

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

**(DS394, DS395, DS398)**

**FIRST WRITTEN SUBMISSION  
OF THE UNITED STATES OF AMERICA**

**June 1, 2010**

## TABLE OF CONTENTS

TABLE OF REPORTS CITED.....	v
TABLE OF EXHIBITS.....	vi
I. INTRODUCTION.....	1
II. PROCEDURAL HISTORY.....	5
III. FACTUAL BACKGROUND.....	6
A. China’s Policies for Developing and Promoting Its Domestic Industry Rely on Restraining the Exportation of Raw Materials.....	7
B. The Raw Materials.....	9
1. Bauxite.....	10
2. Coke.....	11
3. Fluorspar.....	12
4. Magnesium.....	13
5. Manganese.....	14
6. Silicon Carbide.....	16
7. Silicon Metal.....	17
8. Yellow Phosphorus.....	18
9. Zinc.....	19
C. Export Duties.....	20
1. China’s Obligations under the Accession Protocol.....	20
2. China’s Export Duties Framework.....	21
3. “Temporary” Export Duties.....	22
4. “Special” Export Duties.....	23
D. Non-Automatic Export Licensing Framework.....	25
1. Automatic v. Non-Automatic Licensing.....	25
2. Goods Subject to Restricted Exportation.....	27
E. Export Quotas.....	28
1. Introduction.....	28
2. Goods Subject to Export Quotas.....	29
3. Export Quota Amounts.....	31
4. Types of Export Quotas.....	32
a. Export Quotas Allocated Directly.....	32
i. Export Quotas on Coke.....	33
ii. Export Quotas on Zinc.....	39
b. Quotas Allocated through Bidding.....	39
i. Relevant Entities and Involvement of the CCCMC.....	40
ii. Eligibility Criteria.....	42
iii. Review of Qualifications.....	46

	iv.	Awarding the Quota.....	47
	v.	Total Award Price. ....	48
	vi.	Material-Specific Bidding Procedures.....	49
	5.	Conclusion.....	50
F.		Export Licensing Administration and Requirements.....	51
	1.	Types of Export Licenses.....	51
	2.	Application Procedures. ....	52
	a.	License Issuing Entities.....	52
	b.	Application Materials.....	52
	3.	Issuance of Export Licenses.....	53
	4.	Period of Validity.....	55
	5.	Conclusion.....	56
G.		Minimum Export Price Requirement.....	57
	1.	The CCCMC. ....	57
	2.	Establishing Export Prices.....	59
	3.	Coordinated Export Price As a Minimum Export Price. ....	61
	a.	System of “Self-Discipline”.....	61
	b.	MOFCOM Penalties. ....	62
	c.	Licensing Authorities.....	63
	d.	Customs and the Price Verification and Chop Procedure. ....	64
	4.	Conclusion.....	66
IV.		LEGAL DISCUSSION.....	66
A.		China’s Export Duties Are Inconsistent with China’s Obligations under Part I Paragraph 11.3 of the Accession Protocol.....	66
	1.	Paragraph 11.3 of the Accession Protocol.....	66
	2.	China’s “Temporary” Export Duties Are Inconsistent with China’s Obligations under Paragraph 11.3 of the Accession Protocol. ....	67
	3.	China’s Special Export Duty Is Inconsistent with China’s Obligations under Paragraph 11.3 of the Accession Protocol.....	68
	4.	Conclusion.....	69
B.		China’s Export Quotas Are Inconsistent with China’s Obligations under Article XI:1 of the GATT 1994.....	69
	1.	Article XI:1 of the GATT 1994.....	69
	2.	China Uses Quotas to Restrict or Prohibit the Exportation of Certain Raw Materials. ....	69
	3.	China Maintains a Prohibition on the Exportation of Zinc. ....	70
	4.	China’s Export Quotas Are Also Inconsistent with China’s Obligations under Paragraphs 162 and 165 of the Working Party Report. ....	71
C.		China’s Administration and Allocation of Its Export Quotas Is Inconsistent with China’s Obligations under the Accession Protocol, the Working Party Report, and the GATT 1994. ....	72
	1.	China’s Measures Restricting Access to the Export Quotas Are Inconsistent with China’s Trading Rights Obligations. ....	72

a.	Introduction. . . . .	72
b.	China’s Trading Rights Commitments. . . . .	72
i.	Paragraphs 5.1, 5.2 and 1.2 of the Accession Protocol and Paragraphs 83 and 84 of the Working Party Report. . . . .	72
ii.	The Right to Trade for All Enterprises in China and All Foreign Enterprises and Individuals.. . . . .	74
c.	China’s Measures Allocating the Coke Export Quota Are Inconsistent with China’s Trading Rights Commitments. . . . .	76
d.	China’s Measures Administering the Export Quota Bidding System Are Inconsistent with China’s Trading Rights Commitments.. . . .	78
e.	Conclusion. . . . .	79
2.	China’s Administration of its Export Quotas Is Inconsistent with Article X:3(a) of the GATT 1994. . . . .	79
a.	Article X:3(a) of the GATT 1994. . . . .	79
b.	China’s Administration of the Coke Export Quotas Is Not Impartial or Reasonable.. . . . .	79
c.	China’s Administration of the Export Quota Bidding Regime Is Not Impartial or Reasonable. . . . .	82
d.	Conclusion. . . . .	84
3.	China’s Total Award Price Requirement Under the Export Quota Bidding Regime Is Inconsistent with Article VIII:1(a) of the GATT 1994.. . . .	84
a.	Article VIII:1(a) of the GATT 1994. . . . .	84
b.	The Total Award Price Is a “fee or charge of whatever character . . . imposed . . . in connection with . . . exportation”. . . . .	85
c.	The Total Award Price Is Not Limited to the Approximate Cost of Services Rendered. . . . .	86
d.	Conclusion. . . . .	87
D.	China’s Export Licensing for Products Subject to Restricted Exportation Is Inconsistent with China’s Obligations under Article XI:1 of the GATT 1994. . .	87
1.	Article XI:1 of the GATT 1994. . . . .	87
2.	China Uses Licensing to Subject the Exportation of Designated Products to Restriction. . . . .	87
3.	China’s Export Licensing Is Not Automatic. . . . .	89
4.	China’s Export Licensing Is Also Inconsistent with China’s Obligations under Paragraphs 162 and 165 of the Working Party Report. . . . .	90
E.	China’s Minimum Export Price Requirement Is Inconsistent with China’s Obligations under the GATT 1994. . . . .	91
1.	China’s Minimum Export Price Requirement Is Inconsistent with China’s Obligations under Article XI:1 of the GATT 1994. . . . .	91
a.	Coordinated Export Prices.. . . . .	92
b.	Observation of the Coordinated Export Prices by Exporters.. . . .	93
c.	MOFCOM Penalties for Exporting at Low Prices.. . . . .	93
d.	Issuance of Licenses on the Basis of Coordinated Prices. . . . .	94
e.	Price Review by Customs and the PVC Procedure. . . . .	94

	f.	Conclusion. . . . .	95
2.		China’s Administration of the Minimum Export Price Requirement Is Inconsistent with China’s Obligations under Article X:3(a) of the GATT 1994. . . . .	96
	a.	Article X:3(a) of the GATT 1994. . . . .	96
	b.	China’s Administration of the Minimum Export Price System through the PVC Procedure Is Not Impartial or Reasonable. . . . .	97
3.		China’s Failure to Publish Measures Pertaining to the Minimum Export Price Requirement Is Inconsistent with China’s Obligations under Article X:1 of the GATT 1994. . . . .	99
	a.	Article X:1 of the GATT 1994. . . . .	99
	b.	China’s Minimum Export Price Requirements Are Rules of General Application. . . . .	100
	c.	China Has Failed to Publish Important Measures and Provisions Relating to Minimum Export Prices. . . . .	100
V.		CONCLUSION. . . . .	101

**TABLE OF REPORTS CITED**

<b>Short Form</b>	<b>Full Citation</b>
<i>Argentina – Footwear</i>	Panel Report, <i>Argentina – Measures Affecting Imports of Footwear, Textiles Apparel and Other Items</i> , WT/DS56/R, adopted 22 April 1998, as modified by the Appellate Body Report, WT/DS56/AB/R
<i>Argentina – Leather</i>	Panel Report, <i>Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather</i> , WT/DS155/R, adopted 16 February 2001
<i>China – Audiovisual Products</i>	Panel Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Products</i> , WT/DS363/R, adopted 19 January 2010, as modified by the Appellate Body Report, WT/DS363/AB/R
<i>EC – Chicken Cuts</i>	Appellate Body Report, <i>European Communities - Customs Classification of Frozen Boneless Chicken Cuts</i> , WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005
<i>EEC – Fruits and Vegetables</i>	GATT Panel Report, <i>EEC – Programme of Minimum Import Prices, Licences and Surety Deposits for Certain Processed Fruits and Vegetables</i> , L/4687, BISD 25S/68, adopted 18 October 1978
<i>India – Quantitative Restrictions</i>	Panel Report, <i>India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products</i> , WT/DS90/R, adopted 22 September 1999, as modified by the Appellate Body Report, WT/DS90/AB/R
<i>Japan – Semiconductors</i>	GATT Panel Report, <i>Japan – Trade in Semi-Conductors</i> , L/6309, BISD 35S/116, adopted 4 May 1988
<i>US – Customs User Fee</i>	GATT Panel Report, <i>United States – Customs User Fee</i> , L/6264, BISD 35S/245, adopted 2 February 1988,
<i>US – Underwear</i>	Panel Report, <i>United States – Restrictions on Imports of Cotton and Man-Made Fibre Underwear</i> , WT/DS24/R, adopted 25 February 1997, as modified by the Appellate Body Report, WT/DS24/AB/R
<i>US – Underwear (AB)</i>	Appellate Body Report, <i>United States – Restrictions on Imports of Cotton and Man-Made Fibre Underwear</i> , WT/DS24/AB/R, adopted 25 February 1997

**TABLE OF EXHIBITS**

<b>Joint Exhibit No.</b>	<b>Description</b>	<b>Abbreviated Title</b>
JE-2	World Trade Organization, Accession of the People's Republic of China, Decision of 10 November 2001, WT/L/432, circulated 23 November 2001 ( <i>excerpts</i> )	Accession Protocol
JE-3	World Trade Organization, Report of the Working Party on the Accession of China, WT/ACC/CHN/49, circulated 1 October 2001 ( <i>excerpts</i> )	Working Party Report
JE-4	Chart of Raw Material Names	Raw Materials Chart
JE-5	Chart of Raw Materials Subject to Export Duties	Export Duties Chart
JE-6	Chart of Raw Materials Subject to Licensing and Quotas	Licensing and Quotas Chart
JE-7	Chart of Raw Materials Subject to Minimum Export Pricing	Minimum Export Pricing Chart
JE-8	Outline of the Eleventh Five Year Plan for the National Economic and Social Development of the People's Republic of China (2006)	Eleventh Five-Year Plan
JE-9	Blueprint for the Adjustment and Revitalization of the Steel Industry (State Council, March 20, 2009)	Adjustment and Revitalization Plan for the Steel Industry
JE-10	Guidance for Enhancing the Management of Raw Materials Industries (Ministry of Industry and Information Technology (2009) No. 294)	Guidelines for Industrial Management of Raw Materials
JE-11	World Bank Data	
JE-12	[Intentionally left blank]	
JE-13	Adjustment and Revitalization Plan for the Non-Ferrous Industry (State Council 2009)	Adjustment and Revitalization Plan for Non-Ferrous Industries
JE-14	[Intentionally left blank]	

JE-15	U.S. Geological Survey: China Yearbook 2008 [Advance Release]	
JE-16	[Intentionally left blank]	
JE-17	National Mineral Resources Plan (Ministry of Land and Resources PRC, April 11, 2001)	National Mineral Resources Plan
JE-18	Development Policies for the Iron and Steel Industry (National Development and Reform Commission, July 8, 2005)	Development Policies for the Iron and Steel Industry
JE-19	Marianne Lavelle, "Higher Prices? Thank China: China's insatiable hunger for raw goods is starting to sting U.S. consumers," <i>U.S. News and World Report</i> (April 4, 2004)	
JE-20	Peter S. Goodman, "Booming China Devouring Raw Materials: Producers and Suppliers Struggle to Feed a Voracious Appetite," <i>Washington Post</i> (May 21, 2004)	
JE-21	Notice Regarding the 2009 Tariff Implementation Program (State Council Customs Tariff Commission, shuiweihui (2008) No. 40, January 1, 2009)	2009 Tariff Implementation Program
JE-22	Notice "2009 Export Licensing Management Commodities List" (Ministry of Commerce and General Administration of Customs, Notice (2008) No. 100, January 1, 2009)	2009 Export Licensing List Notice
JE-23	Industrial Minerals and Rocks: Commodities, Markets, and Uses, 7th Ed. (2006) (Bauxite)	
JE-24	U.S. Geological Survey Circular 196-W: Aluminum Recycling in the United States in 2000	
JE-25	CRC Handbook of Chemistry and Physics, David R. Lide (Editor), 89th Ed. (2008) ( <i>excerpts</i> )	
JE-26	Industrial Minerals and Rocks: Commodities, Markets and Uses, 7 <sup>th</sup> Ed. (Refractory Clays)	
JE-27	U.S. Geological Survey Minerals Yearbook (1999): Bauxite and Alumina,	
JE-28	U.S. Geological Survey (2008): Minerals Yearbook for Bauxite and Alumina [Advance Release] (January 2010)	

JE-29	<i>The Making, Shaping and Treating of Steel</i> (10th ed. 1985) ( <i>excerpts</i> )	
JE-30	World Coal Institute: Coal & Steel (2007)	
JE-31	Coal Preparation, (5 <sup>th</sup> Ed. 1991) ( <i>excerpts</i> )	
JE-32	[Intentionally left blank]	
JE-33	<i>New Encyclopaedia Britannica</i> (Vol. 21): Industries Extraction and Processing	
JE-34	[Intentionally left blank]	
JE-35	World Steel Dynamics: Steel Strategist No. 35 (Sept. 2009)	
JE-36	[Intentionally left blank]	
JE-37	U.S. Geological Survey Minerals Yearbook (2008): Fluorspar [Advance Release] (January 2010)	
JE-38	U.S. Geological Survey Minerals Commodity Summary: Magnesium Metal (2010)	
JE-39	U.S. Geological Survey: Magnesium, Its Alloys and Compounds (2001)	
JE-40	Roskill Report Overview: The Economics of Magnesium Metal (2008)	
JE-41	U.S. Geological Survey Minerals Yearbook (2008): Magnesium [Advance Release] (2009)	
JE-42	U.S. Geological Survey Minerals Yearbook (2007): Manganese [Advance Release] (2009)	
JE-43	U.S. Geological Survey Mineral Commodity Summaries: Manganese (2010)	
JE-44	International Manganese Institute: Annual Review (2008)	
JE-45	General Review of Manganese Metal in 2009 and Its Outlook for New Year, Tex Report (Feb. 18, 2010)	
JE-46	Tom Vulcan, Manganese – an Unsung Hero, Hard Assets Investor (July 29, 2009)	

JE-47	International Manganese Institute: Manganese Production	
JE-48	[Intentionally left blank]	
JE-49	Industrial Minerals and Rocks: Abrasives (2006)	
JE-50	U.S. Geological Survey Mineral Yearbook: Manufactured Abrasives [Advanced Release] (2009)	
JE-51	Mc-Graw Hill Encyclopedia of Science & Technology (8th Ed. 1997), Vol. 16 ( <i>excerpts</i> )	
JE-52	U.S. Geological Survey Mineral Commodity Summary: Manufactured Abrasives (2010)	
JE-53	U.S. Geological Survey Minerals Yearbook (2008) [Advance Release]: Silicon	
JE-54	U.S. Geological Survey Mineral Commodity Summary: Silicon (2010)	
JE-55	Asian Metal Limited: 2007 Annual Report on Silicon Metal Market	
JE-56	World Silicon Production Statistics	
JE-57	Speight, James G. Chemical Process and Design Handbook (2002) ( <i>excerpts</i> )	
JE-58	CEH Marketing Research Report: Phosphorus and Phosphorus Chemicals ( <i>excerpts</i> )	
JE-59	[Intentionally left blank]	
JE-60	U.S. Geological Survey Minerals Yearbook: Phosphate Rock [Advance Release] (2010)	
JE-61	CCCMC Presentation: China's Phosphate and Phosphate Production and Market Situation (2010)	
JE-62	McGraw-Hill Encyclopedia of Science & Technology Vol. 19 (1997) ( <i>excerpt</i> )	
JE-63	[Intentionally left blank]	
JE-64	Australian Government Fact Sheet: Zinc Ash (2003)	
JE-65	USGS Mineral Commodity Summary: Zinc (2010)	

