquis prior to the Uruguay Round. It should nevertheless be pointed out that Argentina, along with Bangladesh, Brazil, China, Cuba, Ecuador, Guatemala, India, Indonesia, Kenya, Malaysia, Paraguay, the Philippines and South Africa, clarified in document JOB(04)/110 that no mandate was received from the Ministers in Doha to include the issue of export taxes in the negotiating process.

3. In order to understand how most Members interpret the legitimacy of export duties, it should be borne in mind that this instrument does not even feature on the Doha Round agenda. Furthermore, the proposals tabled by Switzerland and Japan for the inclusion of an analysis of such duties after the negotiating groups on both agriculture and NAMA were established were rejected.

4. On the other hand, in document JOB(04)/110, the above-mentioned countries confirmed that export taxes are essential policy instruments and that nine out of ten Members applying these instruments are developing countries, for the following reasons:

- *"First, because export duties constitute an important and reliable source of revenue. It is also an instrument which can easily be invoked and administered;*
- *second, to reduce dependence on the export of commodities which are subject to volatile price fluctuations that have a direct impact on the income and livelihood of farmers and rural population. Also, it helps to promote downstream processing industries in a context of tariff escalation applied by major importing countries; and*
- *third, for food security reasons, to prevent shortages of primary products and to address unfair redistribution of rents in cases of exchange rate distortions".*

##### B. EXPORT DUTIES AS A MEASURE LEGITIMIZED UNDER WTO RULES

5. It should be noted that, as a general principle, a ban on prohibitions and quantitative restrictions on exports has been imposed within the GATT/WTO legal order, more specifically in Article XI:1 of the GATT 1994, the text of which expressly refers to quantitative restrictions. A *contrario sensu*, Article XI:1 does not establish any specifications with regard to export duties. It can

therefore be concluded that this provision is based on the view that border customs duties (tariffs) are more transparent, predictable and less trade-distorting trade measures than quantitative restrictions on imports or exports. Having regard to the above, the GATT contains Articles which specifically refer to export duties. It follows that the duties applied by developing countries to their exports are expressly permitted under WTO rules. The GATT 1994 Articles which specifically refer to the use of such export tariffs are as follows:

- Article I, which explicitly provides that the MFN principle is applicable to export duties (*"Article I: General Most-Favoured-Nation Treatment. 1. **With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation**, or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III\*, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties"*).
- Article VII, which sets out the general principles governing customs valuation (*"Article VII: Valuation for Customs Purposes. 1. **The contracting parties recognize the validity of the general principles of valuation set forth in the following paragraphs of this Article, and they undertake to give effect to such principles, in respect of all products subject to duties or other charges\* or restrictions on importation and exportation** based upon or regulated in any manner by value. Moreover, they shall, upon a request by another contracting party review the operation of any of their laws or regulations relating to value for customs purposes in the light of these principles. The CONTRACTING PARTIES may request from contracting parties reports on steps taken by them in pursuance of the provisions of this Article"*).
- Article VIII on "Fees and Formalities connected with Importation and Exportation", which specifically excludes export duties from these obligations by stating that: *"1.(a) 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"*.
- Paragraph 1 of Article X ("Publication and Administration of Trade Regulations") of the GATT 1994, which states that: *"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 or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them"*.

- Article XI, which excludes in principle export duties from the obligation referred to in its title "*General Elimination of Quantitative Restrictions*" by stating: "*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*". An *a contrario* reading of the rule in question supports the inference that export customs duties are legitimized by the text of the multilateral legal rules.

6. The unequivocal legality and legitimacy of export duties in the GATT/WTO acquis is clear from the above transcription of GATT Articles; such duties would otherwise not be repeatedly referred to in the GATT rules. Attention should be drawn in this regard to the fact that no Panel has ever felt the need to clarify this issue.

#### C. EXPORT DUTIES ARE NOT REQUIRED TO BE BOUND

7. Unlike for import duties, there is no obligation under WTO rules to bind the maximum level of export tariffs in schedules of concessions. Nor are there any restrictions with regard to their method of application, as exist in Article 4.2 of the Agreement on Agriculture for duties on imports of agricultural products.

8. In view of the above, export duties are not bound in schedules of concessions as there is no provision in the GATT 1994 for such binding, nor are there any restrictions concerning the way in which these duties are to be applied.

9. It should be noted that certain Members which have acceded to the WTO in recent years have been required to undertake, under what are known as "WTO-plus" considerations, obligations in relation to export duties which would be at variance with the above with regard to the legality of this trade policy instrument in the light of the WTO rules applicable to pre-existing Members. This tendency to require that candidates for accession undertake obligations additional to those contained in the General Agreement and/or in the covered Agreements distorts the very nature of the Agreement by denying new Members rights enjoyed by the original Members. To avoid misleading interpretations, the Protocol on the Accession of Ukraine had to clarify that the commitment by this country to reduce its export duties did not constitute a reinterpretation of the GATT 1994, nor affect "*the rights and obligations of other Members in respect of provisions on the application of export duties, that are measures in accordance with GATT 1994*".

### III. CONCLUSION

10. In view of the foregoing, Argentina considers that, given that export duties are legitimate trade policy instruments under WTO rules, any attempt to reinterpret the use or application of such duties which undermines or restricts these rules would be not only detrimental to developing countries, but also GATT-inconsistent and incompatible with the objectives of the multilateral trading system.

## ANNEX E-2

### EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF BRAZIL AT THE FIRST SUBSTANTIVE MEETING

1. Brazil considers that the issues under the Panel's analysis are of significant systemic relevance to the interpretation of key provisions of the GATT 1994 and therefore wishes to contribute with the Panel in its task of objectively assessing the claims brought before it.
2. The first issue Brazil wishes to address in its oral statement regards the interpretation of the requirements of Article XI:2(a) of the GATT 1994, invoked by China in its first written submission as a justification for the imposition of exports quotas on refractory-grade bauxite<sup>1</sup>. Article XI:2(a) contains four requirements that must be met in order for a measure that prohibits or restricts the exportation of "other products" to fall under its discipline: a) the measure must be temporarily applied; b) the measure's objective must be to prevent or relieve a shortage of products in the exporting Member; c) this shortage (or the threat thereof) must be critical and d) the product must be essential to the exporting Member.
3. Regarding the first of these requirements, the definition of the term "temporarily applied" is essential to assess the conformity of measures justified under Article XI:2(a). China argues that a measure applied pursuant to this provision could be in force for very long periods of time, without any foreseeable date of expiry. This interpretation of the term "temporarily", however, does not seem to be accurate, specially when analyzed in the context of the other requirements of Article XI:2(a). The textual meaning of the adjective "temporary", from which the adverb temporarily is derived, seems to imply that a temporary measure must either have a time-limit for its application or address a passing need, whose termination is foreseeable in some point in the future.
4. Even though a measure applied under Article XI:2(a) may not have a pre-established date of expiry, because it may address critical shortages whose moment of termination is uncertain, in order for a measure to "last or be meant to last for a limited time only", it must either have an expiry date (in which case it would clearly "last for a limited time only") or have as its purpose the prevention or the relief of a need whose existence is limited in time (in which case it would be "meant to last for a limited time only"). In this last case, the very design and structure of the measure would indicate that its imposition addresses a need that will, in the foreseeable future, cease to exist.
5. On the other hand, if a measure allegedly taken under Article XI:2(a) addresses a permanent need, i.e., a need that would not cease to exist in the foreseeable future, its design and structure would indicate that it is not "meant to last for a limited time only", since the need (in this case, a "critical shortage") cannot be "prevented" or "relieved". Therefore, a shortage of exhaustible natural resources whose reserves are already known to last for a limited period of time cannot be dealt with by measures "temporarily applied". These measures would apply indefinitely, for the shortage of products could not be overcome in the foreseeable future, but only managed over time.
6. Article XI:2(a) cannot be read as a repetition of Article XX(g). While Article XX(g) disciplines long-term conservational policies, Article XI:2(a) seems to relate to temporary crises of supply. In view of this interpretation of Article XI:2(a), the Panel should ascertain if the Chinese export quota applied on refractory-grade bauxite is intended to deal with a temporary supply crisis, or

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<sup>1</sup> See China's first written submission, Section C.

if its structure and design indicate that the measure falls into the category of a long-term conservational policy, better fit for justification under Article XX(g) of the GATT 1994.

7. The second issue Brazil wishes to address in its oral statement pertains to the proper interpretation of Article XX(g), evoked by China in its first written submission to justify the exports duties applied to fluorspar<sup>2</sup> and the export quota applied to refractory-grade bauxite<sup>3</sup>. The Appellate Body Report in *US – Shrimp* established a three-tier test to verify if a measure can be provisionally justified under Article XX(g) of the GATT 1994. First, it must be assessed whether the measure is concerned with "exhaustible natural resources". Second, the measure must be "related to" the conservation of the relevant exhaustible natural resources, implying that the existence of a "genuine relationship of ends and means"<sup>4</sup> between the measure and its objectives is required. Third, it must be established whether the measure is "made effective in conjunction with restrictions on domestic production or consumption". In Brazil's view, the last two requirements of this three-tier test are of particular relevance to the present dispute and, therefore, deserve further consideration.

8. Regarding the second aspect of this test, due notice should be given to the fact that both the domestic and the international restrictions must be "related to" the conservation of exhaustible natural resources. In order to be considered as being conjointly made effective, the domestic and the international restrictions should also have a conservational objective. In the *US – Gasoline* dispute, the Appellate Body also concluded that the second part of paragraph (g) of Article XX of the GATT 1994 "is a requirement of *evenhandedness* in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources<sup>5</sup>". The Appellate Body did not elaborate further on the concept of *evenhandedness*, but it did affirm that there was "no textual basis for requiring identical treatment of domestic and imported products."<sup>6</sup> This requirement might be satisfied with the joint imposition of domestic and international restrictions on production or consumption and trade, aimed at the conservation of exhaustible natural resources, *provided that* both the domestic and the international measures were actually related to the conservation of exhaustible natural resources.

9. The last requirement of Article XX(g) seems to allow for a country to exploit its resources pursuant to its own environmental and developmental policies. Nothing in the WTO Agreements seems to impose the shared use of the world's natural resources as an obligation to Members. Therefore, the right of Members to consider their own developmental needs in the use of their resources is endorsed by WTO law, in a manner consistent with the principle of Permanent Sovereignty over Natural Resources, but without prejudice to the obligation of a Member claiming justification of a measure under Article XX(g) to demonstrate its full compliance with the requirements contained therein, including its chapeau. These requirements ensure that conservational measures adopted pursuant to Article XX(g) relate to a legitimate conservational policy objective; that they do not target exclusively foreign suppliers or consumers; and that they do not constitute a protectionist restriction.

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<sup>2</sup> See China's first written submission, Section B.

<sup>3</sup> See China's first written submission, Section D.

<sup>4</sup> *US – Shrimp* (Appellate Body Report, para. 136)

<sup>5</sup> *US – Gasoline* (Appellate Body Report, page 21)

<sup>6</sup> *US – Gasoline* (Appellate Body Report, page 21)

## ANNEX E-3

### EXECUTIVE SUMMARY OF WRITTEN SUBMISSION AND ORAL STATEMENT OF CANADA

#### I. INTRODUCTION

1. Canada is concerned about the issues involved in this case both as an exporter of raw materials whose companies are engaged in raw material extraction throughout the world, and as a producer of products – notably steel and aluminium – that use the raw materials at issue as inputs.

#### II. EXPORT DUTIES

2. Members are free under the *General Agreement on Tariffs and Trade* ("GATT") to impose export duties unless they negotiate away that right in some other Agreement. If a WTO Member does commit in another Agreement not to impose export duties, then any exceptions to that commitment are governed by that other Agreement.

3. China committed itself in paragraph 11.3 of its Accession Protocol to eliminate export duties on all products except those listed in Annex 6 and even for those listed products to limit the amount of export duties to specified amounts. China's commitment under paragraph 11.3 is not subject to the exceptions in the *GATT* (or elsewhere in the *WTO Agreement*) because there is no language explicitly incorporating Article XX of the *GATT* or language similar to the introductory phrase of paragraph 5.1 of the Accession Protocol.

#### III. NON-FINANCIAL RESTRICTIONS ON EXPORT (QUOTAS, LICENCES AND MINIMUM PRICES)

4. Exports can be limited quantitatively through quotas or by limiting those who are permitted to export through (non-automatic) licensing. China's export quotas on bauxite, coke, fluorspar, silicon carbide and zinc are contrary to Article X:1 of the *GATT*. So is China's related discretionary, non-automatic licensing system, which operates to create additional restrictions independent of the prohibited quotas.

5. Article XI:1 applies to "other measures" that restrict exports. The phrase "other measures" covers minimum export prices because restrictions on exports below certain prices impose economic hardship caused by decreased supplies and increases in prices. Thus, minimum export prices violate Article XI:1 of the *GATT*.

6. China does not satisfy the requirements to defend its measures under Article XI:2(a) of the *GATT*, which permits export restrictions "temporarily applied" to prevent critical shortages. The requirement of temporary application cannot be met through permanent measures that are regularly reviewed. Measures reviewed regularly but imposed indefinitely, as Canada understands the Chinese measures at issues are, are not applied for a fixed time. Further, limited state practice does not meet the requirements of the *Vienna Convention on the Law of Treaties* and is irrelevant for an interpretation of *GATT* Article XI:2(a).

7. Article XX(b) allows a defence to a breach of a provision of the *GATT* where the measure is "necessary to protect human, animal or plant life or health." The export restrictions do not protect human, animal or plant life or health. The evidence is that China imposes the export restrictions

because it wants to ensure that its producers that use those raw materials as inputs are advantaged. There are alternative measures that could be adopted to more effectively address life and health concerns – from stricter health, safety and environmental legislation, to putting more resources into enforcing existing legislation, to providing greater infrastructure and institutional support to deal with environmental and health concerns created by extractive industries.

8. Article XX(g) allows a defence to a breach of a provision of the *GATT* where the measures are "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption." China has not demonstrated even-handedness in the application of its measures. The export restrictions limit the amount of the raw materials in question that foreign users may access, but reveal no similar restriction on domestic users – to the contrary, the effect of export restrictions is to increase domestic consumption.

9. China's evidence of some limitations on domestic production does not serve to demonstrate even-handedness. The production limitations have been imposed after the export restrictions were put in place. Further, a limitation on production affects both foreign and domestic users and is therefore no evidence of a measure affecting only domestic users that could balance the effect of the export restriction that affects only foreign users.

10. China has not met the requirements of the *chapeau* of Article XX, notably because the export restrictions discriminate between domestic and foreign users of the raw materials in question. Also, the facts show that the effect of the export restrictions is to favour domestic users of the raw materials in question and this is a "disguised restriction" within the meaning of the *chapeau*.

#### **IV. OTHER CHARGES IMPOSED ON OR IN CONNECTION WITH EXPORTATION**

11. There are no "holes" that permit a WTO Member to impose charges without constraint except for charges explicitly permitted by the *GATT* (notably export duties). Amounts paid (through a bidding process or otherwise) to obtain the right to export products are either export duties or charges imposed "on or in connection with" exportation covered by *GATT* Article VIII:1(a). China has agreed to limitations on its ability to impose export duties in its Accession Protocol. As a result, whether a bid-winning price is an export duty or falls under *GATT* Article VIII:1(a), it is not consistent with China's WTO obligations.

#### **V. TRANSPARENCY**

12. Transparency, predictability and consistency in the application of trade regulations and procedures are essential to the operation of the world trading system. Without open and predictable procedures, traders cannot operate effectively and competitively. Changing or uncertain requirements also make effective business operations impossible. Violations of Article X of the *GATT* should not be treated as subsidiary considerations to other substantive provisions of the *GATT*.

## ANNEX E-4

### THIRD PARTY SUBMISSION OF CHILE\*

1. Mr Chairman, distinguished members of the Panel, the delegation of Chile, as a third party to this dispute, welcomes the opportunity to present its views on some of the elements involved.
2. This dispute calls for the assessment of systemic matters of the utmost importance. The interpretation that is made with respect to the use of export restrictions should tend towards the reaffirmation of principles and obligations that are essential to the multilateral trading system.
3. Chile has noted with concern the increased use of this type of instrument. We agree with the analysis made by both the WTO and the OECD as regards the distorting effects of such measures on international trade. We attach particular importance to the analyses indicating that when differential export duties are applied to goods belonging to the same production chain, this generates subsidies on the final product exported, thereby distorting the competitive terms of international trade. Chile has suffered and continues to suffer from the effects of measures of this kind.
4. Although it would appear that there are no multilateral disciplines regulating export duties, this by no means implies that such measures are being applied with the unrestricted consent of the interested party, as though endowed with legitimacy in all circumstances and hence free from the scrutiny of the multilateral system.
5. The express limitations to the application of export duties contained in China's Accession Protocol constitutes evidence, in our view, that Members intended that such application should be subject to certain restrictions and limitations. There is an implicit recognition that export duties must be subjected to certain rules in order to preserve the rights of WTO Members.
6. As regards export restrictions disciplined by Article XI of the GATT 1994, which also form part of the subject matter of this dispute, we think that a correct interpretation is in order. In particular, it is essential that we reaffirm the general proscription against instituting or maintaining export prohibitions and restrictions and are clear on the coverage of the exception contained in Article XI:2(a).
7. Considering that much of China's defence is based on the exceptions contained in Article XX(b) and (g) of the GATT 1994, my delegation thinks that the Panel should be very cautious in examining the appropriateness of the requirements and standards contained in those subparagraphs as well as in the chapeau of that Article. It is up to China to provide evidence that the adoption of the challenged measures was justified by the corresponding provisions. If we look at the defence based on subparagraph (g), for example, evidence of the application of restrictions on domestic production or consumption in conjunction with restrictions on exports must flow unequivocally from the background information provided by the party invoking that exception.
8. Finally, regarding China's claim that some of the challenged measures are outside the terms of reference of the Panel because they have been repealed, my delegation would like to recall that the Appellate Body, in the second recourse by Ecuador to Article 21.5 of the DSU in the dispute *European Communities - Bananas III*, pointed out that "once a Panel has been established and the terms of reference for the Panel have been set, the Panel has the competence to make findings with

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\* Original Spanish.



respect to the measures covered by its terms of reference." In this case, owing to the nature of the complaints, and in order to ensure security and predictability, we think that findings should be made with respect to these repealed measures.

Once again, thank you very much for providing us with this opportunity.

## ANNEX E-5

### EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF COLOMBIA

#### I. INTRODUCTION

1. Colombia is intervening in this case because of its systemic interest in the proper interpretation of several provisions: (i) the scope and coverage of China's commitments before the WTO; (ii) the legal standard of review and interpretation of Article XI:1; and (iii) the interpretation of the exceptions under Article XI: 2(a) and Article XX (g) of the GATT 1994.

