

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

(DS394 / DS395 / DS398)

**ANSWERS OF THE UNITED STATES OF AMERICA
TO THE SECOND SET OF QUESTIONS FROM THE PANEL TO THE PARTIES**

December 7, 2010

TABLE OF EXHIBITS

Exhibit No.	Description
JE-177 (corrected)	Key Facts: Fluorspar Lump and Powder and Chamotte
JE-178	Grossman-Watson Response to Question 22 and Additional Issues Raised by Professor Olarreaga
JE-179	“Ups and downs of the yellow phosphorus market in 2007,” China Chemical Reporter (Dec. 6, 2007)
JE-180	2010 Price Data for Fluorspar and High Alumina Clay

Q1. (All Parties) Could the parties comment on the new Exhibit US-1 and in particular could the complainants confirm for which specific articles or provisions of each of the measures at issue they are seeking recommendations and rulings, and where in their submissions this was indicated. Your responses will guide the Panel in drafting the relevant section of the Descriptive Part.

1. In Question 1, the Panel asks the complainants to confirm for which specific articles or provisions of each of the measures at issue they are seeking recommendations and rulings. The United States refers the Panel to the U.S. Panel Request¹, which provides (1) the list of Chinese measures for which the United States seeks recommendations; (2) the legal instruments through which China maintains those measures; and (3) a statement of the claims including identification of the WTO obligations that the listed measures breach. In addition, the United States has supported these claims with argumentation and evidence adduced in its submissions as set out in the attached chart.²

2. In order to provide additional clarification, as requested by the Panel, the chart attached to these answers also identifies the specific provisions of the legal instruments that support the U.S. claims that China's measures are in breach of the relevant WTO obligations. Where no specific provisions are identified, the U.S. claim challenges the entirety of the Chinese measure identified.

Q3. (Complainants) The complainants request recommendations from the Panel regarding several measures identified below for their claims concerning export quotas. Please discuss the relevance of each of the following measures for these claims:

(a) Measures for the Administration of License for the Export of Goods (Order of the Ministry of Commerce (2008) No. 11, July 1, 2008) (Exhibit JE-74);

¹ *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) (“U.S. Panel Request”).

² See attached Chart in Response to Question 1 of the Second Set of Panel Questions.

- (b) **Working Rules on Issuing Export Licenses (Ministry of Commerce, shangpeifa (2008) No. 398, October 9, 2008) (Exhibit JE-97); and**
- (c) **Announcement of the Ministry of Commerce Issuing the "2009 Graded License-Issuing List of Commodities Subject to Export License Administration" (Ministry of Commerce, Notice (2008) No. 124, January 1, 2009) (Exhibit JE-96).**

3. As it relates to the measures identified in the Panel's question, China restricts the exportation of certain goods through the use of both non-automatic export licensing and export quotas. As relevant to this dispute, those goods are bauxite, coke, fluorspar, silicon carbide, and zinc. For such products, non-automatic export licensing is the framework through which China imposes and administers its export quotas.³ The measures identified in the Panel's question are relevant to the U.S. claim concerning export quotas, because these measures (which will be discussed in more detail below) are part of this non-automatic licensing framework through which China imposes and administers its export quotas.

4. MOFCOM, together with Customs, publishes a catalog listing all goods subject to restricted exportation. Exportation of the goods listed in the catalog requires approval by MOFCOM, and is subject to export licensing. Only after an exporter obtains an export license can that exporter seek export clearance from Customs by presenting the export license to Customs for declaration and examination.⁴

5. The same catalog also identifies those products subject to export quotas.⁵ For products subject to export quotas, an applicant for an export license must present *inter alia* export quota

³ See U.S. First Written Submission, paras. 90-99; 185-204.

⁴ U.S. First Written Submission, para. 95.

⁵ See Export Licensing List (Exhibit JE-22), Articles I.1 and I.2.

approval certification in order to obtain an export license.⁶ Only by successfully applying for a quota, can an exporter obtain an export license. Exporting goods subject to restricted exportation without approval or beyond the scope that is approved *e.g.*, where no quota exists or at levels exceeding the designated quotas, is subject to investigation and possible criminal and administrative penalties.⁷

6. As set forth in the U.S. first written submission, China’s export quotas are inconsistent with Article XI:1 of the GATT 1994 and paragraphs 162 and 165 of the Working Party Report.⁸ The measures governing China’s export licensing regime – including those identified in the Panel’s question – are relevant to the U.S. claim regarding export quotas, because China acts through those measures in administering its export quotas. The United States will now turn to a more detailed discussion of the three measures identified in subparts (a), (b), and (c) of Question 3.

7. ***Measures for the Administration of License for the Export of Goods (Order of the Ministry of Commerce (2008) No. 11, July 1, 2008) (Exhibit JE-74) (“Export Licensing Measures”)***: This measure is an important link between China’s export licensing framework and export quota regime. *First*, Article 6 makes clear that the export licenses referred to in this measure “shall include export quota licenses and export licenses.” *Second*, Article 9 provides that the documents to be submitted with application for an export license include “certificates of export quotas”. *Third*, Article 11.1 provides the basis for the issuance of export licenses for

⁶ See U.S. First Written Submission, para. 191; *See also* Export Licensing List (Exhibit JE-22), Article V.1 (“For goods . . . subject to the administration of export quota licenses . . . the issuing authorities shall examine and issue export licenses on the basis of export quotas . . .”)

⁷ U.S. First Written Submission, para. 96.

⁸ U.S. First Written Submission, paras. 242-255.

those products subject to export quotas. *Fourth*, Article 21 prohibits the issuance of export licenses “without quota” or “exceeding quota . . .”, and Article 38 provides for penalties in case an export license is issued in violation of the rules prescribed in Article 21.⁹

8. ***Announcement of the Ministry of Commerce Issuing the "2009 Graded License-Issuing List of Commodities Subject to Export License Administration" (Ministry of Commerce, Notice (2008) No. 124, January 1, 2009) (Exhibit JE-96) (“2009 List of Export Licensing Entities Notice”)***: Article 1(2) provides certain governmental entities with the authority to administer export licenses for specified products including those subject to export quotas *i.e.*, bauxite, coke, fluorspar, silicon carbide, and zinc. Furthermore, Article 5 provides that “for goods subject to export quota bidding, licensing issuing agencies are required to issue export licenses based on the list of enterprises with winning bids . . ., quantities of respective winning bids and the ‘certification of export license of goods applying for quota bidding . . .’.”

9. ***Working Rules on Issuing Export Licenses (Ministry of Commerce, shangpeifa (2008) No. 398, October 9, 2008) (Exhibit JE-97) (“Export Licensing Rules”)***: This measure provides additional rules regarding *inter alia* the export license application process, which as discussed above also governs the issuance of licenses for products subject to export quotas. Additionally, Article 2 provides that the Administration of Quota and License Bureau is the entity responsible for managing, administering, supervising, and inspecting the issuance of export licenses. Finally, Articles 5.2 and 8.2 identify the documents that must be submitted for issuance of a license, including “documents of approval for export issued by the competent authority in charge.” For

⁹ See U.S. First Written Submission, paras. 90-99; 185-204.

products subject to export quota, this includes documents showing that a quota has been allocated.

10. Beyond the measures identified in the Panel’s question, we refer the Panel to paragraphs 90-99 and 185-204 of the U.S. first written submission, which provides a detailed discussion of China’s export licensing regime, including an explanation of how the export licensing framework is used to administer China’s export quotas. Citations to specific provisions of the relevant measures are also provided in those paragraphs and the corresponding footnotes in the U.S. first written submission.¹⁰

Q9. (Complainants) Please explain why you maintain that China imposed a WTO-inconsistent export duty on yellow phosphorus in 2009 when the Circular of the State Council Tariff Commission on the Adjustment of Export Tariffs on Certain Commodities (Exhibit CHN-1) provides that, as of 1 July 2009, the duty on yellow phosphorus was consistent with China's Accession Protocol.

11. The 50 percent special export duty China imposed on yellow phosphorus is set forth in the *2009 Tariff Implementation Program*, and was in effect up until July 1, 2009. The *2009 Tariff Implementation Program* is included in both the U.S. consultations and panel requests. China has not challenged the special export duty of 50 percent that China imposed on yellow phosphorus on top of the ordinary export duty of 20 percent until July 1, 2009, as being outside the Panel’s terms of reference.¹¹

¹⁰ See also U.S. First Written Submission, para. 246.

¹¹ The United States also notes that these export duties can be easily – and quickly – reimposed. See U.S. second written submission, para. 340. The United States notes also that yellow phosphorus production is seasonal. Because the production of yellow phosphorus is energy-intensive, production is scaled back during the winter months and then ramped back up in the spring. See Exhibit CHN-362 (2008 Export Volume and Value of Yellow Phosphorus by Month) and “Ups and downs of the yellow phosphorus market in 2007,” China Chemical Reporter (Dec. 6, 2007) (Exhibit JE-179).

Q16. (Complainants) Are enterprises in China permitted to purchase quota allocations through bidding via the total award (bid-winning) price, and subsequently sell their right to that allocation to another enterprise. In other words, is there a secondary market for the buying and selling of quota shares whether formal or otherwise?

12. The United States does not have information concerning whether there may be a secondary market for the buying and selling of quota shares. However, the measures governing quota bidding do prescribe specific rules for assigning or transferring quota allocations obtained through bidding.¹²

13. For example, an enterprise that obtains a quota allocation through bidding may only assign the quota after having paid the total award price.¹³ In addition, the assignee and assignor enterprises must agree on the quota assignment and apply to the relevant bidding office to gain approval for the assignment. The acquiring enterprise must also satisfy the eligibility requirements for bidding. Finally, Article 36 of the Quota Bidding Implementation Rules specifies that an enterprise that obtains a quota allocation through bidding and assigns more than 20 percent of its quota allocation will be penalized in subsequent rounds of bidding by having the quantity in excess of 20 percent deducted from the enterprise's bid quantity.¹⁴ In short, transferring or assigning of quota shares in the context of export quota bidding is governed by specific rules.

¹² See Quota Bidding Measures, Articles 27-31 (Exhibit JE-77); Quota Bidding Implementation Rules, Articles 22-28, 36 (Exhibit JE-78).

¹³ Quota Bidding Implementation Rules, Article 24, (Exhibit JE-78).

¹⁴ Exhibit JE-78.

Q20. (All Parties) The United States asserts that the production restrictions on fluorspar and bauxite mining are set at such high levels that they are not likely to "bind" or reduce the amount of the materials produced in China in 2010. In particular, the United States claims that the "mining target" for fluorspar and high alumina clay are set at a higher level than that actually mined in 2009, and that the level of "production target" for metallurgic-grade and acid-grade fluorspar are higher than their respective levels of production in 2008 (when production peaked).

14. The Panel has requested that the United States respond to subparts (b), (c), (d), and (e) of Question 20. Before providing responses to the individual subparts, the United States first sets out below certain common background information that relates to each of the subparts of Question 20. The United States then provides a conceptual framework that helps place the responses to the individual subparts within the context of China's attempt to use its "mining targets" and "production targets" as a basis for invoking the Article XX(g) exception with respect to certain measures that China concedes are inconsistent with its WTO obligations.

15. The common background information on the "mining targets" and "production targets" is as follows:

- Through the *Circular of the Ministry of Land and Resources on the Allocation of the 2010 Mining Control Targets Applicable to High-Alumina Clay Ore and Fluorspar Ore*,¹⁵ China set 2010 mining control targets of 4.5 million MT for high alumina clay ores and 11 million MT for fluorspar ores.
- Through the *Circular on the Allocation of Production Quantity Control Targets Applicable to High-Alumina Clay and Fluorspar for the Year 2010*,¹⁶ China set 2010 production control targets of 4 million MT for chamotte (calcined high alumina clay) and 4.71 million MT for fluorspar lump (metallurgical grade fluorspar) and 2.44 million MT for fluorspar powder (acid grade fluorspar).

¹⁵ Exhibit JE-168 (also Exhibit CHN-8?).

¹⁶ Exhibit JE-169 (also Exhibit CHN-8?).

- In the *Analytical Report and Recommendations Regarding the 2010 Mining Quantity Control Targets Applicable to High-Alumina Clay and Fluorspar* (“*Analytical Report on 2010 Targets*”),¹⁷ the Ministry of Land and Resources stated that in 2009, 2.4 million MT of high alumina clay ores were mined in China and 9.4 million MT of fluorspar ores were mined in China.
- The measures China proffers concerning the 2010 mining and production control targets do not provide any information on levels of high alumina clay or fluorspar mining in any years other than 2009, nor do they provide any information on levels of calcined high alumina clay, metspar, or acidspar production in any years.