JE-66	Notice Regarding the 2002 Tariff Implementation Program (State Council Customs Tariff Commission , shuiweihui (2001) No. 14, January 1, 2002)	2002 Tariff Implementation Program
JE-67	Regulations of the People's Republic of China on Import and Export Duties (Order of the State Council (2003) No. 392, adopted at the 26th executive meeting of the State Council on October 29, 2003, January 1, 2004)	Regulations on Import and Export Duties
JE-68	Customs Law of the People's Republic of China (adopted at the 19th Meeting of the Standing Committee of the Sixth National People's Congress on January 22, 1987, amended July 8, 2000)	Customs Law
JE-69	Notice Regarding Imposition of Special Export Duties to Phosphorus Products (State Council Customs Tariff Commission, shuiweihui (2008) No. 17, May 20, 2008)	May 2008 Tariff Commission Special Export Duties Notice
JE-70	Notice Regarding the Scope of Phosphorus Products Subject to Increased Special Export Duties (General Administration of Customs (2008) No. 33, May 20, 2008)	May 2008 Customs Special Export Duties Notice
JE-71	Notice Regarding Adjusting Export Duties (State Council Customs Tariff Commission, shuiweihui (2008) No. 36, December 1, 2008)	December 2008 Export Duties Notice
JE-72	Foreign Trade Law of the People's Republic of China (adopted at the 8 <sup>th</sup> Session of the Standing Committee of the Tenth National People's Congress on April 6, 2004, promulgated on July 1, 2004)	Foreign Trade Law
JE-73	Regulation of the People's Republic of China on the Administration of the Import and Export of Goods (passed at the forty-sixth executive meeting of the State Council on October 31, 2001, January 1, 2002)	Import and Export Regulations
JE-74	Measures for the Administration of License for the Export of Goods (Order of the Ministry of Commerce (2008) No. 11, July 1, 2008)	Export License Measures

JE-75	Measures for the Administration of the Organs for Issuing the Licenses of Import and Export Commodities (Ministry of Foreign Trade and Economic Cooperation, waijingmaopeiguanhanzi (1999) No. 68, September 21, 1999)	Measures for Administration of Licensing Entities
JE-76	Measures for the Administration of Export Commodities Quotas (Order of the Ministry of Foreign Trade and Economic Cooperation No. 12, adopted on December 20, 2001, January 1, 2002)	Export Quota Measures
JE-77	Measures of Quota Bidding for Export Commodities (Decree of the Ministry of Foreign Trade and Economic Cooperation No. 11, adopted on December 20, 2001, January 1, 2002)	Quota Bidding Measures
JE-78	Implementation Rules of Export Quota Bidding for Industrial Products (Ministry of Foreign Trade and Economic Cooperation, November 8, 2001)	Quota Bidding Implementation Rules
JE-79	Notice Regarding 2009 Export Quota Amounts for Agricultural and Industrial Products (Ministry of Commerce, Notice (2008) No. 83, January 1, 2009)	2009 Export Quota Amounts
JE-80	Notice Regarding Passing Down the 2009 First Batch Regular Trade Coke Export Quota (Ministry of Commerce, shangmaohan (2008) No. 140, January 1, 2009)	2009 First Batch Coke Export Quotas for Chinese Enterprises
JE-81	Notice Regarding Passing Down the 2009 Second Batch Regular Trade Coke Export Quota (Ministry of Commerce, shangmaohan (2009) No. 60, issued June 29, 2009)	2009 Second Batch Export Quota for Chinese Enterprises
JE-82	Ministry of Commerce Notice to Foreign-Invested Enterprises Regarding Amounts for the 2009 Industrial Products Export Quotas (2008) No. 92, January 1, 2009	2009 First Batch Coke Export Quota for FIEs
JE-83	Notice Regarding Passing Down the 2009 Second Batch Regular Trade Coke and Rare Earth Export Quota Amounts for Foreign-Invested Enterprises (Ministry of Commerce, shangzihan (2009) No. 73, September 8, 2009)	2009 Second Batch Coke Export Quotas for FIEs
JE-84	[Intentionally left blank]	

JE-85	2009 Coke Export Quota Declaration Conditions and Declaration Procedures (Ministry of Commerce, Notice (2008) No. 76, October 13, 2008)	2009 Coke Export Quota Application Procedure
JE-86	Charter of the China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters (1994)	1994 CCCMC Charter
JE-87	Charter of the China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters (2001)	2001 CCCMC Charter
JE-88	CCCMC Website Pages	
JE-89	CCCMC Brochure	
JE-90	Announcement of Ministry of Commerce on Matters regarding the First Bidding for Export Quotas of Industrial Products in 2009 (Ministry of Commerce, Announcement (2008) No. 85, October 30, 2008)	2009 First Round Bidding Invitation
JE-91	Announcement of Ministry of Commerce on the Notice for the Second Invitation for the Bidding for Industrial Product Export Quotas in 2009 (Ministry of Commerce, Announcement (2009) No. 42, June 9, 2009)	2009 Second Round Bidding Invitation
JE-92	China Association of Enterprises with Foreign Investment Charter	CAEFI Charter
JE-93	Quotas of Fluorspar Lump (Powder) of 2009 (Committee for the Invitation for bid for Export Commodity Quotas, December 11, 2008)	2009 First Round Fluorspar Bidding Procedures
JE-94	Quotas of Bauxite of 2009 (Committee for the Invitation for bid for Export Commodity Quotas, December 10, 2008)	2009 First Round Bauxite Bidding Procedures
JE-95	Quotas of Silicon Carbide of 2009 (Committee for the Invitation for bid for Export Commodity Quotas, December 11, 2008)	2009 First Round Silicon Carbide Bidding Procedures
JE-96	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)	2009 List of Export Licensing Entities Notice
JE-97	Working Rules on Issuing Export Licenses (Ministry of Commerce, shangpeifa (2008) No. 398, October 9, 2008)	Export Licensing Rules

JE-98	Brief of Amicus Curiae: MOFCOM. <i>In Re Vitamin C Antitrust Litigation</i> (E.D. NY Jun. 26, 2006)	<i>Vitamin C</i> MOFCOM amicus brief
JE-99	Decision of the State Council on Various Questions on the Further Reform and Improvement of the Foreign Trade System (State Council, guofa (1990) No. 70, January 1, 1991)	State Council Decision on Reform of the Foreign Trade System
JE-100	Notice on the Issuance of “Various Provisions on the Strengthening of Export Product Coordination and Management” (Ministry of Foreign Economic Relations and Trade, jinchufa (1991) No. 52, February 22, 1991)	Export Product Coordination Provisions
JE-101	Measures for the Administration over Foreign Trade and Economic Social Organizations (Ministry of Foreign Trade and Economic Cooperation, February 26, 1991)	Measures for Administration of Trade Social Organizations
JE-102	Notice Regarding Printing and Distribution of Several Regulations for Personnel Management of Chambers of Commerce for Importers and Exporters (Ministry of Foreign Trade and Economic Cooperation, September 23, 1994)	Regulations for Personnel Management of Chambers of Commerce
JE-103	<i>In re Vitamin C Antitrust Litigation</i> , 584 F. Supp. 2d 546 (E.D. NY Nov. 6, 2008)	<i>Vitamin C</i> Court Opinion
JE-104	MOFCOM Statement in <i>In re Vitamin C Antitrust Litigation</i> (June 9, 2008)	MOFCOM June 2008 statement
JE-105	Memorandum in Support of Defendants’ Joint Motion to Dismiss First Amended Complaint in <i>Resco Products, Inc. v. Bosai Minerals Group and CMP Tianjin Co.</i> (Oct. 7, 2008)	Chinese Bauxite Exporters’ brief
JE-106	Memorandum in Support of Motion to Dismiss Plaintiffs’ First Amended Class Action Complaint by Defendants, China Minmentals Corp. And China National Minerals Co. in <i>Animal Science Products, Inc. v. China National Metals and Minerals Import and Export Corp.</i> (D. NJ Jun. 26, 2009)	Magnesite Defendant’s brief
JE-107	CCCMC Export Commodities Coordination Management Measures ( <i>Animal Science</i> exhibit)	CCCMC Export Coordination Measures
JE-108	CCCMC Measures for Coordination Management of the Bauxite Branch ( <i>Vitamin C</i> Exhibit)	Bauxite Branch Coordination Measures

JE-109	MOFTEC Assistant Minister Liu Xiangdong's Speech to the Third Congress of the CCCMC	
JE-110	MOFTEC Circular on Strengthening the Job in the Coordination of Export Commodities (1998) ( <i>Animal Science</i> Exhibit)	1998 Price Coordination Circular
JE-111	MOFCOM Statement in <i>In re Vitamin C Antitrust Litigation</i> (Aug. 31, 2009)	MOFCOM 2009 statement
JE-112	Charter of the Bauxite Branch of the China Chamber of Commerce of Metals, Minerals and Chemical Importers and Exporters ( <i>Vitamin C</i> Exhibit)	Bauxite Branch Charter
JE-113	Interim Regulations of the Ministry of Foreign Trade and Economic Cooperation on Punishment for Conduct at Exporting at Lower-than-Normal Price (Ministry of Foreign Trade and Economic Cooperation, March 20, 1996)	Export Price Penalties Regulations
JE-114	[Intentionally left blank]	
JE-115	[Intentionally left blank]	
JE-116	[Intentionally left blank]	
JE-117	[Intentionally left blank]	
JE-118	[Intentionally left blank]	
JE-119	[Intentionally left blank]	
JE-120	[Intentionally left blank]	
JE-121	Notice for the Adjustment of the Catalogue of Export Products Subject to Price Review by Customs (Ministry of Foreign Trade and Economic Cooperation and the General Administration of Customs, wajjingmaomaofa (2002) No. 187, May 1, 2002)	2002 PVC Notice
JE-122	Notice Regarding the Trial Administration of 36 Types of Products such as Citric Acid (Ministry of Commerce and General Administration of Customs, Notice (2003) No. 36, November 29, 2003)	2004 PVC Notice
JE-123	Online Verification and Certification Operating Steps (China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters)	Online PVC Instructions

JE-124	CCCMC PVC Online Input Screen Shots (May 2008)	PVC Screen Shot
JE-125	Communication (Ministry of Commerce and General Administration of Customs, (2008) No. 33, May 26, 2008)	2008 PVC Notice
JE-126	Industrial Minerals Articles (2009)	
JE-127	Notice Regarding Rules for Contract Declaration for Chemicals-Related Verification and Stamp Products (China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters Petroleum and Chemicals Products Department, December 30, 2003)	CCCMC PVC Rules
JE-128	Notice on the Allocation of the First Batch of 2010 Export Quotas for Industrial Products for Enterprises with Foreign Investment (“FIEs”) ( Ministry of Commerce (2010) No. 106, February 23, 2010)	2010 First Batch Coke Export Quota for FIEs
JE-129	Notice on the First Batch of 2010 Coke Export Quotas for Enterprises with Foreign Investment (“FIE”) and the Submission of Relevant Documents on Coke Export, International Trade Division of the Department of Commerce of Shanxi Province (March 9, 2010)	Shanxi Province Procedures for First Batch of 2010 Coke Export Quotas for FIEs
JE-130	[Intentionally left blank]	
JE-131	Quotas of Silicon Carbide of 2009, Second Round (Committee for the Invitation for bid for Export Commodity Quotas, September 16, 2009)	2009 Second Round Silicon Carbide Bidding Procedures
JE-132	Announcement on the Second Invitation for the Bidding of Select Industrial Product Export Quotas in 2009 (Committee for the Invitation for bid for Export Commodity Quotas, September 16, 2009)	2009 Announcement of Second Bidding Round for Talc and Silicon Carbide
JE-133	“Import and Export and Production of Magnesium between January and August This Year,” China Magnesium Materials Network website (lnmo.gov.cn) (October 7, 2008)	

## I. INTRODUCTION

1. During the course of China's negotiations to accede to the WTO, there was no disagreement that China maintained various restraints on exportation. However, China stated that since 1992 it had reduced its use of export restraints, and that by 1999 it subjected only 58 categories of products covering a total of 73 items to non-automatic export licensing and export restrictions. Some members of the Working Party considered that China still subjected too many products to export restraints, and some members "expressed particular concern about export restrictions on raw materials." They stated that non-automatic export licensing and export restrictions "should only be applied, after the date of accession, on those cases where this was justified by GATT provisions." In response, China committed that "it would abide by WTO rules in respect of non-automatic export licensing and export restrictions" and that, upon its accession to the WTO, "remaining non-automatic restrictions on exports . . . would be eliminated unless they could be justified."<sup>1</sup>

2. Some members of the Working Party also expressed concerns regarding taxes and charges that China applied exclusively to exports. China noted that while the majority of products were exported from China free of export duty, China subjected 84 items to export duties.<sup>2</sup> With respect to export duties, China committed that it would "eliminate all taxes and charges applied to exports unless specifically provided for" in certain circumstances or "applied in conformity with" certain provisions.<sup>3</sup>

3. However, China has not eliminated its use of export restraints. In the years since China's accession to the WTO in 2001, its export restraints have proliferated in number and kind, driven by the industrial policies adopted in the Five-Year Plans and other plans formulated and approved by China's central government. China now subjects over 600 items to non-automatic licensing and over 350 items to export duties. Moreover, these export restraints have become increasingly restrictive over time; export quota amounts have decreased steadily while export duty rates have increased steadily.

4. The products subject to the export restraints at issue in this dispute are various forms of bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus, and zinc (together the "Raw Materials").<sup>4</sup> China is a leading producer of each of the Raw Materials. These Raw Materials are critical inputs for the most basic industries of modern economies, including the manufacture of steel, aluminum, and a variety of chemicals that are used to produce both everyday items and highly sophisticated, technologically advanced

---

<sup>1</sup> Working Party Report, paras. 157-165 (Exhibit JE-3).

<sup>2</sup> Working Party Report, paras. 155-156 (Exhibit JE-3).

<sup>3</sup> Accession Protocol, para. 11.3 (Exhibit JE-2)

<sup>4</sup> See Section III.B below for detailed descriptions of the Raw Materials and their applications. See also Chart of Raw Materials Names (Exhibit JE-4), which sets out short form names and reference codes for the specific products constituting the various forms of the Raw Materials at issue in this dispute.

products.<sup>5</sup>

5. China’s ambitious and far-reaching policies and plans have propelled its economic and industrial development into the top ranks of the world’s economies. These policies have also distorted the playing field on which WTO Members compete. China’s export restraints not only distort world markets in these critical Raw Materials but they also have effects through the entire manufacturing chain and broad implications for competition and trade in a wide variety of products. In particular, these export restraints adversely affect U.S. and other foreign producers of a wide range of downstream products that use the Raw Materials as inputs. The export restraints disadvantage non-Chinese producers by limiting access to these raw material inputs. By virtue of China’s position as a leading producer of the Raw Materials, this also drives up world prices for these inputs.

6. At the same time, these export restraints enhance access to the Raw Materials as inputs for Chinese producers. This allows Chinese producers a significant competitive advantage for downstream products when competing against downstream products from other Members, both in the domestic Chinese market and export markets.