#### II. CHINA'S COMMITMENTS BEFORE THE WTO

2. The complainants claim that export duties and export quotas are inconsistent with China's obligations under *the Protocol on the Accession of the People's Republic of China* ("the Accession Protocol") and *the Report of the Working Party* ("the Working Party Report").

3. In interpreting the legal status of the Accession Protocol and the Working Party Report, the Panel in *China – Auto Parts*<sup>1</sup> stated: "[t]he Accession Protocol is an integral part of the WTO Agreement (...). In turn, paragraph 342 of China's Working Party Report incorporates China's commitments under its Working Party Report, (...) into the Accession Protocol". These measures are enforceable under the dispute settlement procedure of the WTO.

4. First, regarding the export duties measures, the Parties agree that China applies such measures on various raw materials. The complainants have presented their claims in respect of the export duties under the Accession Protocol and the Working Party Report. In response, China claims that such measures are justified under Articles XX (b) and (g) of the GATT 1994.

5. Based on WTO jurisprudence relative to the Panel's order of analysis<sup>2</sup>, Colombia considers that the Panel should begin its analysis with the complainant's claims under Paragraph 11.3 of the Accession Protocol with respect to export duties.

6. Pursuant to Paragraph 11.3 of the Accession Protocol, Colombia considers that China may apply export duties, if the following criteria are met: (i) that the product is listed in Annex 6; (ii) that the applied export duty does not exceed the tariff level established in Annex 6; and (iii) if the applied export duty exceeds the tariff level established in Annex 6, such an increase must be due to exceptional circumstances. If after the foregoing analysis, it is concluded that the export duties are inconsistent with WTO law, the Panel should consider China's defense pursuant to Articles XX (b) and (g) of the GATT 1994.

7. Second, concerning the export quota measures, while the complainants argue that export quotas applied by China are inconsistent with China's obligations provided in Paragraphs 162 and 165 of the Working Party Report, China requests to exercise judicial economy. According to the order of analysis mentioned *supra*, the Panel should begin its assessment with China's obligations under Paragraphs 162 y 165 of the Working Party Report.

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<sup>1</sup> Panel Report, *China – Auto Parts*, para. 7.740.

<sup>2</sup> Panel Report, *India – Quantitative Restrictions*, para. 5.124.

8. From the joint reading of Paragraphs 162 y 165 of the Working Party Report, it appears that China committed to the following: (i) to only use restrictions when justified under the GATT 1994; and (ii) to eliminate all trade restrictions at the moment of its accession to the WTO, unless that such restrictions could be justified on the basis of the WTO Agreement or the Accession Protocol. If it is determined that the application of export quotas does not comply with the parameters mentioned *supra*, the Panel may conclude that this measure is contrary to China's WTO obligations. If that is the case, the Panel should examine China's defense under Articles XI:2(a) and XX(b) and (g) of the GATT 1994.

### **III. STANDARD OF APPLICATION OF ARTICLE XI: 1 OF GATT 1994**

9. According to GATT and WTO jurisprudence, Colombia submits that in order to determine if a particular measure is a *restriction* on imports, exports or sale for export of any product destined for the territory of any other Member, it is necessary to conclude that such measure limits the possibilities that a merchant has in order to undertake its trading enterprises. Thus, the measure would be a restriction if it: creates uncertainties or adversely affects the investment plans of the merchant; creates prohibitive costs for the merchant to engage in its trading activities; or has an effect on the competitive position of the merchant as to limit its possibilities to import or export any good. It is important to clarify that this assessment should be undertaken in light of the facts of the case and not in an abstract manner, since it is only from the analysis of the measure at issue that it could be concluded whether such measure could be deemed a *restriction*.

10. Following the considerations above, Colombia respectfully requests the Panel to take the opportunity to systematize the criteria for the assessment of whether a measure is a *restriction* under Article XI:1 of the GATT 1994, and that for such a task it takes into account certain aspects outlined in this submission.

### **IV. EXPORT LICENCES**

11. The complainants allege that the Chinese export licensing system (ELS) is inconsistent with Article XI: 1 of the GATT. Colombia believes that the Panel should examine whether the measure adopted by China, allegedly "discretionary and non automatic" according to the complainants, or "automatic" according to China, represents a restriction under the scope of Article XI: 1. In this context, it is relevant to assess the ELS based on the design of the measure at issue.

12. When analyzing if the ELS imposed by China is automatic, non automatic or discretionary, the Panel shall establish up to which point the proceedings for licensing are clear and unambiguous in its terms, despite the allegation advanced by the complainants that the measures have non defined terms, uncertain legal wording, and is discretionary on its face. In Colombia's opinion, the Panel should assess whether these terms defined by the Chinese regulation, offer an extremely broad interpretation that does not grant predictability for exporters regarding the future action of the system's manager.

13. On the other hand, if the Panel finds that this system is not automatic, it is relevant for Colombia that the Panel clarifies whether the fact of it been non automatic renders this system an export restriction. Colombia deems relevant for the Panel to clarify the implications of a non-automatic and discretionary system in light of the Members' obligations.

## V. EXCEPTIONS CLAIMED BY CHINA

14. Pursuant to Article XI:2 (a) and Article XX (g) of the GATT 1994, China holds that the export duties and export quotas measures are consistent with its WTO obligations.

15. In first place, China argues that the export quotas are justified under Article XI:2 (a) of the GATT 1994. This provision establishes that the compliance with the rules of Article XI:1 can be temporarily exempted *inter alia* in order to prevent or relieve critical shortages of either: (i) foodstuffs; or (ii) *other products essential* to the exporting Member. As China points out, as of today there has not been any report, under the GATT or the WTO, dealing with the scope and definition of the term *other products essential* to the exporting Member.

16. As with respect to Article XI: 1 of the GATT 1994, Colombia respectfully request the Panel to include in its report an interpretive standard that sheds light upon the scope of application and requirements for a measure to fall under Article XI: 2 (a) of the GATT 1994.

17. With respect to Article XX (g) of the GATT 1994, according to WTO jurisprudence<sup>3</sup>, the Panel should: (i) determine if the nine (9) raw materials can be included under the category of "exhaustible natural resources"; (ii) examine the relation that exists between the general structure and design of the measures at issue, and the policy goals sought by China, *i.e.* the conservation of those resources; and (iii) identify if the export restrictions are made effective in conjunction with restrictions on domestic production or consumption.

18. If the Panel finds that the restrictions to the exportations imposed by China fall within the purview of Article XX (g) of the GATT 1994, it should conduct an analysis of those restrictions under the chapeau of Article XX of the GATT 1994. In that sense, as established by the Appellate Body<sup>4</sup>, the Panel should examine: (i) if the restrictions to the exportation imposed by China constitute an "arbitrary" measure; (ii) if the restrictions to the exportation imposed by China are a justifiable measure; and (iii) if the restrictions to the exportation impose by China constitute a disguised restriction to international trade.

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<sup>3</sup> Appellate Body Report, *US – Shrimp*, paras. 125-145.

<sup>4</sup> Appellate Body Report, *US – Shrimp*, para. 150.

## **ANNEX E-6**

### **ORAL STATEMENT OF ECUADOR AT THE FIRST SUBSTANTIVE MEETING**

1. Ecuador wishes to thank the Panel for giving us the opportunity to present our views and opinions in this third party session. We have both systemic and legal concerns over the result of this Panel.

2. We would like to touch upon briefly over two issues: (1) The interpretation of article XI of GATT 1994 and (2) The general exception contained in paragraph (g) of article XX of GATT 1994.

#### **I. THE INTERPRETATION OF ARTICLE XI OF GATT 1994.-**

3. For Ecuador is crystal clear that article XI of GATT 1994 does not forbid the application of any form of export taxes, duties or other charges, and there is no commitment or agreement that force to bind them. As it was pointed out by Argentina in its first third party submission, export taxes are important instruments of developmental policy for an important group of developing countries. In the last "World Trade Report 2010: Trade in Natural Resources", Box 19, pages 127 and 128, the WTO has a very illustrative title for that Box that I quote: "Export taxes as tool to address resource volatility, dominance and tariff escalation problems" end of the quote.

4. It is not our intention to begin a debate on economic policy in a mainly legal procedure as this one, but we would only recall another conclusion of the Report over this issue and I quote: "Three motives justify the use of an export tax in these circumstances. First, it softens the impact of rapidly rising world prices in the domestic market (recall that the impact of an export tax is to lower domestic prices) thus protecting local consumers. Second, it increases government revenue, thus easing fiscal imbalances. Third, it taxes windfall gains of exporters, thus promoting a fairer distribution of income" end of the quote.

5. These brief reflections extracted from the Report on which we totally agree, demonstrates how important export taxes are for some developing countries policies, either as tools to promote infant industries, to manage instability of commodity prices or to reduce the impact of tariff escalation applied by develop countries in detriment of developing countries that heavily depend on unprocessed primary commodities, among others. We are sure that the drafters of article XI.1 took into consideration these factors and therefore kindly request that the Panel reaffirms this conclusion.

#### **II. THE GENERAL EXCEPTION CONTAINED IN PARAGRAPH (G) OF ARTICLE XX OF GATT 1994.**

6. Literal (g) of article XX of the GATT 1994 refers to the conservation of exhaustible natural resources. This is a major issue and concern for developing countries like my own and as explained broadly in the third party submission by the Kingdom of Saudi Arabia, that Ecuador fully supports, this exception involves the right of countries to manage their natural resources according to their sovereign present and future developmental requirements, recognized in several International Conventions and Declarations well covered by the Kingdom of Saudi Arabia submission. Ecuador would also like to recall that the Law of the Sea recognises those rights.

7. Regarding the chapeau of article XX, the Panel should find the right balance in interpreting the exception of literal (g) through past precedents of the Appellate Body and the needs of Members

to resort to alternatives that will not endangered their developmental aims, particularly of developing countries.

8. Finally, Ecuador would like to recall that yet once again this dispute involves commitments that certain Members that joined the WTO after the establishment of this organization were force to undertake, as is the case of China and Ecuador. What keeps on surprising us is that those commitments written in our Accession Protocols go beyond the obligations that we have to respect in multilateral and even in plurilateral agreements of the WTO, commitments that the Members who participated in the Uruguay Round have no obligation to comply with.

9. This situation has created an unequal set of obligations for two groups of Members of the WTO. One group that has to comply with their Accession Protocols commitments and the agreements of the WTO and the second one, that has a clear set of obligations only written in the agreements of the WTO and nothing beyond that, while at the same time enjoy a blank check to complain over commitments that they were not oblige to undertake. It's a very unfair situation to describe it in a simple way.

10. We thank again the Members of the Panel for giving us the opportunity to deliver this statement and respectfully request to take into consideration Ecuador's opinions over this dispute.

## ANNEX E-7

### ORAL STATEMENT OF INDIA AT THE FIRST SUBSTANTIVE MEETING

#### I. INTRODUCTION

1. Mr Chairman and distinguished members of the panel. At the outset India would like to thank the panel for giving this opportunity to present its views relating to this dispute in the third party session. The issues brought out in the dispute by the complainants are very significant and raise the issues of restrictions on the exports of raw materials. The issues have systemic importance in as much as these raise the questions of availability of raw materials by industries world over in a fair and GATT/WTO compliant manner. India attaches importance to these issues as we are ourselves producers and exporters of basic minerals as well as we have a large and diverse industry base where these important raw materials are used. Therefore, we have significant interest in ensuring a fair play in the global trade of raw materials which must be in accordance with the rules framed under GATT/WTO.

2. China applies export restrictions on the raw materials in the form of (a) export quotas (b) export duties, (c) export licences and (d) minimum export price requirements through various legislations cited by the complainants. The nine industrial raw materials which have been subjected to the various export restraints imposed by China are– bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus and zinc. These are important raw materials or minerals of critical importance to the downstream industries. These restrictions, when imposed in a manner which is either not consistent with the Article VIII, Article X, Article XI and Article XX of GATT or as per China's commitments under the Protocol of Accession, distort competition by increasing global prices and thereby putting to disadvantage the users of such industrial raw materials. Downstream industries in China therefore have access to cheaper materials than their competitors outside China.

#### A. EXPORT DUTIES

3. China subjects certain raw materials with export duty rates, such as "temporary" export duty rates and/or "special" export duty rates of various magnitude. More specifically China maintains export duty on bauxite, coke, fluorspar, magnesium, manganese, silicon metal and zinc. As per the commitments under Section 11.3, Part I of the Accession Protocol, China is required to eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of the Accession Protocol or applied in conformity with the provisions of Article VIII of the GATT, 1994. These products do not figure in Annex 6 of the Protocol of Accession. Export duties imposed by China on these raw materials cannot be covered under Article VIII of the GATT, 1994 as the financial obligations that China puts on exports are not the kind of fees and charges covered by the said Article.

4. China argues that its export duty with respect to fluorspar is justified under Article XX (g) of the GATT, 1994 and with respect to coke, manganese, magnesium and zinc under Article XX (b) of the GATT, 1994. The general exceptions mentioned under Article XX can be invoked only upon fulfillment of conditions laid down in the chapeau of this Article. The chapeau specifies that such measures are not to be applied in a manner which would, inter-alia, constitute a disguised restrictions on international trade. China has to demonstrate having met this standard in case it claims to maintain the export restrictions under these general exceptions.

**B. EXPORT QUOTA**

5. China restricts the exportation of various forms of bauxite, coke, fluorspar, silicon carbide and zinc by subjecting the exportation of these materials to export quotas or prohibition. This constitutes a violation of Article XI of GATT, 1994 which provides that no prohibition 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 on importation or exportation of any product. China justifies its measure in light of Article XI 2(a) and Article XX (g) of the GATT, 1994 in respect of refractory grade bauxite. Article XI 2(a), according to China, excludes the operation of Article XI (1) where export prohibitions or restrictions are temporarily applied to prevent or relieve critical shortage of foodstuffs or other products essential to the exporting party. Article XX (g) of the GATT, 1994 permits restrictions or prohibition for conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. China has not justified the temporary nature of the measure as well as its application for a limited period.

6. China justifies quota restrictions under Article XX (b) of GATT, 1994 on general exception in respect of rest of the products in question. This Article allows exception from the provisions of GATT, where the measure is necessary to protect human, animal or plant life or health. The measures of China do not appear to address the objective of protecting human, animal or plant life or health.

**C. ADMINISTRATION OF QUOTA AND LICENCES**

7. China imposes and administers its measures in a manner that is not uniform, impartial, and reasonable. Further, it imposes excessive fees and formalities on exportation, and does not publish certain measures pertaining to requirements, restrictions, or prohibitions on exports. China administers the export quotas imposed on bauxite, coke, fluorspar, silicon carbide, and zinc, through its ministries and other organizations under the State Council as well as chambers of commerce and industry associations, in a manner that restricts exports and is not uniform, impartial and reasonable. In connection with the administration of the quotas for these materials, China imposes restrictions on the right of Chinese enterprises as well as foreign enterprises and individuals to export. Therefore, these measures are not consistent with China's obligation under Article X.3 of GATT.

8. 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, as an additional restraint on the exportation of those materials.

9. India, therefore, considers that these measures are inconsistent with Article VIII: 1(a) and VIII: 4, X.1 and X.3(a) of GATT, 1994.

**II. CONCLUSION**

10. India takes this opportunity to request the panel to recommend that China brings its measures in conformity with the provisions of GATT 1994 and its Accession Protocol in accordance with Article 19.1 of the DSU.



## ANNEX E-8

### EXECUTIVE SUMMARY OF WRITTEN SUBMISSION AND ORAL STATEMENT OF JAPAN

1. **Introduction of the written submission:** In the written submission, Japan presents its views on (1) whether Article XX of the GATT can be invoked with respect to violations of paragraph 11.3 of Part I of China's Accession Protocol ("*Protocol*"); (2) whether China has demonstrated that Article XX(g) or XX(b) of the GATT would justify any violations of its World Trade Organization ("WTO") obligations; and (3) whether the "total award price" requirement is contrary to Article VIII:1(a) of GATT and/or paragraph 11.3 of Part I of the *Protocol*.
2. **The applicability of Article XX of the GATT to violations of paragraph 11.3 of Part I of Protocol:** Japan considers that Article XX, stating that "nothing in this Agreement shall be construed to prevent the adoption or enforcement", applies to measures which contravene provisions of the GATT. However, as recognized by the Appellate Body, the introductory phrase under paragraph 5.1 of Part I of the *Protocol* authorized recourse to Article XX.<sup>1</sup> Paragraph 11.3 of Part I of the *Protocol* does not contain such language and the working party report does not indicate that export duties may be authorized by recourse to Article XX.<sup>2</sup> Japan strongly doubts that China may rely on Article XX to justify violations of commitments contained in paragraph 11.3 of Part I of the *Protocol*.
3. If the Panel, however, were to find that Article XX is available as a defense to a violation of paragraph 11.3, Japan submits that the Article XX defense put forward by China may not be found justifiable.
4. **Article XX(g) of the GATT:** Article XX(g) requires that the measure must be concerned with "the conservation of exhaustible natural resources", must "relat[e] to" a conservation goal and must have been "made effective in conjunction with restrictions on domestic production or consumption". With respect to "relat[e] to", a measure must exhibit a "substantial relationship" to the conservationist goal pursued.<sup>3</sup> The key element of the "relating to" test is whether the means are "reasonably related to the ends"<sup>4</sup> and "*close and genuine relationship of means and ends*"<sup>5</sup> is required. Regarding the "in conjunction with", it *does* require that at least some "even-handed" domestic production or consumption restrictions be in place.<sup>6</sup> In terms of context, Article XX(g) *as a whole* requires that any trade-restrictive measures be "made effective in conjunction with restrictions on domestic production or consumption" for the purported objectives. As such, "even-handed" domestic measures may not be such as to effectively undermine the purported objectives and it must contribute to such objectives.
5. Concerning the *chapeau*, China, as the party invoking GATT Article XX, bears the burden of proof in demonstrating that the measures are not applied in a manner which would (i) "constitute a

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<sup>1</sup> See Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 223, 228 and 230.

<sup>2</sup> See Report of the Working Party on the Accession of China, WT/ACC/CHN /49 (1 October 2001), paras. 155-156.

<sup>3</sup> Appellate Body Report, *US – Gasoline*, p. 19 (emphasis added).

<sup>4</sup> Appellate Body Report, *US – Shrimp*, paras. 137, 140-141.

<sup>5</sup> Appellate Body Report, *US – Shrimp*, para. 136.

<sup>6</sup> Cf. GATT Panel Report, *US – Tuna I* where the Panel relied, among other things, on the fact "that the United States representative had provided no evidence that domestic consumption of tuna and tuna products had been restricted in the United States". *US – Tuna I*, para. 4.11.

means of arbitrary or unjustifiable discrimination " or (ii) be "a disguised restriction on international trade".<sup>7</sup>

6. In Japan's view, export quota on refractory grade bauxite can be considered as relating to the conservation of products subject to production restrictions *if* the export quota are set at a level equal to domestic production restrictions. Japan is of the view that the Panel has to take a close look at whether there are "even-handed" domestic duties or equivalent measures in place.