16. In addition, by way of technical background, the United States notes:

- According to China, the production process for fluorspar and high alumina clay involves the mining or extraction of fluorspar and high alumina clay ores from geological deposits followed by the production or processing of those ores into the first tradeable fluorspar and high alumina clay products – i.e., metspar, acidspar, and calcined high alumina clay.¹⁸
- Calcined high alumina clay is produced from high alumina clay ores through a calcination process that drives off water bound to the clay molecules under high temperatures.¹⁹
- Fluorspar ores mined in China have a calcium fluoride (CaF₂) content that can vary from 35 to 80 percent. Metspar, defined as having CaF₂ content of less than or equal to 97 percent, is produced from fluorspar ores by refining those ores through sorting, crushing, and screening. Acidspar, defined as having CaF₂ content of greater than 97 percent, is produced from fluorspar ores by refining the ores through a froth flotation process involving crushing, grinding, mixing with water and reagents, agitating, and several additional stages to further refine the CaF₂ content.²⁰

17. With that background in mind, the United States then turns to placing its responses to the subparts of Question 20 within the context of evaluating China’s proffered Article XX(g) defense. In evaluating whether the mining and production target numbers set by China for

¹⁷ Exhibit JE-166 (also Exhibit CHN-86).

¹⁸ See China’s second oral statement, para. 241.

¹⁹ See Exhibit JE-177 at 2; Exhibit CHN-10 at 9.

²⁰ See Exhibits JE-177, JE-164, and CHN-9.

fluorspar and high alumina clay constitute “biting” restrictions on actual mining and production that actually bind or reduce mining or production, there are two useful inquiries. The first is to examine China’s purpose in setting the target levels. The second is to examine the target levels relative to actual mining and production levels. The United States will address each in turn.

A. China’s Purpose in Setting the Targets

18. In the *Analytical Report on 2010 Targets*, the Ministry of Land and Resources recommends that the mining control target for high alumina clay be set at 4.5 million MT on the basis that the aggregate production capacity for high alumina clay mining is 4.7 million MT,²¹ even though that actual mining level in 2009 was only 2.4 million MT.²² Similarly, the Ministry of Land and Resources recommends that the mining control target for fluorspar be set at 11 million MT on the basis that authorized capacity on the basis of fluorspar mining rights is 13.8 million MT,²³ even though the actual level in 2009 was only 9.4 million MT.²⁴

19. As China has explained in its second oral statement, China’s intention in setting the mining target levels in 2010 was not to bind or limit the amount of production of fluorspar and high alumina clay,²⁵ but “to ensure stable adjustment and transition, in this initial phase.”²⁶ According to China, these targets might restrict production one day in the future, but they do not do so today (in 2010).²⁷

²¹ Exhibit JE-166, Section I(2).

²² Exhibit JE-166, Section I(1)(ii).

²³ Exhibit JE-166, Section II(1)(iii) and II(2).

²⁴ Exhibit JE-166, Section II(1)(ii).

²⁵ China’s second oral statement, paras. 245-246.

²⁶ China’s second oral statement, para. 247.

²⁷ China’s second oral statement, para. 246 (“It is foreseen that the level of permitted extraction will be reduced year by year.”).

20. China did not set the 2010 target numbers with the intention of binding production with actual restrictions. Accordingly, the 2010 target numbers for mining and production of fluorspar and high alumina clay are not and are not meant to be restrictions on production.

B. The Mining and Production Targets in Relation to Actual Mining and Production Levels

21. Examining the target numbers in relation to actual mining and production levels serves to illustrate that the targets, which are set at levels much higher than actual levels, are not restrictions.

1. Whether 2010 Mining Targets Restrict Actual Mining

(b) (All Parties) Please provide data on mining of fluorspar and high alumina clay in 2008.

(c) (All Parties) Please comment on the choice of 2009 data to evaluate the restrictiveness of 2010 mining targets.

22. At the outset, the United States re-emphasizes that the context for considering China's assertions regarding the mining targets is that China has alleged the existence of production restrictions for the purpose of attempting to invoke an exception under Article XX(g) of the GATT 1994. China, as the party asserting the defense, has the burden of proving every single element of that defense, including the existence of production restrictions. If the evidence that China has presented on the record in this dispute does not meet China's burden, China's Article XX(g) defense must be rejected. In contrast, the United States has no burden to provide any evidence on this matter. However, the United States has proceeded to analyze the information China has provided, and has shown that China's information does not support the existence of any meaningful production restrictions.

23. In evaluating the target numbers in relation to actual mining levels, 2009 numbers are appropriate for three reasons. First and foremost, the only relevant mining data on the record in this dispute is for 2009. If the Panel does not consider that 2009 mining data is sufficient to evaluate China's contention that it has imposed production restrictions, then China has failed to meet its burden, and the Article XX(g) defense fails for this reason alone. Second, the record shows that China set the 2010 mining target levels in reference to 2009 mining levels and mining capacity levels.²⁸ Third, mining data for fluorspar and high alumina clay are not available from other sources.

24. In the *Analytical Report on 2010 Targets*, China references proven reserve levels for high alumina clay and for fluorspar from 2001 and 2009. However, with respect to mining statistics, China provides in the *Analytical Report on 2010 Targets* mining data only for 2009 – 2.4 million MT for high alumina clay ores and 9.4 million MT for fluorspar ores.²⁹ China does not provide any mining data in its materials reports on fluorspar (Exhibit CHN-9) or bauxite (Exhibit CHIN-10). Mining statistics are presumably collected by the Ministry of Land and Resources from individual mines and mining license holders. Accordingly, it is China that is best situated to provide such data, and it is China's burden to provide the relevant data that would be necessary to prove each element of its proffered Article XX(g) defense.

25. Although it has no burden to do so, the United States independently has sought information on China's production levels. The only data the United States has obtained on fluorspar mining is contained in the *Market Research on Fluorspar and Selected*

²⁸ See Exhibit JE-166.

²⁹ Exhibit JE-166, Section I(1)(ii) and Section II(1)(ii).

Fluorochemicals report (Exhibit JE-164). This report provides that China's major fluorspar mines produced 2.74 million MT of fluorspar, calculated on a 100 percent CaF_2 basis, in 2008.³⁰ The problem with this statistic is that the amount of fluorspar mined is provided on a 100 percent CaF_2 basis – not on the basis of gross weight. It appears that China's 9.4 million MT mining statistic for 2009 is on the basis of gross weight, *i.e.*, weight of ores mined, regardless of CaF_2 content, and as noted, the CaF_2 content of China's fluorspar ores varies widely from 35 percent to 80 percent.³¹ Accordingly, the data point in the *Market Research on Fluorspar and Selected Fluorochemicals* report does not provide a number for an apples-to-apples comparison with either the 9.4 million MT actual mining statistic for 2009 or the 11 million MT target mining number for 2010.

26. With respect to high alumina clay mining data, the only data available relates to bauxite production – without differentiation of the different bauxite products, *e.g.*, high alumina clay, metallurgical grade bauxite, non-metallurgical grade bauxite, etc. China's bauxite report (Exhibit CHN-10) provides estimated mine production data for 2009 – a year for which the Ministry of Land and Resources has provided mining statistics – for “all types of bauxite products”³² of 37 million MT. Similarly, the Bauxite Report submitted by the United States (Exhibit JE-165) provides bauxite production data for the years 2000 to 2009 – but once again, the data do not break out high alumina clay production from other types of bauxite production.³³

³⁰ Exhibit JE-164 at 19.

³¹ Exhibit JE-177 at 1.

³² Exhibit CHN-10 at 4-5 and Figure 1.

³³ Exhibit JE-165, Figure 3.

27. Therefore, evaluating the 2010 mining targets in light of the only actual mining data available – the 2009 mining data – shows that the 2010 mining targets are set at levels high above actual mining such that the target numbers do not actually restrict mining.

	2010 Mining Target	2009 Actual Mining Level
High Alumina Clay	4.5 million MT	2.4 million MT
Fluorspar	11 million MT	9.4 million MT

2. Whether 2010 Production Targets Restrict Actual Production

28. With respect to the 2010 production targets, China’s measures provide target numbers for fluorspar (metspar and acidspar) and calcined high alumina clay without any reference to actual production levels in 2009 or any other year. China’s explanation in its second oral statement is that these production targets “reinforce the extraction cap.”³⁴ However, China represents that the “extraction caps” or mining targets are not set at a level intended to bind production.³⁵

Accordingly, the production targets, even if they were to “reinforce” the mining targets, would not bind production either.

29. Because China does not provide references to any actual production levels for metspar, acidspar, or calcined high alumina clay, China has not met its burden of showing that its production targets for these materials have any restrictive effect.

30. Nonetheless, the United States will proceed to analyze China’s 2010 production target numbers by comparing them to data on production obtained from other sources.

³⁴ China’s second oral statement, para. 241.

³⁵ See China’s second oral statement, pars. 245-246.

a. Comparisons with Data on Actual Production from Other Sources

(i) Fluorspar

31. With respect to fluorspar, both China’s fluorspar report (Exhibit CHN-9) and the *Market Research on Fluorspar and Selected Fluorochemicals* report provide data on metspar and acidspar production, on a gross weight basis, prior to 2010. China’s fluorspar report shows metspar production in 1990 at approximately 1 million MT and acidspar production in 1990 at approximately 0.7 million MT, growing to around 1.3 million MT of metspar production in 2008 and approximately 1.9 million MT of acidspar in 2008.³⁶ The data in the *Market Research on Fluorspar and Selected Fluorochemicals* report shows China’s production of metspar as approximately 1.2 million MT in 2009 and production of acidspar as approximately 1.8 million MT in 2009.³⁷ Both sources of data show that China’s actual production of metspar and acidspar are well below the 4.71 million MT and 2.44 million MT respective 2010 production targets set by China, demonstrating that the production targets are not set to restrict actual production.

	Target for 2010 Metspar Production (set by MLR)	Target for 2010 Acidspar Production (set by MLR)
Actual Metspar Production in Prior Years (data from Exhs. CHN-9 and JE-164)	4.71 million MT	
	1 - 1.3 million MT	
Actual Acidspar Production in Prior Years (data from Exhs. CHN-9 and JE-164)		2.44 million MT
		0.7 - 1.9 million MT

³⁶ Exhibit CHN-9, Fig. 4.

³⁷ Exhibit JE-164, Table 7 at 34.

(ii) High Alumina Clay

32. With respect to calcined high alumina clay, China has not provided any production data in its measures or in its bauxite report (Exhibit CHN-10). For this reason, China has failed to meet its burden that the targets for high alumina clay result in any restrictions on production.

33. Nonetheless, the United States has proceeded to prepare an analysis, based on data available from other sources. The United States has not located any specific data on the production of calcined high alumina clay in China. However, another way to evaluate the 2010 production target numbers – particularly for calcined high alumina clay – is to calculate the amount of high alumina clay ore required to produce the target amount of calcined high alumina clay and compare that amount with the level of high alumina clay ore actually mined.

b. Comparisons with Data on Actual Production Derived from Mining Data Provided by China Using Estimated Conversion Ratios

(ii) High Alumina Clay

34. While the United States estimates that approximately 1.5 MT of high alumina clay ore is required to produce 1 MT of calcined high alumina clay,³⁸ China's estimate in its Bauxite Report (Exhibit CHN-10) is that the conversion ratio is 2:1.³⁹ The production target of 4 million MT of calcined high alumina clay therefore corresponds to between 6 million (using the U.S. conversion ratio) and 8 million (using China's own conversion ratio) MT of high alumina clay ores. According to China, however, the actual mining level of high alumina clay ores in 2009 was only 2.4 million MT. Put another way, assuming all high alumina clay ores mined in 2009 were

³⁸ See Exhibit JE-177 at 4.

³⁹ See Exhibit CHN-10 at 5-6.

calcined, only between 1.2 and 1.6 million MT of calcined high alumina clay could have been actually produced in 2009. The 2010 production target of 4 million MT for calcined high alumina clay therefore does restrict actual production of calcined high alumina clay.

	Amount of High Alumina Clay Ore Represented in 2010 Production Target	Target for Calcined High Alumina Clay Production in 2010
Amount of Actual High Alumina Clay Ore Mined in 2009	6-8 million MT 2.4 million MT	
Amount of Calcined High Alumina Clay that Actually Could Be Produced in 2009		4 million MT 1.2-1.6 million MT

(ii) Fluorspar

35. China does not provide metspar and acidspar actual production data. For this reason, China has failed to meet its burden that the targets for metspar and acidspar result in any restrictions on production.

36. Nonetheless, the United States has sought other, reliable sources of data for metspar and acidspar production prior to 2010. These data show that the 2010 production targets do not restrict actual production of metspar or acidspar. Undertaking the conversion/comparison exercise for evaluating the 2010 metspar and acidspar production targets can supplement and support the conclusion drawn from the hard production data.

37. However, estimating the amount of fluorspar ores required to produce 1 MT of metspar and 1 MT of acidspar is complicated by the fact that there is a wide variable range of CaF₂ content in China's fluorspar ores (35 to 80 percent); met-spar is defined to include material with a wide variable range of CaF₂ content (less than or equal to 97 percent); and, because of the high

CaF₂ content required for acidspar and higher grades of metspar, a “recovery rate” of less than 100 percent incurred in the production process must also be estimated and taken into account. Accordingly, the U.S. estimated conversion ratios for metspar and acidspar production are back-of-the-envelope calculations to illustrate the supportive point that the 2010 metspar and acidspar target numbers for production are set at levels that could not restrict actual production of metspar or acidspar.