7. At issue in this dispute are four types of restraints that China imposes on the exportation of the Raw Materials: (1) export duties; (2) export quotas; (3) export licensing; and (4) minimum export price requirements. As detailed below, each type of export restraint is, in itself and sometimes also in the manner in which it is administered, inconsistent with China’s obligations under the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”) and China’s Protocol of Accession to the WTO (“Accession Protocol”), which incorporates commitments made by China in the Report of the Working Party on China’s Accession to the WTO (“Working Party Report”). Paragraphs 8 through 17 below briefly outline the U.S. claims regarding each of these restraints.

### **Export Duties**

8. China’s obligations under paragraph 11.3 of Part I of the Accession Protocol require that China not impose export duties on products that are not listed in Annex 6 of the Accession Protocol. These obligations also require China to limit any export duties imposed on products that are listed in Annex 6 to the rates provided therein.

9. However, China imposes export duties on bauxite, coke, fluorspar, magnesium,

---

<sup>5</sup> For instance, bauxite is used to make the aluminum used in beverage cans and the frames of racing bicycles; fluorspar is used to produce the refrigerants used in mobile and stationary air conditioning units; magnesium is used to produce aircraft fuselages; manganese is used in the production of the stainless steel used in kitchen appliances; and yellow phosphorus is used to produce cleaning agents and food ingredients.

manganese, silicon metal, yellow phosphorus, and zinc,<sup>6</sup> even though none of these materials is listed in Annex 6. In addition, China also imposes export duties on yellow phosphorus (which is listed in Annex 6) at a rate that exceeds the maximum rate provided in Annex 6.

## Export Quotas

### *Maintenance of Export Quotas*

10. Article XI:1 of the GATT 1994 and the Accession Protocol, through its incorporation of paragraphs 162 and 165 of the Working Party Report, provide for the obligation not to maintain prohibitions or restrictions on exportation. Despite these obligations, China imposes quotas on the exportation of bauxite, coke, fluorspar, silicon carbide, and zinc.<sup>7</sup>

### *Administration of the Export Quotas*

11. China's commitments under paragraphs 5.1 and 5.2 of Part I of the Accession Protocol and paragraphs 83 and 84 of the Working Party Report (commonly referred to as China's "trading rights" commitments), require China to give all foreign enterprises and individuals, as well as all enterprises in China, the right to export most products. Furthermore, China explicitly committed to eliminate its examination and approval system and to eliminate certain eligibility criteria for obtaining the right to export. In its administration of the quota for coke, which is directly allocated, and the quotas for bauxite, fluorspar, and silicon carbide, which are allocated through a bidding process, China breaches these commitments by impermissibly requiring exporters to satisfy certain criteria in order to be eligible to participate in the process required to receive an allocation of the quotas.

12. Under Article X:3(a) of the GATT 1994, China is required to administer its laws and regulations pertaining to restrictions on exports in a uniform, impartial and reasonable manner. China breaches this obligation because it administers aspects of its coke export quota and aspects of its export quota bidding process through the China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters ("CCC MC"), and the involvement of that organization renders China's administration of these quotas partial and unreasonable.

13. Article VIII:1(a) of the GATT 1994 commits China to limit fees and charges imposed on or in connection with exportation to the approximate cost of services rendered. However, in the administration of the export quotas allocated through a bidding system, China requires bidding enterprises that are awarded a portion of the quota to pay a fee that is not limited to the

---

<sup>6</sup> See Chart of Raw Materials Subject to Export Duties (Exhibit JE-5) for specific products subject to export duties.

<sup>7</sup> See Chart of Raw Materials Subject to Licensing and Quotas (Exhibit JE-6) for specific products subject to export quotas.

approximate cost of services rendered in the bidding process.

## **Export Licensing**

14. Although Article XI:1 of the GATT 1994 and the Accession Protocol, through its incorporation of paragraphs 162 and 165 of the Working Party Report, commit China not to maintain prohibitions or restrictions on exportation, China's export licensing requirements for bauxite, coke, fluorspar, manganese, silicon carbide, and zinc<sup>8</sup> constitute restrictions on exportation that breach these commitments.

## **Minimum Export Price Requirements**

### *Maintenance of Minimum Export Price Requirements*

15. As mentioned above, Article XI:1 of the GATT 1994 requires China not to maintain prohibitions or restrictions on exportation. Nevertheless, China's measures establish and enforce a minimum price for the exportation of bauxite, coke, fluorspar, magnesium, silicon carbide, yellow phosphorus, and zinc,<sup>9</sup> thus restricting their exportation by prohibiting exportation at prices below a designated floor.

### *Administration of the Minimum Export Price Requirements*

16. Article X:3(a) of the GATT 1994 requires China to administer its laws and regulations pertaining to restrictions on exports in a uniform, impartial and reasonable manner. China administers aspects of its minimum export price requirements through the CCCMC. For the reasons explained in this submission, this involvement of the CCCMC renders China's administration of the minimum export price requirements partial and unreasonable.

17. The obligations of Article X:1 of the GATT 1994 require that China publish its laws and regulations pertaining to restrictions or prohibitions on exports promptly in a manner that allows governments and traders to become familiar with them. However, China has failed to publish many of its laws and regulations related to the establishment and administration of its minimum export price system.

\* \* \* \* \*

18. These export restraints on the Raw Materials are significant trade barriers that contravene

---

<sup>8</sup> See Chart of Raw Materials Subject to Licensing and Quotas (Exhibit JE-6) for specific products subject to export licensing.

<sup>9</sup> See Chart of Raw Materials Subject to Minimum Export Prices (Exhibit JE-7) for specific products subject to minimum export price requirements.

core obligations of the multilateral trading system. The United States and other WTO Members raised their concerns regarding such restraints during the course of China’s accession discussions. Members have continued to raise concerns both in WTO fora, such as China’s Transitional Review Mechanism<sup>10</sup>, and in bilateral fora, to no avail. As a result, the United States has brought its concerns to the WTO dispute settlement system for resolution. This submission will set forth the details of the U.S. legal claims, as well as the facts underlying those claims, regarding China’s measures restraining the exportation of these key industrial raw materials of which China is a leading global producer.

## II. PROCEDURAL HISTORY

19. The United States requested consultations with the Government of the People’s Republic of China (“China”) on June 23, 2009, pursuant to Articles 1 and 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”) and Article XXII of the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”) with respect to China’s restraints on the exportation from China of various forms of bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus, and zinc (together the “Raw Materials”). On the same day, the European Communities (henceforward the “European Union” or “EU”)<sup>11</sup> requested consultations with China with respect to the same restraints. The requests were circulated to WTO Members on June 25, 2009.<sup>12</sup> On August 21, 2009, Mexico requested consultations with China regarding the same restraints. Mexico’s request was circulated to WTO Members on August 26, 2009.<sup>13</sup>

20. The United States, the EU, and Mexico (together the “Complainants”) each notified China of its desire to be joined in the consultations of the other complainants pursuant to Article 4.11 of the DSU. Two other Members (Canada and Turkey) notified their desire to be joined in the consultations, pursuant to Article 4.11 of the DSU. China accepted these requests. The Parties held joint consultations on July 30 and September 1-2, 2009. These consultations provided helpful clarification, but failed to resolve the dispute.

21. On November 4, 2009, the United States, the EU, and Mexico each requested the

---

<sup>10</sup> See G/C/W/435 (19 November 2002); G/C/W/473 (17 November 2003); G/MA/W/58 (31 August 2004); G/C/W/499 (11 November 2004); G/MA/W/71 (6 September 2005); G/C/W/530 (12 October 2005); G/MA/W/78 (18 September 2006); G/C/W/560 (6 November 2006); G/MA/W/89 (18 September 2007); G/C/W/587 (5 November 2007); G/MA/W/94 (1 October 2008); G/C/W/603 (24 October 2008).

<sup>11</sup> On December 1, 2009, the European Communities became the European Union.

<sup>12</sup> *China – Measures Related to the Exportation of Various Raw Materials* – Request for Consultations by the United States, WT/DS394/1 (23 June 2009); *China – Measures Related to the Exportation of Various Raw Materials* – Request for Consultations by the European Communities, WT/DS395/1 (23 June 2009).

<sup>13</sup> *China – Measures Related to the Exportation of Various Raw Materials* – Request for Consultations by Mexico, WT/DS398/1 (21 August 2009).

establishment of a panel pursuant to Article 6 of the DSU.<sup>14</sup> The Dispute Settlement Body (“DSB”) considered this request at its meeting on November 19, 2009, at which time China objected to the establishment of a panel.

22. On December 10, 2009, the United States, the EU, and Mexico each renewed its request for the establishment of a panel. Each complainant requested that a single panel be established to examine the three complaints pursuant to Article 9.1 of the DSU. At the DSB meeting of December 21, 2009, the DSB established a single panel with standard terms of reference to examine the complaints by the United States, the EU, and Mexico.<sup>15</sup>

23. The Panel was constituted on March 29, 2010.<sup>16</sup>

### III. FACTUAL BACKGROUND

24. In this section, the United States provides factual background relating to: China’s policies; the Raw Materials at issue; and the various export restraints through which China pursues its policy objectives.

- Section III.A describes the role of export restraints in China’s industrial policies;
- Section III.B describes the Raw Materials at issue in this dispute;
- Section III.C describes China’s export duties on bauxite, coke, fluorspar, magnesium, manganese, silicon metal, yellow phosphorus, and zinc;<sup>17</sup>
- Section III.D describes the non-automatic export licensing framework through which China restricts the exportation of products;<sup>18</sup>
- Section III.E describes the export quotas that China imposes on bauxite, coke, fluorspar, silicon carbide, and zinc;<sup>19</sup>

---

<sup>14</sup> *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); *China – Measures Related to the Exportation of Various Raw Materials – Request for the Establishment of a Panel by the European Communities*, WT/DS395/7 (9 November 2009); *China – Measures Related to the Exportation of Various Raw Materials – Request for the Establishment of a Panel by Mexico*, WT/DS398/6 (9 November 2009).

<sup>15</sup> *Dispute Settlement Body: Minutes of the Meeting Held on 21 December 2009*, WT/DSB/M/277, para. 75.

<sup>16</sup> Note by the Secretariat: Constitution of the Panel Established at the Requests of the United States, the European Communities, and Mexico, WT/DS394/8, WT/DS395/8, WT/DS398/7, circulated 30 March 2010.

<sup>17</sup> See Chart of Raw Materials Subject to Export Duties (Exhibit JE-5).

<sup>18</sup> See Chart of Raw Materials Subject to Licensing and Quotas (Exhibit JE-6).

<sup>19</sup> See Chart of Raw Materials Subject to Licensing and Quotas (Exhibit JE-6).

- Section III.F describes the requirements and procedures for the non-automatic export licensing framework introduced in Section III.D that China imposes on bauxite, coke, fluorspar, manganese, silicon carbide, and zinc; and
- Section III.G describes the minimum export price requirements that China imposes on bauxite, coke, fluorspar, magnesium, silicon carbide, yellow phosphorus, and zinc.<sup>20</sup>

**A. China’s Policies for Developing and Promoting Its Domestic Industry Rely on Restraining the Exportation of Raw Materials**

25. China’s economic development is guided and directed by various plans and policies formulated and issued by the central government, including the *Five Year Plans for National Economic and Social Development*, which China’s central government has issued regularly since 1953.

26. Over the period of the tenth and eleventh Five-Year Plans, spanning the years 2001 to the present, China has achieved remarkable progress in its industrial growth and development. The growth of the Chinese economy following accession to the WTO in 2001 is reflected in data from the World Bank regarding two key indicators of development: Gross Domestic Product (“GDP”) and value added by manufacturing.<sup>21</sup> As the chart below demonstrates, China’s GDP more than doubled between 2001 and 2008. Its manufacturing sector, as measured by value added by manufacturing, also more than doubled in the same period. By any conceivable measure, China’s growth following its accession to the WTO can only be described as explosive.

	2001	2002	2003	2004	2005	2006	2007	2008
<b>GDP (current US\$, billions)</b>	1324.8	1453.8	1641.0	1931.6	2235.9	2657.9	3382.3	4327.0
<b>Industry, value added (current US\$, billions)</b>	266.1	325.61	438.3	593.4	762.5	969.7	1220.0	1434.6

27. China’s industrial growth and its plans for continued growth and improvement, however, come at the expense of the rest of the world. China’s production of industrial raw materials and processed goods has increased dramatically. China’s exports of processed, value-added goods

<sup>20</sup> See Chart of Raw Materials Subject to Minimum Export Prices (Exhibit JE-7).

<sup>21</sup> World Bank Data (Exhibit JE-11).

have also increased. However, China’s exports of industrial raw materials have decreased.

28. These trends are the result of a deliberate strategy that China employs to optimize the conditions for realizing its economic and industrial ambitions. China often invokes the concept referred to by the shorthand “two resources, two markets,”<sup>22</sup> which identifies the distinction between domestic and international resources, and domestic and international markets, as a source for advantage. China’s industrial strategy is to leverage and exploit the differences in the international and domestic markets for raw materials and downstream, processed products, using restraints on exports as the linchpin. In essence, as reflected in various Chinese central government industrial plans, the strategy restrains the exportation of raw materials, in particular those in which China enjoys a comparative advantage,<sup>23</sup> and low value-added products,<sup>24</sup> while simultaneously encouraging the exportation of high value-added and processed products.<sup>25</sup> The strategy also includes encouraging Chinese industry to “venture out” to source and exploit foreign sources of raw materials and resources.<sup>26</sup>

29. By restraining the exportation of raw materials in which China enjoys a comparative advantage, China is able to constrict supply to world markets and increase prices for non-Chinese consumers, leading to increased profits for the Chinese producers of those raw materials.<sup>27</sup> By imposing restraints on the exportation of raw materials and low value-added products while at the same time encouraging the exportation of high value-added, highly processed products, China and its industries are able to convert what would otherwise have been freely exported, lower profit raw materials into indirect exports of those raw, low-value inputs in the form of higher profit downstream products.<sup>28</sup> The combination of restraining the exportation of low value-added products while encouraging the exportation of high value-added products, affords China’s developing domestic industries the opportunity to grow strong and improve the quality of their

---

<sup>22</sup> See, e.g., Adjustment and Revitalization Plan for the Steel Industry, II.5 (Exhibit JE-9); Eleventh Five Year Plan, Chapter 1, para. 3 (Exhibit JE-8); National Mineral Resources Plan 4(2) (Exhibit JE-17).

<sup>23</sup> National Mineral Resources Plan, 4(3) and 7.4 (Exhibit JE-17).

<sup>24</sup> Eleventh Five-Year Plan, Chapter 35, Section I (Exhibit JE-8); Guidelines for Industrial Management of Raw Materials, para. 6 (Exhibit JE-10); Development Policies for the Iron and Steel Industry, Article 30 (Exhibit JE-18); Adjustment and Revitalization Plan for the Steel Industry, IV.1 (Exhibit JE-9); Adjustment and Revitalization Plan for Non-Ferrous Industries, 2.2 para. 5 (Exhibit JE-13).

<sup>25</sup> Eleventh Five-Year Plan, Chapter 35, Section I (Exhibit JE-8); Guidelines for Industrial Management of Raw Materials, para. 6 (Exhibit JE-10); Adjustment and Revitalization Plan for the Steel Industry, I, IV.1 (Exhibit JE-9); Adjustment and Revitalization for Non-Ferrous Industries, 2.2 para. 5 (Exhibit JE-13).

<sup>26</sup> National Mineral Resources Plan, (4)(2) and 7.4 (Exhibit JE-17); Adjustment and Revitalization Plan for Non-Ferrous Industries, part 1, para. 3; part 2.2, para. 5, part 3.5 (“developing overseas resources and enhancing resource-guaranteeing ability”), part 4.6 (Exhibit JE-13); Adjustment and Revitalization Plan for the Steel Industry, part II.II.5 (Exhibit JE-9); Guidelines for Industrial Management of Raw Materials, para. 13 (Exhibit JE-10); Eleventh Five-Year Plan, Chapter 37, Section 3 (Exhibit JE-8).

<sup>27</sup> National Mineral Resources Plan, 4(3) and 7.4. (Exhibit JE-17).