7. **Article XX(b) of the GATT:** China invokes Article XX(b)<sup>8</sup> in relation to a violation of Paragraph 11.3 of Part I of the *Protocol* relating to export duties<sup>9</sup> and a violation of Article XI:1 of the GATT in relation to export quota.<sup>10</sup> It is not clear from China's submission whether China restricts the production of these products, but, even if it does, Japan does not believe that China has sufficiently explained why the export quotas and export duties on these products are "necessary" to protect human health.

8. **Sovereignty over natural resources and the WTO:** Japan also notes that China's invocation of the UNGA Resolution on permanent sovereignty over natural resources is irrelevant because the preamble only states that "due regard should be paid to the rights and duties of States under international law".<sup>11</sup> And this resolution is not legally binding. Further, China became a Member of the WTO by its own free choice, it should observe the WTO Agreements in good faith. Lastly, the languages "the optimal use of the world's resources" in the preamble of the Marrakesh Agreement establishing the WTO Agreement imply that the WTO Members have agreed to share their natural resources efficiently among the Members.

9. **The total award price:** The total award price, in Japan's view, is likely inconsistent with paragraph 11.3 of Part I of the *Protocol*. Although the total award price is a charge applied to exports of bauxite, silicon carbide and fluorspar, it is not provided for in Annex 6 of the *Protocol*.<sup>12</sup> It is also not applied in conformity with Article VIII of the GATT, because either (i) Article VIII does not apply to the total award price; or (ii) because the total award price is not limited to the approximate cost of services rendered to *individual exporters*. Therefore, the total award price is inconsistent with paragraph 11.3 of Part I of the *Protocol*.

10. **Introduction of the oral statement :** In the oral statement, Japan addresses six topics: (1) the requirement to present the problem clearly; (2) expired measures; (3) Article XI:1 of the GATT; (4) China's GATT Article XI:2 defense; (5) the principle of sovereignty over national resources and Article XX(g) of the GATT; and (6) China's GATT Article XX defenses. Because of the limited spaces allowed for executive summary, Japan does not include its discussion on topics (5) and (6) which were also discussed in its first written submission.

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<sup>7</sup> See also Appellate Body Report, *US – Shrimp (Article 21.5- Malaysia)*, para. 118; Appellate Body Report, *US – Shrimp*, para. 150; Appellate Body Report, *US – Gasoline*, pgs. 21-22.

<sup>8</sup> Sub-paragraph (b) provides that, so long as the requirements of the *chapeau* are met, WTO Members can adopt or maintain measures that are "necessary to protect human, animal or plant life or health".

<sup>9</sup> China's first written submission, para. 197.

<sup>10</sup> China's first written submission, para. 528.

<sup>11</sup> See UN GA Resolution 1803(XVII), *Permanent Sovereignty Over Natural Resources* (14 December 1962), Preamble.

<sup>12</sup> Since the types of bauxite, silicon carbide and fluorspar subject to the total award price requirement are not listed in that Annex.

11. **Requirement to present the problem clearly:** China claims that the complainants have failed to "plainly connect" the measures and treaty provisions in Section III of their panel requests.<sup>13</sup> The determination of whether a problem is stated clearly, i.e. there is plain connection, must be made with respect to the panel request read "as a whole"<sup>14</sup> thus it is evident that Section III "present the problem[s] clearly".

12. **Expired measures:** China requests that the Panel refrain from making findings and recommendations related to some measures because they expired before the Panel proceedings "commenced".<sup>15</sup> Japan notes that the date of establishment of the panel is generally the relevant point in time for determining whether measures may be included within a panel's terms of reference.<sup>16</sup>

13. **Article XI:1 of the GATT:** China argues that the Complainants have failed to state *prima facie* claims under Article XI:1 of the GATT with respect to export quotas.<sup>17</sup> In Japan's view, therefore, there can be little doubt that the Complainants need not demonstrate that Article XI:2 does not apply in order to establish a violation of Article XI:1 of the GATT. Rather, it is China which must invoke Article XI:2 as a defense and which also bears the burden of proving that it applies.

14. **China's Article XI:2 defense:** Canada has clearly presented five key points to defend a measure under Article XI:2(a) in its submission.<sup>18</sup> Japan agrees with Canada that the Chinese measure does not fulfil the requirement of temporary application. Further, Japan considers it doubtful that the Chinese measure complies with the "critical shortage" requirement as the term "critical" means " [o]f, pertaining to, or constituting a crisis" or "of decisive importance." <sup>19</sup> Japan requests the Panel to take full account of this consideration when reviewing the Chinese defense.

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<sup>13</sup> See China's first written submission, paras. 16 and 29.

<sup>14</sup> See Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 169.

<sup>15</sup> See China's first written submission, Part II.E.3.

<sup>16</sup> See, e.g., Appellate Body Report, *EC – Chicken Classification*, para. 156; Appellate Body Report, *EC – Selected Customs Matters*, para. 184.

<sup>17</sup> China's first written submission, para. 351.

<sup>18</sup> Third party submission of Canada, para.14. While Japan generally agrees with Canada's assessment of the requirements, for the sake of clarity, it would note that a respondent invoking Article XI:2(a) need only demonstrate compliance with the Article XI:2(a). The requirement that the measure at issue be an "export restriction or prohibition" is of course for complainants to establish.

<sup>19</sup> New Shorter Oxford English Dictionary (1993), p. 551.

## **ANNEX E-9**

### **EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF KOREA**

#### **I. INTRODUCTION**

1. This third party submission is presented by the Government of the Republic of Korea ("Korea") with respect to certain aspects of the first written submissions of the United States, the European Union and Mexico (collectively the "Co-Complainants") dated 1 June 2010 and of the People's Republic of China ("China") dated 4 August 2010, respectively. Korea has systemic interests in the interpretation and application of various provisions of the GATT 1994, the Accession Protocol and the Working Party Report, all of which are extensively discussed in this controversial dispute. Korea appreciates this opportunity to present its views to the Panel.

#### **II. LEGAL ARGUMENTS**

##### **A. MERE VAGUENESS OF THE TERMS CONTAINED IN THE PROVISIONS OF LAWS AND REGULATIONS OF A MEMBER DOES NOT NECESSARILY AMOUNT TO THE MEMBER'S "AS SUCH" VIOLATION**

2. In this factually intensive dispute, the parties present different accounts and descriptions for key factual situations. In Korea's view, as to some, if not all, of the measures raised in this dispute, the Co-Complainants seem to have presented factual information and legal arguments to substantiate their prima facie claims.

3. In certain instances, however, the Co-Complainants appear to have simply identified situations where vague terms are used in the laws and regulations of the Member complained against. The Co-Complainants then appear to argue that these are sufficient to find "as such" violation on the part of the Member. To the extent these legislative documents contain "discretionary" language, we submit that the Panel's evaluation of the issue should be guided by the "good faith presumption" which is attached to the interpretation of a Member's laws and regulations. In *US – Oil Country Tubular Goods Sunset Reviews*, noting the general "presumption that WTO Members act in good faith in the implementation of their WTO commitments," the Appellate Body stated that this presumption "is particularly apt in the context of measures challenged 'as such.'"<sup>1</sup>

##### **B. THE EXPORT QUOTA MEASURE ADOPTED BY CHINA SEEMS TO BE INCONSISTENT WITH CHINA'S OBLIGATION UNDER THE GATT 1994, THE ACCESSION PROTOCOL AND THE WORKING PARTY REPORT**

4. The Chinese legislative framework as outlined by the Co-Complainants seems to prove the existence of an export quota measure within the meaning of Article XI:1 of the GATT 1994. As China's MOFCOM sets the annual quotas for exportation of bauxite, coke, fluorspar, silicon carbide and zinc in accordance with the relevant laws and regulations including Measures for the Administration of Export Quotas and prohibits out-of-quota exportation with the penalty of administrative and criminal sanction, a fair argument could be made that the measure amounts to a

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<sup>1</sup> See *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R (29 Nov. 2004), at para. 173.

quantitative restriction that prohibits or restricts the exportation or sale for export of products as the panel and the Appellate Body determined in *India – Quantitative Restrictions*.<sup>2</sup>

5. Information and materials submitted by the Co-Complainants also indicate that China's imposition of the export quota constitutes violation of relevant provisions of the Accession Protocol and paragraphs of the Working Party Report. The measure particularly implicates Articles 5.1 and 1.2 of the Accession Protocol and paragraphs 84, 162 and 165 of the Working Party Report.

6. In this regard, China seems to take the position that its export quota does not implicate "right to import or export," but rather it is based on its "right to regulate" which is permitted under Article 5.1 of the Accession Protocol. In our view, "right to regulate" may describe the situation where the challenged measure does not restrict export per se but rather attempts to address other legitimate administrative purposes such as evaluating exporting enterprises' demand and capacity beforehand or coordinating amounts and timing of export to avoid the disruption in the relevant domestic markets. China's Measures for the Administration of Export Quotas, however, hardly provides for a mechanism to ensure that the export demand of the applicants, either individually or collectively, is to be ultimately accommodated to the fullest. The measure challenged, therefore, seems to be closer to "right to trade" than "right to regulate" in the spectrum.

C. ASSUMING THE CO-COMPLAINANTS' FACTUAL INFORMATION IS ACCURATE, CHINA'S EXPORT DUTIES SEEM TO BE INCONSISTENT WITH ITS OBLIGATION UNDER THE ACCESSION PROTOCOL

7. The Co-Complainants then claim that China's export duties for certain raw materials are inconsistent with China's obligation under Article 11.3 of the Accession Protocol. Korea notes that in its first written submission China refutes factual information submitted by the Co-Complainants and argues that some measures are no longer in place. Korea believes that in this respect the Panel needs to sort out differences in factual information among the parties and confirm the current status of the challenged measure.

8. Even if factual discrepancies are accounted for, however, the factual information and legal arguments submitted by the Co-Complainants tend to show the violation of the relevant provision of the Accession Protocol. For instance, China states that the export duties are not imposed any more on some of the items challenged in this dispute. But this confirmation, on the other hand, seems to indicate the continued imposition of export duties for other raw materials.

D. TO THE EXTENT CHINA'S EXPORT LICENSING IS IMPLEMENTED AS THE FINAL STEP FOR EXPORT QUOTAS, IT MAY BE INCONSISTENT WITH CHINA'S OBLIGATIONS UNDER RELEVANT PROVISIONS OF GATT 1994, ACCESSION PROTOCOL AND WORKING PARTY REPORT

9. The Co-Complainants also challenge China's export licensing system. The Co-Complainants allege that the export licensing of China "as such" constitutes violation of Article XI:1 of the GATT 1994, Articles 5.1 and 1.2 of the Accession Protocol and paragraphs 84, 162 and 165 of the Working Party Report. Here also, the parties show stark differences in describing factual situations and legislative frameworks in place in China. The key difference here is whether the licensing system is automatic or non-automatic.

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<sup>2</sup> See *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R, (22 Sept. 1999) (upheld by the Appellate Body in its report, WT/DS90/AB/R), at para. 5.128.)

10. In its first written submission, China refutes the Co-Complainants' claim that the export licensing is non-automatic and discretionary. The specificity and details of China's explanation seem to substantiate its claim that the export licensing is indeed automatic. Regardless of the automaticity, however, there still seems to be a possibility that the export licensing may implicate Article XI:1 of the GATT 1994. China's explanations of the export licensing describe the measure as being closely related to the export quota system and as, in fact, a final step for the administration of export quota. As China acknowledges, in order to obtain export licenses the exporters of the raw materials must submit "quota-granting documents" with other application materials. As all other application materials are the same between quota product exporters and non-quota product exporters, the submission of "quota-granting documents" could be considered to be dispositive in the case of exporters of the raw materials subject to the respective quotas.

11. To the extent the export licensing is administered as a final step for the export quotas for the above-mentioned raw materials, the export licensing could be regarded as a part of the export quota system and thus, the export licensing claim could be collapsed into the export quota claim, which may then implicate violation of Article XI:1 of the GATT 1994 and other relevant provisions in the Accession Protocol and the Working Party Report.

E. A CAREFUL SCRUTINY SHOULD BE CONDUCTED TO DETERMINE IF THE CHALLENGED MEASURES COULD BE JUSTIFIED UNDER ARTICLE XX OF THE GATT 1994

12. Assuming the existence of violation of provisions of the GATT 1994, the Accession Protocol and the Working Party Report, China then presents the claim that its measures are justified under Article XX of the agreement, particularly as a measure necessary to protect human life or health and to conserve exhaustible natural resources.

13. Assuming that China proves these measures are designed to protect human, animal or plant life or health, the remaining key issue is whether they are "necessary" to achieve the objective. Korea submits that the Panel should carefully carry out its analyses, in accordance with the relevant jurisprudence, to confirm that the challenged measures are justified as "necessary" to achieve public health and environmental protection goals.

14. China also claims that the measures at issue are to conserve exhaustible natural resources in accordance with Article XX(g) of the GATT 1994. Even if these raw materials are exhaustible natural resources and the measures are to conserve these resources, it does not seem clear, from China's arguments, whether they are made effective in conjunction with restrictions on domestic production or consumption. This requirement, as China also agrees, is to ensure that the burden of conservation-related measures is evenly distributed between foreign trade and domestic trade. Although the burden does not have to be identical between foreign trade and domestic trade, the Panel may want to examine evidence that the measure imposing Member has conducted analyses to distribute the burden reasonably and proportionally.

## ANNEX E-10

### EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF SAUDI ARABIA

#### I. INTRODUCTION

1. The Kingdom of Saudi Arabia has joined as a third party in this dispute to provide its views on a number of fundamental issues relating to the proper interpretation of Articles XI and XX of the GATT 1994. These issues are of systemic importance to all WTO Members, particularly developing countries that are pursuing strategies of economic diversification and sustainable development.

#### II. EXPORT LICENSING AND GATT ARTICLE XI

2. The purpose of GATT Article XI is the general elimination of *quantitative* restrictions. The Article's interpretation must begin with its title, "General Elimination of Quantitative Restrictions", which forms an integral part of it. Any interpretation of Article XI that expands its coverage to all prohibitions or restrictions, whether or not related to import or export *quantities*, would render the Article's title meaningless. This would be inconsistent with basic tenants of treaty interpretation, as adopted in WTO jurisprudence.<sup>1</sup>

3. In assessing whether a measure is an impermissible restriction on exports, a panel should first determine whether it imposes a formal quantitative restriction. If the measure is not a formal quantitative restriction, the panel should then analyze the measure's design, architecture and structure to determine whether it has a restrictive effect, and is designed to have a restrictive effect, on export quantities. Several WTO Panels have adopted this analytical framework.<sup>2</sup>

4. An export restriction that is permitted by Article XI – for example an export duty – may be "made effective" through an export licence. Its function is to implement an underlying measure that is itself permitted by Article XI. Thus, an export licensing system which implements a permitted export restriction will be consistent with GATT Article XI as long as the system itself does not introduce any additional restriction beyond what is necessary to administer the permissible measure.

5. GATT Article XI permits "automatic" export licensing systems because such systems do not impose any restrictions on exports. Based on the *Agreement on Import Licensing Procedures* (ILA), "automatic" export licensing could be defined as "licensing where approval of the application is granted in all cases," and "non-automatic" export licensing could be defined as a broad residual category of licences that are not "automatic", *i.e.*, granted in all cases. Export restrictions that are permitted by GATT Article XI – "duties, taxes or other charges" – must be administered by such "non-automatic" licensing because failure to pay the duty, tax or charge would result in the rejection of a licence application (*i.e.*, the licence would not be "granted in all cases").

6. Given Article XI's express provision for certain export restrictions, non-automatic licensing systems must be allowed to the extent that they have "made effective" such permissible restrictions. Thus, non-automatic export licensing will be WTO-consistent whenever it implements an otherwise

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<sup>1</sup> See Appellate Body Report, *US – Softwood Lumber IV*, para. 93. See also Appellate Body Report, *US – Carbon Steel*, para. 67 and Appellate Body Report, *US – Gasoline*, p. 23.

<sup>2</sup> See Panel Report, *India – Autos*, paras. 7.266-7.268; see also Panel Report, *Colombia – Ports of Entry*, para. 7.252.

permissible export restriction in a form that does not create, and is not designed to create, additional limiting conditions beyond what is necessary to administer the permitted restriction. The second criterion determines whether the non-automatic licensing system is itself an impermissible quantitative restriction, *i.e.*, whether the system imposes, and is designed to impose, additional restrictive conditions beyond those necessary to administer the measure.

7. The Panel report in *India – Quantitative Restrictions* does not support the complainants' conclusion that all non-automatic licensing is inconsistent with GATT Article XI. First, the Panel in that case did not distinguish between "non-automatic" and "discretionary" licensing systems and never explained whether it considered the terms to be the same or different.<sup>3</sup> Moreover, the licensing systems at issue were clearly discretionary. Thus, the Panel's ruling had nothing to do with the broad category of "non-automatic licensing" as that term is meant under the ILA. The Panel should therefore reject the complainants' interpretation of *India – Quantitative Restrictions*.

### III. MINIMUM EXPORT PRICES AND GATT ARTICLE XI

8. A minimum export price does not impose a numerical limitation on the quantity of exports, and must therefore be examined on a case-by-case basis to determine whether it functions as, and is designed to function as, a prohibited quantitative restriction. For example, a minimum export price that is equal to or lower than the relevant international price would have no restrictive effect on export quantities. Such a system could not limit export volumes in violation of Article XI. Thus, a standard consistent with the Article's text does not support the complainants' view that a minimum export price is *per se* inconsistent with Article XI.

9. Prior jurisprudence is of limited relevance in assessing the consistency of minimum export prices with Article XI. The GATT Panel ruling in *EEC – Minimum Import Prices*, on which complainants rely, concerned import pricing measures. There is an important legal distinction between minimum import prices and minimum export prices. The former can constitute a type of "other duty or charge" imposed on importation in excess of a Member's tariff bindings under GATT Article II:1(b). The latter does not implicate any schedule of bound concessions, but rather has the effect of "duties, taxes or other charges" on exports that are permitted under Article XI. Thus, arguments that rely on direct analogies between minimum import prices and minimum export prices should be treated with caution. If a minimum export price measure takes the form of a "duty, tax or other charge", it is exempt from the prohibition of Article XI. A ruling to the contrary would impose a limitation on Members' unlimited right to employ export duties, taxes or charges.

### IV. GATT ARTICLE XX(G)

10. The Panel's interpretation of Article XX(g) should be guided by three fundamental principles. First, the term "conservation" of exhaustible natural resources in Article XX(g) should be interpreted in a manner that recognizes the fundamental public international law principle that each State enjoys permanent sovereignty over its natural resources (PSNR). The Appellate Body noted in *US – Gasoline* that "the *General Agreement* is not to be read in clinical isolation from public international law."<sup>4</sup> Under public international law, States' sovereignty over their natural resources is part of their territorial sovereignty. PSNR has evolved into an established principle of customary international law, and comprises the rights of States to explore, exploit, and dispose of their natural resources for national development.