- (d) (United States) The United States contends in paragraph 82 of its second oral statement that the fluorspar mining target is set at 11 million MT in 2010. According to estimates of the United States, in order to produce the target production of metspar and acidspar in 2010, 16 million MT of fluorspar ore is required. Please clarify how the mining target on fluorspar is not effective at reducing production of metspar or acidspar.**

38. The Panel has asked for clarification on how the 2010 mining target for fluorspar ores of 11 million MT, set by China, is not effective at reducing the production of metspar and acidspar, whose targets in 2010, based on the U.S. conversion ratio estimates, represent approximately 16 million MT of fluorspar ores.⁴⁰ The Panel’s question seeks to evaluate whether the 2010 target number for fluorspar mining can be a restriction on the 2010 target numbers for metspar and acidspar production.

39. The amount of fluorspar ores mined will always, by nature, restrict the amount of tradeable fluorspar (metspar or acidspar) that can be produced, because the tradeable fluorspar can only be produced from the fluorspar ores. Consider, as an example, that one kilogram of fresh grapes can be dried to yield a quarter kilogram of raisins. A 4 kilogram target for grape picking would necessarily restrict the maximum amount of raisins that can be produced to 1

⁴⁰ See note below and corrected Exhibit JE-177.

kilogram. However, if, in addition to the 4 kilogram target for grape picking, there is also a 2 kilogram target for raisin production – the raisin production target becomes meaningless as either a restriction or as an aspirational target, in light of the existence of the 4 kilogram grape picking target.

40. The exercise the United States is undertaking here, however, is to evaluate whether the 2010 target numbers for mining and production can be understood to be actual restrictions on mining and production. This requires: (1) comparing target numbers with actual levels and, where data on actual levels are not available, (2) deriving apples-to-apples estimates of actual amount that can be compared with the target amounts of ores to be mined or tradeable fluorspar to be produced. The key comparison, therefore, is between the amount of fluorspar ores represented by the 2010 production targets (the estimated 16 million MT figure cited by the Panel – which should have been calculated as 11.7 million MT)⁴¹ and the actual amount of fluorspar ores mined (9.4 million MT), in order to show that the 2010 production targets do not restrict actual production.

- (e) **(United States) On the basis of the United States' second oral statement, the 2008 mining of fluorspar can be estimated at 7.04 million MT. Given the United States' assertion that the production of metspar and acidspar peaked in 2008, how can the amount of fluorspar mined in 2009 be higher than the estimate in 2008? (See paragraph 82 of the United States' second oral statement).**

⁴¹ The United States notes that conversion ratio formulas for metspar and acidspar on page 3 of Exhibit JE-177 should be divided, rather than multiplied, by 0.8 and 0.97 respectively. This has the effect of changing the conversion ratios to 1.5:1 for metspar and 1.9:1 for acidspar and changing the estimated amount of fluorspar ores required for producing the 2010 target amounts of metspar (4.71 million MT) and acidspar (2.44 million MT) to 11.7 million MT, which exceeds the 9.4 million MT of actual fluorspar ores that, according to China, were mined in 2009. A corrected version of Exhibit JE-177 is submitted along with these Answers.

41. The United States recalls the challenges noted above related to deriving precise conversion ratios for the amount of fluorspar ore required to produce metspar or acidspar: there is a wide variable range of CaF_2 content in China's fluorspar ores (35 to 80 percent); met-spar is defined to include material with a wide variable range of CaF_2 content (less than or equal to 97 percent); and, because of the high CaF_2 content required for acidspar and higher grades of metspar, a "recovery rate" of less than 100 percent incurred in the production process must also be estimated and taken into account. The conversion ratios provided by the United States are therefore back-of-the-envelope estimates used for making illustrative calculations.

42. The United States would again emphasize, however, that China has the burden of showing that its production targets actually restrict production. If China believes that different conversion ratios should be used and would be supportive of its Article XX(g) defense, China has the burden of putting evidence on the record in support of its positions.

43. The United States also notes that the conversion ratios used for its calculations may be too conservative – *i.e.*, they may underestimate the amount of fluorspar ores required to produce metspar and acidspar. The use of conservative conversion ratios could explain why the calculations of the amount of ores represented by 2008 metspar and acidspar production numbers results in a number lower than the 9.4 million MT that China has stated were mined in 2009,⁴² even though data show that 2009 levels of metspar and acidspar production were slightly lower than in 2008.⁴³

⁴² See Exhibit JE-166 (Exhibit CHN-86).

⁴³ Exhibit JE-164.

44. Finally, from a theoretical standpoint, a smaller amount of fluor spar ores mined in one year could result in a larger amount of metspar and acidspar production than in another year (the comparison year) if, *e.g.*: the feedstock ores have a higher CaF_2 content; the recovery rate is higher; or not all fluor spar ore mined is processed into metspar and acidspar and more ores are processed than in the comparison year.

Q21. (All Parties) The parties appear to agree that the imposition of export restrictions on raw materials provide an incentive to develop the downstream sector. China claims that the pollution generated by the downstream sector does not take into account in its estimates of the contribution of its export measures to pollution reduction because the pollution generated by the downstream sector is low. Notwithstanding these effects, an enlarged downstream sector also induces additional demand for the raw materials. Could the Parties comment on the opportunity to take these additional effects on pollution into account when assessing whether export restrictions make a material contribution to the environmental objective?

45. The United States submits that in evaluating the validity of China's Article XX(b) defense to its breach of its WTO commitments, the Panel must take into account the fact that China entirely ignores the impacts on downstream industries resulting from China's export restraints on the raw materials. As the United States has explained, China's failure to analyze the effects of its policies downstream highlights the fact that the export restraints, which restrict only foreign users' access to the raw materials, are not in fact environmental measures. Rather, they are measures intended to benefit the downstream industries that use these raw materials. Furthermore, as the party with the burden of establishing all of the elements of its proffered Article XX(b) defense, China's failure to analyze these impacts means that China cannot meet its burden of showing that the measures make a material contribution to the supposed environmental objective.

46. We recall that China’s defense under Article XX(b) as it relates to certain of the export restraints⁴⁴ is that the restraints are necessary to reduce environmental pollution associated with the production of the raw materials on which the restraints are imposed. China urges the Panel to consider certain analyses – developed solely for the purpose of this dispute – purporting to show that China’s measures reduce pollution associated with the production of the raw materials subject to the export restraints. In making this argument, China adduces information regarding the environmental impacts of producing the raw materials.⁴⁵ Yet, while Dr. Olarreaga’s model acknowledges that one effect of the export restraints is increased consumption of the raw materials in China,⁴⁶ China failed to address the environmental impact associated with this increased consumption.

47. When asked about the environmental impacts of its export restraints downstream, China urges the Panel to ignore any such effects. China asserts – without providing any basis – that the pollution associated with the expansion of China’s downstream industries that benefit from these export restraints is either unknowable⁴⁷ or insignificant.⁴⁸ China’s line of reasoning should be rejected. The expansion of downstream production activity, and its associated environmental harm, demonstrates the fallacy of China’s assertions that the export restraints at issue are

⁴⁴ China asserts a defense under Article XX(b) in relation to the export duties on magnesium metal, manganese metal, and coke, and magnesium scrap, manganese scrap, and zinc scrap. China also asserts a defense under Article XX(b) in relation to the export quotas on coke and silicon carbide.

⁴⁵ China’s First Written Submission, paras. 231-47; 290-96; 531-38.

⁴⁶ Exhibit CHN-124; Exhibit CHN-146.

⁴⁷ Exhibit CHN-442, p. 7; Exhibit CHN-481, p. 8; For a detailed discussion of the flaws in Dr. Humphreys’ assertions regarding the environmental impact of increased downstream production, *see* U.S. Second Written Submission, paras. 89-96; U.S. Second Oral Statement, paras. 51-53.

⁴⁸ Exhibit CHN-443, p. 6-7; Exhibit CHN-481, p. 7-10.

environmental measures, let alone that they are necessary to reduce environmental pollution.⁴⁹

We also note that there appears to be an inherent contradiction, because to the extent that the pollution effects downstream are unknowable, it is unclear how China was able to discern that those effects are also insignificant. And finally, as the party with the burden of establishing that its measure materially contributes to the protection of human, animal or plant life or health, China cannot meet this burden by simply asserting – without evidence – that downstream pollution effects are insignificant.

48. China’s assertion that the pollution effects are unknowable is not credible. As just discussed, China provided in its first written submission detailed estimates of the pollution generated by production of the raw materials. More recently, China also provided, with its second oral statement, estimates of quantities pollutants emitted in China in recent years.⁵⁰ Thus, China appears to have access to detailed information regarding pollution in China, beyond the pollution associated with production of the raw materials. It is therefore unpersuasive that China is unable to provide the Panel with an assessment of the pollution effects associated with increased consumption of the raw materials.

49. In order to depict pollution associated with downstream production as insignificant, China repeatedly asserts that the pollution associated with production of the raw materials is the

⁴⁹ See also, Grossman-Watson Report at p. 5 (Exhibit JE-158) (“The Chinese export restrictions collectively serve to promote China’s downstream production and exports of alloy metals such as steel and aluminum. Incentives for downstream production of metal alloys depend importantly on the prices of the inputs used in this production. By depressing the domestic prices of primary metals in China, the export restrictions enhance the profit opportunities for producers of steel, aluminum, and other downstream goods. In fact, Chinese exports of steel and aluminum have increased dramatically in the last decade. The environmental impacts of China’s export restrictions should be assessed not only with respect to the induced effects on production and consumption of the inputs, but also in recognition of their downstream output effects.”)

⁵⁰ See Exhibit CHN-522.

most polluting step in the production chain.⁵¹ This assertion is flawed and unreliable for a number of reasons.

50. First, China has failed to adduce any evidence to support this assertion, and the Panel should therefore reject this assertion.⁵² Second, even if it were true that the pollution associated with downstream production were less than pollution associated with production of the metals, coke, and silicon carbide, that does not support China’s assertion that the downstream pollution effects are “negligible”⁵³ or that the Panel should ignore those effects in assessing whether the export restraints are necessary to accomplish China’s stated pollution-reduction objectives. The stimulation of additional consumption of the raw materials downstream runs directly contrary to China’s assertion that the export restraints are environmental measures, rather than measures designed to promote expanded production and exports of higher value-added products.

51. Third, China’s assertion also ignores the fact that China imposes export duties on upstream inputs, such as manganese ores, and zinc ores. Dr. Humphreys states, “the production of coke, magnesium metal, manganese metal and silicon carbide will, without doubt, be *the* most polluting step in the respective production chains of which they are a part. Any pollution effects further downstream, after the production of the basic materials are likely to be significantly

⁵¹ Exhibit CHN-443, pp. 6-7; Exhibit CHN-481, pp. 7-11.

⁵² With respect to coke, Dr. Humphreys points to a single source from the Illinois Waste Management and Research Center in Exhibit CHN-481, p. 9, n. 38. We note that China has not submitted the document, and the document was not available at the link provided by China. In any event, even the excerpt cited by China states only that “[c]oke production is one of the major pollution sources from steel production.” It does not support China’s assertion that coke is the most polluting step in production. With respect to the other products, Dr. Humphreys simply asserts that the production of the metal is the most polluting step in the production chain, without any factual support.

⁵³ See China’s Second Written Submission, p. 99.

smaller, relative to the upstream impacts.”⁵⁴ However, Dr. Humphreys does not address the environmental impact of imposing export restraints on ores. The export duties on manganese and zinc ores stimulate additional consumption of the ores downstream, and therefore additional primary production of manganese metal and zinc. If, as China asserts, pollution levels decrease as production moves further downstream, then the imposition of export duties on the ores runs directly contrary to China’s stated environmental objectives. China’s repeated refrain – that it does not address these impacts because China does not assert a defense for these export restraints⁵⁵ – is nonsensical. The imposition of export restraints on the ores are facts relevant to the analysis of whether the export restraints on the metals satisfy the requirements of Article XX(b), and the relevance of such facts does not depend on China’s legal position with respect to those facts.

52. The most recent contribution by Dr. Olarreaga also suffers from a number of flaws as it relates to this issue.⁵⁶ In response to criticism in the Grossman-Watson Report, Dr. Olarreaga makes a number of assertions defending his failure to address the impact of the export restraints as a package that considers the vertical linkages between upstream and downstream production. None of his assertions withstands scrutiny. First, he suggests that the advantage of his model was simplicity, and that considering the vertical linkages would have been more complicated. Even if this is true, the supposed simplicity of the model does not render it reliable where he failed to address a complexity that is relevant to the conclusion China asks the Panel to reach. Second, Dr. Olarreaga asserts that his failure to address vertical linkages among various products

⁵⁴ Exhibit CHN-442, p. 6.