<sup>28</sup> See Adjustment and Revitalization Plan for Non-Ferrous Industries, 3.1 (Exhibit JE-13).

output in an environment that is largely sheltered from the competition that would have come from international producers with unrestrained access to the same raw material inputs.

30. In the meantime, China’s industrial growth has given rise to an enormous demand for industrial raw materials. Recognized and characterized by commentators as an “insatiable hunger” or “voracious appetite” beginning in the mid-2000s,<sup>29</sup> China has decided that it wants to guarantee the supply of raw material resources for its industries.<sup>30</sup> By encouraging Chinese raw material and resource-consuming industries to “go abroad” to ensure a steady and reliable supply of raw materials for domestic industrial use,<sup>31</sup> China’s policy takes advantage of the market access that other Members provide to their raw materials pursuant to their WTO commitments.

31. The export restraints that China imposes on the Raw Materials are part of this industrial policy, which is predicated on advantaging China’s domestic producers and industries, but distorts the international economic marketplace and is inconsistent with China’s WTO obligations. Over the course of the first decade following China’s accession to the WTO, these export restraints have proliferated and become more restrictive.

## **B. The Raw Materials**

32. The nine industrial raw materials subject to the various export restraints imposed by China are either naturally occurring minerals or materials that have undergone some initial processing. China is a leading global producer of all nine of these raw materials, which renders China’s restraints on their exportation particularly distortive for non-Chinese consumers of these raw materials and of the products manufactured from them.

---

<sup>29</sup> Marianne Lavelle, “Higher Prices? Thank China: China’s insatiable hunger for raw goods is starting to sting U.S. consumers” *U.S. News and World Report*, April 4, 2004 (Exhibit JE-19); Peter S. Goodman, “Booming China Devouring Raw Materials: Producers and Suppliers Struggle to Feed a Voracious Appetite,” *Washington Post*, May 21, 2004 (Exhibit JE-20).

<sup>30</sup> Adjustment and Revitalization Plan for Non-Ferrous Industries, Section 2.3.6 (“Further improve ability to guarantee resources”), Section 3.5 (“developing overseas resources and enhancing resource guaranteeing ability”), and Section 4.6 (“increase resource guaranteeing ability”) (Exhibit JE-13); Development Policies for the Iron and Steel Industry, Article 30 (Exhibit JE-18); Adjustment and Revitalization Plan for the Steel Industry, II.II.5 (“combine domestic demand with global allocation; . . . put top priority on meeting the domestic demand”) (Exhibit JE-9).

<sup>31</sup> National Mineral Resources Plan, (4)(2) and 7.4 (Exhibit JE-17); Adjustment and Revitalization Plan for Non-Ferrous Industries, part 1, para. 3; part 2.2 para. 5, part 3.5 (“developing overseas resources and enhancing resource-guaranteeing ability”); part 4.6 (Exhibit JE-13); Adjustment and Revitalization Plan for the Steel Industry, part II.II.5 (Exhibit JE-9); Eleventh Five-Year Plan, Chapter 35 Section 2 (“expand...resources that are lacking domestically...and raw materials imports”), Chapter 37 Section 3 (“carry out value-added foreign trade and accelerate the diversification of places of origin for products”) (Exhibit JE-8).

## 1. Bauxite

Raw Material Category	Product Name	Product Name Short Form	Chinese HS No. <sup>32</sup>	Chinese Commodity Code <sup>33</sup>
Bauxite	Refractory clay	Refractory clay	2508.3000	2508300000
	Aluminum ores and concentrates	Aluminum ores and concentrates	2606.0000	2606000000
	Ash and residues primarily containing aluminum	Aluminum ash and residues	2620.4000	N/A

33. Bauxite is an aluminum-bearing mineral that is used to produce aluminum metal (also known as “primary aluminum”), as well as to make abrasives (*i.e.*, materials that are hard and can be used to polish, grind, cut, sharpen, or sand surfaces), refractories (*i.e.*, materials that can withstand very high temperatures and can be used to line kilns, furnaces, reactors, and incinerators), cement, and various chemicals.

34. Bauxite is a naturally occurring, heterogeneous material comprised primarily of one or more aluminum hydroxide minerals, plus various mixtures of other minerals and impurities in smaller amounts. Bauxite is typically classified according to its intended commercial application, such as abrasive, cement, chemical, metallurgical and refractory.<sup>34</sup>

35. Aluminum never occurs on its own in nature, only as part of compounds, the most commercially important of which is bauxite.<sup>35</sup> The vast majority of bauxite mined (*i.e.*, aluminum ores and concentrates) is converted to alumina (Al<sub>2</sub>O<sub>3</sub>) for the production of aluminum metal.<sup>36</sup> Bauxite is also used in non-metallurgical applications such as various forms of specialty alumina and in refractories (produced, *e.g.*, from refractory clay, the better grades of which are

<sup>32</sup> As indicated in Table 7 to *2009 Tariff Implementation Program* (Exhibit JE-21). Note that “N/A” is indicated where the particular Chinese HS Number is not listed in the *2009 Export Products Duty List*.

<sup>33</sup> As indicated in Appendix to *2009 Export Licensing List Notice* (Exhibit JE-22). Note that “N/A” is indicated where the particular Chinese Commodity Code is not listed in the *2009 Export Licensing Commodities List*.

<sup>34</sup> *Industrial Minerals and Rocks: Commodities, Markets, and Uses*, 7<sup>th</sup> Ed. (2006) (Bauxite) at 227 (Exhibit JE-23).

<sup>35</sup> U.S. Geological Survey Circular 1196-W (2006): *Aluminum Recycling in the United States in 2000* at W-1 (Exhibit JE-24). See CRC Handbook of Chemistry and Physics, David R. Lide (Editor), 89<sup>th</sup> Ed. (2008) at 4-3 (Exhibit JE-25).

<sup>36</sup> U.S. Geological Survey Circular 1196-W (2006): *Aluminum Recycling in the United States in 2000* (Exhibit JE-24) at W-1. See CRC Handbook of Chemistry and Physics, David R. Lide (Editor), 89<sup>th</sup> Ed. (2008) at 4-3 (Exhibit JE-25).

exceptionally rich in aluminum<sup>37</sup>), abrasives, and cement. Aluminum ash and residues are used in ceramics and powder metallurgy. The aluminum chemicals and steel industries also consume significant quantities of bauxite.<sup>38</sup>

36. In 2008, China was the world's second leading producer of bauxite, producing an estimated 35 million metric tons (MT), which accounted for approximately 17 percent of global production.<sup>39</sup>

## 2. Coke

Raw Material Category	Product Name	Product Name Short Form	Chinese HS No.	Chinese Commodity Code
Coke	Coke and semi-coke made from coal whether or not agglomerated	Coke	2704.0010	2704001000

37. Coke is a material processed from coal that is used both as a fuel and as a source of carbon in various industrial metallurgical and chemical manufacturing processes. It is a key ingredient in the making of steel.

38. Coke is processed from coking coal, a low-ash, low-sulfur bituminous coal. In order to produce coke, coking coal is fed into a series of ovens, which are sealed and heated at high temperatures in the absence of oxygen. Volatile compounds that are driven off the coal are collected and processed to recover combustible gases and other by-products. The solid carbon remaining in the oven is coke.<sup>40</sup>

39. The coke produced from coking coal is often referred to as metallurgical coke, because it is used in producing metals. Metallurgical coke must be carbonized from coking coal at high temperatures.<sup>41</sup> There are two principal types of metallurgical coke, distinguished by their size, shape and chemical properties: (1) blast furnace coke and (2) foundry coke.<sup>42</sup> Semi-coke is coke

---

<sup>37</sup> Industrial Minerals and Rocks: Commodities, Markets and Uses, 7<sup>th</sup> Ed. (Refractory Clays) (Exhibit JE-26) at 407.

<sup>38</sup> U.S. Geological Survey Minerals Yearbook (1999): Bauxite and Alumina at 10.1. (Exhibit JE-27).

<sup>39</sup> U.S. Geological Survey Minerals Yearbook (2008): Bauxite and Alumina [Advance Release] (January 2010) Table 9 at 10.10. (Exhibit JE-28)

<sup>40</sup> *The Making, Shaping and Treating of Steel*, (10<sup>th</sup> ed. 1985) at 141-142 (Exhibit JE-29); World Coal Institute, *Coal & Steel* (2007) at 4 (Exhibit JE-30).

<sup>41</sup> *The Making, Shaping and Treating of Steel*, (10<sup>th</sup> ed. 1985) at 141 (Exhibit JE-29).

<sup>42</sup> *Coal Preparation*, (5<sup>th</sup> Ed. 1991) (*excerpts*) at 938 and 942 (Exhibit JE-31).

produced from low-temperature carbonization.<sup>43</sup>

40. Blast furnace coke is the most commonly produced form of coke and is a key input for the production of crude steel by integrated steel producers. Coke is used as a fuel and as a source of carbon in smelting iron ore in a blast furnace. The resulting molten product, known as pig iron, can be immediately used in the steelmaking process or can be cooled into ingots and stored for future use in making crude steel. Foundry coke is used as a fuel and as a source of carbon in the production of iron, which can be used to make cast iron products such as automobile engines and parts and pipe fittings.<sup>44</sup>

41. China is the world’s leading producer of coke; China’s coke production was 340 million MT in 2008 and constituted approximately 60 percent of global production.<sup>45</sup>

### 3. Fluorspar

Raw Material Category	Product Name	Product Name Short Form	Chinese HS No.	Chinese Commodity Code
Fluorspar	Fluorspar containing, by weight $\leq$ 97% calcium fluoride	Met-spar	2529.2100	2529210000
	Fluorspar containing, by weight $>$ 97% calcium fluoride	Acid-spar	2529.2200	2529220000

42. Fluorspar (also known as “fluorite”) is a mineral used in producing a variety of products including primary aluminum, steel, and all varieties of fluorochemicals that form the building blocks for refrigerants that are used in refrigerators and air conditioning units.

43. Fluorspar is a naturally occurring rock-like mineral that is milled into two principal grades: (1) sub-acid grade, which includes metallurgical and ceramic grades, also commonly called “met-spar,” which has a calcium fluoride content less than or equal to 97 percent, and (2) acid grade, also known as “acid-spar,” which has a calcium fluoride content greater than 97 percent.<sup>46</sup>

<sup>43</sup> *The Making, Shaping and Treating of Steel*, (10<sup>th</sup> Ed. 1985) at 98 (Exhibit JE-29).

<sup>44</sup> See *New Encyclopaedia Britannica*, Vol. 21, at 511 (JE-33).

<sup>45</sup> World Steel Dynamics: Steel Strategist No. 35 (Sept. 2009) (Exhibit JE-35).

<sup>46</sup> U.S. Geological Survey Minerals Yearbook (2008): Fluorspar [Advance Release] at 26.1 (Exhibit JE-37).

44. Fluorspar is used directly or indirectly to manufacture products such as aluminum, gasoline, insulating foams, plastics, refrigerants, and steel. Met-spar is generally used for ceramics and steelmaking applications. Acid-spar is primarily used in higher value applications, including as a feedstock in the manufacture of hydrofluoric acid (“HF”), the starting material for a wide range of chemicals containing fluorine (“fluorochemicals” or “fluorocarbon chemicals”), including hydrofluorocarbons (“HFCs”) and hydrochlorofluorocarbons (“HCFCs”), fluoroelastomers, and fluoropolymers.<sup>47</sup>

45. China is the world’s largest producer of fluorspar.<sup>48</sup> In 2008, China alone produced an estimated 54 percent of the world’s supply of fluorspar while the other four major producing countries, combined, produced approximately 34 percent.<sup>49</sup>

#### 4. Magnesium

Raw Material Category	Product Name	Product Name Short Form	Chinese HS No.	Chinese Commodity Code
Magnesium	Magnesium containing, by weight, at least 99.8% magnesium	Magnesium metal	8104.1100	N/A
	Other unwrought magnesium	Unwrought magnesium	8104.1900	N/A
	Magnesium waste and scrap	Magnesium waste and scrap	8104.2000	N/A

46. Magnesium is alloyed with other elements in order to make them lighter and more easily welded. Magnesium is typically used to manufacture aircraft fuselages, wheels, automotive and jet-engine parts, luggage frames, portable power tools, fireworks, milk of magnesia, road flares, and cameras and optical instruments.

47. Magnesium (magnesium metal, unwrought magnesium, and magnesium waste and scrap) must be produced from magnesium-containing materials such as seawater, well and lake brines and bitterns, and minerals such as dolomite, magnesite, brucite, carnallite, and olivine.<sup>50</sup>

<sup>47</sup> U.S. Geological Survey Minerals Yearbook (2008): Fluorspar [Advance Release] at 26.2 (Exhibit JE-37).

<sup>48</sup> U.S. Geological Survey Minerals Yearbook: China (2008) [Advance Release] at 9.1 (Exhibit JE-15).

<sup>49</sup> U.S. Geological Survey Minerals Yearbook (2008): Fluorspar [Advance Release] at Table 9 (Exhibit JE-37). The other four major producing countries are, in order: Mexico, Mongolia, South Africa, and Russia.

<sup>50</sup> U.S. Geological Survey Mineral Commodity Summary: Magnesium Metal (2010) at 97 (Exhibit JE-38).

48. There are several different methods for producing magnesium metal.<sup>51</sup> In China, the majority of the magnesium production takes place using dolomite (calcium-magnesium carbonate  $\text{CaCO}_3 \cdot \text{MgCO}_3$ ) through a thermic method called the “Pidgeon” process,<sup>52</sup> which uses an externally-heated vacuum retort. This process consists of reducing magnesium oxide, produced by calcining the dolomite raw material, with ferrosilicon to produce metallic magnesium and a calcium iron silicate slag.<sup>53</sup>

49. Magnesium metal’s principal use is as an alloying addition to aluminum to increase the hardness and corrosion resistance of the pure metal.<sup>54</sup> Diecasting and iron and steel desulfurization are also important applications for magnesium.<sup>55</sup> Magnesium compounds, primarily magnesium oxide, are used mainly as refractory material in furnace linings for producing iron and steel, nonferrous metals, glass, and cement. Magnesium oxide and other compounds also are used in agricultural, chemical, and construction industries.<sup>56</sup>

50. China is the world’s largest producer of magnesium metal, accounting for approximately 77 percent of global output of 860,000 MT in 2007.<sup>57</sup>

## 5. Manganese

<b>Raw Material Category</b>	<b>Product Name</b>	<b>Product Name Short Form</b>	<b>Chinese HS No.</b>	<b>Chinese Commodity Code</b>
<b>Manganese</b>	Manganese ores and concentrates, including ferromanganese ores and concentrates containing more than 20% manganese by dry weight	Manganese ores and concentrates	2602.0000	N/A

<sup>51</sup> U.S. Geological Survey: Magnesium, Its Alloys and Compounds (2001) at 3 (Exhibit JE-39).

<sup>52</sup> Roskill Report Overview: The Economics of Magnesium Metal at 3 (Exhibit JE-40).

<sup>53</sup> U.S. Geological Survey: Magnesium, Its Alloys and Compounds (2001) at 23 (Exhibit JE-39).

<sup>54</sup> U.S. Geological Survey: Magnesium, Its Alloys and Compounds (2001) at 18 (Exhibit JE-39).

<sup>55</sup> U.S. Geological Survey Minerals Yearbook (2008): Magnesium [Advance Release] at 45.1 (Exhibit JE-41).

<sup>56</sup> U.S. Geological Survey: Magnesium, Its Alloys and Compounds at 15 (Exhibit JE-39).

<sup>57</sup> Roskill Report Overview: The Economics of Magnesium Metal at 2 (Exhibit JE-40).

	Unwrought manganese; manganese waste and scrap; powder	Manganese metal	8111.0010	8111001010 (unwrought Mn waste and scrap)
8111001090 (unwrought Mn; powder)				

51. Manganese is used in many applications to increase strength, hardness, wear resistance, and other properties. Specific applications for manganese include kitchen sinks, cooking utensils, batteries, and cookware.