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<sup>3</sup> Panel Report, *India – Quantitative Restrictions*, paras. 5.129 and 5.137.

<sup>4</sup> Appellate Body Report, *US – Gasoline*, p. 17 (original emphasis). See also Vienna Convention on the Law of Treaties, Art. 31.3(c).



11. Second, Article XX(g) encompasses the regulatory autonomy of each Member to determine for itself how it wishes to conserve its natural resources to meet the development needs of current and future generations. The principle of PSNR includes the sovereign right, recognized by the United Nations, to promote economic and social development through the use of natural resources. This right is supported by UN Resolutions on the concept of "sustainable" development, which involves the exploitation of resources to meet current and future development needs. The objective of "optimal use of the world's resources in accordance with the objective of sustainable development" is also explicitly recognized in the Preamble to the WTO Agreement. As the Appellate Body noted in *US – Shrimp*, "this preamble language reflects the intentions of negotiators of the *WTO Agreement*" and must therefore "add colour, texture and shading to our interpretation of the agreements annexed to the *WTO Agreement*...."<sup>5</sup> Nothing in the WTO Agreements imposes any obligation to share resources.

12. Third, a WTO Member exercising its rights to conserve exhaustible natural resources must also comply with the strict conditions of the chapeau of Article XX. PSNR rights do not permit a WTO Member to apply any conservation measure in a manner which would constitute a means of arbitrary or unjustifiable discrimination, or a disguised restriction on international trade. The chapeau acts as a limiting condition on a Member's right to justify its measures under Article XX, and thus demands a high level of scrutiny – higher than that of provisional justification under the Article's exceptions.<sup>6</sup> The chapeau "serves to ensure that Members' rights to avail themselves of exceptions are exercised in good faith to protect interests considered legitimate under Article XX, not as a means to circumvent one Member's obligations towards other WTO Members."<sup>7</sup> It demands an assessment of both a measure's provisions and its actual application,<sup>8</sup> and is a crucial check on the legitimacy and WTO-consistency of a measure provisionally justified under one of the paragraphs of Article XX.

## V. CONCLUSION

13. The parties to this proceeding have raised important systemic issues related to the interpretation of GATT Article XI and the scope of GATT Article XX(g). Saudi Arabia respectfully requests that the Panel consider the Kingdom's comments on these issues.

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<sup>5</sup> Appellate Body Report, *US – Shrimp*, para. 153 (original emphasis).

<sup>6</sup> See Appellate Body Report, *US – Shrimp*, para. 157; Appellate Body Report, *US – Gasoline*, pp. 22-23.

<sup>7</sup> Appellate Body Report, *Brazil – Retreaded Tyres*, para. 215.

<sup>8</sup> Appellate Body Report, *US – Shrimp*, para. 160. See also Appellate Body Report, *Brazil – Retreaded Tyres*, para. 215.

## ANNEX E-11

### EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF TURKEY

#### I. INTRODUCTION

1. Turkey thanks the Panel for giving the opportunity to present its views in this proceeding. Turkey takes no position what so ever as to the defense and allegations presented by the parties on whether the specific measure at issue is inconsistent to the subject provisions of the WTO Agreements but, would like to contribute, by expressing its legal analysis on the issues of (1) export duties and (2) export quotas.

#### II. EXPORT DUTIES

2. Although Article XI of GATT 1994 generally prohibits import export restrictions, it allows WTO Members to impose duties on exports. However, in the case of China, as an integral part of the WTO Agreement, commitments in the Accession Protocol and commitments referred to in paragraph 342 of the Working Party Report, should also be taken into consideration.

3. Regarding export duties, according to Paragraph 11.3 of the Accession Protocol "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."

4. Therefore, in order to determine whether China shall "eliminate all taxes and charges applied to exports, the Panel should first decide (i) whether the financial obligations that China puts on exports are the kind of fees and charges covered by Article VIII and applied in conformity with the provisions of Article VIII.; and (ii) whether they are specifically provided for in Annex 6 and applied in accordance with the terms and conditions specified for those products in Annex 6. If answers to these two conditions are negative for a product in question and if the measures are not justified by any other WTO Agreements than the taxes and charges on exports should be eliminated.

5. China states in its submission that Article XX of GATT 94 justifies some of its measures. As it is well settled by the WTO jurisprudence, a measure can be justified by Article XX, i) if it falls under one or another of the particular exceptions listed from paragraphs (a) to (j) under Article XX; and ii) if it satisfies the requirements imposed by the opening clauses of Article XX.<sup>1</sup>

6. Without prejudice to its rights to elaborate the specific requirements envisaged in the specific paragraphs and the chapeau of Article XX of the GATT 1994, in this dispute Turkey would like to contribute to the Panel analysis by referring the negotiating history of the chapeau and paragraph g, which it considers, has value in interpreting them.

7. The issue of providing exceptions was discussed during the negotiations of the Charter of the International Trade Organization (ITO) and the General Agreement on Tariffs and Trade (GATT 1947). At the end of the negotiations, the negotiators decided to use. the term "*between countries where the same conditions prevail*" in the chapeau, instead of the term "*foreign countries where the same conditions prevail*".

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<sup>1</sup> Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3, (*US – Gasoline*), p.22

8. With regard to the paragraph g of Article XX, during the negotiations a proposal was made in which it was suggested that, export restrictions should be permitted for the preservation of scarce natural resources even if there is no restriction on domestic consumption.<sup>2</sup> In response to that suggestion it was stated that "One of the ways in which export prohibitions could be used ...is for protective purposes. It is possible for a raw material producing country, which wishes to industrialize, to do so behind a protective arrangement which is extremely effective, and that is preventing anybody else getting the raw material to use in his already existing industries"<sup>3</sup> Therefore the proposal was not accepted.<sup>4</sup>

9. In this regard, Turkey is of the view that negotiating history of the GATT XX(g) shed light on coverage of the Article and understanding the aim of the negotiators.

### III. EXPORT QUOTAS

10. One of the issues that was suggested by China, with regard to export quotas is that Article XI:1 shall not apply to measures that carry the characteristics specified in Articles XI:2(a)-(c).. In justifying its suggestion China explained that the relation between Article X:1 and XI:2 is similar to those of between Article 27 and 3 of the SCM Agreement and between Article II.(b) and II.2 of GATT 1994.

#### A. THE RELATION BETWEEN ARTICLE 27 AND 3 OF THE SCM AGREEMENT AND ITS SIMILARITY TO THE RELATION BETWEEN ARTICLE XI:1 AND XI:2 OF GATT 94

11. Turkey considers that the relationship between Article XI:1 and XI:2 is not similar to that of between Articles 27 and 3.1(a) of the SCM Agreement. While Article XI:2 of the GATT 1994 provides an affirmative defence against the obligations brought by Article XI:1, Article 27 of the SCM Agreement introduces positive obligations for developing countries in order to exempt them from the obligations brought by Article 3 of the said Agreement.

12. According to the general interpretation of international law and WTO jurisprudence, the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.<sup>5</sup> In this regard, the party relying on the affirmative defence is obliged to prove the existence of the conditions determined in the so called defence. This is also the case when a party relies on one of the exceptions enclosed in GATT XI:2.

13. However, Article 27 of the SCM Agreement provides certain conditions for the beneficiary to benefit from an exemption from the obligations brought by Article 3 of the SCM Agreement, which shall be understood as positive obligations, not affirmative defences. In this regard, if a party claims that these positive conditions are not satisfied by the beneficiary country and thus this country should not benefit from the exemption, than the claiming party, shall be obliged to prove the lack of such conditions. Such as the case in the Appellate Body decision in *Brazil - Aircraft*.<sup>6</sup>

14. For the reasons stated above, in Turkey's view, the relationship between GATT 94 Articles XI:1 and XI:2 is different than that of Articles 27 and 3:1(a) of the SCM Agreement.

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<sup>2</sup> E/PC/T/C.II/QR/PV/1, p.15

<sup>3</sup> E/PC/T/C.II/QR/PV/1, p.20-21

<sup>4</sup> E/PC/T/C.II/59, p.5

<sup>5</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, 323, p 14

<sup>6</sup> Appellate Body Report, *Brazil – Aircraft*, WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, 1161, para 140-141

**B. RELATION BETWEEN ARTICLE II.(B) AND II.2 OF GATT 94 AND OF ITS SIMILARITY TO THE RELATIONSHIP BETWEEN ARTICLE XI.1 AND XI.2 OF GATT 94**

15. Turkey considers that the relationship between Articles II.1(b) and II.2 of GATT 94 and Articles XI.1 and XI.2 of GATT 94 do indeed provide similarities. Both of them provide affirmative defence against the application of obligations stated in the previous paragraphs. In this regard, the party relying on the affirmative defence is obliged to prove the existence of the conditions determined in the so called affirmative defence Article.

16. However, the Appellate Body reversed the burden of proof obligation in *India-Additional Duties*. According to the Appellate Body's reasoning, a case by case evaluation is needed in order to determine which party carries the burden of proof, within the scope of GATT Article XI:2. In other words, the first thing that the Panel should decide is which party carries the burden of proof. Even if the Panel should decide that the complaining Parties bare the burden of proof, there are certain preconditions that should be fulfilled, such as;

- (a) the potential for application of Article XI:2 is to be clear from the face of the challenged measure,
- (b) The close relationship between Articles II:1(b) and II:2 exists in Articles XI:1 and XI:2 as well, therefore they are also of closely inter-related character and are required to be read together.
- (c) the party complained against must show that the measure does not breach Article XI.1, because of it's justification by Article XI:2.
- (d) the nature and content of the rebuttal submission should contain the rebuttal arguments and the evidence thereof, that substantiate the aim of XI.2.

17. Therefore, Turkey considers that the relationship between GATT 94 Articles XI:1 and XI:2 is similar to that of between Article II:1(b) and II:2. However this does not necessarily mean that the same approach should automatically be followed in the case of the application of Articles XI:1 and XI:2

**IV. CONCLUSION**

18. Turkey appreciates this opportunity to present its views to the Panel.

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**ANNEX F**

**PRELIMINARY RULING**

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**ANNEX F-1**

**FIRST PHASE OF PRELIMINARY RULING**

**WORLD TRADE  
ORGANIZATION**

**WT/DS394/9**  
**WT/DS395/9**  
**WT/DS398/8**  
18 May 2010

(10-2762)

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Original: English

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

Communication from the Panel

The Panel has asked the Chairman of the Dispute Settlement Body to circulate to the Members for their information, the following communication dated 7 May 2010 from the Panel to the Parties.

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By means of this communication, the Panel hereby responds to China's request for a preliminary ruling dated 30 March 2010, regarding the compliance of the Complainants' panel requests with the requirements of Article 6.2 of the DSU in the above-mentioned disputes.

The Panel has carefully examined the views expressed by all Parties and Third Parties with respect to China's request. The Panel has decided to rule today on some parts of China's request and to reserve its decision on other parts.

In sum, the Panel today rules as follows:

- The Panel finds that its terms of reference are limited to those measures explicitly identified by bullet points in each of the three sections of the Complainants' panel requests.
- Of these measures, the Panel finds that the term "related measures" as referred to in the last bullet point in each of the listed measures, is too broad and undefined a term and therefore falls outside the Panel's terms of reference.
- The Panel decides that its terms of reference are not limited to those products falling under the tariff lines described in footnotes one to nine of the panel requests. The Panel concludes that these tariff lines are only indicative of the broad scope of the challenge.

- The Panel rules that the panel requests include the two corrected tariff lines regarding zinc.
- The Panel finds that the Complainants' claims under paragraph 342 of the Report of the Working Party on the Accession of China fall outside its terms of reference.
- The Panel will not consider the preliminary ruling submitted by the Complainants from a separate, ongoing panel proceeding.

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:

- Whether the Complainants' panel requests sufficiently identify the measures at issue and the products possibly affected by such measures.
- Whether the Complainants' panel requests provide for a summary of the legal basis of the complaint sufficient to present the problem clearly.

The Panel's detailed analysis of the issues under consideration and rulings with respect to these issues is hereby annexed.

For purposes of transparency and due process, and having consulted the Parties, the Panel intends to send a copy of this communication to all Third Parties in the proceedings and will also request that this communication be circulated to all WTO Members.



## ANALYSIS AND RULINGS BY THE PANEL

1. On 30 March 2010, China filed a request before this Panel for a preliminary ruling.<sup>1</sup> China asserted that specific sections of the Complainants' panel requests<sup>2</sup> for the establishment of this Panel (panel requests) are inconsistent with Article 6.2 of the Understanding on the Rules and Procedures Governing the Settlement of Disputes (DSU).<sup>3</sup> The Parties presented preliminary written submissions. China commented on the Complainants' Joint Response to China's preliminary ruling request whereas the Complainants did not comment on China's comments.<sup>4</sup> On 29 April 2010, the Panel held a hearing with the Parties and a separate session with the Third Parties on China's request. On the same date, the Panel sent written questions to the Parties on China's request. The Parties responded to the Panel's questions on 3 May 2010 and submitted comments on 5 May 2010 on each other's responses.

2. Essentially, China argues that the Complainants' panel requests do not comply with the requirements of Article 6.2 of the DSU because they do not identify clearly and specifically enough which measures are challenged and for which specific products. China also argues that the panel requests do not provide a brief summary of the legal basis sufficient to present the problem clearly, as the measures identified in Section III of the panel requests are not plainly connected to the list of provisions that the Complainants consider to be infringed.

3. The Panel recalls that the DSU does not provide for preliminary rulings requests by parties although their occurrence has increased recently, notably in challenging the jurisdiction of panels traditionally based on the Complaining party's panel request.

4. Article 6.2 of the DSU requires, *inter alia*, that a panel request identifies the "specific measures at issue" and provides "a brief summary of the legal basis (...) sufficient to present the problem clearly". The need for precision in the panel requests flows from the two essential purposes of the terms of reference, namely, to define the "scope of the dispute" and to serve the "due process" objective of notifying the parties and third parties of the nature of the complainants' case.<sup>5</sup> Compliance with the requirements of Article 6.2 must be determined on the merits of each case, having considered the panel request as a whole and the parties' first written submission if necessary, and in the light of attendant circumstances.<sup>6</sup>

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<sup>1</sup> China's request for a preliminary ruling pursuant to Article 6.2 of the DSU, 30 March 2010 (China's request).

<sup>2</sup> Request for the Establishment of a Panel by the United States (WT/DS394/7); Request for the Establishment of a Panel by the European Communities (WT/DS395/7) and Request for the Establishment of a Panel by Mexico (WT/DS398/6).

<sup>3</sup> For instance, see China's request, paras. 3 and 30, as well as the Annex of China's request.

<sup>4</sup> See China's request; Response of the United States, European Union, and Mexico to China's request (Joint response on 21 April 2010) and China's Comments on the Joint Response (China's comments) (23 April 2010). The Complainants sent emails on 25 April informing the Panel that they chose not to comment in writing on China's comments. This was an optional procedure in the Panel's timetable for the Preliminary ruling proceedings.

<sup>5</sup> Appellate Body Report on *EC – Chicken Cuts*, para 155 referring to Appellate Body Report on *US – Carbon Steel*, para. 126 (quoting Appellate Body Report on *Brazil – Desiccated Coconut*, DSR 1997:I, 167, at 186 (emphasis omitted); and referring to Appellate Body Report on *EC – Bananas III*, para. 142).

<sup>6</sup> Appellate Body Report on *Korea – Dairy*, paras. 124-127. See also, Appellate Body Report on *US – Carbon Steel*, para. 127

5. The Panel has given due consideration to the Parties' requests and arguments. It has carefully examined the Complainants' panel requests in light of both the letter and the spirit of Article 6.2 of the DSU<sup>7</sup>, as they define its jurisdiction and terms of reference. The Panel has also taken into account the need to ensure China's ability to defend itself<sup>8</sup> and its right to be well informed of the Complainants' case, as well as the right of the Complainants to have a prompt resolution of the disputes<sup>9</sup> in accordance with Article 3.3 of the DSU, while keeping in mind that "[t]he procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes."<sup>10</sup>

6. Taking into account all these elements, the Panel issues its preliminary ruling on the following aspects.

#### THE MEASURES CHALLENGED

7. China claims that in their panel requests the Complainants failed to sufficiently identify the measures they challenge.<sup>11</sup> China's main focus is on the alleged lack of defined products covered by each challenged measure. Before addressing this argument from China, the Panel will discuss two sets of terms used by the Complainants in their panel requests of concern to the Panel itself:<sup>12</sup> the use of "among others" preceding the lists of challenged measures and the reference to "any amendments or extensions; related measures; replacement measures; renewal measures; and implementing measures" to any of the listed measures, as identified in the last bullet point of each of the listed measures in each of the three sections of the Complainants' panel requests.

8. The Panel recalls that within the meaning of Article 6.2 of the DSU, a panel request must specify the measures challenged. The Panel is aware that the obligation to identify the specific measure at issue does not oblige the complainant to set forth the "precise content" of the measure in its panel request. Instead, the Appellate Body found that "although a measure cannot be identified without some indication of its contents, the identification of a measure within the meaning of Article 6.2 needs be framed only with sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue."<sup>13</sup> A measure may thus be identified by its substance or nature<sup>14</sup>, so long as what is referred for adjudication by a panel may be discerned from the panel request.<sup>15</sup>

9. As the goal of such requirements is, *inter alia*, to ensure that the defendant is well aware of the scope of the challenge it faces in a dispute, the Panel believes that the defendant in any panel procedure must know clearly which of its measures are challenged. So "as a general rule, the

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<sup>7</sup> Appellate Body on *EC – Bananas III*, para. 142.

<sup>8</sup> Appellate Body Report on *US – Carbon Steel*, para. 127. See also, Appellate Body Report on *Korea – Dairy*, para. 127.

<sup>9</sup> Regardless of the fact that there are three complaints (DS394, DS395 and DS398) which implies three different disputes, the Panel will refer in its subsequent communications to "dispute" when referring to the process of this current Panel.

<sup>10</sup> Appellate Body Report on *US – FSC*, para. 166.

<sup>11</sup> For instance, see China's request, paras. 13-19 and 59-66; and China's comments, paras. 10-32.

<sup>12</sup> The Panel has the right and obligation to address issues even if the parties to the dispute remain silent on those issues. Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, para. 35.

<sup>13</sup> Appellate Body Report on *US – Continued Zeroing*, para. 169.

<sup>14</sup> Panel Report on *Argentina – Footwear (EC)*, para. 8.40. See also, Panel Report on *EC – Approval and Marketing of Biotech Products*, para. 7.47.