⁵⁵ Exhibit CHN-519, p. 25;

⁵⁶ Exhibit CHN-519.

is attributable to the fact that he was not asked to do so. This, too, is beside the point as it does not somehow render Dr. Olarreaga's analysis reliable. As the party invoking the defense under Article XX(b), it is China's burden to adduce the evidence and argumentation necessary to demonstrate that its measures satisfies the requirements of the defense. This includes, where China relies on consultants, to ensure that China or its consultant addresses the "research question" that needs to be addressed for purposes of establishing its defense.⁵⁷

53. In short, the expansion of China's downstream industries as a result of China's export restraints demonstrates that China's export restraints are economic – not environmental – policies. If China in fact were concerned about the environmental effects of raw material production, it would adopt measures – such as production controls or pollution controls – that directly effect environmental effects of raw material production. And these measures would not result in increased pollution by Chinese industries that are currently benefitting from the export restraints.

⁵⁷ Dr. Olarreaga also defends his failure to take account of the upstream-downstream linkages among the products, by asserting that it is attributable to the complainants' choice of which measures to challenge. Dr. Olarreaga states that "since the Complainants challenged 3 vertical links in the manganese market, but only 2 vertical links for the case of magnesium, the resulting *effects* (taking vertical linkages into consideration) claimed by the Complainants would be *different*." Exhibit CHN-519, p. 24. This assertion is illogical and unpersuasive. It may be the case that each product at issue in the dispute merits a different analysis, because the market for each product is different. Insofar as that is the case, China should provide the Panel with a separate analysis for each product in order to ensure that the analysis for each product accurately reflects the market situation for that product. This "difference" in the analyses is attributable to China's export policies, and not to the scope of the products captured by the complainants' challenge. In other words, if China imposes an export restraint on manganese ore, manganese scrap, and manganese metal – as it does – it is relevant to China's environmental defense to assess the environmental impact of imposing these export restraints simultaneously. The credibility of China's contentions that the export restraint on scrap results in increased secondary production is undermined by the fact that China also imposes export restraints on ores, thereby encouraging additional primary production. Similarly, China's assertion that the export restraints on magnesium metal, manganese metal, coke, and silicon carbide result in decreased pollution associated with the production of those products, fails to take into account the increased consumption of these products by downstream production processes, which are themselves polluting. This is true regardless of the scope of the complainants' challenge.

Q22. (All Parties) The WTO-UNEP Report (2009, p. 55) states: "[f]rom the evidence that has been gathered to date, studies on whether or not there is an environmental Kuznets curve for greenhouse gas emissions have produced conflicting results." Based on this statement, should the Kuznets curve form part of the Panel's assessment?

54. Please see Exhibit JE-178 in which Dr. Gene Grossman and Dr. Mark Watson address in detail the Environmental Kuznets Curve ("EKC") as it relates to greenhouse gas emissions, and respond to certain other assertions of Dr. Olarreaga regarding the EKC in Exhibit CHN-519.^{58 59}

Q23. (All Parties) China claims to impose export restrictions on fluorspar and refractory grade bauxite for conservation purposes. The parties appear to agree that the imposition of export restrictions on raw material provides an incentive to develop the downstream industry. An enlarged downstream sector would generate additional demand for raw materials. Would this additional demand not undermine China's conservation objectives?

55. The United States agrees that the export restraints on fluorspar and high alumina clay incentivize the development of the downstream fluorspar and high alumina clay industries, and that this in turn creates additional demand for fluorspar and high alumina clay. This additional demand in turn contradicts the purported conservation objectives that China ascribes to its measures. For additional detail, please see the part of the answer to Question 31 below addressing China's argument in Section VI.D.b.3 of its second oral statement.

⁵⁸ In Exhibit JE-178, Dr. Grossman and Dr. Watson also respond to Dr. Olarreaga's arguments in Exhibit CHN-519 regarding export restraints as an inefficient policy tool for addressing environmental concerns.

⁵⁹ In addition to the other critiques of the United States and Drs. Grossman and Watson on Professor Olarreaga's analysis of the impacts of the export restraints on production and consumption, the United States would also note that the framework utilized by Professor Olarreaga is one based on competitive markets. Professor Olarreaga provides no rationale as to why this framework is appropriate for the Chinese economy, where many enterprises producing the products in this dispute are state-owned and may have non-commercial interests that may call into question their responsiveness to price changes when making production decisions. *See* Working Party Report, para. 150 ("Several members of the Working Party noted that China was continuing the process of transition towards a full market economy."); Brief of Amicus Curiae: MOFCOM. *See also In Re Vitamin C Antitrust Litigation* (E.D. NY Jun. 26, 2006) (Exhibit JE-98), p. 3 ("China's ongoing transition from a state-run command economy to a market-driven economy"); *See also* Exhibit JE-98, pp. 6-7.

Q29. (Complainants) Do the complainants agree with China that "primary and secondary metals are perfect substitutes in consumption" (Exhibit CHN-519, paragraph 70)? Is this true for magnesium, manganese and zinc as well?

56. The United States does not agree with Olarreaga's assertion that "primary and secondary metals are perfect substitutes in consumption." As an initial matter, we note that China has failed to substantiate this assertion. As discussed in the U.S. second written submission, China's discussion of recycling relies heavily on facts related to the recycling of steel and aluminum.⁶⁰ These assertions bear no relevance to China's arguments as they relate to the products in this dispute, because the feasibility of recycling and applications for secondary metals depend on the technical characteristics of the specific products at issue. Indeed, even in the statement of Dr. Olarreaga to which the Panel's question refers, Dr. Olarreaga does not substantiate his assertion with any information related to the products in this dispute. Dr. Olarreaga cites to a journal article discussing the recycling of aluminum.⁶¹ The specific sentence from that article that he cites states, "[M]ost metals can be recycled again and again with little or no decline in material performance and quality."⁶² Thus, the statement does not specifically address the products relevant to this dispute. In short, China has failed to provide any support for the assertion that secondary and primary metals are perfect substitutes, and the Panel should therefore reject that assertion. In addition, there are a number of facts that directly contradict Dr. Olarreaga's assertion.

⁶⁰ U.S. Second Written Submission, paras. 55-57.

⁶¹ Exhibit CHN-519, para. 70 n. 62 citing M. Melo, 1999, "Statistical analysis of metal scrap generation: the case of aluminum in Germany", *Resources, Conservation and Recycling* Vol. 26, pp. 99-113.

⁶² Exhibit CHN-519, para. 70 n. 62 citing M. Melo, 1999, "Statistical analysis of metal scrap generation: the case of aluminum in Germany", *Resources, Conservation and Recycling* Vol. 26, pp. 99-113 (emphasis added).

57. **Manganese.** As it relates to manganese, Dr. Olarreaga’s assertion referenced in the Panel’s question fails for a simple and straightforward reason. As the complainants have explained in previous submissions, there is no secondary production of manganese metal.⁶³ Therefore, there is no secondary manganese metal.

58. **Magnesium.** As the United States set forth in Exhibit JE-152, different types of magnesium scrap may be limited in their applications. Pure and alloy magnesium metal are used in four different applications: (1) aluminum alloying; (2) as a structural metal; (3) desulfurisation in iron and steel processing; and (4) electrochemical uses. Only certain types of magnesium scrap can be used to produce secondary magnesium metal. High-grade scrap without impurities can be melted; however, other types of clean magnesium scrap may be recycled by direct grinding of the scrap into powder for iron and steel desulfurisation applications. Other contaminated scrap are not used to produce secondary magnesium, because they can introduce impurities into the streams of production.⁶⁴ Thus, secondary magnesium is not usable in the same applications as primary magnesium.

59. **Zinc.** While secondary zinc generally may be of comparable quality as primary zinc, certain types of zinc scrap may require additional processing in order to be usable in the production of zinc.⁶⁵ This may affect the economic feasibility of recycling zinc, and therefore the availability of secondary zinc as compared to primary zinc.⁶⁶

⁶³ Complainants’ First Oral Statement, para. 106.

⁶⁴ See Exhibit JE-152, p. 2.

⁶⁵ Exhibit JE-154, p. 5.

⁶⁶ See Exhibit JE-154, p. 5 n. 23 (“the reason more zinc is not recovered is economic, not technical”).

Q31. (Complainants) With regard to China's domestic actions, could the complainants comment in detail on paragraphs 236 to 256 of China's second oral statement.

60. In Section VI.D of China's second oral statement (paras. 230-256), China responds to arguments set forth in the U.S., EU, and Mexican Second Written Submissions rebutting China's Article XX(g) justification for the imposition of the export duties on fluorspar and the export quota for bauxite, as applied to high alumina clay. The three main arguments China advances in Section VI.D of its second oral statement are: (1) the export duties on fluorspar and export quota for bauxite, as applied to high alumina clay, relate to conservation (paras. 233-239 of China's second oral statement); (2) restrictions on domestic production, domestic consumption, and international consumption of fluorspar and high alumina clay exist (paras. 240-247 of China's second oral statement); and (3) China's objectives in imposing export duties on fluorspar and export quotas for bauxite, in the absence of similar export restraints imposed on downstream products made from fluorspar and high alumina clay, are not purely economic (paras. 248-256 of China's second oral statement). China's approach in this section of its oral statement is to take aim at strawmen constructed out of misrepresentations of U.S. and its co-complainants' arguments; distort the standard of Article XX(g) of the GATT 1994; and continue to insist that an aggressively effective industrial policy is really a policy for conservation.

61. In paragraphs 236 to 256 of Section VI.D, China references a number of its domestic actions concerning fluorspar and high alumina clay. The United States will comment on these measures in detail below.

A. Domestic Actions Referenced in Section VI.D.2 (paragraphs 236-239)

62. China references a number of domestic actions or measures in paragraphs 236 through 239 of its second oral statement in support of its argument that its export duties on fluorspar and export quota on bauxite, as applied to high alumina clay, relate to conservation, as required by the first clause of Article XX(g). To recall, the Appellate Body has interpreted “relating to” as requiring a “substantial relationship”⁶⁷ between the challenged measure and the goal of conservation that constitutes a “close and genuine relationship of ends and means.”⁶⁸ The United States observes as an initial matter that in Section VI.D.2 of its second oral statement, China adopts the interpretation of “conservation” presented by the United States in the U.S. second written submission and appears to have abandoned the interpretation it advanced in its first written submission.⁶⁹

63. In its second oral statement, China does not argue that the export duties on fluorspar or the export quota on bauxite, as applied to high alumina clay, are in themselves related to conservation. Instead, China’s argument is that these export restraints are related to a number of domestic actions or other measures that are in turn related to conservation.

64. Setting aside the question of whether these domestic actions are “related to conservation,” the United States notes that China’s approach is fundamentally at odds with the text of Article XX(g). If an otherwise GATT-inconsistent measure is to be excused under Article XX(g), that measure must relate to conservation. The inquiry is whether the challenged measure – here the

⁶⁷ *U.S. – Gasoline (AB)*, at 18.

⁶⁸ *U.S. – Shrimp (AB)*, para. 135.

⁶⁹ See China’s first written submission, paras. 104-144 (“To summarize this discussion, Article XX(g) must be interpreted in a manner that recognizes WTO Members’ sovereign rights over their own natural resources. These rights must be exercised in the interests of a Member’s own social and economic development . . . ,” para. 142).

export duties on fluorspar or the export quota on bauxite as applied to high alumina clay – relates to conservation.

65. In paragraph 236 of its second oral statement, China presents a number of measures that it argues implement its mineral resources conservation policy. In six separate bullets, China lists these measures in groups, describing the effect that it argues each group of measures has. The Panel has asked for detailed comments on these “domestic actions” (as well as those referenced in paragraphs 237-256 of China’s second oral statement). The United States will show through its comments below that the measures do not have the effects that China argues that they have.

66. In the first two bullets of paragraph 236, the export restraints on fluorspar and bauxite (as applied to high alumina clay) are listed:

- (1) in combination with *Measures for the Administration of Registration of Mining of Mineral Resources*⁷⁰ and the *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*⁷¹ as measures “limiting the quantity of fluorspar and refractory bauxite [*i.e.*, high alumina clay] that can be extracted and consumed;”⁷² and
- (2) in combination with the *Circular on Passing Down the Controlling Quota of the 2010 Total Production Quantity of High-alumina Bauxite Ores and Fluorspar Ores*⁷³ as measures “limiting the quantity of fluorspar and refractory bauxite [*i.e.*, high alumina clay] that can be processed and consumed.”⁷⁴

67. The other measures or domestic actions referenced in the footnotes to the remaining third through sixth bullets in paragraph 236 are presented as conservation-related measures, but do not include the export restraints on fluorspar and bauxite. These other measures are described as

⁷⁰ Exhibit CHN-93, Art. 5(3).

⁷¹ Exhibit CHN-97 (also Exhibit JE-168).

⁷² China’s second oral statement, para. 236, first bullet.

⁷³ Exhibit CHN-98 (also Exhibit JE-169).

⁷⁴ China’s second oral statement, para. 236, second bullet.

measures “restricting the number of mining enterprises,” “increasing the cost of extraction,” “increasing the cost of extraction and initial processing and reducing waste, by requiring investment in efficient ore-dressing techniques and other environmental technology,” and “imposing fines and forcing the closure of mining enterprises that do not comply with China’s mineral resources conservation policy.”⁷⁵ According to China’s presentation, however, the export restraints on fluorspar and bauxite (as applied to high alumina clay) are not related to the operation of these particular measures and domestic actions.