52. Manganese is an element whose sulfur-fixing, deoxidizing, and alloying properties make it essential to iron and steel production, as well as other metallurgical applications, including aluminum alloying.<sup>58</sup> Manganese is contained in all stainless steels and nickel-based alloys. Manganese has no satisfactory substitute in its major applications.<sup>59</sup>

53. Manganese ores and concentrates are used in steel production to make pig iron and through upgrading ore to ferroalloys.<sup>60</sup> As an alloying agent, manganese increases steel strength and toughness.<sup>61</sup> Manganese is also used for nonmetallurgical purposes such as the production of dry cell batteries in its oxide form, in plant fertilizers and animal feed. Manganese metal (unwrought manganese) is used as an additive in the production of aluminum, steel and other alloys. Manganese metal is a key component of certain widely used aluminum alloys.<sup>62</sup>

54. China is one of the world’s leading producers of manganese ore,<sup>63</sup> accounting for approximately 28 percent of world production by gross weight<sup>64</sup> in 2007 and approximately 25 percent (2.4 million MT) of world production in 2009.

55. China is the world’s leading producer of manganese metal by a significant margin.

---

<sup>58</sup> U.S. Geological Survey Minerals Yearbook (2007): Manganese [Advance Release] (2009) at 47.1, 47.2 (Exhibit JE-42).

<sup>59</sup> U.S. Geological Survey Mineral Commodity Summaries: Manganese (2010) at 99 (Exhibit JE-43).

<sup>60</sup> U.S. Geological Survey Mineral Commodity Summaries: Manganese (2010) at 98 (Exhibit JE-43).

<sup>61</sup> *The Making, Shaping and Treating of Steel* (10<sup>th</sup> Ed. 1985) at 1316 (Exhibit JE-29).

<sup>62</sup> U.S. Geological Survey Mineral Commodity Summaries: Manganese (2010) at 98 (Exhibit JE-43); U.S. Geological Survey Minerals Yearbook (2007): Manganese [Advance Release] (2009) at 47.1-47.2; 47.8 (Exhibit JE-42).

<sup>63</sup> U.S. Geological Survey: China Yearbook 2008 [Advance Release] at 9.3 (Exhibit JE-15) and U.S. Geological Survey Mineral Commodity Summaries: Manganese (2010) (Exhibit JE-43).

<sup>64</sup> U.S. Geological Survey Minerals Yearbook (2007): Manganese at Table 8 (Exhibit JE-42).

China’s estimated annual capacity to produce manganese metal is 1.8 to 2.0 million MT per year, which is 35 times greater than production capacity in South Africa, the world’s second largest producer of the metal.<sup>65</sup> China produced an estimated 950,000 MT of manganese metal in 2008, which accounted for over 95% of total world production of the metal.<sup>66</sup>

## 6. Silicon Carbide

Raw Material Category	Product Name	Product Name Short Form	Chinese HS No.	Chinese Commodity Code
Silicon Carbide	Silicon carbide	Silicon carbide	N/A	2849200000
	Crude silicon carbide (of which the silicon carbide content is greater than 15% by weight)	Crude silicon carbide	N/A	3824909910

56. Silicon carbide (also commonly known by the trade names Carborundum and Crystolon) is used as an abrasive, in refractories, and as an additive in steel-making.

57. Silicon carbide is made by fusing a mixture of high-grade silica sand and carbon (usually coke) in an electric furnace.<sup>67</sup> Silicon carbide can withstand very high temperatures and will retain its physical strength. It is also extremely hard. As a result, it is primarily used as an abrasive (including antislip, blasting, bonded, coated, and sawing abrasives; polishing and buffing compounds; and tumbling media), in non-clay refractories.<sup>68</sup> Silicon carbide is also used as an additive in steel, and as an additive in case iron and miscellaneous uses in metallurgical applications.<sup>69</sup>

58. China has the world’s largest capacity for producing silicon carbide for abrasive

---

<sup>65</sup> See International Manganese Institute: Annual Review (2008) at 14 (Exhibit JE-44); *General Review of Manganese metal in 2009 and Its Outlook for New Year*, Tex Report, (Feb. 18, 2010) (Exhibit JE-45); Tom Vulcan, *Manganese – an Unsung Hero*, July 29, 2009, Hard Assets Investor (Exhibit JE-46).

<sup>66</sup> See U.S. Geological Survey: China Yearbook 2008 [Advance Release] at 9.16 (Exhibit JE-15); International Manganese Institute: Annual Review (2008) at 9 (Exhibit JE-44). Note that the International Manganese Institute reports that China produced 1.1 million tons of manganese metal in 2008. See International Manganese Institute: Manganese Production (Exhibit JE-47).

<sup>67</sup> Industrial Minerals and Rocks: Abrasives (2006) at 154 (Exhibit JE-49).

<sup>68</sup> U.S. Geological Survey Minerals Yearbook: Manufactured Abrasives [Advance Release] (2009) at 4.2 (Exhibit JE-50); Mc-Graw Hill Encyclopedia of Science & Technology (8<sup>th</sup> Ed. 1997), Vol. 16 at 455 (Exhibit JE-51).

<sup>69</sup> Industrial Minerals and Rocks: Abrasives (2006) at 154 (Exhibit JE-49).

applications, accounting for approximately 45 percent of the world’s capacity in 2009.<sup>70</sup>

## 7. Silicon Metal

<b>Raw Material Category</b>	<b>Product Name</b>	<b>Product Name Short Form</b>	<b>Chinese HS No.</b>	<b>Chinese Commodity Code</b>
<b>Silicon Metal</b>	Silicon containing by weight less than 99.99% silicon	Silicon metal	2804.6900	N/A

59. Silicon metal is used in steel alloys, nonferrous (primarily aluminum) alloys, silicones, fumed silica, and other chemical applications.<sup>71</sup> Downstream applications of silicon metal include the manufacture of cookware, medical applications, sealants, adhesives, lubricants, insulation, and breast implants. Another primary use of silicon metal is the manufacture of cast parts for the automotive industry. Silicon metal may also be refined into polycrystalline silicon (not within the scope of this dispute), a high value material that is used in both semiconductors and solar cells.<sup>72</sup>

60. Silicon is a light chemical element with metallic and nonmetallic characteristics. Silicon metal is not found free in nature. Silica (silicon dioxide) as quartz or quartzite is used to produce silicon metal for the aluminum and chemical industries.<sup>73</sup>

61. China is the world’s single largest producer of silicon metal, accounting for approximately 75 percent of total global production.<sup>74</sup> China produced an estimated 780,000 MT of silicon metal in 2009, accounting for 50 percent of global output. Brazil, the second largest producer of silicon metal in 2009, produced only an estimated 157,500 MT, which accounts for approximately 10 percent of global output.<sup>75</sup>

---

<sup>70</sup> U.S. Geological Survey Mineral Commodity Summary: Manufactured Abrasives (2010) at 15 (Exhibit JE-52).

<sup>71</sup> U.S. Geological Survey Minerals Yearbook (2008): Silicon at 67.1-67.2; 67.8 (Exhibit JE-53).

<sup>72</sup> U.S. Geological Survey Minerals Yearbook (2008): Silicon at 67.1 (Exhibit JE-53).

<sup>73</sup> U.S. Geological Survey Minerals Yearbook (2008): Silicon at 67.1 (Exhibit JE-53).

<sup>74</sup> See U.S. Geological Survey Mineral Commodity Summary: Silicon (2010) at 145 (Exhibit JE-54); Asian Metal Limited: 2007 Annual Report on Silicon Metal Market at 3 (Exhibit JE-55).

<sup>75</sup> See U.S. Geological Survey Mineral Commodity Summary: Silicon (2010) at 145 (Exhibit JE-54); World Silicon Production Statistics, Table III (Exhibit JE-56).

## 8. Yellow Phosphorus

Raw Material Category	Product Name	Product Name Short Form	Chinese HS No.	Chinese Commodity Code
Yellow Phosphorus	Yellow phosphorus (white phosphorus)	Yellow phosphorus	2804.7010	N/A

62. Yellow phosphorus (also known as white or elemental phosphorus) is used to make a number of industrial chemicals, including highly concentrated phosphoric acid, phosphorus trichloride, phosphorus pentasulfide, and phosphorus pentoxide,<sup>76</sup> which are in turn used to manufacture products such as flame retardants, automotive lubricants, water treatment chemicals, cleaning agents, and food ingredients.<sup>77</sup>

63. Yellow phosphorus is produced by reducing phosphate rock (calcium phosphate or calcium fluorophosphate) with carbon (which can be supplied by coke) in the presence of silica as flux, with an electric arc furnace providing the necessary heat for the reaction.<sup>78</sup>

64. China is the leading producer of yellow phosphorus in the world<sup>79</sup>, producing an estimated 740,000 MT in 2008.<sup>80</sup> In 2008, China's production capacity accounted for 70 percent of the world's capacity<sup>81</sup> and China's production was estimated at more than 70 percent of total world supply.<sup>82</sup>

---

<sup>76</sup> James G. Speight, *Chemical Process and Design Handbook* at 2.398 (Exhibit JE-57).

<sup>77</sup> CEH Marketing Research Report: Phosphorus and Phosphorus Chemicals at 12-13 (Exhibit JE-58).

<sup>78</sup> James G. Speight, *Chemical Process and Design Handbook* at 2.401 (Exhibit JE-57).

<sup>79</sup> U.S. Geological Survey Minerals Yearbook: Phosphate Rock [Advance Release] (2010) at 56.2 (Exhibit JE-60).

<sup>80</sup> CEH Marketing Research Report: Phosphorus and Phosphorus Chemicals at 115 (Exhibit JE-58). At a meeting of the producers' association in China in March 2009, it was reported that total yellow phosphorus production in 2008 ranged between 700,000 and 800,000 MT. The English translation of a paper disseminated at the "2009 Forum about Phosphorus and Related Products Market" organized by the CCCMC indicates that 2008 production was between 700,000 and 800,000 MT. See CCCMC Presentation: China's Phosphate and Phosphate Production and Market Situation (2010) at 5-6 (Exhibit JE-61).

<sup>81</sup> CEH Marketing Research Report: Phosphorus and Phosphorus Chemicals at 8 (Exhibit JE-58).

<sup>82</sup> CEH Marketing Research Report: Phosphorus and Phosphorus Chemicals at 115 (China), 25 (US), 67 (EU), 83 (E. Eur.) (Exhibit JE-58).

## 9. Zinc

Raw Material Category	Product Name	Product Name Short Form	Chinese HS No.	Chinese Commodity Code
Zinc	Zinc ores and concentrates (excluding gray feed zinc oxide containing more than 80% zinc oxide)	Zinc ores and concentrates excluding gray feed grade zinc oxide	2608.0000 ex	2608000090
	Gray feed zinc oxide containing more than 80% zinc oxide	Gray feed grade zinc oxide	2608.0000 ex	2608000001
	Unwrought zinc containing by weight 99.995% or more zinc	Unwrought ≥ 99.995% zinc	7901.1110	7901111000
	Unwrought zinc containing by weight 99.99% or more but less than 99.995% zinc	Unwrought 99.99% < zinc content ≤ 99.995% zinc	7901.1190	7901119000
	Unwrought zinc containing by weight less than 99.99% zinc	Unwrought < 99.99% zinc	7901.1200	7901120000
	Unwrought zinc alloys	Unwrought zinc alloys	7901.2000	7901200000
	Zinc waste and scrap	Zinc waste and scrap	7902.0000	N/A
	Hard zinc ash and residues	Hard zinc spelter	2620.1100	N/A
	Other zinc ash and residues	Other zinc ash and residues	2620.1900	N/A

65. The most important uses of zinc are in its alloys and as a protective coating on other metals (i.e., galvanizing to prevent corrosion).<sup>83</sup> For example, zinc is widely used in the production of corrosion-resistant steel.<sup>84</sup>

<sup>83</sup> McGraw-Hill Encyclopedia of Science & Technology Vol. 19 (1997) at 702 (Exhibit JE-62).

<sup>84</sup> See *The Making, Shaping and Treating of Steel* (10<sup>th</sup> Ed. 1985) at 1128-29 (Exhibit JE-29).

66. Zinc ores and concentrates (including gray feed grade zinc oxide) and zinc waste and scrap are used to make unwrought or slab zinc (including unwrought  $\geq 99.995\%$  zinc, unwrought  $99.99\% < \text{zinc content} \leq 99.995\%$  zinc, unwrought  $< 99.99\%$  zinc, unwrought zinc alloys), which is then consumed for galvanizing and electroplating, corrosion resistance, and making zinc-based and zinc-copper alloys such as brass and bronze. Zinc ash and residues (including hard zinc spelter and other zinc ash and residues) are primarily used for fertilizers and other agricultural applications.<sup>85</sup> Zinc-based alloys (alloys in which zinc is the primary constituent) are used for casting, both die casting and gravity casting, and for wrought applications.<sup>86</sup>

67. Zinc is a malleable, ductile metal.<sup>87</sup> Zinc is mined as an ore or separated as a by-product of processing lead ores.<sup>88</sup>

68. China is the world's largest producer of zinc. In 2009, China produced an estimated 2.8 million MT of zinc, approximately 25 percent of global production.<sup>89</sup>

### C. Export Duties

#### 1. China's Obligations under the Accession Protocol

69. In 2001, when it acceded to the WTO, China reserved the right to impose export duties, up to specified duty rate limits, on 84 products to the imposition of export duties.<sup>90</sup> In fact, at the time, China actually imposed export duties on only 36 products. In the years since China's accession, however, the number of products on which China imposes export duties exploded from 36 in 2002<sup>91</sup> to 373 in 2009.<sup>92</sup> During this period, for certain products on which it reserved the right to impose export duties, China has also increased the export duty rates beyond the agreed limits.

70. At the time of China's accession to the WTO, members of the Working Party raised concerns regarding taxes and charges that China applied exclusively to exports and expressed the view that such charges should be eliminated unless applied in conformity with GATT Article VIII or Annex 6 of China's Accession Protocol.<sup>93</sup>

---

<sup>85</sup> Australian Government Fact Sheet: Zinc Ash (2003) (Exhibit JE-64).

<sup>86</sup> McGraw-Hill Encyclopedia of Science & Technology Vol. 19 (1997) at 703 (Exhibit JE-62).

<sup>87</sup> McGraw-Hill Encyclopedia of Science & Technology Vol. 19 (1997) at 699 (Exhibit JE-62).

<sup>88</sup> McGraw-Hill Encyclopedia of Science & Technology Vol. 19 (1997) at 701 (Exhibit JE-62).

<sup>89</sup> U.S. Geological Survey Mineral Commodity Summary: Zinc (2010) at 185 (Exhibit JE-65).

<sup>90</sup> Working Party Report, para. 156 (Exhibit JE-3); *See also 2002 Tariff Implementation Program* (Exhibit JE-66).

<sup>91</sup> *2002 Tariff Implementation Plan*, Table 5 (Exhibit JE-66).

<sup>92</sup> *2002 Tariff Implementation Plan*, Table 7 (Exhibit JE-66).

<sup>93</sup> Working Party Report, para. 155 (Exhibit JE-3).

71. Accordingly, China committed in its Accession Protocol to “eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of this Protocol or applied in conformity with the provisions of Article VIII of the GATT 1994.”<sup>94</sup>

72. Annex 6 of the Accession Protocol, titled “Products Subject to Export Duty,” sets forth a list of 84 discrete products by individual harmonized system (HS) numbers accompanied by a short description of each product. The products listed in Annex 6 are those for which China retained the right to continue imposing export duties. The list of products in Annex 6 also indicates, next to each of the 84 products, an export duty rate expressed as an *ad valorem* percentage. These listed export duty rates are the upper limit of rates which China retained the right to impose on the export of these products. As the note to Annex 6 states:

China confirmed that the tariff levels included in this Annex are maximum levels which will not be exceeded. China confirmed furthermore that it would not increase the presently applied rates, except under exceptional circumstances. If such circumstances occurred, China would consult with affected members prior to increasing applied tariffs with a view to finding a mutually acceptable solution.<sup>95</sup>

73. China restrains the exportation of various forms of bauxite, coke, fluorspar, magnesium, manganese, silicon metal, yellow phosphorus, and zinc through the imposition of export duties as described below.<sup>96</sup>

## 2. China’s Export Duties Framework

74. The *Regulations on Import and Export Duties* provide that all goods permitted to be imported into or exported out of China shall, unless otherwise provided for by the State Council, be subject to the imposition of import and export duties in accordance with the *Regulations on Import and Export Duties*.<sup>97</sup>

75. The *Regulations on Import and Export Duties* provide that export duties are established in export duty rates.<sup>98</sup> There are at least three types of export duty rates: “regular” export duty rates that are established to be generally applicable; “temporary” export duty rates established for

---

<sup>94</sup> Accession Protocol, para. 11.3 (Exhibit JE-2).