<sup>15</sup> Appellate Body Report on *US – Continued Zeroing*, para. 168.

measures included in a panel terms' of reference must be measures that are in existence at the time of the establishment of the panel".<sup>16</sup>

**1. "among others"**

10. The panel requests contain an introductory paragraph and then three sections. Each section refers to a generic type of measure – export quotas, export duties and additional restraints imposed on exportation. Each section is composed first of narrative paragraphs describing what the complainants' consider generally to be the "problem", second, of a list of challenged legal instruments and finally, of a list of the WTO obligations alleged to have been violated by the listed measures.

11. The Panel is concerned with certain aspects of the three lists of challenged measures. After the narrative paragraph(s) in each of the three sections, the Complainants identify the lists of measures with the following phrase: "...these Chinese measures are reflected in, *among others*" (emphasis added). This phrase indicates that the measures listed by bullet points in the panel requests are not the only measures allegedly inconsistent with WTO obligations and leaves open the possibility that the Complainants might include additional measures in subsequent submissions.

12. The Panel is of the view that the Complainants cannot be allowed to include additional measures other than those listed and identified by bullet points in the panel requests. Such an "open ended" list would not contribute to the "security and predictability" of the WTO dispute settlement system as required by Article 3.2 of the DSU.

13. For this reason, the Panel considers that only the listed measures explicitly identified by bullet points in the three sections of the Complainants' panel requests fall within the Panel's terms of reference and will thus be examined by the Panel.

**2. "as well as any amendments or extensions; related measures; replacement measures; renewal measures; and implementing measures"**

14. In response to the Panel's questions during the preliminary ruling hearing, the Complainants suggested that they do not intend to introduce new measures and that the phrase "among others" is intended to cover the same situations as those envisaged by the last bullet point of each of those three lists which reads "as well as any amendments or extensions; related measures; replacement measures; renewal measures; and implementing measures".

15. The Complainants add that the purpose of the "among others" phrase, as well as the last bullet in the list of legal instruments referring to "any amendments or extensions; related measures; replacement measures; renewal measures; and implementing measures" is to make clear that the Chinese legal instruments that the Complainants have been able to identify to date may not be the only ones through which China maintains the measures at issue, and to specifically include such instruments within the Panel's terms of reference.<sup>17</sup>

16. The Panel shares the concern that a respondent should not be allowed to unilaterally modify one or more of the initially challenged measures with a view to avoiding a Panel's jurisdiction. At the same time, measures to be included in the Panel's terms of reference should generally exist at the time of the filing of the panel request. There are nonetheless situations where new governmental actions were considered to be so closely linked to the challenged measure that they were also considered to

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<sup>16</sup> Appellate Body Report on *EC – Chicken Cuts*, paras. 156.

<sup>17</sup> Complainants' answer to the Panel's questions after the preliminary ruling hearing, para. 19.

have been captured by the Panel's initial terms of reference. Amendments to challenged legislation that do not change the "essence" of the initial measure bring the amended measure under the initial terms of reference.<sup>18</sup> The same was said when the initial measure expired and was replaced by a new one or when the effect of the new (implementing) measure is the same as the expired one.<sup>19</sup> However, in *EC – Chicken Cuts* two related measures were adopted during the panel process but were considered to be excluded from the terms of reference because, although related to the same matter and having the same effect, they were not amendments to the original measures with the same essence as the original measures.

17. In the Panel's view, undefined "related measures" is too broad a term and does not allow China to know clearly what specific measures are being challenged in the current disputes. For this reason, the Panel believes that the Complainants cannot add to their list of challenged measures a broad scope of "related measures".<sup>20</sup>

18. Therefore, the Panel will not read the last bullet point of each of the three lists of specific measures as referring to any "related measures".

19. With regard to the reference to "implementing measures", it is not clear whether the Complainants refer to domestic implementing measures or whether they seek to include the measures that China may have to implement if the Complainants were to succeed in this current challenge. The Panel reads these terms to refer to actions taken by China to implement existing challenged measures.<sup>21</sup>

20. For this reason, the Panel considers that only the listed measures explicitly identified by bullet points in the three sections of the Complainants' panel requests - as well as any future amendment(s) or extensions, replacement measures, renewal measures and implementing measures, as described above by the Panel - fall within the Panel's terms of reference and will thus be examined by the Panel.

### **3. Whether the identification of the measures requires the specification of the products concerned**

21. China claims that in their panel requests the Complainants failed to sufficiently identify the measures they challenge because the Complainants do not adequately specify which specific products are covered by each challenged measure.<sup>22</sup> In order to properly identify the challenged measures, and since many of the listed measures are laws of general application, China argues that the Complainants should have identified the specific products for each of the measures. In response, the Complainants assert that they have clearly listed the basic products concerned by the dispute.<sup>23</sup> The Complainants argue that the reference to "various forms" of the nine materials mentioned in the introductory paragraph of the panel requests, as well as the descriptive list of tariff lines included through footnotes one to nine, seek to provide examples of the broad scope of their challenge.<sup>24</sup> In turn, China

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<sup>18</sup> Appellate Body Report on *Chile – Price Band System*, para. 139.

<sup>19</sup> Appellate Body Report on *US – Upland Cotton* (21.5), para. 270.

<sup>20</sup> The Appellate Body noted in a case that the phrase "implementing measures and other related measures" does not identify the specific measures at issue as required in Article 6.2 of the DSU. Appellate Body Report on *EC – Selected Customs Matters*, para. 152, footnote 369.

<sup>21</sup> The Panel will not read this phrase as involving a measure subject to proceedings under Article 21.5 of the DSU.

<sup>22</sup> For instance, see China's request, paras. 13-19 and 59-66; and China's comments, paras. 10-32.

<sup>23</sup> Joint Response, paras. 13-22.

<sup>24</sup> *Ibid.*

seeks to have the scope of the disputes limited to the explicit tariff lines listed in footnotes one to nine regarding each product mentioned in the introductory paragraph of those panel requests.<sup>25</sup>

22. The Panel notes that the Complainants identified in their panel requests nine "materials"<sup>26</sup>: bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus and zinc.<sup>27</sup> The Complainants added a footnote to each of these materials. In each footnote, the Complainants stated that each material "includes but is not limited to" a series of tariff lines.<sup>28</sup> The Panel understands that the introductory paragraph of the Complainants' panel requests serves to describe generally the scope of the Complainants' challenge. In that introductory paragraph, the Complainants state, in a general manner their concerns over export-related restrictions alleged to be imposed by China through measures concerned with those nine materials. Then, in each of the following three sections in their panel requests, the Complainants submit the legal description or framework of their challenge against the specific measures imposing generally "export quotas", "export duties" and "additional restraints imposed on exportation", alleged to be maintained by China on (some of) those nine products. Accordingly, the Panel understands that each of the listed measures identified in each of the three sections of the panel requests will cover one, some or all of the nine materials mentioned in the introductory paragraph of the panel requests.

23. The Panel considers that the Complainants could also have identified for the nine materials at issue, each and every potentially relevant tariff line, or they could have stated that their claims target "all" tariff lines between X,Y or Z HS lines concerned by each of the nine products identified. But the Complainants chose to only announce the broad scope of their challenge and seem to have wanted to provide more specificity only in the following three sections of their panel requests. Indeed, the following three sections of each panel request then list the specific measures covering, one or more of the nine materials listed in the introductory paragraph.

24. In the Panel's view, the introductory paragraph offers a general presentation of the dispute and the more specific elements of the challenge are included in Sections I, II and III of the panel requests. If the first general listing of products mentioned in the introductory paragraph does not fully inform China of the exact scope of the products concerned by the dispute, the measures listed in the following sections - the Chinese legal instruments - are alleged to provide more specificity. In other words, each of these Chinese legal instruments has a specific product application that covers one, some or all of the products listed in the introductory paragraph of the panel request.<sup>29</sup>

25. The Panel, therefore, rejects China's claim that the terms of reference of this Panel are limited to the measures represented by the tariff lines listed in the footnotes to the products mentioned in the introductory paragraph of the Complainants' panel requests.

26. The Panel agrees with China that the claims need to be as clear as possible and as early as possible in the panel process so as to allow China to defend itself fully. The Panel is also aware that pursuant to Article 19 of the DSU, it can ultimately only make recommendations on specific provisions of specific measures and therefore may need to consider and examine the specific situation of specific challenged instruments as they apply to specific products or group of products.

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<sup>25</sup> China's request, paras. 13-19. See also, China's comments, para. 31.

<sup>26</sup> By "materials", the Panel also understands "products".

<sup>27</sup> As noted in para. 29 of China's request, the Complainant's panel requests are nearly identical. Therefore, any reference to the panel requests refer to any of the documents referred to in footnote 2.

<sup>28</sup> See footnotes one to nine of the panel requests.

<sup>29</sup> Appellate Body Report on *EC – Chicken Cuts*, para. 165-66.

27. Even if, as noted above, the Complainants' panel requests could have been more detailed, in that the Complainants could have identified the measures and the materials they referred to<sup>30</sup>, the Panel is of the view that when it is requested to assess the clarity of a panel request, with reference to the requirements of Article 6.2 of the DSU, it has to consider the panel request as a whole<sup>31</sup> and as part of an integrated and evolving panel process. The Panel believes that there is a possibility that the parameters of some challenged measures will be clarified by the Complainants' first written submissions. Therefore, in the Panel's view, the overall sufficiency of a panel request and whether the right of the respondent to defend itself adequately was or was not prejudiced, may be better determined in light of the Parties' first written submissions.<sup>32</sup>

28. In that context, the Panel notes in particular the undertaking by a representative of the Complainants that this preliminary procedure is somewhat premature and that all possible concerns over the undefined scope of their challenge will be answered once China and the Panel receive the Complainants' first written submissions.

29. In light of the above, the Panel decides to reserve its decision on this part of China's request and to rule on it at a later stage once it has examined the Parties' first written submissions and is able to take full account of China's ability to defend itself. In that context, the Panel notes that it has provided China with a long period of time to respond to the Complainants' first written submissions. The Panel is not saying that all flaws in a panel request can be cured by a first written submission<sup>33</sup> but rather that after the parties' first written submission, the Panel will be in a better position to determine whether China has suffered any prejudice by the Complainants' panel requests while ensuring that this panel process is not unduly delayed.

#### **4. The specific problem of the typographical error of the HS line regarding the zinc**

30. China requested that the Panel exclude from its terms of reference any claims concerning two tariff lines erroneously identified by the Complainants in the context of zinc.<sup>34</sup> As soon as they became aware of this error, the Complainants admitted that these two tariff lines were typographical errors and referred (the Panel and the complainants) to the correct tariff lines.<sup>35</sup> In response to a Panel question and at the request of the Panel, China accepted the correction of these two typographical errors and it made clear that China's understanding of the panel requests includes the "corrected tariff lines".<sup>36</sup>

31. In light of China's response, the Panel will also read the panel requests as including the two corrected tariff lines.

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<sup>30</sup> Appellate Body Report on *EC – Chicken Cuts*, para. 165-66. However, in paragraph 167 of this same ruling, the Appellate Body recognized that under some circumstances it may be necessary to identify the products at issue.

<sup>31</sup> Appellate Body Report on *Korea – Dairy*, paras. 124-127. See also: Appellate Body Report on *US – Carbon Steel*, para. 127.

<sup>32</sup> Appellate Body Report on *US – Carbon Steel*, para. 127.

<sup>33</sup> Appellate Body Report on *EC – Bananas III*, para. 143.

<sup>34</sup> China's request, para. 66 and China's comments, para. 32.

<sup>35</sup> Footnote 15 and para. 18 of the Joint Response. During the hearing for the preliminary ruling request, a representative of the Complainants admitted that they became aware of it in the course of the proceedings.

<sup>36</sup> China's answer to the Panel's questions after the preliminary ruling hearing, paras. 4-5.

**THE REQUIREMENT TO PROVIDE A BRIEF SUMMARY OF THE LEGAL BASIS OF THE COMPLAINT SUFFICIENT TO PRESENT THE PROBLEM CLEARLY WITH REGARD TO SECTION III OF THE PANEL REQUESTS**

32. China submits that the Section III of the Complainants' panel requests do not provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly, contrary to the requirements of Article 6.2 of the DSU. For China, this is because in Section III there is no clear connection between the listed measures, the list of WTO provisions claimed to be violated and the narrative paragraphs that describe generally how "some" of the listed measures are inconsistent with "some" WTO disciplines.<sup>37</sup> China claims that this lack of clarity is exacerbated by the Complainants' subsequent contradictory argument that "all" 37 listed measures are inconsistent with "all" 13 listed WTO obligations. According to China, such a "double listing" approach is contrary to the requirement of Article 6.2 of the DSU to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.<sup>38</sup>

33. In the Panel's view, whether the mere listing of articles of a particular WTO agreement is sufficient to comply with the requirement to provide a summary of the legal basis of the complaint<sup>39</sup>, is to be determined on a case-by-case basis.<sup>40</sup> In some instances, especially if a provision contains multiple obligations within it, a mere listing would not be sufficient to satisfy the obligation in Article 6.2.<sup>41</sup>

34. In that context, the Panel notes in particular that:

"a 'brief summary of the legal basis of the complaint' required by Article 6.2 of the DSU aims to explain succinctly *how* or *why* the measure at issue is considered by the complaining Member to be violating the WTO obligation in question. This brief summary must be sufficient to present the problem clearly. Taken together [with the identification of the measures at issue], these different aspects of a panel request serve not only to define the scope of a dispute, but also to meet the due process requirements."<sup>42</sup>

35. The Panel recalls that Section III of the panel requests, entitled "Additional Restraints Imposed on Exportation", comprises three sub-parts: first, it contains narrative paragraphs, then a list of measures and, finally, the WTO provisions that the Complainants consider are infringed by the listed measures. The narrative paragraphs describe generally the types of measures that the Complainants are challenging and points to some of their WTO inconsistency. In the Panel's view, these narrative paragraphs aim at explaining succinctly how and why some of the challenged measures at issue are inconsistent with some of the WTO principles. Then, the listed legislative instruments identified by bullet points appear to be the more specific measures alluded to in the narrative paragraphs; the final part provides a list of all WTO obligations that would be violated by one or all of the listed measure.

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<sup>37</sup> For instance, see China's request, paras. 48-58.

<sup>38</sup> For instance, see China's comments, paras. 48-63.

<sup>39</sup> Appellate Body Report on *Korea – Dairy*, para. 124.

<sup>40</sup> Appellate Body Report on *Korea – Dairy*, para. 127.

<sup>41</sup> Appellate Body Report on *Korea – Dairy*, para. 124.

<sup>42</sup> Appellate Body Report on *EC – Selected Customs Matters*, para. 130.

36. The Panel agrees with China that the Complainants' argument that all the listed measures violate all the listed WTO obligations seems to contradict the substance of the narrative paragraphs that some (groups of) measures are inconsistent with some of the listed WTO obligations.

37. However, as noted before, the Panel is aware that WTO panel proceedings are an integrated and evolving process and the sufficiency of a panel request is to be determined by taking into account the Parties' first written submissions in order to assess fully whether the ability of the respondent to defend itself was prejudiced.<sup>43</sup>

38. In that context, the Panel notes, in particular, the undertaking from a representative of the Complainants that this preliminary procedure is somewhat premature and that all possible concerns over the undefined scope of their challenge will be answered once China and the Panel receive the Complainants' first written submissions.

39. In light of the above, the Panel decides to reserve its decision on this part of China's request and to rule on it at a later stage, once it has examined the Parties' first written submissions and is more able to take fully into account China's ability to defend itself. In that context, the Panel notes that it has provided China with an extensive period of time to respond to the Complainants' first written submissions. The Panel has already noted that it is not saying that all flaws in a panel request can be cured by a first written submission<sup>44</sup> but rather that after the parties' first written submission, the Panel will be in a better position to determine whether China has suffered any prejudice by the Complainants' panel requests while ensuring that this panel process is not unduly delayed.

**THE COMPLAINANTS' WITHDRAWAL OF THEIR CLAIMS UNDER PARAGRAPH 342 OF THE REPORT OF THE WORKING PARTY ON THE ACCESSION OF CHINA**

40. The Panel notes that the Complainants have informed China and the Panel that they do not intend to pursue any claims regarding China's obligations under paragraph 342 of the Working Party Report on the Accession of China and referred to in Section II of their panel request via Article 1.2 of China's accession Protocol.<sup>45</sup>

41. Therefore, the Panel rules that these specific claims fall outside the Panel's terms of reference.

**THE REFERENCE TO A PRELIMINARY RULING FROM ANOTHER PENDING CASE**

42. The Complainants submitted in support of their allegations, a copy of a preliminary ruling issued by another panel in an ongoing case. Korea, as the respondent in this other dispute and a Third Party in the present one, requests the Panel to refrain from taking into account in any way this preliminary ruling. China shares Korea's concerns.<sup>46</sup>

43. The Panel notes that this preliminary ruling was not circulated to WTO Members and is not yet an official WTO document within the meaning of the Decision on Derestriction.<sup>47</sup> The Panel notes also that WTO dispute proceedings are generally understood to be confidential unless otherwise determined by panels with the agreement of the parties.

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<sup>43</sup> Appellate Body Report on *US – Carbon Steel*, para. 127.

<sup>44</sup> Appellate Body Report on *EC – Bananas III*, para. 143.

<sup>45</sup> Joint Response, para. 35.

<sup>46</sup> China's answer to the Panel's questions after the preliminary ruling hearing, para. 13.

<sup>47</sup> Procedures for the Circulation and Derestriction of WTO Documents, WT/L/452, adopted on 14 May 2002.



44. In light of this, the Panel will not consider this preliminary ruling issued in another ongoing panel process. The Panel also requests the Parties to omit any further reference to this preliminary ruling or any other document illustrating panel deliberations from pending cases.

## CONCLUSION

45. The Panel has decided to issue its preliminary ruling in two stages.<sup>48</sup> In issuing the ruling in this manner, the Panel has kept in mind that according to Article 3.10 of the DSU, the Parties are required to engage in dispute settlement procedures "in good faith in an effort to resolve the dispute".

46. The Panel has ruled on issues which are relevant to its own jurisdiction and that could not be clarified by the parties' first written submission or at any other stage during this panel process. The Panel reserves its decisions on China's request that the Complainants' panel requests do not sufficiently identify the product coverage of each of the listed measure and do not comply with the requirements of Article 6.2 of the DSU. The Panel expects that the Complainants will clarify in their first written submissions which of the listed measures (or group thereof) for which specific products (or group thereof) are inconsistent with which specific WTO obligations among those listed in the last part of Section III of their panel requests. In ruling this way, the Panel wants to ensure that China is able to defend itself appropriately and that this panel process is not unduly delayed.

47. The Panel reserves its decision to develop its reasoning regarding each aspect of its preliminary ruling in a subsequent ruling or in its final report.