68. The United States will first address China’s arguments that the export restraints at issue relate to conservation in combination with measures that China argues limit extraction, processing, and consumption, and then address the other measures referenced in Section VI.D.2.

1. Measures “Limiting the Quantity of Fluorspar and Refractory Bauxite [i.e., High Alumina Clay] that Can Be Extracted, Processed, and Consumed”

69. China appears to argue that the export duties on fluorspar and export quota on bauxite, as applied to high alumina clay, “relate to conservation” because, when considered in a bundle with other measures, they limit the quantity of fluorspar and high alumina clay that can be extracted, processed, and consumed. However, China creates these bundles of measures for the purpose of its dispute settlement submission; China has not shown that it has developed any sort of coherent regulatory scheme adopted for the purpose of conservation. Moreover, even when these measures are artificially considered as working together, they do not limit the quantity of fluorspar ore or high alumina clay ore that can be mined or processed into tradeable product (*i.e.*, metallurgical grade and acid grade fluorspar or calcined high alumina clay). The export duties on

⁷⁵ China’s second oral statement, para. 236, third through sixth bullets, notes 259-264.

fluorspar increase the cost of obtaining fluorspar to non-Chinese purchasers. The export quota on bauxite limits the quantity of high alumina clay – as well as other refractory clays and aluminum ores and concentrates – that non-Chinese purchasers can obtain. These export restraints do not impose any limits on the amount of these raw materials that can be mined or processed.

70. With respect to limiting the amount of fluorspar or high alumina clay that can be consumed, the export duties on fluorspar and the export quota on bauxite, as applied to high alumina clay, certainly negatively affect the level of consumption of these raw materials by foreign users. However, taking unrestricted exports as a baseline, the imposition of these export duties and export quota actually increase availability of fluorspar and high alumina clay to China’s domestic consumers, which would lead to increased domestic consumption. By adversely impacting consumption of fluorspar and high alumina clay by foreign users only, these export restraints do not “relate to conservation” of these materials.

71. The export restraints on fluorspar and high alumina clay also do not create a restriction on domestic consumption. China has argued in its second written submission and again in its second oral statement that, under certain circumstances, an export quota could work in combination with a production restriction and result in a domestic consumption restriction.⁷⁶ However, for reasons the United States has detailed in its second oral statement⁷⁷ and summarized further below in the discussion on China’s arguments in Section VI.D.3.a of its second oral statement, China’s argument is fundamentally flawed and its export duties on

⁷⁶ See China’s second written submission, paras. 199-202; China’s second oral statement, paras. 240-244.

⁷⁷ U.S. second oral statement, paras. 91-95.

fluorspar and export quota on bauxite, as applied to high alumina clay, do not create a domestic consumption restriction.

72. China also appears to argue that the three other measures listed in these first two bullets in paragraph 236 of its second oral statement constitute restrictions on production and consumption.⁷⁸ An examination of these other measures reveals that they do constitute restrictions on domestic production or consumption.

73. China argues that the *Measures for the Administration of Registration of Mining of Mineral Resources*,⁷⁹ with a reference to Art. 5(3) of that measure, provide for a mining capacity limit that is established in each mining license. However, Article 5(3) of the *Measures for the Administration of Registration of Mining of Mineral Resources* states:

When applying for a mining license, the following materials should be submitted to a mining right registration department concerned:

...

(3) Program for the development and utilization of the mineral resources;

74. Neither Article 5(3) nor any other sub-paragraph of Article 5 of the *Measures for the Administration of Registration of Mining of Mineral Resources* appears to provide for a mining capacity limit in a mining license. Even if this measure did what China asserts, a mining capacity limit set in individual mining licenses, without more, does not limit the quantity of fluorspar or high alumina clay that can be mined in China.

75. China also argues that the *Circular of the Ministry of Land and Resources on Passing Down the 2010 Controlling Quota of Total Extraction Quantity of High-alumina Bauxite Ores*

⁷⁸ See paras. 237-238 of China's second oral statement.

⁷⁹ Exhibit CHN-93, Art. 5(3).

and Fluorspar Ores⁸⁰ provides for “extraction caps.” As the United States has detailed in earlier submissions and in response to Question 20 above, the mining targets provided for in this measure are set at such high levels that they are not meaningful restrictions on the amount of fluorspar or high alumina clay that can be mined.⁸¹

76. Similarly, China argues that the *Circular on Passing Down the Controlling Quota of the 2010 Total Production Quantity of High-alumina Bauxite Ores and Fluorspar Ores*⁸² provides for “production caps.” As the United States has detailed in earlier submissions and above in response to Question 20, the production targets provided for in this measure are set at such high levels that they are not meaningful restrictions on the amount of tradeable fluorspar or high alumina clay that can be produced from fluorspar or high alumina clay ores.⁸³

2. Other Measures Referenced in Footnotes 259-264

77. China presents the other measures in the remaining bullets in paragraph 236 of its second oral statement as measures that implement a mineral resources conservation policy. However, China has failed to show that these measures constitute domestic production or consumption restrictions.

a. Third Bullet

78. China argues that certain measures restrict the number of fluorspar and high alumina clay mining enterprises.⁸⁴ Even if the measures China cites accomplish what China argues they do,

⁸⁰ Exhibit CHN-97 (also Exhibit JE-168).

⁸¹ See U.S. second written submission, paras. 163-175 and 276-288; U.S. second oral statement, paras. 77-84.

⁸² Exhibit CHN-98 (also Exhibit JE-169).

⁸³ See U.S. second written submission, paras. 163-175 and 276-288; U.S. second oral statement, paras. 77-84..

⁸⁴ China’s second oral statement, para. 236, third bullet.

restricting the number of mining enterprises does not restrict the amount of fluorspar or high alumina clay that can be produced in China. As much or even more fluorspar or high alumina clay may be mined, even if the number of mining enterprises decreases.

79. Based on China’s description, the five measures “addressing environmental, technological, labor, and other standards”⁸⁵ appear to address the terms on which mining enterprises may operate and standards those enterprises should comply with, but do not restrict the number of mining enterprises that can operate. Beyond listing the five measures in a footnote, China does not provide any references to specific provisions in these measures (some of which are quite general – e.g., the *Mineral Resources Law of the People’s Republic of China* and the *Environmental Protection Law of the People’s Republic of China*) or any discussion of how these measures operate to restrict the number of mining enterprises. Again, it is China’s burden of proof to make these showings.

80. China represents that the *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*, with reference to Article II of that measure, provides for the temporary suspension of the right to apply for new exploration and mining rights. Article II provides for the strict control of newly-added mining capacity, stating only that “in principle,” the authorities may not accept “new applications for the registration of exploration or extraction of refractory-grade bauxite (high-alumina bauxite) or fluorspar anymore.” While this might affect the expansion of

⁸⁵ The measures listed in footnote 259 of China’s second oral statement are: (1) *Mineral Resources Law of the People’s Republic of China* (Exhibit CHN-78); (2) *Environmental Protection Law of the People’s Republic of China* (Exhibit CHN-88); (3) *Measures for the Administration of Registration of Mining of Mineral Resources* (Exhibit CHN-93); (4) *Public Notice on Refractory-Grade Bauxite (High Alumina Bauxite) Industry Entrance Standards* (Exhibit CHN-275); and (5) *Public Notice on Fluorspar Industry Entrance Standards* (Exhibit CHN-96).

production capacity, it does not restrict the production of fluorspar or high alumina clay, which occurs well below their respective production capacity levels.⁸⁶ Additionally, it is not clear, aside from the announcement of this rule “in principle,” whether in practice, the authorities may nevertheless accept new applications.

81. China also represents that the *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*⁸⁷ provides for the consolidation of mines. While consolidating mines may reduce the overall number of mines, the goal of the measure is to “rationalize the deployment of mineral exploitation” and “optimize the structure of mining enterprises,”⁸⁸ not to restrict the amount of fluorspar or high alumina clay ores that may be produced from those mines. Consolidation of mines could lead to more efficient and even increased levels of production.

b. Fourth Bullet

82. China argues that certain measures increase the cost of extraction.⁸⁹ As the United States has detailed in earlier submissions, the mineral resources tax and mineral compensation fee are set at such low levels relative to the prices of fluorspar and high alumina clay that their effect, which would affect both domestic and foreign users, would be minimal.

⁸⁶ See Exhibit JE-166, I(1)(ii) and (iii), and I(2) (citing 2009 actual mining of high alumina clay at 2.4 million MT; authorized mining capacity at 4.2 million MT; and aggregate mining capacity at 4.7 million MT) and II(1)(ii) and (iii), and II(2) (citing 2009 actual mining at 9.4 million MT; and authorized mining capacity at 13.8 million MT).

⁸⁷ Exhibit CHN-95.

⁸⁸ *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* (Exhibit CHN-95), Section II.a and b.

⁸⁹ China’s second oral statement, para. 236, third bullet.

83. In 2009 and through the first half of 2010, the applicable resource tax for fluorspar mining was 3 RMB/MT (approximately 0.45 USD/MT),⁹⁰ constituting 0.08 percent of the reported price of 533 USD/MT. After June 1, 2010, the resource tax for fluorspar was raised to 20 RMB/MT (approximately 3 USD/MT),⁹¹ constituting approximately 0.8 percent of the reported price of 350-365 USD/MT.⁹² Similarly, in 2009 and through the first half of 2010, the applicable resource tax for high alumina clay was 3 RMB/MT (approximately 0.45 USD/MT),⁹³ constituting 0.08-0.1 percent of the reported price of 470-535 USD/MT. After June 1, 2010, the resource tax for high alumina clay was raised to 20 RMB/MT (approximately 3 USD/MT) (assuming high alumina clay is covered by “high alumina bauxite”) or 6 RMB/MT (approximately 0.9 USD/MT) (assuming high alumina clay is covered by “other refractory grade clay”),⁹⁴ constituting 0.5-0.7 percent of the reported price of 405-535 USD/MT or 0.1-0.2 percent of the reported price of 405-535 USD/MT respectively.⁹⁵ As detailed in the U.S. second written submission, the resource tax is set at such a low level that it would not meaningfully restrict production or consumption of fluorspar or high alumina clay and does not appear to be systematically collected.⁹⁶

⁹⁰ *Detailed Rules for the Implementation of the Provisional Regulations on Resource Tax*, Appendix (Exhibit CHN-91). See discussion at U.S. second written submission, paras. 153-154.

⁹¹ *Notice Adjusting the Applicable Tax Rates of Resource Taxes of Refractory Grade Clay and Fluorspar* Cai Shui [2010] No. 20 (Ministry of Finance and the General Administration of Taxation, effective June 1, 2010) (Exhibit CHN-90). See discussion at U.S. second written submission, para. 166.

⁹² Exhibit JE-180.

⁹³ *Detailed Rules for the Implementation of the Provisional Regulations on Resource Tax*, Appendix (Exhibit CHN-91).. See discussion at U.S. second written submission, paras. 266-267.

⁹⁴ *Notice Adjusting the Applicable Tax Rates of Resource Taxes of Refractory Grade Clay and Fluorspar* Cai Shui [2010] No. 20 (Ministry of Finance and the General Administration of Taxation, effective June 1, 2010) (Exhibit CHN-90). See discussion at U.S. second written submission, para. 279.

⁹⁵ Exhibit JE-180.

⁹⁶ U.S. second written submission, paras. 153-154 and 266-267.

84. With respect to the compensation fee, the United States has detailed the reasons why the fee does not constitute a restriction on domestic production or consumption, including the fact that it is set at a very low rate, it is calculated in a manner that incentivizes the maximization of production up to approved mining recovery rates, and it appears not to be systematically collected.⁹⁷

c. Fifth Bullet

85. China also argues that certain measures increase the cost of extraction and initial processing and reducing waste, by requiring investment in efficient ore-dressing techniques and other environmental technology. Once again, beyond listing the four measures in a footnote, China does not provide any references to specific provisions in these measures (some of which are quite general – e.g., the *Mineral Resources Law of the People’s Republic of China* and the *Environmental Protection Law of the People’s Republic of China*) or any discussion of how these measures operate to require investment in efficient ore-dressing techniques and other environmental technology. However, even assuming that these measures do what China represents that they do, any such increases in the cost of extraction, initial processing, and reducing waste, would affect domestic and foreign users the same, and would affect the terms on which fluorspar or high alumina clay are produced without necessarily restricting the production of these raw materials.

⁹⁷ U.S. second written submission, paras. 155-157 and 268-270. Furthermore, even if either of these measures were considered a restriction, they would affect both domestic and foreign users equally, meaning the imposition of the export restraints in addition to these measures would not be even-handed. See U.S. second written submission paras. 160-162, 175, 273-275, 288.

d. Sixth Bullet

86. China represents that certain measures impose fines and force the closure of mining enterprises that do not comply with China’s conservation policy. Again, these measures address the terms on which mining enterprises may operate and standards those enterprises should comply with, but do not restrict the quantities of their permitted output.