<sup>95</sup> Accession Protocol, Annex 6 (Exhibit JE-2).

<sup>96</sup> For purposes of the discussion of China’s export duties, the terms “bauxite,” “coke,” “fluorspar,” “magnesium,” “manganese,” “silicon metal,” “yellow phosphorus,” and “zinc” cover the forms of each of these Raw Materials listed in Chart of Raw Materials Subject to Export Duties (Exhibit JE-5) and in the table in Section III.C.3 below.

<sup>97</sup> *Regulations on Import and Export Duties*, Article 2 (Exhibit JE-67).

<sup>98</sup> *Regulations on Import and Export Duties* Article 9 (Exhibit JE-67).

a limited period of time;<sup>99</sup> and “special” export duty rates established under special circumstances.<sup>100</sup>

76. The Customs Tariff Commission (“Tariff Commission”), established by the State Council, is responsible for adjusting and determining items subject to duties, duty nomenclature and heading numbers, and duty rates (i.e., “regular” duty rates). The Tariff Commission also determines the goods subject to “temporary” duty rates, the “temporary” duty rates, and the time limits for those duties. In addition, the Tariff Commission is responsible for the application of duty rates in special circumstances, i.e., “special” duty rates.<sup>101</sup>

77. The General Administration of Customs (“Customs”), established by the State Council, is responsible for supervising and controlling the entry and exit of goods into and from China’s borders. Its responsibilities include collecting customs duties as well as other taxes and charges related to import and export.<sup>102</sup>

### 3. “Temporary” Export Duties

78. Article 9 of the *Regulations on Import and Export Duties* provides that temporary export duty rates can be applied for a defined period of time. Article 11 of the *Regulations on Import and Export Duties* further provides that where a good is subject to both a “regular” export duty rate and a “temporary” duty rate, the “temporary” duty rate prevails.

79. On December 15, 2008, the Tariff Commission issued the *Notice Regarding the 2009 Tariff Implementation Program* (State Council Customs Tariff Commission, shuiweihui (2008) No. 40, January 1, 2009) (“*2009 Tariff Implementation Program*”), which took effect on January 1, 2009. Section II of the *2009 Tariff Implementation Program* outlines adjustments to export duties, providing that in 2009: the “regular” export duty rates in effect for 2008 will remain unchanged;<sup>103</sup> certain goods will be subject to “temporary” duty rates<sup>104</sup> as set out in detail in the Export Products Duty Rate List. The *2009 Tariff Implementation Program* does not specify any distinct time limit for the duration of the application of the temporary export duty rates.

80. The Export Products Duty Rate List identifies, by HS number, 373 goods subject to export duties in 2009.<sup>105</sup> The Export Products Duty Rate List indicates the duty rates applicable to those goods as “regular” export duty rates, “temporary” export duty rates, and/or “special”

---

<sup>99</sup> See *Regulations on Import and Export Duties*, Articles 4, 9, and 11 (Exhibit JE-67).

<sup>100</sup> See *Regulations on Import and Export Duties*, Articles 4 (Exhibit JE-67).

<sup>101</sup> *Regulations on Import and Export Duties*, Article 4 (Exhibit JE-67).

<sup>102</sup> *Regulations on Import and Export Duties*, Article 2 (Exhibit JE-67).

<sup>103</sup> *2009 Tariff Implementation Program*, Section II(1) (Exhibit JE-21).

<sup>104</sup> *2009 Tariff Implementation Program*, Section II(2) (Exhibit JE-21).

<sup>105</sup> *2009 Tariff Implementation Program*, Appendix (Exhibit JE-21).

export duty rates.

81. The Export Commodities Duty Rate List sets out the following duty rates:

<b>Raw Material</b>	<b>Duty List Item No.</b>	<b>Product Name (Short Form)</b>	<b>HS No.</b>	<b>Temporary Export Duty Rates</b>
Bauxite	37	Refractory clay	2508.3000	15%
	67	Aluminum ores and concentrates	2606.0000	15%
	96	Aluminum ash and residues	2620.4000	10%
Coke	109	Coke	2704.0010	40%
Fluorspar	53	Met-spar	2529.2100	15%
	54	Acid-spar	2529.2200	15%
Magnesium	363	Magnesium metal	8104.1100	10%
	364	Unwrought magnesium	8104.1900	10%
	365	Magnesium waste and scrap	8104.2000	10%
Manganese	63	Manganese ores and concentrates	2602.0000	15%
	369	Manganese metal	8111.0010	20%
Silicon Metal	113	Silicon metal	2804.6900	15%
Zinc	353	Zinc waste and scrap	7902.0000	10%
	91	Hard zinc spelter	2620.1100	10%
	92	Other zinc ash and residues	2620.1900	10%

82. Annex 6 of China’s Accession Protocol does not include any of the products listed in the table above.

#### **4. “Special” Export Duties**

83. The *Regulations on Import and Export Duties* provides the Tariff Commission authority

to apply “special” export duties under special circumstances.<sup>106</sup>

84. On May 14, 2008, the Tariff Commission issued the *May 2008 Tariff Commission Special Export Duty Notice*<sup>107</sup> to Customs, introducing the imposition of a “special” export duty rate of 100 percent on yellow phosphorus, effective May 20, 2008. The *May 2008 Tariff Commission Special Export Duty Notice* stated that the 100 percent “special” export duty rate would be added to the existing export duty rate applied to yellow phosphorus, which was at the time 20 percent. On May 16, 2008, Customs issued the *May 2008 Customs Special Export Duty Notice*,<sup>108</sup> announcing and implementing the *May 2008 Tariff Commission Special Export Duty Notice*.

85. Accordingly, the total export duty rate applicable to yellow phosphorus increased from 20 percent to 120 percent on May 20, 2008, within a week of the issuance of the *May 2008 Tariff Commission Special Export Duty Notice* and the *May 2008 Customs Special Export Duty Notice*. The *May 2008 Tariff Commission Special Export Duty Notice* provided that the special export duty rate would be applied until December 31, 2008.

86. On November 13, 2008, the Tariff Commission issued the *Notice Regarding Adjusting Export Duties* (State Council Tariff Policy Commission, shuiweihui (2008) No. 36, December 1, 2008)<sup>109</sup> (“*November 2008 Tariff Commission Export Duties Notice*”) to Customs, lowering the special export duty rate on certain goods, as set out in the annexed tables, effective December 1 to December 31, 2008. Table 1 of the *November 2008 Tariff Commission Export Duties Notice* indicated that the special export duty rate for yellow phosphorus was being adjusted while Table 2 provided that the special export duty rate for yellow phosphorus was being adjusted from 100 percent to 75 percent. The “regular” export duty rate of 20 percent applicable to yellow phosphorus remained unchanged. This resulted in a combined export duty rate for yellow phosphorus of 95 percent.

87. On December 15, 2008, the Tariff Commission issued the *2009 Tariff Implementation Program*, which took effect on January 1, 2009. Section II of the *2009 Tariff Implementation Program* outlines the adjustments to export duties, providing that in 2009, certain raw materials would continue to be subject to the imposition of special duties<sup>110</sup> as set out in detail in the 2009 Export Products Duty Rate List. The *2009 Tariff Implementation Program* does not specify any distinct time limit for the duration of the application of the special export duty rates.

88. The 2009 Export Products Duty Rate List provides for a 50 percent “special” export duty

---

<sup>106</sup> *Regulations on Import and Export Duties*, Article 4 (Exhibit JE-67).

<sup>107</sup> *May 2008 Tariff Commission Special Export Duties Notice* (Exhibit JE-69).

<sup>108</sup> *May 2008 Customs Special Export Duties Notice* (Exhibit JE-70).

<sup>109</sup> *December 2008 Export Duties Notice* (Exhibit JE-71).

<sup>110</sup> *2009 Tariff Implementation Program*, Section II(2) (Exhibit JE-21).

rate for yellow phosphorus for 2009 as well as a 20 percent “regular” export duty rate, for a combined export duty rate of 70 percent.

89. Yellow phosphorus is one of the 84 goods listed in Annex 6. The maximum duty rate for yellow phosphorus designated in Annex 6 is 20 percent.<sup>111</sup>

#### **D. Non-Automatic Export Licensing Framework**

90. During the course of China’s accession, China stated that it was reducing the use of export restraints and that by 1999, it was subjecting only 73 items to non-automatic export licensing and export restrictions.<sup>112</sup> In 2009, however, China subjected over 600 items to non-automatic export licensing and export restrictions.<sup>113</sup>

91. China restricts the exportation of various forms of bauxite, coke, fluorspar, manganese, silicon carbide, and zinc by subjecting their exportation to non-automatic export licensing.<sup>114</sup> Certain of these products are subject to both non-automatic export licensing and export quotas while others are subject only to non-automatic export licensing.<sup>115</sup>

92. Non-automatic export licensing is the framework through which China imposes and administers the export quotas for bauxite, coke, fluorspar, silicon carbide, and certain forms of zinc, as discussed below in Section III.E. For these products, the non-automatic export licensing requirements function as a restriction on exportation additional to the restriction effected by the export quotas.

93. Manganese and certain forms of zinc are subject to non-automatic licensing, but not quotas. Details on the export licensing procedures for all of these Raw Materials are discussed in more detail below in Section III.F.

#### **1. Automatic v. Non-Automatic Licensing**

94. The exportation of goods from China is free and not restricted unless otherwise provided

---

<sup>111</sup> See Accession Protocol, Annex 6, item no. 11 (Exhibit JE-2).

<sup>112</sup> Working Party Report, paras. 157-165 (Exhibit JE-3).

<sup>113</sup> 2009 Export Licensing List Notice (Exhibit JE-22).

<sup>114</sup> For purposes of the discussion of China’s non-automatic export licensing, the terms “bauxite,” “coke,” “fluorspar,” “manganese,” “silicon carbide,” and “zinc” cover the forms of each of these Raw Materials listed in Chart of Raw Materials Subject to Export Licensing and Quotas (Exhibit JE-6) and in the table in Section III.D.2 below.

<sup>115</sup> See Chart of Raw Materials Subject to Licensing and Quotas (Exhibit JE-6) for products subject to export licensing.

for by law or regulation.<sup>116</sup> For such goods, China may employ a system of automatic export licensing in order to monitor the exportation.<sup>117</sup>

95. At the same time, China maintains the authority to restrict or prohibit the exportation of goods<sup>118</sup> and subjects goods whose exportation is restricted to an export licensing administration.<sup>119</sup> China’s Ministry of Commerce (“MOFCOM”)<sup>120</sup> is the department responsible for the centralized administration of export licenses for China. As such, MOFCOM is responsible for formulating the rules and regulations on the administration of export licenses, supervising and inspecting the implementation of such measures, and punishing violations and violators. Together with Customs, MOFCOM is responsible for formulating, adjusting, and publishing a catalog listing all goods subject to export restriction.<sup>121</sup> Exportation of the goods listed in the catalog requires approval by MOFCOM<sup>122</sup> and is subject to export licensing<sup>123</sup> that is, accordingly, not automatic. (Hereinafter, all discussion regarding and references to “export licenses” and “export licensing” relate to licenses and licensing of a non-automatic nature, unless otherwise noted.) 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.<sup>124</sup>

96. 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 leading to potential criminal and administrative penalties including the penalties applicable to smuggling, invalidation of any applicable licenses, and suspension or revocation of the right to engage in foreign trade for up to three years.<sup>125</sup> License issuing entities that issue licenses exceeding their authority are subject to penalties including warnings and

---

<sup>116</sup> *Foreign Trade Law*, Article 14 (Exhibit JE-72); *Import and Export Regulations*, Article 4 (Exhibit JE-73).

<sup>117</sup> *Foreign Trade Law*, Article 15 (Exhibit JE-72).

<sup>118</sup> *Foreign Trade Law*, Articles 16, 17 (Exhibit JE-72); *Import and Export Regulations*, Article 35 (Exhibit JE-73).

<sup>119</sup> *Export Licensing Measures*, Article 2 (Exhibit JE-74).

<sup>120</sup> China’s Ministry of Commerce was previously known as the Ministry of Foreign Economic Relations and Trade (“MOFERT”) and later the Ministry of Foreign Trade and Economic Cooperation (“MOFTEC”). For ease of reference, this ministry is referred to as “MOFCOM” hereinafter.

<sup>121</sup> *Foreign Trade Law*, Article 18 (Exhibit JE-72); *Import and Export Regulations*, Article 35 (Exhibit JE-73); *Export License Measures*, Article 3 para. 2 (Exhibit JE-74).

<sup>122</sup> *Foreign Trade Law*, Article 19 (Exhibit JE-72).

<sup>123</sup> *Export License Measures*, Article 2 (Exhibit JE-72).

<sup>124</sup> *Import and Export Regulations*, Article 43 (Exhibit JE-73); *Export License Measures*, Article 6 (Exhibit JE-74).

<sup>125</sup> *Foreign Trade Law*, Articles 61, 64 (Exhibit JE-72); *Import and Export Regulations*, Articles 64, 65 (Exhibit JE-73); *Export License Measures*, Articles 21, 38 (Exhibit JE-74).

suspension or termination of their right to issue licenses.<sup>126</sup> Any individual working as staff at a license issuing entity that is responsible for issuing licenses outside the scope of approval, is also subject to criminal and administrative penalties including removal from his position, being issued a warning, demotion, and dismissal and the responsibility of the managing head of the entity will also be investigated.<sup>127</sup>

97. Forging, altering without approval, buying and selling export licenses are also acts subject to criminal and civil penalties.<sup>128</sup>

## 2. Goods Subject to Restricted Exportation

98. MOFCOM, in collaboration with other relevant departments of the State Council, must publish the catalog of goods subject to restricted exportation within 21 days of the list taking effect.<sup>129</sup> In practice, this catalog is updated and issued annually, taking effect on January 1. On December 10, 2008, MOFCOM and Customs published the *2009 Export Licensing List* announcing the catalog of export-restricted goods for 2009, which includes the materials listed below<sup>130</sup>:

Raw Material	Chinese Commodity Code No.	Short Form Name	2009 Export Licensing List Item No.
Bauxite	2508.30.00.00	Refractory clay	18
	2606.00.00.00	Aluminum ores and concentrates	
Coke	2704.00.10.00	Coke	27
Fluorspar	2529.21.00.00	Met-spar	21

<sup>126</sup> *Export License Measures*, Articles 21, 36, 38 (Exhibit JE-74); *Measures for Administration of Licensing Entities*, Articles 40, 41 (Exhibit JE-75).

<sup>127</sup> *Export License Measures*, Article 42 (Exhibit JE-74); *Measures for Administration of Licensing Entities*, Articles 40, 41 (Exhibit JE-75).

<sup>128</sup> *Foreign Trade Law*, Articles 34, 63 (Exhibit JE-72); *Import and Export Regulations*, Article 66 (Exhibit JE-73); *Export License Measures*, Article 39 (Exhibit JE-74); *Measures for Administration of Licensing Entities*, Articles 40, 41, 42 (Exhibit JE-75).

<sup>129</sup> *Import and Export Regulations*, Article 35 (Exhibit JE-73); *Export License Measures*, Article 3, para. 2 (Exhibit JE-74).

<sup>130</sup> *2009 Export Licensing List Notice* (Exhibit JE-22).