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<sup>48</sup> We also note that there is no established jurisprudence nor is there any established practice as to whether a panel needs to rule on the scope of its terms of reference on a preliminary basis, i.e. before the issuance of its Report to the parties. See also Appellate Body Report, *US – Carbon Steel*, para. 123.

## ANNEX F-2

### SECOND PHASE OF PRELIMINARY RULING

#### *China – Measures Related to the Exportation of Various Raw Materials* **WT/DS394, DS395, DS398**

#### **Second Phase of the Preliminary Ruling**

1. By means of this communication, the Panel hereby informs the parties of its decision on certain matters pertaining to China's request dated 30 March 2010 for a preliminary ruling regarding the consistency of the complainants' Panel requests with Article 6.2 of the Understanding on the Rules and Procedures Governing the Settlement of Disputes (DSU).
2. For purposes of transparency and due process, and having previously consulted the Parties, the Panel intends to send a copy of this communication to all Third Parties in the proceedings and will also request that this communication be circulated to all WTO Members.
3. On 30 March 2010, China filed a request before this Panel for a preliminary ruling. In its request, China asserted that specific sections of the complainants' requests for the establishment of this Panel<sup>1</sup> (Panel requests) are inconsistent with Article 6.2 of the DSU. The parties commented on China's request in subsequent submissions. On 29 April 2010, the Panel then held a hearing with the Parties and a separate session with the third parties on China's request. On the same date, the Panel sent written questions to the Parties regarding China's request. The Parties responded to the Panel's questions on 3 May 2010 and submitted comments on 5 May 2010 on each other's responses.
4. On 7 May 2010, the Panel informed the parties of its intention to rule on China's request in two phases. In this communication,<sup>2</sup> 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.
5. In this first phase, the Panel recalled that Article 6.2 of the DSU serves to define the "scope of the dispute" as well as "due process" objectives through the requirements that a complainant's Panel request must identify the "specific measures at issue" and provide "a brief summary of the legal basis sufficient to present the problem clearly". The Panel made the following rulings:
  - 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.
  - 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.

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<sup>1</sup> Request for the Establishment of a Panel by the United States (WT/DS394/7); Request for the Establishment of a Panel by the European Communities (WT/DS395/7) and Request for the Establishment of a Panel by Mexico (WT/DS398/6).

<sup>2</sup> WT/DS394/9, WT/DS395/9, WT/DS398/8.

- 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.
- The Panel requests include the two corrected tariff lines regarding zinc.
- 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.
- The Panel will not consider the preliminary ruling submitted by the complainants in a separate, ongoing panel proceeding.

6. In addition to these rulings, the Panel indicated that it would reserve its decision on two remaining issues until after it had received the complainants' first written submissions. These two issues are:

- Whether the complainants' Panel requests sufficiently identify the products concerned by the challenged measures; and
- Whether Section III of the complainants' Panel requests provides a summary of the legal basis of the complaint sufficient to present the problem clearly, in particular whether the complainants established sufficient "connections" between the alleged claims and violations.

7. In deciding to reserve its decision on these two issues, the Panel acknowledged that not all flaws in a Panel request can be cured by a first written submission.<sup>3</sup> However, it noted at the same time that WTO panel proceedings are an integrated and evolving process. The Panel also took note of the statement from a representative of the complainants that any possible concerns over the undefined scope of their challenge would be answered in the complainants' first written submissions. The Panel thus considered it appropriate to assess the sufficiency of the Panel requests by taking into account the parties' first written submissions. Having done so, it would be in a position to assess fully whether China had been prejudiced in its ability to defend itself.<sup>4</sup> The Panel also sought to ensure that the Panel process was not unduly delayed.

8. The first phase of the Panel's preliminary ruling was circulated as WTO document WT/DS394/9, 395/9, 398/9.

9. The Panel has received and examined the parties' first written submissions, and has heard the parties' further oral arguments regarding China's preliminary ruling request. The Panel has also considered the parties' answers to the Panel's questions<sup>5</sup> and their respective comments on each other's answers.<sup>6</sup> The Panel turns now to the two remaining issues set out in paragraph 6 above.

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<sup>3</sup> Appellate Body Report on *EC – Bananas III*, para. 143.

<sup>4</sup> Appellate Body Report on *US – Carbon Steel*, para. 127.

<sup>5</sup> Reference made in this ruling to responses to questions of the Panel by the parties means those responses provided by the parties on 13 September 2010 to the questions posed by the Panel.

<sup>6</sup> Reference made in this ruling to comments to the responses to questions of the Panel by the parties means those comments provided by the parties on 17 September 2010 to the responses provided by each other to the questions posed by the Panel.

A. WHETHER IN FAILING TO IDENTIFY THE PRODUCTS AT ISSUE THE COMPLAINANTS HAVE THEREFORE FAILED TO PROPERLY IDENTIFY THE CHALLENGED MEASURES

10. In its request for a preliminary ruling, China claimed that the complainants failed in their Panel requests to identify sufficiently the measures they challenge because the complainants' requests do not adequately specify which specific products are covered by each challenged measure.<sup>7</sup> China argued that many of the listed measures are laws of general application, and that the complainants should have identified the specific products at issue for each of the measures set out in the Panel requests. In response, the complainants asserted that they had clearly listed the products concerned by the dispute.<sup>8</sup> The complainants argued that the reference to "various forms" of the nine materials mentioned in the introductory paragraph of the Panel requests, as well as the descriptive list of tariff lines included through footnotes one to nine in the Panel requests, provide examples of the broad scope of their challenge.<sup>9</sup> In turn, China sought to have the scope of the disputes limited to the explicit tariff lines listed in footnotes one to nine regarding each product mentioned in the introductory paragraph of the Panel requests.<sup>10</sup>

11. The Panel noted in the first stage of its preliminary ruling that the introductory paragraph of the complainants' Panel requests offers a general presentation of the dispute, and the more specific elements of the challenge are included in Sections I, II and III of the Panel requests. While recognizing that relying exclusively on the products identified in the first paragraph could lead to confusion as to the precise scope of the claims, the Panel considered that the measures listed in the following sections – certain Chinese legal instruments – could clarify whether some or all of the nine materials were covered. In other words, each of the Chinese legal instruments potentially would have to have a specific product application that covers one, some or all of the products listed in the introductory paragraph of the Panel requests. The Panel clarified that in any case the complainants' claims would not be limited to products covered by the particular tariff lines identified in the complainants' Panel requests. In this context, the Panel reserved its ruling on whether the challenged measures identified sufficiently which products form the basis of each of the claims. The Panel emphasized the need to ensure that China would be able to defend itself adequately.

12. In general, unless the identification of a product at issue defines the specificity of the challenged measure, panel Requests need not specifically identify the products covered by each of the claims. The Appellate Body in *EC – Chicken-Cuts* explained as follows:

"Article 6.2 of the DSU does not refer to the identification of the products at issue; rather, it refers to the identification of the specific measures at issue. Article 6.2 contemplates that the identification of the products at issue must flow from the specific measures identified in the panel request. Therefore, the identification of the product at issue is generally not a separate and distinct element of a panel's terms of reference; rather, it is a consequence of the scope of application of the specific measures at issue. In other words, it is the *measure* at issue that generally will define the *product* at issue.

At the same time, we acknowledge that the Appellate Body held, in *EC – Computer Equipment*, that, with respect to certain WTO obligations, in order to identify the

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<sup>7</sup> See China's preliminary ruling request, paras. 13-19 and 59-66; and China's comments, paras. 10-32.

<sup>8</sup> Joint Response of the complainants to China's request for a preliminary ruling, paras. 13-22.

<sup>9</sup> *Ibid.*

<sup>10</sup> China's preliminary ruling request, paras. 13-19. See also China's comments on the joint response, para. 31.

specific measures at issue, it may be necessary also to identify the products at issue.<sup>11,12</sup>

13. In this dispute, the challenged measures would have to have specific product applications that cover one or several of the products listed in the introductory paragraph of the Panel requests. The Panel recognizes that there may be situations where products should be identified specifically in order to ensure clarity with respect to the measures at issue. Therefore, the Panel reviewed the complainants' Panel requests and first written submissions with this in mind. The Panel acknowledges that the complainants' separate Panel requests might each have provided further detail on which products were at issue with respect to each of the measures. However, the Panel considers that in their first written submissions, as well as in statements made during the first substantive meeting of the Panel with the parties, the complainants brought further precision on which products are concerned with each specific challenged measure, whether in relation to China's Accession Protocol, China's Working Party Report, or the GATT 1994.

14. In Section I of their Panel requests<sup>13</sup>, pertaining to export quotas, the complainants explain that they are challenging the imposition of export quotas by China in terms of the legal instruments specified therein (listing 25 legal instruments), and regarding the following five products: bauxite, coke, fluorspar, silicon carbide, and zinc.

15. Furthermore, the United States, Mexico and the European Union confirmed in paragraphs 104, 107, and 70 of their first written submissions, respectively, that the following five products are subject to export quotas: bauxite, coke, fluorspar, silicon carbide, and zinc. From these products, bauxite, fluorspar, and silicon carbide are identified in connection with quotas allocated by bidding (bauxite, fluorspar, and silicon carbide), while coke and zinc are identified in connection with quotas allocated directly. The complainants further identified in their responses to question No. 2 posed by the Panel, the legal instruments in connection with export quotas for which they are seeking recommendations. During the first panel meeting, the complainants also jointly filed Exhibit JE-134 in which they specify the precise raw materials, and the product names in short form, that pertain to their claims relating to export duties and export quotas.<sup>14</sup>

16. In light of the identification of the relevant materials, the Panel considers that China has been able to put forward specific defences with respect to these claims. This is reflected in the fact that China's asserted defences related to the imposition of several of the export quotas at issue. This supports the conclusion that the complainants sufficiently identified the scope of their claim on export quotas. For instance, in Section VI(C) of its first written submission, China argues that Article XI:1 of the GATT 1994 does not apply to export quotas applied to refractory-grade bauxite, by virtue of

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<sup>11</sup> (footnote original) The Appellate Body stated in *EC – Computer Equipment*:

"We note that Article 6.2 of the DSU does *not* explicitly require that the products to which the 'specific measures at issue' apply be identified. However, with respect to certain WTO obligations, in order to identify 'the specific measures at issue', it may also be necessary to identify the products subject to the measures in dispute."

(Appellate Body Report, *EC – Computer Equipment*, para. 67) (emphasis original).

<sup>12</sup> Appellate Body Report on *EC – Chicken Cuts*, paras. 165-66.

<sup>13</sup> Request for the Establishment of a Panel by the United States (WT/DS394/7); Request for the Establishment of a Panel by the European Communities (WT/DS395/7) and Request for the Establishment of a Panel by Mexico (WT/DS398/6).

<sup>14</sup> The Panel notes that the complainants submitted Exhibit JE-134 to illustrate the precise products for which China has raised an affirmative defense, either under Article XI:2(a) of the GATT 1994 (in the case of refractory grade bauxite), or under Article XX of the GATT 1994 (in the case of refractory grade bauxite, coke and silicon carbide).

Article XI:2(a) of the GATT 1994. Also, in Sections VI(D), and VI(E) of its first written submission, China argues that the export quotas applied to refractory grade bauxite, coke and silicon carbide are justified pursuant to Article XX of the GATT 1994. In addition, China responded to the Panel's questions following the first substantive meeting and commented on the answers provided by the claimants.<sup>15</sup>

17. Therefore, with regard to the export quotas referred to in Section I of the Panel requests, the Panel considers that the complainants in this dispute have sufficiently identified the products at issue to sufficiently identify the challenged measures, consistently with the requirements of Article 6.2 of the DSU.

18. In Section II of the complainants' Panel requests, the complainants claim that China imposes export duties on certain products inconsistently with its commitments under Paragraph 11.3 of China's Accession Protocol. They indicate the measures under challenge and the products concerned with each challenged measure. In this section, the complainants make clear that they are challenging the imposition of export duties by China in terms of the legal instruments specified therein (including 19 legal instruments) and regarding the following eight products: bauxite, coke, fluorspar, magnesium, manganese, silicon metal, yellow phosphorous, and zinc.

19. The complainants' first written submissions as well as their responses to question No. 2 posed by the Panel further demonstrate the precise measures for which the complainants are seeking rulings and recommendations from the Panel. These are:

- Customs Law<sup>16</sup>;
- Regulations on Import and Export Duties<sup>17</sup>; and
- 2009 Tariff Implementation Program<sup>18, 19</sup>.

In their first written submissions, the complainants confirmed that the products identified with these legal instruments are: bauxite, coke, fluorspar, magnesium, manganese, silicon metal, yellow phosphorous, and zinc.<sup>20</sup> In the previously mentioned Exhibit JE-134<sup>21</sup> the complainants also specify

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<sup>15</sup> For instance, the Panel asked the parties in question No. 5 to provide a table indicating for the period before 2009 any change over time in the level of export quotas on the products concerned in this dispute. In its response, China submitted as Exhibit CHN-440 a table listing the level of export quotas imposed on the relevant products at issue during the period 2006-2009. Furthermore, in paras. 50 and 51 of its comments on the complainants' responses to the same question, China provided clarifications on information provided by the complainants.

<sup>16</sup> The Customs Law of the People's Republic of China (adopted at the 19<sup>th</sup> Meeting of the Standing Committee of the Sixth National People's Congress on 22 January 1987, amended 8 July 2000).

<sup>17</sup> Regulations of the People's Republic of China on Import and Export Duties (Order of the State Council (2003) No. 392, adopted at the 26<sup>th</sup> executive meeting of the State Council on 29 October 2003, 1 January 2004).

<sup>18</sup> Notice Regarding the 2009 Tariff Implementation Program (State Council Tariff Policy Commission, shuiweihui (2008) No. 40, 1 January 2009).

<sup>19</sup> The Panel notes that Section II of the complainants' Panel requests listed more than three measures; however, the complainants have narrowed the scope of their claims.

<sup>20</sup> United States' first written submission, paras. 234 and 237; Mexico's first written submission, paras. 237 and 240; European Union's first written submission, paras. 130 and 148.

<sup>21</sup> See footnote 14 above.

the precise raw materials, and the product names in short form, that pertain to their claims relating to export duties.<sup>22</sup>

20. As with claims on export quotas in Section I of the complainants' Panel requests, China also raised a number of defences with respect to the imposition of export duties. In the Panel's view, China's ability to offer a specific response supports the conclusion that the complainants sufficiently identified the scope of these claims to permit China to defend itself. For instance, in paragraphs 84 and 85 of its first written submission, China asserted that it does not impose export duties on bauxite. In paragraphs 86 to 90 of its first written submission, China explained that it does not impose a special export duty on yellow phosphorous in excess of the *ad valorem* rate in Annex 6. In Section V of its first written submission, China argued that export duties applied to exports of fluorspar, coke, magnesium, manganese, and certain forms of zinc are justified pursuant to Article XX of the GATT 1994. Furthermore, China responded to the Panel's questions following the first substantive meeting and commented on the responses provided by the claimants.<sup>23</sup>

21. Therefore, with regard to the export duties referred to in Section II of the Panel requests, the Panel considers that the complainants in this dispute have sufficiently identified the products at issue to sufficiently identify the challenged measures, consistently with the requirements of Article 6.2 of the DSU.

22. In Section III of the complainants' Panel requests, entitled "Additional Restraints Imposed on Exportation", the complainants challenge requirements and procedures in connection with China's quota bidding system; the administration of export quotas; certain requirements related to export licensing; the administration of an alleged minimum export price (MEP) regime; and the alleged failure to publish quota amounts. The parties dispute whether the challenge against the failure to publish quota amounts is properly brought against both zinc and coke. The Panel considers each of these in turn.

23. In respect of their claims concerning allocation of export quotas through a bidding system, the complainants identify bauxite, fluorspar, and silicon carbide in their Panel requests. The complainants confirm these as the relevant products in their first written submissions.<sup>24</sup>

24. In connection with their claims pertaining to the administration of export quotas, the complainants identify bauxite, coke, fluorspar, silicon carbide, and zinc in the introductory paragraph of their Panel requests. In their first written submissions, the complainants restate their challenge against certain aspects relating to the direct quota allocation of zinc and coke, as well as certain aspects of the bidding allocation system in respect of bauxite, fluorspar, and silicon carbide.<sup>25</sup>

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<sup>22</sup> In the case of export duties, the complainants identify coke, fluorspar, magnesium, manganese, and zinc, as the raw materials relevant to their claims.

<sup>23</sup> For instance, the Panel asked the parties in Panel question No. 3 to provide a table indicating for the period before 2009 any change over time in the level of export duties on the products concerned in this dispute. In its response, China submitted as Exhibit CHN-439 a table listing the level of export duties imposed on the relevant products at issue during the period 2006-2009. Furthermore, in paras. 48 and 49 of its comments on the complainants' responses to this question, China highlighted discrepancies between the complainants' and China's information, and submitted a new table as Exhibit CHN-466 to compare the export duty level information provided by the parties.

<sup>24</sup> United States' first written submission, para. 315; European Union's first written submission, para. 104; Mexico's first written submission, para. 318.

<sup>25</sup> United States' first written submission, paras. 292 to 303, 284 to 289; European Union's first written submission, paras. 238 to 245; Mexico's first written submission, paras. 295 to 306.

25. With respect to claims concerning export licensing, the complainants identify bauxite, coke, fluorspar, manganese, silicon carbide, and zinc in their Panel requests, and confirm these products in their first written submissions.<sup>26</sup>

26. In connection with their challenge against China's alleged coordination of MEPS, the complainants did not identify products in their Panel requests, stating only that "China also imposes quantitative restrictions on the exportation of the materials by requiring that prices for the materials meet or exceed a minimum price before they may be exported."<sup>27</sup> However, in their first written submissions, the complainants identify bauxite, coke, fluorspar, magnesium, manganese, silicon metal, yellow phosphorus, and zinc as relevant to their claims in this context.<sup>28</sup>

27. Finally, in connection with the European Union's challenge regarding the publication of a zinc quota, the European Union's Panel request refers specifically to a failure by China to publish a quota amount for the export of zinc, or to publish the conditions or procedures relevant to making applications to export zinc.

28. In the light of the above, in the Panel's view, the complainants have clarified through their first written submission which products relate to their Section III claims against China's quota bidding system, the administration of export quotas, certain requirements related to export licensing, and the alleged coordination of MEPS. Therefore, for these claims, the Panel considers that the complainants in this dispute have sufficiently identified the products at issue to sufficiently identify the challenged measures, consistently with the requirements of Article 6.2 of the DSU.

29. In sum, for the above reasons, the Panel concludes that the complainants have sufficiently identified the products concerned by each measure in accordance with the requirements of Article 6.2 of the DSU. In the Panel's view, the complainants have clarified in their first written submissions which products are covered by which measures for each of their claims listed in Sections I, II and III of their Panel requests. As discussed above, China has responded to the complainants' claims, both providing arguments on the legal status of various challenged measures and asserting specific defences to certain of the complainants' claims. The defences raised by China are addressed to particular subsets of the concerned raw materials. China has also presented arguments in connection with specific products and has discussed the operation of specific measures listed in the complainants' Panel requests. This confirms that China has been able to understand which products are affected by each claim.