B. Domestic Actions Referenced in Section VI.D.3.a (paragraphs 240-247)

87. In paragraphs 240-247 of its second oral statement, China repeats the hypothetical example set forth in its second written submission that an export quota of 40 units imposed along with an “extraction cap” of 100 units results in a domestic consumption restriction of 60 units. Extrapolating from this example to its export quota on bauxite – as applied to high alumina clay, China argues that, combined with the mining target, it has in place both a domestic production and consumption restriction as well as a foreign consumption restriction on high alumina clay.

88. The United States has, in its second oral statement, discussed in detail the flaws in China’s example and argument. To summarize:

- China’s argument addresses only the combination of an export quota with an “extraction cap” and does not apply to the export duties imposed on fluorspar;
- An export quota only limits the amount of a product that can be made available to foreign users – it does not “set aside” that amount for foreign use and make it unavailable to domestic users, nor does it guarantee that the full amount (or any amount) will be traded to export markets;
- Even if an export quota were guaranteed to be filled, a restriction on domestic consumption would only result if domestic demand exceeded the difference between the production restriction and the export quota;
- The mining target for high alumina clay is set at a level that is so much higher than actual mining that it does not constitute a production restriction;.

- China’s actual export quota is imposed on bauxite – which includes aluminum ores and concentrates and other refractory clays in addition to high alumina clay – while China’s mining target is addressed only to high alumina clay. China’s argument does not take into account a situation where an export quota is imposed on a basket of products, but where the theoretical “production restriction” applies to only one subset of products covered by the export quota.

89. In addition, the United States has in previous submissions detailed the reasons why the mining targets provided in the *2010 Mining Quantity Control Targets Measure* do not constitute production restrictions⁹⁸ – *i.e.*, the numbers are set at such high levels relative to actual production that they are not meaningful restrictions on production.

90. In response to the U.S. observation that the mining target levels are too high to restrict production, China argues that it was not China’s intent to reduce the level of permitted extraction with the 2010 target numbers⁹⁹ – 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.”¹⁰⁰ China’s explanation makes clear that its proffered “restrictions on domestic production” are not intended to restrict in the present – but intended only as pointing the way to potential or future restrictions. Article XX(g) requires that a challenged measure be made effective in conjunction with “restrictions on domestic production or consumption” – not “potential restrictions on domestic production or consumption.” China also argues that the target levels are set below the production capacity approved in mining licenses and potential production

⁹⁸ See U.S. second written submission, paras. 283-285; U.S. second oral statement, paras. 83-84; and Answer to Question 20 above.

⁹⁹ As China states at paragraphs 245-246 of its second oral statement: “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.”

¹⁰⁰ China’s second oral statement, para. 246 (emphases added).

capacity associated with approved exploration enterprises.¹⁰¹ The United States observes once again that Article XX(g) requires that a challenged measure be made effective in conjunction with “restrictions on domestic production or consumption” – not “restrictions on domestic production capacity” or “restrictions on potential domestic production capacity.”

91. Accordingly, China has not demonstrated through these domestic actions that it imposes restrictions on domestic production or consumption of fluorspar or high alumina clay.

C. Domestic Actions (or Omissions) Referenced in Section VI.D.3.b (paragraphs 248-256)

92. In paragraphs 248-256 of its second oral statement, China argues that, contrary to the allegations of the co-complainants, its “objectives in restricting domestic production, and domestic and international consumption, of fluorspar and refractory bauxite [*i.e.*, high alumina clay] are not purely economic.”¹⁰² This is one of the most glaring instances of China’s strawman argumentation in Section VI.D of its second oral statement.

93. The relevant inquiry under Article XX(g) is whether the challenged measure relates to conservation. It is China’s burden to show affirmatively that the export duties on fluorspar and export quota on bauxite, as applied to high alumina clay, relate to conservation. It is not enough for China to argue that the goal of these export restraints is not purely economic. And it is not particularly relevant to the Article XX(g) analysis for China to argue – as it appears to in this section of its oral statement – that the goal of its purported domestic restrictions is not purely economic.

¹⁰¹ China’s second oral statement, para. 247.

¹⁰² China’s second oral statement, para. 248.

94. In support of its assertion that the co-complainants have alleged that China’s objectives in restricting domestic production, and domestic and international consumption, of fluorspar and high alumina clay are “purely economic,” China cites to para. 301 of the EU second written submission and paras. 148 and 144 of Mexico’s and the U.S. second written submissions respectively. Those paragraphs from the co-complainants’ second written submissions address the fact that China’s imposition of export restraints on fluorspar and high alumina (not China’s imposition of purported domestic restrictions) services a powerful industrial strategy and economic interest, which belies China’s remonstrations that those export restraints are “primarily aimed at”¹⁰³ servicing conservation goals (not that China’s goal is “purely economic”).

95. In particular, it is the co-complainants’ position that China’s export duties on fluorspar and an export quota on high alumina clay through an export quota on bauxite, viewed in light of: (1) the absence of meaningful restrictions on domestic production or consumption; and (2) the absence of similar restraints on the higher value and higher value-added downstream products derived from fluorspar and high alumina clay – demonstrate that those export restraints, in the words of the Appellate Body, are “not primarily or even substantially designed for implementing conservationist goals.”

96. China’s argument in paragraphs 248-256 of its second oral statement appears to be that the lack of similar export restraints imposed by China on downstream products is intended to be an efficient way of “constraining the production and consumption of fluorspar and high alumina clay.”¹⁰⁴ Again, China establishes the framework for this argument by constructing a strawman

¹⁰³ See *U.S. – Shrimp*, para. 136.

¹⁰⁴ See China’s second oral statement, para. 251.

in place of the co-complainants’ actual argument. China states that it “questions the Complainants’ assertion that it would be more efficient for China to impose restrictions on downstream fluorspar and refractory bauxite [*i.e.*, high alumina clay] products.”¹⁰⁵ China does not cite to any portion of the co-complainants’ submissions as a reference for this “assertion” by the co-complainants. In actuality, the co-complainants’ position is that the lack of similar export restraints on downstream fluorspar and high alumina clay products undermines China’s argument that the export restraints on fluorspar and high alumina clay raw material relates to the conservation of fluorspar and high alumina clay because restraints on the exportation of the raw materials, without similar downstream export restraints, increase domestic supply, demand, and consumption for the raw materials – which would undermine rather than serve the goal of conserving these raw materials.

97. China’s argument regarding the lack of export restraints on downstream products in Section VI.D.3.b addresses only fluorspar – which is subject to export duties. The argument appears to be that imposing export duties on downstream fluorspar products would be inefficient at curbing domestic demand for fluorspar because the proportion of the value of fluorspar in relation to the value of the downstream fluorspar products declines as the downstream products’ value increases.¹⁰⁶

98. The relevant question under Article XX(g), however, is not what is the most efficient means of constraining China’s production and consumption of fluorspar through the imposition of export duties. The relevant question is whether China’s export duties on fluorspar bear a

¹⁰⁵ China’s second oral statement, para. 248.

¹⁰⁶ China’s second oral statement, paras. 251-252.

substantial relationship to the conservation of fluorspar. The point, therefore, is this: given the additional domestic demand induced by China's export duties on fluorspar and the lack of any meaningful domestic production or consumption restrictions, the absence of corresponding export restraints on fluorspar's downstream production only diverts exports of fluorspar to exports of higher value downstream products and is incompatible with a conservation goal.

99. The fact is that China's export duties, combined with an export quota until 2010, have been imposed on fluorspar exports while the higher value downstream fluorspar products are not correspondingly constrained and no meaningful restrictions are imposed on production or consumption. The result of these policies is that any amount of fluorspar can be produced and exported out of China freely – but only if the fluorspar has first been processed in China into a higher value product. Accordingly, China's export restraints on fluorspar do not “relate to” conservation of fluorspar but instead appear to relate to the protection and development of China's domestic processing industry.

100. The data in the *Market Research on Fluorspar and Selected Fluorochemicals* report¹⁰⁷ demonstrate how this has played out in the years 2000 through 2008 and 2009. In this last decade, Chinese exports of fluorspar (both metallurgical grade and acid grade fluorspar) have decreased significantly¹⁰⁸ while Chinese production of fluorspar has grown at a moderate pace¹⁰⁹ and China's fluorspar consumption has grown 124 percent.¹¹⁰ This growth in consumption is reflected in substantial growth in the production in downstream fluorochemicals of nearly 300

¹⁰⁷ Exhibit JE-164.

¹⁰⁸ Exhibit JE-164, Fig. 8; Tables 8-11, at 34-36.

¹⁰⁹ JE-164 at 8, and Table 7 at 34.

¹¹⁰ JE-164 at 9, and Table 5 at 29-30.

percent for hydrofluoric acid (HF), over 300 percent for HCFC-22; and over 350 percent for PTFE.¹¹¹

101. In the meantime, exports of these downstream fluorochemicals have ballooned during this time period – over 400 percent for PTFE,¹¹² over 700 percent for HF¹¹³ and more than 1000 percent for HCFC-22.¹¹⁴ In 2009, the total amount of fluorspar equivalent, on a 100% CaF₂ basis, that was exported – in the form of fluorspar (which decreased significantly over the time period pursuant to China's export restraints), HF, HCFC-22 and PTFE – was nearly 8 times what it was in 2000.¹¹⁵ These data illustrate how China's imposition of export restraints on fluorspar have only curbed exports of fluorspar while fluorspar production and consumption, and exports of high value downstream products¹¹⁶ have grown at impressive rates.

102. China's measures and these data demonstrate the close and genuine relationship of ends and means between China's industrial policy and the export restraints on fluorspar – and the lack of a similar relationship between the export restraints and the conservation of fluorspar.

Q44. (United States and Mexico) The confidentiality agreement signed by CCCMC Secretariat employees states: "Party B shall assume strict confidentiality responsibility with respect to business secrets he knows or possesses." Why does this not constitute an effective safeguard?

103. The confidentiality agreement does not constitute an effective safeguard because, by law, not all CCCMC Secretariat staff are required to sign these confidentiality agreements. It remains uncontroverted that the *Regulations for Personnel Management of Chambers of Commerce*

¹¹¹ JE-164 at 9 and Tables 17-18 at 41; Tables 27-28 at 53; and Tables 38-39 at 60.

¹¹² JE-164, Table 48 at 66.

¹¹³ JE-164 at 11 and Table 22 at 50.

¹¹⁴ JE-164 at 12 and Table 33 at 57.

¹¹⁵ JE-164, Table 50 at 67.

¹¹⁶ See China's second oral statement, paras. 254-256 for examples of price differentials between downstream products and fluorspar.

provide that a chamber of commerce's Secretariat staff need not be employees. In fact, the *Regulations for Personnel Management of Chambers of Commerce* prescribe a preference for chambers of commerce to address its Secretariat staffing needs by selecting and seconding persons from its from member companies.

104. In Exhibit CHN-530, China has provided an assurance by the CCCMC that currently, CCCMC Secretariat staff responsible for administering the coke, bauxite, and silicon carbide export quotas have not been selected or seconded from CCCMC member enterprises but instead have been recruited from the general public and are employees of the CCCMC Secretariat that have signed an employment contract and a confidentiality agreement. However, this is different from China's laws requiring that CCCMC Secretariat staff responsible for administering the coke, bauxite, and silicon carbide export quotas sign confidentiality agreements. China's laws do not so require.

105. The *Regulations for Personnel Management of Chambers of Commerce* provide that the staffing needs of a Chamber of Commerce's Secretariat must primarily be "covered by selecting people from member companies"¹¹⁷ or may be covered by directly seconding people from member companies. According to the *Regulations for Personnel Management of Chambers of Commerce*, only if these other means of meeting its staffing needs are not sufficient, may a chamber of commerce advertise openly and recruit from non-member companies or from the

¹¹⁷ *Regulations for Personnel Management for Chambers of Commerce* (Exhibit JE-102), Art. 8.

general public¹¹⁸ – and these are the only types of staff persons for whom employment contracts are executed.¹¹⁹

106. Accordingly, China’s assurance is only that – at the moment – the CCCMC Secretariat staff members responsible for the administration of the coke, bauxite, and silicon carbide export quotas are bound by a confidentiality agreement that may serve as an effective safeguard against unreasonable and partial administration of those export quotas. In light of Articles 8 and 11 of the *Regulations for Personnel Management of Chambers of Commerce*, China cannot represent that these confidentiality agreements constitute a safeguard against inappropriate flows of sensitive business information because China’s laws provide that persons not bound by such agreements may and should be responsible for the administration of these export quotas.

107. China asserts in its second oral statement that “Articles 8 and 11 of the 1994 *Certain Provisions on Personnel Management of Chambers of Commerce for Importers and Exporters* . . . show that employees recruited from member enterprises are bound by CCCMC employment and confidentiality agreements, just like any other employees working at the relevant departments of the CCCMC.”¹²⁰ This is not true. Article 11 of this measure requires employment contracts only for those Secretariat staff members recruited from the general public or from non-member companies.¹²¹

¹¹⁸ *Regulations for Personnel Management for Chambers of Commerce* (Exhibit JE-102), Art. 8.