	2529.22.00.00	Acid-spar	
Manganese	8111.00.10.10 8111.00.10.90	Manganese metal	39
Silicon carbide	2849.20.00.00 3824.90.99.10	Silicon carbide	32
Zinc	2608.00.00.01 2608.00.00.90	Zinc ores and concentrates	23
	7901.11.10.00 7901.11.90.00 7901.12.00.00 7901.20.00.00	Unwrought zinc alloys	38

99. All of the goods listed above are subject to export licensing. As set forth above, some of those goods are also subject to export quotas. The export quotas are discussed in more detail in Section III.E below.

## E. Export Quotas

### 1. Introduction

100. China restricts the exportation of various forms of bauxite, coke, fluorspar, silicon carbide, and zinc by subjecting the exportation of these materials to export quotas or prohibitions.<sup>131</sup> As will be discussed in more detail below, China maintains two systems for administering export quotas: through direct allocation or through a quota bidding system.<sup>132</sup> The export quotas on coke and zinc are allocated “directly.”<sup>133</sup> The export quotas on bauxite, fluorspar, and silicon carbide are allocated through a bidding system.<sup>134</sup>

101. China’s *Foreign Trade Law* confers the authority to restrict or prohibit the exportation of goods through export quotas,<sup>135</sup> and subjects goods whose exportation is subject to export quotas

---

<sup>131</sup> For purposes of the discussion of China’s export quotas, the terms “bauxite,” “coke,” “fluorspar,” “silicon carbide,” and “zinc” cover the forms of each of these Raw Materials listed in Chart of Raw Materials Subject to Export Licensing and Quotas (Exhibit JE-6) and in the table in Section III.E.2 below.

<sup>132</sup> *Import and Export Regulations*, Article 39 (Exhibit JE-73).

<sup>133</sup> *2009 Export Licensing List Notice*, Article I(1) (Exhibit JE-22).

<sup>134</sup> *2009 Export Licensing List Notice*, Article I(2) (Exhibit JE-22).

<sup>135</sup> *Foreign Trade Law*, Articles 16-17, 19 (Exhibit JE-72).

to an export quota administration.<sup>136</sup> Under the *Foreign Trade Law*, MOFCOM is the government agency responsible for the centralized administration of all export quotas for China. As such, MOFCOM is responsible for setting the total amount of export quotas of the following year no later than October 31 of each year, distributing export quotas, evaluating applications for export quotas, and determining whether to grant quotas.<sup>137</sup> Furthermore, MOFCOM, in collaboration with Customs, is responsible for formulating, adjusting, and publishing a catalog listing all goods subject to export quota.<sup>138</sup>

102. MOFCOM must approve the exportation of the goods listed in the catalog as subject to quota before they can be exported.<sup>139</sup> Entities that are approved to export under the quotas are issued a certificate of quota. Only after an exporter obtains a certificate of quota can that exporter seek export clearance from Customs by presenting the certificate of quota (along with other required documentation, including an export license) to Customs for declaration and examination.<sup>140</sup> Exporting goods subject to restricted exportation without approval or beyond the scope that is approved, *e.g.*, where there is an export prohibition or at levels exceeding the designated quotas, is subject to investigation and potential criminal and administrative penalties including the penalties applicable to smuggling, invalidation of any applicable licenses, and suspension or revocation of the right to engage in foreign trade for up to three years.<sup>141</sup>

103. Quota administering authorities that distribute quotas exceeding their authority are subject to penalties including warnings and suspension or termination of their right to distribute quotas.<sup>142</sup>

## 2. Goods Subject to Export Quotas

104. As set forth in Section III.D above, MOFCOM, in collaboration with other relevant departments of the State Council, is required to publish the catalog of goods subject to restricted

---

<sup>136</sup> *Import and Export Regulation*, Article 36 (Exhibit JE-73); *Export Quota Measures*, Article 1 (Exhibit JE-76).

<sup>137</sup> *Foreign Trade Law*, Article 18 (Exhibit JE-72); *Import and Export Regulations*, Article 37-39 (Exhibit JE-73).

<sup>138</sup> *Foreign Trade Law*, Article 18 (Exhibit JE-72), *Import and Export Regulations*, Article 37-39 (Exhibit JE-73).

<sup>139</sup> *Foreign Trade Law*, Article 19 (Exhibit JE-72).

<sup>140</sup> *Import and Export Regulations*, Article 41 (Exhibit JE-73); *See Export Quota Measures*, Article 25 (providing that enterprises that receive a certificate of quota must then apply for an export license).

<sup>141</sup> *Foreign Trade Law*, Articles. 61, 64 (Exhibit JE-72); *Import and Export Regulations*, Articles. 64, 65 (Exhibit JE-73); *Export Quota Measures*, Article 26 (Exhibit JE-76).

<sup>142</sup> *Export Quota Measures*, Article 29 (Exhibit JE-76); *Quota Bidding Measures*, Article 36 (Exhibit JE-77); *Quota Bidding Implementation Rules*, Article 32 (Exhibit JE-78).

exportation, including export quotas, within 21 days of the list taking effect.<sup>143</sup> The catalog effective for the year 2009 includes the Raw Materials listed in the following table as subject to export quotas.<sup>144</sup> In addition, the *2009 Export Licensing List Notice* identifies whether the export quota for each material is allocated directly or through quota bidding as shown in the table below.<sup>145</sup>

<b>Raw Material</b>	<b>Product Name Short Form</b>	<b>Chinese Commodity Code No.</b>	<b>2009 Export Licensing List<sup>146</sup> Item No.</b>	<b>Quota Regime (Direct or Quota Bidding)</b>
Bauxite	Refractory Clay	2508.30.00.00	18	Quota Bidding
	Aluminum ores and concentrates	2606.00.00.00	18	Quota Bidding
Coke	Coke	2704.00.10.00	27	Direct
Fluorspar	Met-spar	2529.21.00.00	21	Quota Bidding
	Acid-spar	2529.22.00.00	21	Quota Bidding
Silicon carbide	Silicon carbide	2849.20.00.00	32	Quota Bidding
	Crude silicon carbide	3824.90.99.10	32	Quota Bidding
Zinc	Zinc ores and concentrates	2608.00.00.01	23	Direct
		2608.00.00.90	23	Direct

<sup>143</sup> *Import and Export Regulations*, Article 35 (Exhibit JE-73); *Export Quota Measures*, Article 7 (Exhibit JE-76).

<sup>144</sup> *2009 Export Licensing List*, attachment to *2009 Export Licensing List Notice* (Exhibit JE-22).

<sup>145</sup> *2009 Export Licensing List Notice* (Exhibit JE-22). See also Chart of Raw Materials Subject to Licensing and Quotas (Exhibit JE-6).

<sup>146</sup> Exhibit JE-22.

### 3. Export Quota Amounts

105. China’s measures also direct MOFCOM to determine the total amount of the annual export quota for each good subject to export quotas and to announce the total amount of the annual export quota for each product by October 31 of the previous year.<sup>147</sup> Consistent with this directive, in October 2008, MOFCOM published the 2009 export quota amounts for several products including bauxite, fluorspar, and silicon carbide.<sup>148</sup> The 2009 export quota amounts for these products are shown in the following table:

Raw Material	Product Name Short Form	Chinese Commodity Code No.	2009 Quota Amounts (metric tons)
Bauxite	“Refractory Clay”	2508.30.00.00	930,000
	“Aluminum ores and concentrates”	2606.00.00.00	
Fluorspar	“Met-spar”	2529.21.00.00	550,000
	“Acid-spar”	2529.22.00.00	
Silicon carbide	“Silicon carbide”	2849.20.00.00	216,000
	“Crude silicon carbide”	3824.90.99.10	

106. For the export quotas on bauxite and fluorspar, China did not allocate the full amount of the quota in 2009. China allocated only half (465,000 metric tons) of the export quota on bauxite, and 350,000 metric tons of the export quota on fluorspar.

107. With respect to the export quotas on coke and zinc, however, China has not published the total annual amounts of the quota in advance of allocating the quota.

108. With respect to coke, China instead publishes notices during the year announcing that

<sup>147</sup> *Import and Export Regulations*, Article 38 (Exhibit JE-73); *Export Quota Measures*, Articles 9-11 (Exhibit JE-76).

<sup>148</sup> *2009 Export Quota Amounts* (Exhibit JE-79).

MOFCOM is distributing the export quota on coke to specific enterprises listed in those notices.<sup>149</sup> Only by reviewing those notices at the end of the year and tallying the quantities of coke that were allocated during the year, can the total amount of the coke export quota for the year be assessed. According to such notices issued in 2009, the total quantity of coke allocated to specific enterprises for export was 13,092,000 metric tons.

109. China has not published any quota amount in relation to the export quota on zinc in 2009.

#### **4. Types of Export Quotas**

##### **a. Export Quotas Allocated Directly**

110. As set forth above, China administers the export quotas on certain products through “direct allocation.”<sup>150</sup> As relevant to this dispute, China subjects the export of coke and zinc to export quotas that are allocated directly.<sup>151</sup>

111. For these export quotas, MOFCOM is directed to determine the total amount of the quota for each year and in doing so, is directed to take into account certain factors. These factors are: (i) the needs of guaranteeing the safety of the national economy; (ii) the needs of protecting the limited domestic resources; (iii) development planning, objectives and policies of the State on the relevant industries; and (iv) demands on the international and domestic markets, and the production and sales status.<sup>152</sup> The annual export quotas apply for the calendar year period, expiring on December 31 of the year for which the quotas are promulgated.

112. In addition, MOFCOM is directed to administer an application process for these export quotas. As part of that process, only enterprises that have the “license or qualification for import and export management and whose economic activities did not violate laws and regulations in the most recent three years” may apply for a quota.<sup>153</sup>

113. Enterprises under local administration are required to submit their applications for export quotas to the relevant local authorities, which review such applications and report to MOFCOM on the applications received. Enterprises under central administration submit their applications for export quota directly to MOFCOM. MOFCOM accepts the applications filed by enterprises

---

<sup>149</sup> 2009 First Batch Coke Export Quota for Chinese Enterprises (Exhibit JE-80); 2009 Second Batch Coke Export Quota for Chinese Enterprises (Exhibit JE-81); 2009 Second Batch Coke Export Quotas for FIEs (Exhibit JE-83); 2009 First Batch Coke Export Quota for FIEs (Exhibit JE-82).

<sup>150</sup> *Import and Export Regulations*, Article 39 (Exhibit JE-73).

<sup>151</sup> 2009 Export Licensing List Notice (Exhibit JE-22).

<sup>152</sup> *Export Quota Measures*, Article 10 (Exhibit JE-76). MOFCOM may also adjust the annual quota amount by September 30 of the preceding year.

<sup>153</sup> *Export Quota Measures*, Article 13 (Exhibit JE-76).

under central administration and the applications reviewed and submitted by the local administrative authorities.<sup>154</sup>

114. MOFCOM then distributes the quotas to enterprises under central administration and distributes quotas to local administrative authorities, which further distribute those quotas to the enterprises within their respective areas.<sup>155</sup>

115. In order to guide the quota allocation process, MOFCOM and the local administrative authorities are directed to take into consideration the following factors: (i) the export performance of the particular good; (ii) the utilization rate of the export quota; (iii) the “business management capacity” of the applicant; and (iv) the “production scale and resources status of the applicant enterprise or area” during the previous three years.<sup>156</sup>

116. The export quotas allocated to enterprises may be adjusted by MOFCOM or the local authorities under the following circumstances: (i) major changes in the international market; (ii) major changes in domestic resources; or (iii) “obvious imbalances in the quota-use-pace” between enterprises or areas.<sup>157</sup> To that end, the Export Quota Measures direct the local administrative authorities to inspect the utilization rate of export quotas and, where prescribed utilization rate requirements are not met, to redistribute quota amounts.<sup>158</sup>

#### **i. Export Quotas on Coke**

117. The export quota for coke is allocated directly.<sup>159</sup> Rather than publish the coke quota amount for a given year in advance, China issues notices during the year announcing that certain “batches” of the coke export quota are being allocated to specific enterprises.<sup>160</sup> In addition, China allocates and administers the quota separately for Chinese enterprises compared to foreign-invested enterprises. In other words, China issues notices during the year announcing the allocation of batches of the coke export quota for Chinese enterprises.<sup>161</sup> Separately, China also publishes notices announcing the allocation of batches of the coke export quota to foreign-

---

<sup>154</sup> *Export Quota Measures*, Article 14 (Exhibit JE-76).

<sup>155</sup> *Export Quota Measures*, Article 17 (Exhibit JE-76).

<sup>156</sup> *Export Quota Measures*, Article 19 (Exhibit JE-76).

<sup>157</sup> *Export Quota Measures*, Article 20 (Exhibit JE-76).

<sup>158</sup> *Export Quota Measures*, Article 21 (Exhibit JE-76).

<sup>159</sup> *2009 Export Licensing List Notice*, Article I(1) (Exhibit JE-22).

<sup>160</sup> *2009 First Batch Coke Export Quota for Chinese Enterprises* (Exhibit JE-80); *2009 Second Batch Coke Export Quota for Chinese Enterprises* (Exhibit JE-81); *2009 Coke Export Quota Application Procedures* (Exhibit JE-85).

<sup>161</sup> *2009 First Batch Coke Export Quota for Chinese Enterprises* (Exhibit JE-80); *2009 Second Batch Coke Export Quota for Chinese Enterprises* (Exhibit JE-81)

invested enterprises.<sup>162</sup> China also does not publish notices announcing when it will allocate the various batches of the coke export quota during the year or how many batches will be allocated in a given year.

**(a) Application Process**

118. China requires enterprises to apply to receive an allocation of coke under the export quota for a given year in October of the previous year. As part of that application process, China requires enterprises to satisfy certain criteria in order to be eligible to receive an allocation under the quota. Applicant enterprises who do not satisfy the requisite criteria are not permitted to export coke under the quota. In addition, MOFCOM administers different application processes for Chinese enterprises and foreign-invested enterprises.<sup>163</sup>

***Chinese Enterprises***

119. MOFCOM issued procedures governing the coke quota application process in 2009 for Chinese enterprises. That measure provides the requirements that enterprises must satisfy in order to be eligible to receive an allocation under the quota. With respect to production enterprises, the applicants are required to:

- (i) be registered pursuant to the national legislation on economic, industrial and trade management administration, qualifying for import and export operations or proceeding with the registration as a foreign trade operator, having the credentials of an independent legal person;
- (ii) have supplied for export at least 250,000 metric tons of coke in 2008 in accordance with certain relevant standards;
- (iii) in case the enterprise has not fulfilled criteria (ii) above, have exported an average yearly volume of at least 200,000 metric tons of coke during the period 2005-07;
- (iv) be producing products complying with the national standards in force and being ISO 9000 certified;
- (v) be complying with the national and local governments' relevant regulations including those relating to employment;
- (vi) be complying with certain environmental standards and regulations; and

---

<sup>162</sup> See 2009 First Batch Coke Export Quota for FIEs (Exhibit JE-82); 2009 Second Batch Coke Export Quota for FIEs (Exhibit JE-83).

<sup>163</sup> See opening paragraph of 2009 Coke Export Quota Application Procedures (Exhibit JE-85)..

(vii) having no record of legal or regulatory infringements.<sup>164</sup>

120. With respect to Chinese trading companies, China requires such enterprises to also satisfy requirements (i), (iv), (v), and (vii) set out above in respect of production enterprises. However, China imposes prior export experience requirements that differ from those imposed on production enterprises. Specifically, trading enterprises are required to have exported an average yearly volume of at least 200,000 metric tons of coke during the period 2005-07, or have supplied for export an average volume of at least 400,000 metric tons of coke during the period 2005-07. In addition to prior export experience, trading companies are required to have a registered capital of at least RMB 50 million.<sup>165</sup>

121. China also requires Chinese enterprises applying to export coke under the quota to submit the following documents:

(i) business license, registered Foreign Trade Operator Registration Form or the PRC Import and Export Compliance Certificate and the Customs number and Identification number;

(ii) ISO 9000 quality management system certificate;

(iii) supporting documents issued by the labor and social insurance administration confirming the enterprises' participation in certain social programs;

(iv) for production companies:

(a) if the products are purchased and exported by a trading company, the company must submit the original VAT invoice drawn up by the National Tax Bureau for export sales, a copy of the export Customs declarations, and a copy of export verification records;

(b) if the products are exported via an export agent company, the company must submit the original export invoice, a copy of the Customs declaration, a copy of export verification records, and a copy of evidence showing that the goods are exported via an export agent; and

(c) documents certifying compliance with relevant environmental protection laws;

(v) for export companies: the original VAT invoice or the original export invoice, a

---

<sup>164</sup> 2009 Coke Export Quota Application Procedures, Section I(1) (Exhibit JE-85).