**B. WHETHER SECTION III OF THE COMPLAINANTS' PANEL REQUESTS PROVIDE FOR A SUMMARY OF THE LEGAL BASIS OF THE COMPLAINT SUFFICIENT TO PRESENT THE PROBLEM CLEARLY**

30. In addition to its challenges under Article 6.2 of the DSU, discussed above and in the first phase of the Panel's preliminary ruling, China also challenges whether Section III of the complainants' Panel requests provide a summary of the legal basis of the complaint sufficient to present the problem clearly as required by Article 6.2 of the DSU. In essence, China argues that the complainants failed to establish sufficient connections between the measures listed in their Panel requests and their

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<sup>26</sup> United States' first written submission, para. 185; European Union's first written submission, para. 159; Mexico's first written submission, para. 188.

<sup>27</sup> Request for the Establishment of a Panel by the United States (WT/DS394/7); Request for the Establishment of a Panel by the European Communities (WT/DS395/7) and Request for the Establishment of a Panel by Mexico (WT/DS398/6).

<sup>28</sup> United States' first written submission, para. 349; European Union's first written submission, para. 353; Mexico's first written submission, para. 352.



assertions of violations of various WTO provisions. In its Preliminary ruling request, China specifically challenged the complainants' assertion that *all* the listed measures are inconsistent with *all* of the listed WTO provisions. China submits that the complainants' subsequent written submissions did not rectify the situation. China has also taken particular issue with alleged *new* measures identified in connection with China's alleged coordination of MEPs.

31. In the first phase of its preliminary ruling<sup>29</sup>, The Panel acknowledged a potential contradiction between the structure of the complainants' Panel requests and their argumentation that *all* the listed measures violate *all* the listed WTO obligations. However, the Panel took note of the complainants' assertion that any possible concerns over the undefined scope of their challenge would be addressed in the complainants' first written submissions. The Panel therefore decided that it would only be able to deal with the issue of whether Section III of the complainants' Panel requests provide sufficient connection between the listed measures, the list of WTO provisions claimed to be at issue, and the narrative paragraphs that precede the listed measures, after it had reviewed the parties' first written submissions.

32. The Panel received the complainants' first written submissions on 1 June 2010, after it had issued the first phase of its preliminary ruling. The complainants did not directly address in their submissions or in their subsequent oral statements the two matters on which the Panel had reserved its ruling.<sup>30</sup>

33. In its first written submission and at the first substantive meeting of the parties, China asserted that the complainants' first written submissions failed to rectify the legal deficiencies in Section III of the Panel requests and otherwise failed to seek sufficiently precise recommendations and rulings from the DSB with respect to the issues raised in Section III of their Panel requests. In particular, for measures identified in the Panel requests in connection with the MEP-related claims, China argued that the measures had expired and were thus not properly before the Panel. This, it argues, is because the complainants, failed to hold consultations on those measures, which they later identified, or otherwise because the particular challenged measures were not identified in the Panel requests.

34. The Panel will first address the matter of MEP-related measures, and then address whether Section III of the complainants' Panel requests provide for a summary of the legal basis of the complaint sufficient to present the problem clearly.

## **2. The MEP-related measures included in the Panel's terms of reference**

35. As part of its challenge against Section III of the complainants' Panel request, China argued that the complainants have introduced in their first written submissions new MEP-related measures that should not be considered in the Panel's terms of reference. In paragraph 39 of its first written submission, China listed 15 MEP-related measures that the complainants referred to in their submissions. According to China, only two of those measures were included in both the complainants' consultation and panel requests; seven were included in the panel requests but not the consultation requests; two were included only in the consultation requests; and finally four of those measures do not appear in either the consultation or panel requests. For China, only the two measures that appear in both the consultations and Panel requests are properly within the Panels' terms of reference.

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<sup>29</sup> Preliminary Ruling, first phase, WT/DS394/9, WT/DS395/9, WT/DS398/8.

<sup>30</sup> In their joint oral statement, the complainants only addressed the issue of whether the Panel should make findings on 2009 measures that may have expired or been repealed.

36. In connection with the first substantive meeting of the parties, the Panel further questioned the parties as to which measures should form the basis of the Panel's recommendations, including for challenges in Section III of the complainants' Panel requests.<sup>31</sup> The Panel also sought from the complainants specific clarification on which measures comprise the complainants' MEP-related claims, and whether the alleged measures referred to by the complainants are listed specifically in the Panel requests, or otherwise constitute amendments, extensions, replacement measures, renewal measures or implementing measures, as referred to in the requests.

37. In response to Panel's enquiry, the complainants (in two charts, one filed jointly by the United States and Mexico, and a second by the European Union) identified a list of measures that they consider to be in the Panel's terms of reference. Notably, the complainants each refer to 21 MEP-related measures, including the 15 measures identified in paragraph 39 of the China's first written submission, as well as six additional measures that do not appear in the chart provided by China.<sup>32</sup>

38. Of the 21 MEP-related measures discussed above, the following 15 measures are listed in paragraph 39 of the China's first written submission:

- Export Price Penalties Regulations<sup>33</sup>;
- Measures for Administration of Licensing Entities<sup>34</sup>;
- Rules for Coordination of Customs Price Review<sup>35</sup>;
- Rules on Price Reviews of Export Products<sup>36</sup>;
- Provisional Rules on Export Price Verification<sup>37</sup>;
- CCCMC PVC Rules<sup>38</sup>;

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<sup>31</sup> Question No. 2 posed by the Panel to the complainants.

<sup>32</sup> See Annex A for a full list of the short titles of these measures as referred to by the parties. The Panel uses these short titles in its ruling.

<sup>33</sup> 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), identified by China as item number 1 in the chart presented on para. 39 of its first written submission on 4 August 2010.

<sup>34</sup> Measures for the Administration of the Organs for Issuing the Licenses of Import and Export Commodities (Ministry of Foreign Trade and Economic Cooperation, waijingmaopeiguanhanzi (1999) No. 68, September 21, 1999), identified by China as item number 2 in the chart presented on para. 39 of its first written submission on 4 August 2010.

<sup>35</sup> Rules for Coordination with Respect to Customs Price Review of Export Products (Ministry of Foreign Trade and Economic Cooperation guanzonghanzi No. 21, 1997), identified by China as item number 3 in the chart presented on para. 39 of its first written submission on 4 August 2010.

<sup>36</sup> Notice on the Rules on Price Reviews of Export Products by the Customs (Ministry of Foreign Trade and Economic Cooperation guanzonghanzi No. 21, 1997), identified by China as item number 4 in the chart presented on para. 39 of its first written submission on 4 August 2010.

<sup>37</sup> 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), identified by China as item number 5 in the chart presented on para. 39 of its first written submission on 4 August 2010.

<sup>38</sup> 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

- Online PVC Instructions<sup>39</sup>;
- Decision on the Reform and Improvement of the Trade System<sup>40</sup>;
- Various Provisions on the Strengthening of Export Product Coordination and Management<sup>41</sup>;
- CCCMC Export Coordination Measures<sup>42</sup>;
- CCCMC Bauxite Branch Coordination Measures<sup>43</sup>;
- "system of self-discipline"<sup>44</sup>;
- Adjustment of the Catalogue of Export Products Subject to Price Review<sup>45</sup>;
- Notice Regarding the Trial Administration of 36 Products<sup>46</sup>; and
- Communication<sup>47</sup>;

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and Chemicals Products Department, 30 December 2003), identified by China as item number 6 in the chart presented on para. 39 of its first written submission on 4 August 2010.

<sup>39</sup> Online Verification and Certification Operating Steps (China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters), identified by China as item number 7 in the chart presented on para. 39 of its first written submission on 4 August 2010.

<sup>40</sup> 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), identified by China as item number 8 in the chart presented on para. 39 of its first written submission on 4 August 2010. Complainants did not seek recommendations for this measure in their response to question No. 2 posed by the Panel.

<sup>41</sup> 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), identified by China as item number 9 in the chart presented on para. 39 of its first written submission on 4 August 2010. Complainants did not seek recommendations for this measure in their response to question No. 2 posed by the Panel.

<sup>42</sup> Identified by China as item number 10 in the chart presented on para. 39 of its first written submission on 4 August 2010.

<sup>43</sup> Identified by China as item number 11 in the chart presented on para. 39 of its first written submission on 4 August 2010.

<sup>44</sup> Identified by China as item number 12 in the chart presented on para. 39 of its first written submission on 4 August 2010.

<sup>45</sup> 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, waijingmaomaofa (2002) No. 187, May 1, 2002), identified by China as item number 13 in the chart presented on para. 39 of its first written submission on 4 August 2010. Complainants did not seek recommendations for this measure in their response to question No. 2 posed by the Panel.

<sup>46</sup> 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), identified by China as item number 14 in the chart presented on para. 39 of its first written submission on 4 August 2010. Complainants did not seek recommendations for this measure in their response to question No. 2 posed by the Panel.

<sup>47</sup> Communication (Ministry of Commerce and General Administration of Customs (2008) No. 33, May 26, 2008), identified by China as item number 15 in the chart presented on para. 39 of its first written submission on 4 August 2010. Complainants did not seek recommendations for this measure in their response to question No. 2 posed by the Panel.

39. In addition to these 15 measures, the complainants identified the following six measures among the 21 relevant measures (as discussed in paragraph 37 above):

- Measures for Administration of Trade Social Organizations<sup>48</sup>;
- Regulations for Personnel Management of Chambers of Commerce<sup>49</sup>;
- 1994 CCCMC Charter<sup>50</sup>;
- 2001 CCCMC Charter,<sup>51</sup>
- Bauxite Branch Charter<sup>52</sup>; and
- MOFTEC Circular.<sup>53</sup>

40. In response to question No. 2 from the Panel, the complainants requested findings and recommendations on the following 15 of the 21 measures discussed above, all of which they consider to fall within the Panel's terms of reference:<sup>54</sup>

- Measures for Administration of Trade Social Organizations;
- Regulations for Personnel Management of Chambers of Commerce;
- 1994 CCCMC Charter;
- 2001 CCCMC Charter;
- Export Price Penalties Regulations;
- Measures for Administration of Licensing Entities;

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<sup>48</sup> Measures for the Administration Over Foreign Trade and Economic Social Organizations (Ministry of Foreign Trade and Economic Cooperation, 26 February 1991), identified by the complainants as item "a" in Chart A submitted to respond to question no. 1 of the Panel on 13 September 2010.

<sup>49</sup> 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, 23 September 1994), identified by the complainants as item "b" in Chart A submitted to respond to question No. 1 of the Panel on 13 September 2010.

<sup>50</sup> Charter of the China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters (1994), identified by the complainants as item "c" in Chart A submitted to respond to question No. 1 of the Panel on 13 September 2010.

<sup>51</sup> Charter of the China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters (2001), identified by the complainants as item "c" in Chart A submitted to respond to question No. 1 of the Panel on 13 September 2010.

<sup>52</sup> Identified by the complainants as item "d" in Chart A submitted to respond to question no. 1 of the Panel on 13 September 2010.

<sup>53</sup> MOFTEC Circular on Strengthening the Job in the Coordination of Export Commodities (1998), identified by the complainants as item "e" in Chart A submitted to respond to question No. 1 of the Panel on 13 September 2010.

<sup>54</sup> The complainants are not asking for recommendations and findings on six of the 21 measures referred to collectively by the parties.

- Rules for Coordination of Customs Price Review;
- Rules on Price Reviews of Export Products; and
- Provisional Rules on Export Price Verification;
- CCCMC PVC Rules;
- Online PVC Instructions;
- CCCMC Export Coordination Measures;
- CCCMC Bauxite Branch Coordination Measures;
- Bauxite Branch Charter; and
- "system of self-discipline".

41. Of the 15 measures listed in paragraph 40 of this ruling, the complainants submit that six measures appear in both the consultation and Panel requests, and are within the Panel's terms of reference. These six measures are:

- Measures for Administration of Trade Social Organizations;
- Regulations for Personnel Management of Chambers of Commerce;
- 1994 CCCMC Charter;
- 2001 CCCMC Charter;
- Export Price Penalties Regulations; and
- Measures for Administration of Licensing Entities.

42. The complainants argue that the remaining nine measures of the 15 measures listed in paragraph 40 for which they seek recommendations are within the Panel terms of reference because they are "implementing" measures.<sup>55</sup> The complainants concede that certain of these nine measures appear in the complainants' consultations requests but not the Panel requests; others appear in the Panel requests but not the consultations requests; and finally, certain measures do not appear in either of the requests.<sup>56</sup> In their responses to Panel question No. 1, the complainants specified which are those nine "implementing" measures, and further indicated which are the measures that they implement. These are:

- Rules for Coordination of Customs Price Review;

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<sup>55</sup> In their responses to question No.1 from the Panel, the complainants actually allege that there are 11 implementing measures. The parties have recognized that two of these measures – the 1994 CCCMC Charter, and the 2001 CCCMC Charter – appear in both the consultations and Panel requests, and are not argued to fall outside the Panel's terms of reference. See para. 35 above.

<sup>56</sup> See complainants' response to Panel question No. 1.

- Rules on Price Reviews of Export Products;
- Provisional Rules on Export Price Verification;
- CCCMC PVC Rules;
- Online PVC Instructions;
- CCCMC Export Coordination Measures;
- CCCMC Bauxite Branch Coordination Measures,
- Bauxite Branch Charter; and
- "system of self-discipline".

43. The complainants have not to date explained in their responses or otherwise how any of these measures "implement" other measures.

44. China responded that those measures identified by the complainants as "implementing" measures should not be in the Panel's terms of reference. China contended that the complainants failed to meet their burden to explain how any of these measures implement other measures. For China, the set of additional measures referred to by the complainants are not new governmental actions, nor have the complainants demonstrated that these measures have the same "essence" or "effect" as those measures originally included in the Panel requests. Therefore, they cannot properly be considered as "implementing" measures within the Panel's terms of reference.<sup>57</sup>

45. The Panel considers it appropriate to address whether the complainants' Panel requests respect Article 6.2 of the DSU, both in light of China's request and with a view to confirming its competence to rule on the measures at issue.<sup>58</sup> The Panel will address each of the measures discussed above.

46. To begin, the Panel recalls the findings of the Appellate Body that a panel request must identify the measures with sufficient clarity to indicate the nature of the measure and the gist of what is at issue.<sup>59</sup> The Appellate Body has indicated that the obligation to afford due process is "inherent in the WTO dispute settlement system"<sup>60</sup> and is "fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings".<sup>61</sup> It concluded that:

"[T]he protection of due process is an essential feature of a rules-based system of adjudication, such as that established under the DSU. Due process protection

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<sup>57</sup> China's response to Panel question No. 1; China's comments on complainants' responses to Panel question No. 1. The complainants request the Panel not to consider these new arguments raised by China in its Panel's preliminary ruling because these issues were not raised by China at the outset of its preliminary ruling request and were not addressed by the parties in the context of their preliminary ruling request.

<sup>58</sup> Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36.

<sup>59</sup> Preliminary Ruling, first phase, para. 8, referring to Appellate Body Report on *US – Continued Zeroing*, paras. 168-169.

<sup>60</sup> Appellate Body Report on *Chile – Price Band System*, para. 176. See also Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, para. 107.

<sup>61</sup> Appellate Body Report on *Thailand – H-Beams*, para. 88.

guarantees that the proceedings are conducted with fairness and impartiality, and that one party is not unfairly disadvantaged with respect to other parties in a dispute."<sup>62</sup>

This includes requiring that the respondent be afforded an adequate opportunity to respond to claims, arguments, or evidence presented by the complainants.<sup>63</sup>

47. In the first phase of its preliminary ruling, the Panel recognized that its terms of reference are generally limited to measures that have been identified in the complainants' Panel requests. The Panel also recognized, however, that there may be situations where a new governmental measure or action that may not have existed at the time of the Panel request may nevertheless be so closely linked to the challenged measures that it falls within the Panel's terms of reference. Such measure could potentially include an amendment or extension, related measure, replacement measure, renewal measure, or implementing measure.<sup>64</sup> Such measure, however, must not change the "essence" of the initial measure that was properly identified in the Panel request.<sup>65</sup> The Panel also recalls that it has ruled that the scope of the Panel's terms of reference in this dispute would not extend to broad and undefined "related measures".<sup>66</sup>

48. In the Panel's view, those six measures that appear in both the consultations and Panel requests are clearly within the Panel's terms of reference. To recall from paragraph 40 above, these are:

- Measures for Administration of Trade Social Organizations;
- Regulations for Personnel Management of Chambers of Commerce;
- 1994 CCCMC Charter;
- 2001 CCCMC Charter;
- Export Price Penalties Regulations; and
- Measures for Administration of Licensing Entities.

49. However, the complainants have not demonstrated that the nine remaining MEP-related "implementing" measures (see paragraph 42 above) for which they seek recommendations implement other measures identified in the complainants' Panel requests.<sup>67</sup> Of these 9 implementing measures, the complainants indicated that five of them appear in the Panel requests but not the consultations requests. These are:

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<sup>62</sup> Appellate Body Report on *US – Continued Suspension*, para. 433.

<sup>63</sup> Appellate Body Report on *US – Continued Suspension*, para. 433; Appellate Body Report on *US – Gambling*, paras. 269-273; Appellate Body Report on *Canada – Wheat Exports and Grain Imports*, para. 177; Appellate Body Report on *Mexico – Corn Syrup* (Article 21.5 – US), para. 47; Appellate Body Report on *Australia – Salmon*, paras. 272 and 278; and Appellate Body Report on *Brazil – Desiccated Coconut*, p. 22.

<sup>64</sup> Preliminary Ruling, first phase, para. 16. The Panel noted in that phase of its ruling that the term "implementing measures" refers to actions taken by China to implement existing challenged measures.

<sup>65</sup> Preliminary Ruling, first phase, para. 16, referring to Appellate Body Report on *Chile – Price Band System*, para. 139, and Appellate Body Report on *US – Upland Cotton* (Article 21.5 – Brazil), para. 270.

<sup>66</sup> Preliminary Ruling, first phase, paras. 17 and 18.

<sup>67</sup> These include measures that were identified in both the Panel and consultations requests as well as measures that only appear in the Panel requests. These do not include measures that appear solely in the consultations requests.

- Rules for Coordination of Customs Price Review;
- Rules on Price Reviews of Export Products;
- Provisional Rules on Export Price Verification;
- CCCMC PVC Rules; and
- Online PVC Instructions.

50. The complainants further indicated that the remaining four alleged "implementing" measures do not appear in the consultations or Panel requests. These are:

- CCCMC Export Coordination Measures;
- CCCMC Bauxite Branch Coordination Measures;
- Bauxite Branch Charter; and
- "system of self-discipline".