¹¹⁹ *Regulations for Personnel Management for Chambers of Commerce* (Exhibit JE-102), Art. 11.

¹²⁰ China’s second oral statement, para. 320.

¹²¹ See Exhibit JE-102 or Exhibit CHN-315.

Q48. (All Parties) According to China's translation of their Exhibit No. 16 (Article 11(4)), one of the rights of CCCMC Members is the right "to supervise the operation of this Association, give comments and suggestions" (emphasis added). What does it mean to "supervise the operation"?

108. The language at issue is from China's translation of Article 11(4) of the *2001 CCCMC Charter* (Exhibit CHN-16). The United States translated the language at issue in Exhibit JE-86 as "monitor the Chamber's work" A more precise translation of the phrase would be: "to exercise oversight over the work of this Chamber . . ." The phrase "to exercise oversight over the work" would be used to describe the exercise of oversight by, e.g., a manager over the work his or her subordinates or a board over the work of a corporation.

Q50. (All Parties) Is the standard under Article X:3(a) whether an action will "necessarily lead to ..." the same as whether there is an "inherent danger"? Does this depend on whether an "as such" or "as applied" challenge is brought?

109. It appears this question relates specifically to the Article X:3(a) claims brought solely by the EU. The United States notes only that the Article X:3(a) claims that it has brought regarding China's administration of its export quotas and minimum export price system are "as such" challenges for which the standard is whether there is an inherent danger of conflict of interest or inappropriate flows of sensitive commercial information that renders China's administration partial or unreasonable.

Q52. (Complainants) Please comment on Exhibit CHN-529 and Exhibit CHN-530.

110. With respect to comments on Exhibit CHN-529, Further Statement on Relevant Matters Regarding the Issuance of Export Licenses for Zinc and Manganese from the Quota and License Administrative Bureau of the Ministry of Commerce (Nov. 11, 2010), the United States refers to its answer to Question 61 below.

111. With respect to comments on Exhibit CHN-530, Letter of Confirmation from the CCCMC (Nov. 10, 2010), the United States refers to its answer to Question 44 above.

Q54. (United States and Mexico) In paragraph 326 of its second oral statement, China asserts that documents submitted to the CCCMC Secretariat are needed to verify whether applicant enterprises satisfy the quota allocation requirements. Please comment on this statement.

112. China makes this statement in the context of the U.S. claim that China’s administration of its export quotas is inconsistent with Article X:3(a) of the GATT 1994. As the United States set forth in its previous submissions, the involvement of the China Chamber of Commerce of Metals, Minerals, and Chemicals Importers and Exporters (“CCCMC”) in determining whether applicant enterprises may export products subject to quota renders the administration of the quotas partial and unreasonable in contravention of Article X:3(a) of the GATT 1994.¹²²

113. In paragraph 326 of its second oral statement, China essentially argues that because it imposes certain eligibility requirements on applicants seeking to export products subject to quota, the CCCMC’s involvement is necessary to ensure that applicant enterprises satisfy the eligibility requirements. According to China, this is sufficient to render the CCCMC’s involvement reasonable under Article X:3(a). China is incorrect.

114. In *Argentina – Leather*, the panel stated: “the requirement of reasonableness, we believe, turns on the question of information flows and whether it is reasonable to allow persons access to certain information which is irrelevant to the stated purpose of the legislation in question.”¹²³

Even if it were the case that China’s eligibility requirements for applicant seeking to export under

¹²² U.S. First Written Submission, paras. 291-314; 353-69.

¹²³ Panel Report, *Argentina – Leather*, para. 11.86.

the quota were permissible,¹²⁴ by virtue of its involvement in the administration of export quotas, CCCMC gains access to information far beyond that required to assess an applicant's conformity with the prescribed eligibility criteria. For example, China requires enterprises seeking to export coke under the quota to submit *inter alia* export invoices, business license, documentation regarding compliance with laws pertaining to labor and environment standards. In the context of export quota bidding, applicants seeking to export are required to provide *inter alia* a balance sheet and income statement.

115. As the United States set forth in its first written submission, the sensitive commercial documents that applicant enterprises are required to provide contain a wide range of information. Some of that information may be relevant to determining whether the applicant enterprises have the requisite prior export experience and registered capital, which, in any event, are impermissible restrictions on the right to trade.¹²⁵ However, by virtue of obtaining access to these documents, representatives of the CCCMC would also gain access to other confidential information that bears no relevance to the administration of the application process for export quotas.¹²⁶ Accordingly, the flow of this information to the CCCMC is unreasonable in contravention of Article X:3(a) of the GATT 1994.

¹²⁴ China's eligibility requirements are inconsistent with China's trading rights commitments in paragraph 5.1 of the Accession Protocol and paragraphs 83 and 84 of the Working Party Report. *See* U.S. First Written Submission, paras. 256-90.

¹²⁵ *See* U.S. First Written Submission, paras. 278-90.

¹²⁶ U.S. First Written Submission, para. 311; *See also* U.S. Second Written Submission, para. 363.

Q55. (United States and Mexico) Also in paragraph 326 of its second oral statement, China queries whether the United States and Mexico are challenging the substantive content of the quota allocation rules. Could the United States and Mexico please comment on this statement.

116. China’s statement arises in the context of the U.S. claim that the involvement of the CCCMC in the administration of export quotas renders the administration unreasonable, and therefore, inconsistent with China’s obligations under Article X:3(a). China’s oblique statement to which the Panel refers appears to be asserting that because the information submitted to the CCCMC is necessary “to permit the CCCMC Secretariat’s Bidding Department and Minerals & Metals Department to verify whether the applicant enterprises satisfy the quota qualification requirements,” the United States may be challenging the quota allocation rules themselves rather than the administration of the quota. China’s oblique statement is beside the point. As China itself notes¹²⁷, the United States has challenged the quota allocation rules themselves as inconsistent with China’s trading rights commitments.¹²⁸ Separately, the United States also challenges the administration of the export quotas. By virtue of its involvement in the administration of export quotas, the CCCMC obtains access to sensitive commercial information of the applicant enterprises that goes far beyond what is necessary to confirm an applicant enterprise’s conformity with the quota qualification requirements. This flow of information to the CCCMC is an aspect of the administration of the export quotas that is unreasonable in contravention of Article X:3(a) of the GATT 1994.¹²⁹

¹²⁷ See China’s Second Oral Statement para. 326.

¹²⁸ U.S. First Written Submission, paras. 278-90.

¹²⁹ See U.S. Answers to Second Set of Panel Questions, Question 54; U.S. First Written Submission, paras. 292-314.

Q60. (United States) In paragraph 340 of its first written submission, the United States argues that MOFCOM imposes conditions on the exportation of products subject to licensing such as the quantities, the price at which the products can be exported, the qualifications that exporters must possess in order to export, and any other conditions that MOFCOM decides it needs in order to provide its approval. In these last two respects, the United States cites the Measures for Administration of Trade and Social Organizations (Exhibit JE-101), Articles 8(2), 8(3) and 8(4). This Exhibit does not appear to contain these provisions. Could the United States please comment.

117. The United States thanks the Panel for noting this erroneous citation and regrets any inconvenience caused. The correct citation in support of the statement made in paragraph 340 of the U.S. first written submission is: *Export Licensing Rules* (Exhibit JE-97), Articles 8(2), 8(3) and 8(4).

Q61. (All Parties) China has submitted two statements from China's MOFCOM Quota & License Administrative Bureau - as Exhibit CHN-345 and Exhibit CHN-529 - stating that the license-issuing authorities' review of export license applications are "strictly procedural". China contends that these statements confirm that licenses for all the Raw Materials at issue will be issued automatically within three days of receiving a valid and complete set of application documents. The European Union suggests that it could be satisfied with such formal statements or commitments by China in the context of these disputes as a way to achieve a positive solution to the dispute. What value should the Panel attribute to these statements made in the context of these proceedings?

118. As a general matter, the United States notes that in the context of WTO dispute settlement, both the complaining party and the defending party routinely make assertions concerning the meaning and operation of the defending party's measures. The assertions made by the parties and presented to the Panel are not due any special weight simply because they are made by the defending party, or by any particular agency in the government of the defending party.

119. Here, China has presented certain statements of China's License Bureau that apparently were prepared for the purpose of this dispute. China has not provided any rationale why the views set out in these statements should be accorded any greater interpretative weight than any comparable views provided to the Panel by other representatives of China, or for that matter, by representatives of the complaining parties. These statements are not themselves legal instruments and do not change or affect the legal instruments within this Panel's terms of reference establishing the export licensing that is challenged in this dispute.

120. In Exhibit CHN-345, China has provided a statement from MOFCOM's Quota and License Administrative Bureau (License Bureau) describing the requirements for exporters applying for licenses to export goods subject to the administration of quotas and goods subject to the administration of export licenses only. In Exhibit CHN-529, China has provided a further statement from the License Bureau that exporters seeking export licenses for certain zinc products (Chinese Commodity Code (CCC) Nos. 7901.1110.00, 7901.1190.00, 7901.1200.00, and 7901.2000.00) and certain manganese products (CCC Nos. 8111.0010.10, 8111.0010.90, and 8111.0090.00 (not in the scope of the present dispute)) need only submit certain forms and that the review by the License Bureau involves only the examination of whether the documents and information submitted are authentic, complete, and valid.

121. However, these statements do not change the fact that under China's laws, this export licensing framework is designed to administer export restrictions for goods designated for restricted exportation because the issuance of these export licenses is conditioned on obtaining the approval of China's trade authorities:

- The *Export Licensing Rules* require exporters seeking export licenses to submit “the documents of approval for export issued by the competent authority-in-charge”¹³⁰ and “other materials to be submitted as required by the Ministry of Commerce”¹³¹ and requires the licensing entity to examine “whether an operator has the qualifications to operate the business,” “whether the documents of approval for export submitted by an operator are complete and valid,” and “whether the other materials submitted comply with relevant regulations.”¹³²
- The *Export Licensing Measures* require that “[f]or 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 and the export contracts (photocopies of the originals) of the Operators.”¹³³
- The *Import and Export Regulations* require that “[f]or the goods restricted from exportation that are subject to the administration of licenses . . . [t]he administrative departments of export licenses shall decide whether to grant a license or not within 30 days after receiving the application.”¹³⁴
- The *Foreign Trade Law* provides for the restriction of exports under Article 16 and in Article 19 provides that: “The State applies quota and licensing system to the management of goods subject to import or export restrictions . . . Goods . . . that are subject to the administration of quotas or licenses can only be imported or exported with approval from the foreign trade department of the State Council . . .”¹³⁵
- This is in contrast to the provision in the *Foreign Trade Law* that “. . . the State Council may, where the monitoring of imports and exports so requires, employ a system of automatic licensing for import and export of some goods that can be imported and exported freely . . . For goods subject to automatic licensing for import and export, if the consignor or consignee applies for automatic licensing prior to handling customs formalities, the State Council’s foreign trade department and the institutions entrusted thereby shall grant the license.”¹³⁶

122. Under the framework established by these measures, there are two broad categories of export goods in China: (1) goods that can be exported freely and (2) goods subject to restricted

¹³⁰ *Export Licensing Rules* (Exhibit JE-97), Art. 5(2) (emphasis added).

¹³¹ *Export Licensing Rules* (Exhibit JE-97), Art. 5(5) (emphasis added).

¹³² *Export Licensing Rules* (Exhibit JE-97), Art. 8(1), (2) and (4) (emphases added).

¹³³ *Export Licensing Measures* (Exhibit JE-74), Art. 11(7) (emphasis added).

¹³⁴ *Import and Export Regulations* (Exhibit JE-73), Art. 43 (emphasis added).

¹³⁵ *Foreign Trade Law* (Exhibit JE-72), Arts. 16 and 19 (emphases added).

¹³⁶ *Foreign Trade Law* (Exhibit JE-72), Art. 15(emphases added).

exportation. For this second category of export restricted goods, there are two sub-categories:

(a) goods subject to export quotas and (b) goods not subject to export quotas. For all goods subject to restricted exportation, China implements an export licensing system pursuant to the *Export Licensing Measures*. For those sub-category of goods subject to quantitative export restrictions, their exportation is also governed by the *Export Quota Measures*¹³⁷ or the *Quota Bidding Measures*.¹³⁸

123. The statements provided by the License Bureau in Exhibits CHN-345 and CHN-529 and China's arguments beg the fundamental question of why, in particular, China decided to designate certain manganese and zinc products for export restriction and place them on the *2009 Export Licensing List*.¹³⁹ Under China's laws, designation of a good for restricted exportation must be made on the basis of one of the sub-paragraphs of Article 16 – e.g., because the restriction is necessary to maintain public morality, to protect human health, to protect natural resources that are exhaustible or in short supply, etc.¹⁴⁰ Article 18 of the *Foreign Trade Law* provides that MOFCOM shall formulate, adjust, and publish a catalog of goods designated for restricted exportation pursuant to Article 16 of the *Foreign Trade Law*. Accordingly, MOFCOM formulated, adjusted, and published the *2009 Export Licensing List*.¹⁴¹ China has provided no justification under the GATT 1994 nor reference to the bases provided in Article 16 of the

¹³⁷ Exhibit JE-76.