51. For those measures listed in paragraph 49 that are alleged to be "implementing" measures and that were in Panel requests, the complainants did not seek to explain the "essence" of these measures or their link to any measures included in the consultation requests.<sup>68</sup> The complainants merely assert in response to question No. 1 from the Panel that all nine measures are implementing measures. The complainants did not explain why the measures listed in paragraph 50 above were not in their consultation or Panel requests, nor how they can be considered implementing measures.

52. The complainants' late reference to these nine MEP-related measures (that either appear in the Panel request but not the consultations request, or that do not appear in the consultations or Panel requests) and their failure to argue or demonstrate that these measures either maintain the essence of the measures they are alleged to implement leads the Panel to find that the complainants have failed to comply with the requirements of Article 6.2 of the DSU, with respect to these nine measures.<sup>69</sup> As a result of this delayed identification of these nine measures, China was not given appropriate notice of all aspects of the claims against it. It did not know the case it had to meet and thus was not afforded opportunity to respond. Even if the complainants were eventually to address how such measures "implement" the original measures, this would not cure a failure to meet the obligations of Article 6.2 of the DSU. The time for proper notice has passed. Later explanation would only afford China a late and limited opportunity to respond. China signalled early on the complainants' failure to properly

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<sup>68</sup> Panels and the Appellate Body have addressed requirements for including measures in a panel's terms of reference that were not included in a consultations request. Requirements include addressing whether a measure has the "same essence" and "effect" as a measure in the consultations request. *See* Panel Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 7.21; Appellate Body Report on *US – Certain EC Products*, paras. 74- 77. *See also* Appellate Body Report on *US- Continued Zeroing*, para. 230; Panel Report on *US – Continued Zeroing*, paras. 7.26 and 7.27.

<sup>69</sup> The Panel recalls its statement from the first phase of its preliminary ruling that measures to be included in the Panel's terms of reference should generally exist at the time of the filing of the panel request, except in cases where new governmental actions were considered to be so closely linked to the challenged measures that they may be also considered to fall within the Panel's terms of reference. The Panel also recalled that such measures must not change the "essence" of the measures originally challenged. *See* Panel ruling, first phase, para. 16; referring to Appellate Body Report on *Chile – Price Band System*, para. 139.



identify these measures. Nevertheless, no explanation was provided by the complainants as to why these new measures were not included in the requests. All that the Panel has before it is a chart with the descriptor "implementing" for these nine measures.

53. The Panel notes specially the complainants' failure to explain how the alleged implementing measures implement measures – some of which China claims are expired measures. Implementing measures normally would not derive authority from measures whose legal authority has expired. The complainants have not indicated that any of the additional alleged "implementing" measures are new or were put in place after the Panel requests were submitted. In the interests of due process and good faith, it was incumbent upon the complainants to provide explanations about the measures they consider fall within the Panel's terms of reference.

54. In the Panel's view, the complainants would have had to provide more arguments and evidence in their opening written and oral submissions, or in responses to the Panel's questions, to have met the obligations of Article 6.2 of the DSU. Although more argumentation might have been possible in later submissions, additional evidence supporting material on the issue of the Panel's terms of reference with respect to implementing measures would have been too late at the rebuttal phase.<sup>70</sup>

55. The Panel does not have enough evidence at this stage to persuade it that the measures could operate to implement the measures mentioned in the requests, and it cannot permit the complainants to submit new evidence at this stage. Nor can it seek to make the complainants case for them through posing more questions. Neither the respondent nor the Panel should on their own have to determine what specific MEP-related measures are under challenge, and therefore what measures define the terms of reference.

56. In reaching this conclusion, the Panel does not mean to imply that a panel request must always include extensive detail about alleged implementing measures. The Appellate Body has previously explained that adequate notice to a respondent is not determined by examining one part of the panel request in isolation, but rather by considering the request as a whole, and in the light of attendant circumstances.<sup>71</sup> Moreover, the Appellate Body has explained that the different claims in the request for establishment must be read in their context.<sup>72</sup>

57. For the reasons above, the Panel rules that the following six measures are within its terms of reference:

- Measures for Administration of Trade Social Organizations;
- Regulations for Personnel Management of Chambers of Commerce;
- 1994 CCCMC Charter;
- 2001 CCCMC Charter;
- Export Price Penalties Regulations; and
- Measures for Administration of Licensing Entities.

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<sup>70</sup> Appellate Body Report on *Argentina – Textiles*, para. 79

<sup>71</sup> Appellate Body Report on *US – Carbon Steel*, para. 127.

<sup>72</sup> Panel Report on *Mexico – Anti-dumping Measures on Rice*, para. 7.31 (original footnote omitted).

The Panel considers that only these above MEP-related measures fall within its terms of reference and hence, it will only address these measures in this ongoing dispute.

58. The Panel is aware that China has raised further objections with respect to the complainants' MEP-related claims. The Panel will address these additional matters in its Panel report. Having ruled on the specific measures relevant to the complainants' claims of MEP-related claims, the Panel will now address whether Section III of the complainants' Panel requests fail to present the problem clearly by failing to provide sufficient connections between the listed measures and the listed claims of violations.

**3. Whether Section III of the complainants' Panel requests fail to present the problem clearly by failing to provide sufficient connections between the listed measures and the listed claims of violations**

59. Having addressed specific questions pertaining to the relevant measures at issue for the complainants MEP-related claims, the Panel will next address China's broader assertion that Section III of the complainants' Panel requests fail to present the problem clearly in accordance with paragraph 6.2 of the DSU.

60. For China, Section III does not provide a clear connection between the listed measures, the list of provisions claimed to be violated, and the narrative paragraphs that describe generally how "some" of the listed measures are inconsistent with "some" WTO disciplines.

61. In response to a question No. 2 from the Panel, the parties identified those measures for which the Panel should provide recommendations in its final report.<sup>73</sup> As explained above,<sup>74</sup> the complainants (in two charts, one filed jointly by the United States and Mexico, and a second by the European Union) listed those measures that they consider relevant for all of their claims made in connection with Sections I, II and III of their Panel requests.

62. China asserts that the variation between the table presented by the United States and that by the European Union underscores that the complainants have not sufficiently identified which subset of claims is made under which subset of the 13 treaty provisions, with respect to which subset of the 37 measures that appear in Section III of the Panel requests. China argues that the complainants describe the subject matter of their claims differently, including what China alleges are different issues regarding the administration of export quotas and allocation conditions, and quota bid-winning fees.

63. The Panel recalls its view that the matter of whether the mere listing of provisions of a particular WTO agreement is sufficient to comply with the requirement to provide a summary of the legal basis of the complaint must be determined on a case-by-case basis.<sup>75</sup>

64. The Panel observes that Section III, in various respects, includes claims against:

- (a) China's administration of its quota system;
- (b) China's export licensing system;

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<sup>73</sup> Question No. 2 posed by the Panel to the complainants.

<sup>74</sup> See para. 37.

<sup>75</sup> Preliminary Ruling, first phase, para. 33, referring to Appellate Body Report on *Korea – Dairy*, para. 127.

- (c) China's coordination of MEPs and failure to publish such prices; and
- (d) China's failure to publish certain quota amounts.

65. For the reasons set forth below, the Panel considers that the complainants' first written submission set out sufficient connections between the challenged measures and certain violations attributed to such measures. The Panel would note, preliminarily, its view that differences in the scope of the claims (including in the narrative paragraphs) as presented by the United States, Mexico and the European Union do not necessarily affect the proper identification of measures by each of the complainants.

66. The Panel agrees with China that, contrary to their assertions, the complainants did not advance *all* claims, under *all* treaty provisions, with respect to *all* measures. Indeed, the complainants clarified the connection of the measures at hand with the specific claims in their responses to question No. 2 posed by the Panel. This may be illustrated through various examples referred to below.

67. First, with regard to the administration of China's export quota system, the United States and Mexico identified the instrument entitled "Regulation of the People's Republic of China on the Administration of Import and Export of Goods" as one of the legal instruments related to the administration of the export quota system. The United States and Mexico identified the inconsistency of this measure with Article X:3 (a) of the GATT 1994.

68. Second, with regard to the export licensing system, the complainants identified the instrument entitled "Export License Measures"<sup>76</sup> as one of the legal instruments related to the imposition of the administration of China's quota system. The United States and Mexico claimed the inconsistency of the measure with Article XI:1 of the GATT 1994,<sup>77</sup> while the European Union claimed that the measure is inconsistent with Article XI:1 of the GATT 1994, paragraph 1.2 of China's Accession Protocol, and paragraphs 83 and 84, and 162 and 165 of the Working Party Report.

69. Third, with regard to the MEP-related claims, the complainants identified the instrument entitled "Measures for Administration of Trade Social Organization"<sup>78</sup> as one of the related legal instruments. The complainants contended that this measure and others are inconsistent with Article XI:1 as well as Article X:1 and X:3 of the GATT 1994.

70. The Panel also considers that the fact China raised specific defences against a number of claims under Section III of the Panel requests supports its view that the complainants have met their burden to present the problem clearly. For instance, in Section VII of its first written submission, China reserved arguments about the consistency of its administration of its quota system with its obligations under the WTO. China asserted in Section VIII(B) of its first written submission that the administration of its export licensing system is consistent with Article XI:1 of the GATT 1994. Finally, in connection with certain MEP-related measures, China submitted that it no longer coordinates minimum export prices. In addition, China takes this stance in connection with assertions

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<sup>76</sup> Measures for the Administration of License for the Export of Goods (Order of the Ministry of Commerce (2008) No. 11, July 1, 2008).

<sup>77</sup> Although the United States and Mexico in their first written submissions, alleged that China's export licensing is inconsistent with paragraph 1.2 of China's Accession Protocol and paragraphs 162 and 165 of China's working party report, the United States and Mexico did not request the Panel to make recommendations on these claims in their responses to Panel question No. 2. The Panel is therefore unclear whether the United States and Mexico intend to proceed with these additional claims of violation.

<sup>78</sup> "Measures for the Administration over Foreign Trade and Economic Social Organization "(Ministry of Foreign Trade and Economic Cooperation, 26 February 1991).

that China failed to publish measures pertaining to such coordination, or that it administers such coordination in a manner that is not impartial, reasonable and uniform.

71. Finally, the Panel will address claims by the European Union that China failed to publish certain quota amounts. As with its other claims on Section III of the Panel requests, China asserted generally that the European Union did not provide sufficient connections between the listed measures and these claims. In addition, China argued that the European Union may only proceed with its publication claims concerning the zinc quota, and not the coke quota, due to a failure to give notice of a claim against the coke quota in its Panel request. In the latter respect, China argues that, in paragraph 4 of Section III of its Panel request, the European Union states only 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*" (emphasis added)." It notes no mention of a quota on "coke".

72. The European Union responded that it properly set forth both claims against zinc and coke in its Panel request. Specifically, the European Union refers to the first paragraph of Section III of its Panel Request which reads "China ... does not publish certain measures pertaining to the requirements, restrictions or prohibitions on exports". The European Union claims that this language demonstrates that the European Union raised a claim of non-publication of measures and that the specific mention of zinc in the fourth paragraph of the Panel Request was for illustrative purposes only.<sup>79</sup>

73. The Panel observes that under Article 6.2 of the DSU, a complainant must "identify the *specific* measures at issue". The Panel explained above that there is no general requirement in Article 6.2 of the DSU to identify the products at issue in a complainants' Panel request, and that different claims in the request for establishment must be read in their context.<sup>80</sup>

74. Given the specific language of the European Union's Panel request, the Panel is of the view that the European Union has brought its publication claims concerning quotas only with respect to zinc, and not coke. The Panel finds nothing in the narrative description or elsewhere in Section III to support the assertion that the reference to zinc in paragraph 4 of that section was for illustrative purposes only. Indeed, the language in its request suggests the contrary. For instance, the European Union did not incorporate phrases like "such as", "for example", or "*inter alia*". Moreover, each of the other narrative paragraphs in Section III of the European Union's Panel request (with the exception of paragraph 4) contain a precise list of products subject to other claims of violation. This implies that paragraph 4 was in the same vein and should not be read differently.

75. The inclusion of the reference to the zinc quota in the Panel request is an indication to the Panel that the European Union was aware of, as well as capable of identifying the measures which had not been published. The European Union could have been clearer, and instead it left China unsure as to the nature of the case against it. The European Union could have referenced the coke quota in the relevant paragraph of Section III of its Panel request, thereby ensuring that it fell within the Panel's terms of reference. 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.<sup>81</sup>

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<sup>79</sup> European Union's opening oral statement, para. 24.

<sup>80</sup> Panel Report on *Mexico – Anti-Dumping Measures on Rice*, para. 7.31 (*original footnote omitted*).

<sup>81</sup> The panel on *China – Audiovisual Services* 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

76. In light of the particular approach taken by the European Union, whereby it referred specifically to the zinc quota and listed precise products in other paragraphs the Panel concludes that the European Union failed to identify China's alleged omission to publish the coke quota as a specific measure at issue in its Panel request, in accordance with the requirements set out in Article 6.2 of the DSU. The Panel therefore considers that the publication claim concerning the zinc quota is within its terms of reference; but that related to the coke quota is not.

77. For the foregoing reasons, the Panel considers that the complainants have provided sufficient connections between the listed claims and violations in Section III for certain of their claims, but not others. Specifically, the Panel rules that the complainants have made connections between the measures and claims sufficient to meet the requirements of Article 6.2 of the DSU for the following: in respect of (i) claims concerning China's administration of its quota system; (ii) claims concerning China's export licensing system; (iii) China's coordination of MEPs and the failure to publish such prices; and (iv) China's alleged failure to publish quota amounts for zinc. For these claims, the Panel considers that China has not been prejudiced in its ability to defend itself. Accordingly, the Panel will consider those listed measures and related claims within its terms of reference. However, the Panel agrees with China that the European Communities has not set forth a publication claim concerning quota amounts of coke for the reasons provided above. Accordingly, the Panel finds this allegation to fall outside its terms of reference.

#### C. CONCLUSIONS

78. The Panel recalls its earlier decision to issue its preliminary ruling in two stages. In issuing this second phase of its ruling, the Panel hereby completes its preliminary ruling. The Panel determines in this ruling through its assessment of the complainants' first written submissions and oral statements, and responses to questions posed by the Panel, that Sections I, II and III of the Panel requests sufficiently identify the products concerned by the challenged measures. In addition, although the complainants' panel Requests could have been clearer, for the most part, 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. The Panel also determined that its terms of reference with respect to claims relating to China's alleged coordination of MEPs are limited to assessing the WTO compatibility of the following measures:

- Measures for the Administration Over Foreign Trade and Economic Social Organizations (Ministry of Foreign Trade and Economic Cooperation, 26 February 1991);<sup>82</sup>
- 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, 23 September 1994);<sup>83</sup>

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or include one thing implies the exclusion of the other or of the alternative (see Panel Report on *China – Audiovisual Services*, 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.

<sup>82</sup> Identified by the complainants as item "a" in Chart A submitted in response to Panel question No. 1. In this ruling, this measure is referred to as "Measures for Administration of Trade Social Organizations".

<sup>83</sup> Identified by the complainants as item "b" in Chart A submitted in response to Panel question No. 1. In this ruling, this measure is referred to as "Regulations for Personnel Management of Chambers of Commerce".

- Charter of the China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters (1994);<sup>84</sup>
- Charter of the China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters (2001);<sup>85</sup>
- 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 20 March 1996);<sup>86</sup> and
- Measures for the Administration of the Organs for Issuing the Licenses of Import and Export Commodities (Ministry of Foreign Trade and Economic Cooperation, waijingmaopeiguanhanzi (1999) No. 68, September 21, 1999).<sup>87</sup>

The Panel will therefore limit its assessment to whether these six measures violate either Article X:1 or X:3(a), or Article XI:1 of the GATT 1994.

79. The Panel is aware that China has raised further objections with respect to the Panel's terms of reference. The Panel notes that its preliminary ruling does not exhaust all matters raised by China with respect to the Panel's terms of reference. In particular, the Panel has not dealt with the claim of China that certain of the challenged measures have now expired. The Panel will address these additional claims in its Panel report.

80. The Panel reserves its decision to develop its reasoning regarding each aspect of its preliminary ruling in a subsequent ruling or in its final report.

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<sup>84</sup> Charter of the China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters (1994), identified by the complainants as item "c" in Chart A submitted in response to Panel question No. 1. In this ruling, this measure is referred to as "1994 CCCMC Charter".

<sup>85</sup> Charter of the China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters (2001), identified by the complainants as item "c" in Chart A submitted in response to Panel question No. 1. In this ruling, this measure is referred to as "2001 CCCMC Charter".

<sup>86</sup> Identified by China as item number 1 in the chart presented on para. 39 of its first written submission on 4 August 2010. In this ruling, this measure is referred to as "Export Price Penalties Regulations".

<sup>87</sup> Identified by China as item number 2 in the chart presented on para. 39 of its first written submission on 4 August 2010. In this ruling, this measure is referred to as "Measures for Administration of Licensing Entities".

Annex A

Table of legal instruments referred to in this ruling

Short Titles	Complete Names
Customs Law	Customs Law of the People's Republic of China (adopted at the 19 <sup>th</sup> Meeting of the Standing Committee of the Sixth National People's Congress on 22 January 1987, amended 8 July 2000)
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 26 <sup>th</sup> executive meeting of the State Council on 29 October 2003, 1 January 2004)
2009 Tariff Implementation Program	Notice Regarding the 2009 Tariff Implementation Program (State Council Tariff Policy Commission, shuiweihui (2008) No. 40, 1 January 2009)
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)
Measures for Administration of Licensing Entities	Measures for the Administration of the Organs for Issuing the Licenses of Import and Export Commodities (Ministry of Foreign Trade and Economic Cooperation, wajingmaopeiguanhanzi (1999) No. 68, September 21, 1999)
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)
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)
Provisional Rules on Export Price Verification	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)
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)
Online PVC Instructions	Online Verification and Certification Operating Steps (China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters)
Decision on the Reform and Improvement of the 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)
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)
CCCMC Export Coordination Measures	CCCMC Export Coordination Measures

Short Titles	Complete Names
CCCMC Bauxite Branch Coordination Measures	CCCMC Bauxite Branch Coordination Measures
"system of self-discipline"	"system of self-discipline"
Adjustment of the Catalogue of Export Products Subject to Price Review	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)
Notice Regarding the Trial Administration of 36 Products	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)
Communication	Communication (Ministry of Commerce and General Administration of Customs (2008) No. 33, May 26, 2008)
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, 26 February 1991)
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, 23 September 1994)
1994 CCCMC Charter	Charter of the China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters (1994)
2001 CCCMC Charter	Charter of the China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters (2001)
Bauxite Branch Charter	Bauxite Branch Charter
MOFTEC Circular.	MOFTEC Circular on Strengthening the Job in the Coordination of Export Commodities (1998)