¹³⁸ Exhibit JE-77.

¹³⁹ For the other products subject to export licensing, China also subjects their exportation to quantitative restrictions for which China has, for the most part, articulated justifications in this dispute. (The exceptions are the export quota for fluor spar and the export quota/export prohibition for zinc ores and concentrates, which China does not defend in this dispute.)

¹⁴⁰ See *Foreign Trade Law* (Exhibit JE-72), Art. 16(1), (2), and (4).

¹⁴¹ *2009 Export Licensing List Notice* (Exhibit JE-22).

Foreign Trade Law, for subjecting certain manganese and zinc products or any of the other licensing products¹⁴² to restricted exportation and export licensing administration.

124. Even if the License Bureau’s statements were actually binding legal opinions, then they would clarify the specific requirements for seeking and obtaining an export license for certain manganese and zinc products – that are currently in place – they do not change China’s legal framework, which premise the export licensing under Articles 16 and 19 of the *Foreign Trade Law* on the approval of China’s trade authorities, and they do not offer any explanation or justification for imposing export licensing on these products in the first place. As noted in the U.S. answer to Question 64 below, in paragraphs 162 and 165 of the Working Party Report, China specifically committed, separately from its commitment in Article XI:1 of the GATT 1994, to eliminate these export licensing requirements unless they could be justified.

125. In this regard, the United States notes that the commitments China undertook in paragraphs 162 and 165 of the Working Party Report are separate and distinct from China’s obligations under Article XI:1 of the GATT 1994. Accordingly, it would not be appropriate for the Panel to refrain from making findings and recommendations with respect to these provisions of the Working Party Report in the exercise of “judicial economy” as China urges in its first written submission.¹⁴³

¹⁴² See Exhibit JE-6.

¹⁴³ China’s first written submission, paras. 806-808.

Q64. (United States and Mexico) China asserts that conditions identified by the United States and Mexico do not grant license-issuing authorities "the authority and ability to control and restrict exports". China argues that the particular identified measure "relate solely to the restrictive effect of export quotas ... or ... allegedly ... a minimum export price requirement" and not to any restrictive effect of export licenses (China's second oral statement, paragraph 366). Please comment.

126. China's assertion is that export restrictions like export quotas and minimum export price requirements are given effect through export licensing. China's assertion supports, rather than rebuts, the point made by the United States, which is that China's export licensing system provides China's trade authorities with the authority and ability to control and restrict exports – *i.e.*, to give effect to export restrictions. These export restrictions may include export quotas and minimum export pricing requirements, as China has pointed out, as well as any other *ad hoc* restrictions that China may choose to implement. The export licensing gives effect to those restrictions by conditioning the issuance of export licenses for the products subject to those restrictions, on the exporter first obtaining the approval of China's trade authorities – and submitting documents evidencing that approval¹⁴⁴ for review and authentication by China's licensing entities. Even more, however, the export licensing is in itself a restriction on exportation.

127. China's legal framework for restricting exports is built upon the foundation of the export licensing system at issue in this dispute. As provided by the *Foreign Trade Law*, and similar to the discipline set forth in Article XI:1 of the GATT 1994, the exportation of goods from China is "free" unless otherwise provided.¹⁴⁵ The *Foreign Trade Law* provides that prohibitions or

¹⁴⁴ See *Export Licensing Rules* (Exhibit JE-97), Arts. 5(2) and (5); 8(1), (2), and (4); *Export Licensing Measures* (Exhibit JE-74), Art. 11(7); *Import and Export Regulations* (Exhibit JE-73), Art. 43; and *Foreign Trade Law* (Exhibit JE-72), Arts. 16 and 19, as cited in response to Question 61.

¹⁴⁵ *Foreign Trade Law* (Exhibit JE-72), Art. 14

restrictions on exportation may be permitted on the basis of a positive list of reasons set forth in Article 16, some of which echo the exceptions in the GATT 1994. Products that are designated by MOFCOM for export restriction, on the basis of Article 16 of the *Foreign Trade Law*, are placed on a positive list of products subject to export licensing.¹⁴⁶ In spite of China’s arguments in this proceeding, therefore, the evidence presented in China’s measures (as well as in the Working Party Report¹⁴⁷ and China’s notifications to the WTO Committee on Market Access¹⁴⁸) demonstrates that China considers its export licensing to be a restriction on exportation.

128. Contrasted with the exportation of goods that are exported from China “freely,” traders exporting goods that are subject to export licensing must submit to the required licensing procedures, formalities, scrutiny, and review. Furthermore, once a product is designated for export restriction and placed on the export licensing list, traders are placed on notice that additional requirements, approvals, and conditions may be imposed on their ability to secure an export license.

129. As noted above, the *Foreign Trade Law* requires a reason, as set forth in Article 16 of the *Foreign Trade Law*, for restricting the exportation of a good and subjecting it to export licensing. In addition, the Working Party Report documents China’s recognition of its export licensing requirements under Article 16 of the *Foreign Trade Law* as requiring justification under the GATT 1994.¹⁴⁹ In paragraphs 162 and 165 of the Working Party Report, China committed specifically to eliminating these export licensing requirements unless they could be justified.

¹⁴⁶ See 2009 Export Licensing List Notice (Exhibit JE-22).

¹⁴⁷ Working Party Report, paras. 157-165.

¹⁴⁸ See Exhibit JE-172.

¹⁴⁹ See Working Party Report, paras. 158, 162, and 165.

130. In the present dispute, the co-complainants have challenged China’s imposition of export licensing on certain forms of bauxite, coke, fluorspar, manganese, silicon carbide, and zinc under Article XI:1 of the GATT 1994 and separately under paragraphs 162 and 165 of the Working Party Report. China has made no attempt to justify its designation of these products on its export licensing list. Accordingly, China has not only breached its commitment under Article XI:1 of the GATT 1994 but also the specific commitments it made to either eliminate or justify this export licensing in paragraphs 162 and 165 of the Working Party Report.

Q67. (Complainants) With respect to their MEP-related claims (in particular the Article XI:1 claim), could the complainants indicate which particular aspects of the Measures for the Administration over Foreign Trade and Economic Social Organizations (Exhibit JE-101), and Notice Regarding Printing and Distribution of Several Regulations for Personnel Management of Chambers of Commerce for Importers and Exporters (Exhibit JE-102) they are challenging.

131. The complainants challenge China’s MEP requirement in which the CCCMC plays critical roles. The complainants’ challenge, with respect to the *Measures for the Administration over Foreign Trade and Economic Social Organizations* (Exhibit JE-101) and the *Notice Regarding Printing and Distribution of Several Regulations for Personnel Management of Chambers of Commerce for Importers and Exporters* (Exhibit JE-102), is directed at what China itself has represented – i.e., that these two measures establish that actions of China’s Chambers of Commerce in the functioning of China’s MEP system are attributable to China.¹⁵⁰

132. Specifically, China has attested that its Chambers of Commerce “exist under Chinese law for the purpose, when authorized, of regulating specific industries,”¹⁵¹ including the “regulation

¹⁵⁰ *Vitamin C MOFCOM amicus brief* (Exhibit JE-98), Section II.A at 5-9.

¹⁵¹ *Vitamin C MOFCOM amicus brief* (Exhibit JE-98) at 8.

over export pricing and output levels.”¹⁵² In support of this fact, China has referenced the *Measures for the Administration over Foreign Trade and Economic Social Organizations* (Exhibit JE-101), Articles 2 and 14 (“Social organizations established with *coordination and industry regulatory functions as authorized by [the Ministry]* must implement the administrative rules and regulations relating to foreign trade and economy.”)¹⁵³

133. China has also attested that “[MOFCOM’s] authority over the Chamber is plenary” and “the Chamber is the instrumentality through which the Ministry oversees and regulates the business of importing and exporting” in China.¹⁵⁴ In support of this fact, China has cited:

- Article 16 of the *Measures for the Administration over Foreign Trade and Economic Social Organizations* (Exhibit JE-101) (MOFCOM’s authority over the Chambers “cover[s] such aspects as the Chamber’s selection of its leaders, its personnel management system, its budget and accounting systems and its salary structure”);
- the following the provisions of the *Notice Regarding Printing and Distribution of Several Regulations for Personnel Management of Chambers of Commerce for Importers and Exporters* (Exhibit JE-102):
 - Annex II, 4¹⁵⁵ (“Ministry shall verify and approve Chamber’s authorized number of personnel”);
 - Annex III, 8¹⁵⁶ (“Chamber’s general working staff ‘shall be chosen primarily from the employees in service of their membership organizations or the competent authorities in charge of foreign trade and economics and the public institutions directly under their leadership’”);
 - Annex IV, 13¹⁵⁷ (“candidates for senior positions within the Chamber ‘are recommended by [the Ministry] or recommended by

¹⁵² *Vitamin C MOFCOM amicus brief* (Exhibit JE-98) at 8.

¹⁵³ *Vitamin C MOFCOM amicus brief* (Exhibit JE-98) at 8.

¹⁵⁴ *Vitamin C MOFCOM amicus brief* (Exhibit JE-98) at 9.

¹⁵⁵ Exhibit JE-102, Art. 4.

¹⁵⁶ Exhibit JE-102, Art. 8.

¹⁵⁷ Exhibit JE-102, Art. 13.

over 1/3 of the [C]hamber’s member companies and approved by [the Ministry]”);

- Annex V, 17¹⁵⁸ (“Ministry shall ‘verify and approve the total amount of salary of the [C]hamber’”); and
- Article 21 of the *Measures for the Administration over Foreign Trade and Economic Social Organizations* (Exhibit JE-101) (“The Chamber, in turn, must submit to the Ministry its ‘annual working plan and arrangement of major events,’ including all ‘important meetings and activities’”); and
- Article 14 of the *Measures for the Administration over Foreign Trade and Economic Social Organizations* (Exhibit JE-101) (“the Chamber ‘must implement the administrative rules and regulations relating to foreign trade and economy’”).¹⁵⁹

Q68. (Complainants) Please comment on China's assertion in its second written submission that the complainants have not adduced argument and evidence showing that, pursuant to Article X:1 of the GATT 1994, the CCCMC Charter is a "law[], regulation[], judicial decision[] and administration ruling[] of general application", within the meaning of Article X:1, that requires publication.

134. China argues in its second written submission that the United States has failed to show that the *2001 CCCMC Charter* is measure requiring publication under Article X:1. In fact, the United States has shown that the *2001 CCCMC Charter* is a law or regulation of general application made effective by a WTO Member pertaining to restrictions on exports within the meaning of Article X:1.

135. As set forth in the U.S. First Written Submission, the CCCMC plays critical roles in making effective the MEP system; the CCCMC coordinates industry export prices among its members; it enforces adherence by its members to the coordinated export prices through a system of “self-discipline”; it can impose sanctions on its members for failing to abide by the

¹⁵⁸ Exhibit JE-102, Art. 17.

¹⁵⁹ *Vitamin C MOFCOM amicus brief* (Exhibit JE-98) at 9.

coordinated export prices; it is empowered to investigate its members and recommend to MOFCOM that more severe penalties be imposed on members found to have violated the CCCMC's coordination; it notifies coordinated export prices to China's export license issuing entities; and it verified that export prices for yellow phosphorus met or exceeded the coordinated export price under the PVC Procedure. As such, the *2001 CCCMC Charter* pertains to restrictions on exports.

136. The *2001 CCCMC Charter* is also a law or regulation of general application made effective by a WTO Member. According to China, and as detailed above in the answer to Question 67, the CCCMC is an instrumentality of MOFCOM.¹⁶⁰ The *CCCMC Charter* is the CCCMC's constitution or its organic statute or *règlement organique* – it sets forth the CCCMC's mission, functions, authority, and rules and regulations. The establishment of the charter is required by Chinese law¹⁶¹ and must be reviewed and approved by MOFCOM.¹⁶²

137. Accordingly, the *2001 CCCMC Charter* is a law or regulation of general application made effective by a WTO Member pertaining to restrictions on exports that is subject to the Article X:1 obligation to publish.

¹⁶⁰ See *Vitamin-C MOFCOM Amicus Brief* (Exhibit JE-98) at 8-9. In the same vein, the United States notes that in support of arguments set forth in its second oral statement, China was able to produce a statement from the CCCMC (Exhibit CHN-530) in the same way (and dated almost on the same day) as it was able to produce a statement from the Ministry of Commerce (Exhibit CHN-529).

¹⁶¹ Measures for the Administration over Foreign Trade and Economic Social Organizations, Arts. 9(2) and 10 (Exhibit JE-101); Regulations for Personnel Management of Chambers of Commerce for Importers and Exporters, Arts. 2, 4, and 5 (Exhibit JE-102).

¹⁶² Measures for the Administration over Foreign Trade and Economic Social Organizations, Arts. 7-10 (Exhibit JE-101); Regulations for Personnel Management of Chambers of Commerce for Importers and Exporters, Arts. 4-5 (Exhibit JE-102).