<sup>165</sup> 2009 Coke Export Quota Application Procedures, Section I(1) (Exhibit JE-85).

copy of the export customs declaration, a copy of the export verification record and a copy of proof of products being exported via an export agent;

- (vi) other trading (distribution) companies must also provide the following pieces of evidence and supporting documents from the most recent three years (2005-2007):
- (a) if the products are purchased and exported by a trading company, the company must submit the original VAT invoice drawn up by the National Tax Bureau for export sales, a copy of the export Customs declarations, and a copy of export verification records;
  - (b) if the products are exported via an export agent company, the company must submit the original export invoice, a copy of the Customs declaration, a copy of export verification records, and a copy of evidence showing that the goods are exported via an export agent;

New applicants for a coke export quota are required to submit all of the aforementioned documents for the past three years, while enterprises that have previously been allocated a portion of a coke export quota must submit the bulk of the documents for only the past year.<sup>166</sup>

### ***Foreign-Invested Enterprises***

122. Foreign-invested enterprises seeking to export coke are subject to a different regime than wholly Chinese-owned companies.<sup>167</sup> The regime specific to foreign-invested enterprises sometimes overlaps with the application process applicable to Chinese enterprises. As such, China subjects foreign-invested enterprises both to the application procedures and eligibility criteria set forth in the previous section and to additional requirements.

123. The measures allocating portions of the quotas to foreign-invested enterprises in 2009 make clear that foreign-invested enterprises are subject to an application and approval process for the coke export quota. The notices issuing the first and second batch of the coke export quota to foreign-invested enterprises state that if necessary, the local authorities and MOFCOM should reexamine the “export scale” of foreign-invested enterprises as set forth in their applications.<sup>168</sup> Thus, the notices make reference to an application process for foreign-invested enterprises seeking to export coke under the quota. While those application procedures do not appear to be published for 2009, China has published coke export quota application procedures for foreign-invested enterprises in 2010. These measures establish that in administering the 2010 coke

---

<sup>166</sup> 2009 Coke Export Quota Application Procedures, Article III (Exhibit JE-85).

<sup>167</sup> See 2009 Coke Export Quota Application Procedures (Exhibit JE-85).

<sup>168</sup> See 2009 First Batch Coke Export Quota for FIEs (Exhibit JE-82); 2009 Second Batch Coke Export Quota for FIEs (Exhibit JE-83).

export quota for foreign-invested enterprises, the relevant Chinese authorities examined the applicants' prior exports.<sup>169</sup>

**(b) Involvement of the China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters**

124. The CCCMC is a membership organization whose members must be legally listed and registered entities engaged in the import and export, or other trade-related activities, of metals, minerals, and chemicals in China.<sup>170</sup> According to the most recent data, the CCCMC has more than 4000 members,<sup>171</sup> consisting of foreign trade companies, trade and manufacturing companies, joint venture companies, private enterprises and research institutes operating businesses in ferrous metals, non-ferrous metals, non-metallic minerals and products, construction materials, coal and coal products, oil and oil products, chemicals, plastics, fine chemicals, agro-chemicals, rubber products, etc.<sup>172</sup>

125. The *2009 Coke Export Quota Application Procedures* assigns the CCCMC a vital role in the application process for the coke export quota, including reviewing and evaluating the applications of enterprises seeking to export under the quota.

---

<sup>169</sup> The measures administering the 2010 coke export quota allocation to foreign-invested enterprises also provide for an application process for such enterprises to be allocated a portion of the quota. In allocating the first batch of coke export quotas to foreign-invested enterprises for 2010, MOFCOM listed several enterprises in Shanxi and Yunnan provinces and allocated certain amounts under the export quota to each specific enterprise. *2010 First Batch Coke Export Quotas for FIEs* (Exhibit JE-128). The measure goes on to provide that the relevant administrative departments of each province should notify the foreign-invested enterprises in their jurisdiction that have been allocated portions of the quota to submit the relevant application materials to MOFCOM by March 31. Pursuant to this notice, the department of commerce of Shanxi Province issued a notice specifying the procedures for the foreign-invested enterprises to apply to be able to export under the quota. *Shanxi Province Procedures for First Batch of 2010 Coke Export Quotas for FIEs* (Exhibit JE-129). The measure specifies that foreign-invested enterprises exporting coke must submit certain documents to the local department of commerce *in addition to* those documents outlined above that wholly Chinese-owned enterprises are required to submit. The additional documents that foreign-invested enterprises must submit are: (1) relevant permits by the provincial coking industry administrative agencies; (2) foreign-invested enterprise certificates and permits that have passed annual inspections; and (3) certificates of registration of shareholders. The applications must be submitted to MOFCOM and courtesy copies must also be submitted to the CCCMC. Finally, MOFCOM's notice allocating the quota to enterprises also provides some guidance regarding the application process specifying that foreign-invested enterprises should be allocated coke quota amounts for export based on their prior export volumes and values in prior years. *2010 First Batch Coke Export Quotas for FIEs* (Exhibit JE-128).

<sup>170</sup> *2001 CCCMC Charter*, Article 8 (Exhibit JE-87). For additional details regarding the CCCMC, see Section III.G.

<sup>171</sup> CCCMC Website Pages (Exhibit JE-88).

<sup>172</sup> CCCMC Website Pages (Exhibit JE-88); CCCMC Brochure (Animal Science Exhibit 99-4) at 2, paras. 2 and 3 (Exhibit JE-89).

126. Companies under central administration are required to submit their applications to MOFCOM and to submit a copy to the CCCMC.<sup>173</sup> Enterprises under local administration are required to submit their applications to the relevant local trade authority. These local authorities examine the applications, conduct a preliminary examination of whether the applicants satisfy the requisite conditions, and submit to MOFCOM and CCCMC a list of companies that fulfil the necessary requirements.

127. MOFCOM then delegates to CCCMC and the China Coking Industry Association the responsibility for examining whether the companies applying to export coke under the quota have satisfied the requisite eligibility criteria. The CCCMC must formulate and send its opinion regarding the applications to MOFCOM.<sup>174</sup> Subsequently, MOFCOM publishes the list of all companies having applied for coke exports quotas as well as the list of those complying with the criteria “on the basis of the compliance advice given by CCCMC.”

### (c) Allocation of Batches of the Coke Export Quota

128. **2009 Export Quota.** On December 26, 2008, China published a notice allocating the first batch of the coke export quota to specific Chinese enterprises. The total amount of coke allocated to Chinese enterprises in the first batch was 5,780,000 metric tons.<sup>175</sup> Subsequently, on June 29, 2009, China allocated the second batch of coke export quotas to specific Chinese enterprises. The total amount allocated was 6,130,000 metric tons.<sup>176</sup> China did not publish any other measures allocating additional amounts of the coke export quota to Chinese enterprises in 2009. Accordingly, the total quantity of the coke export quota allocated to Chinese enterprises for 2009 was 11,910,000 metric tons.

129. With respect to foreign-invested enterprises, China allocated the first batch of the 2009 coke export quota to foreign-invested enterprises in January 2009. The total amount allocated in that batch was 591,000 metric tons.<sup>177</sup> Subsequently, in September 2009, China announced the allocation of the second batch of the coke export quota for foreign-investment enterprises. The total amount allocated in the second batch was also 591,000 metric tons.<sup>178</sup> China did not publish any other notices allocating additional amounts of the coke export quota to foreign-invested enterprises in 2009. Accordingly, the total quantity of the coke export quota allocated to foreign-invested enterprises for 2009 was 1,182,000 metric tons.

130. Thus, in 2009, the total quantity of coke allocated for export to all enterprises – Chinese

---

<sup>173</sup> *2009 Coke Export Quota Application Procedures*, Article II (Exhibit JE-85).

<sup>174</sup> *2009 Coke Export Quota Application Procedures*, Article II (Exhibit JE-85).

<sup>175</sup> *2009 First Batch Coke Export Quota for Chinese Enterprises* (Exhibit JE-80).

<sup>176</sup> *2009 Second Batch Coke Export Quota for Chinese Enterprises* (Exhibit JE-81).

<sup>177</sup> *2009 First Batch Coke Export Quota for FIEs* (Exhibit JE-82).

<sup>178</sup> *2009 Second Batch Coke Export Quota for FIEs* (Exhibit JE-83).

and foreign-invested enterprises – was 13,092,000 metric tons.

## ii. Export Quotas on Zinc

131. China also imposes export quotas on zinc.<sup>179</sup> However, unlike the administration of export quotas on coke, China did not publish any measures in 2009 announcing the quantities of zinc that may be exported under the quota. China also has not published any measures setting forth application procedures for enterprises seeking to export under the quota. As a result, there is no information available regarding either the amount of the zinc export quota or how it is allocated.

### b. Quotas Allocated through Bidding

132. China allocates the export quotas on bauxite, fluorspar, and silicon carbide through a bidding process.<sup>180</sup> China has promulgated a series of regulations setting forth the basic rules and procedures governing the export quota bidding system. These measures were adopted on the basis of China’s *Foreign Trade Law*, which provides that “the state applies quota system . . . to the management of goods subject to . . . export restriction,”<sup>181</sup> and pursuant to China’s *Import and Export Regulations*, which provides that export “quotas may be allocated . . . through bidding,”<sup>182</sup> and that “the administrative departments of export quotas . . . shall, on the basis of the provisions of the present Regulation, formulate specific measures of administration to lay out clear instructions on the qualifications of the applicants . . .”<sup>183</sup>

133. The *Quota Bidding Measures*,<sup>184</sup> in conjunction with the *Quota Bidding Implementation Rules*,<sup>185</sup> outline the regulatory structure and certain basic rules and procedures governing the quota bidding process. In addition, MOFCOM has promulgated regulations setting forth the procedures for specific rounds of bidding for the relevant products.<sup>186</sup>

134. The *Quota Bidding Measures* define quota bidding as the procedure through which “an export enterprise may obtain with certain compensation the quotas”, through “voluntary bidding.”<sup>187</sup> The *Quota Bidding Measures* further provide that goods can be subject to quota

---

<sup>179</sup> See *2009 Export Licensing List Notice* (Exhibit JE-22).

<sup>180</sup> See *Chart of Raw Materials Subject to Export Licensing and Quotas* (Exhibit JE-6).

<sup>181</sup> See *Foreign Trade Law*, Article 19 (Exhibit JE-72).

<sup>182</sup> See *Import and Export Regulations* Article 39 (Exhibit JE-73).

<sup>183</sup> See *Import and Export Regulations*, Article 44 (Exhibit JE-73).

<sup>184</sup> *Quota Bidding Measures* (Exhibit JE-77).

<sup>185</sup> *Quota Bidding Implementation Rules* (Exhibit JE-78).

<sup>186</sup> *2009 First Round Bidding Invitation* (Exhibit JE-90); *2009 Second Round Bidding Invitation* (Exhibit JE-91).

<sup>187</sup> *Quota Bidding Measures*, Article 2 (Exhibit JE-77).

bidding where (a) they are “non-renewable, staple-resource-type” goods; (b) they are “well-positioned on the international market and upon the export volume of which the impact of price fluctuation is relatively little”; (c) they are in “oversupply, supplied in a relatively decentralized way and liable to be dumped at low price, thereby giving rise to anti-dumping prosecution in foreign countries”; or (d) they must be the subject of an export quota on the basis of international treaties with other countries that “have imposed relevant restrictions.”<sup>188</sup>

135. China requires entities seeking to export materials subject to export quota bidding to bid for the right to export. The bidding procedure that applies depends on the type (or “mode”) of bidding procedure to which the material is subject. The two modes of bidding are public bidding and negotiated bidding. China subjects bauxite, fluorspar, and silicon carbide to public bidding.

136. China prescribes strict rules governing the bidding process. As set forth below, enterprises seeking to export the materials subject to the bidding procedure are required *inter alia* to satisfy certain eligibility criteria. In addition, these enterprises submit a bid price and bid quantity for the material they are seeking to export in conformity with the rules set forth by the relevant entities. China then awards portions of the quota to certain enterprises pursuant to the procedures detailed below. These enterprises must then pay a “total award price” in order to export.

137. An enterprise that satisfies the procedures related to the export quota bidding process and is awarded a portion of the export quota, must still apply for an export license in order to export under the quota. Article 32 of the *Quota Bidding Measures* provides that after being awarded any quota, “an enterprise shall apply to the designated licensing authority for an export license within the quota’s validity period.”<sup>189</sup> This provision further provides that a list of successful bidding enterprises and their award quantities in quota bidding will be forwarded to the relevant licensing authorities.<sup>190</sup> Finally, Article 33 of the *Quota Bidding Measures* makes clear that the issuance of licenses under these circumstances is subject to China’s Regulations on the Administration of Export Licenses.<sup>191</sup> Section III.F discusses the requirements and procedures of China’s export licensing regime in greater detail.

#### **i. Relevant Entities and Involvement of the CCCMC**

138. MOFCOM is responsible for the centralized administration of export quota bidding,

---

<sup>188</sup> *Quota Bidding Measures*, Article 6 (Exhibit JE-77).

<sup>189</sup> *Quota Bidding Measures*, Article 32 (Exhibit JE-77); *See also Quota Bidding Implementation Rules*, Article 29 (Exhibit JE-78).

<sup>190</sup> *Quota Bidding Measures*, Article 32 (Exhibit JE-77). *See also Quota Bidding Implementation Rules*, Article 29, (Exhibit JE-78).

<sup>191</sup> *Quota Bidding Measures*, Article 7 (Exhibit JE-77). *See also Quota Bidding Implementation Rules*, Articles 29-30 (Exhibit JE-78).

including determining the types of goods that are subject to export quota bidding and the total quantity of export quotas to be allocated through bidding.

139. To that end, MOFCOM has set up an Export Quota Bidding Committee, (the “Bidding Committee”). The *Quota Bidding Measures* provide that MOFCOM shall be responsible for “leading and supervising the work of bidding invitation through the” Bidding Committee.<sup>192</sup> This provision further provides that the Bidding Committee “shall consist of a leader of, and personnel from the relevant departments and bureaus under” MOFCOM.<sup>193</sup>

140. In addition, the *Quota Bidding Measures* also provide that the Bidding Committee “shall, according to the types of commodities subject to bidding, establish the corresponding offices of quota bidding for export commodities under the relevant chambers of commerce for import and export,” known as Bidding Offices.<sup>194</sup> The Bidding Offices are composed of representatives of the CCCMC, the China Association of Enterprises with Foreign Investment and the “authority responsible for the coordination of the relevant industry.” The head of the CCCMC also serves as the director of the Bidding Offices.<sup>195</sup> The *Quota Bidding Implementation Rules* further solidify the role of the CCCMC, providing that the “relevant chamber of commerce for import and export shall be responsible for the daily operation of the bidding office.”<sup>196</sup>

141. Both the Bidding Committee and the Bidding Offices, in their respective capacities, have responsibility over virtually every aspect of the administration of the export quota bidding procedure, including evaluating the applications of enterprises that apply to participate in the bidding and establishing the minimum bid price and bid quantity.

142. The Bidding Committee’s responsibilities include directing export quota biddings. The Bidding Committee also sets a base or minimum bid price and invalidates bid prices that are “excessively high and obviously deviate from the law of price”.<sup>197</sup> The Bidding Committee is also authorised to set a maximum and minimum quantity that each enterprise may bid.<sup>198</sup>

143. The Bidding Offices’ – and therefore the CCCMC’s – responsibilities in the administration of the export quota bidding process include:

---

<sup>192</sup> *Quota Bidding Measures*, Article 7 (Exhibit JE-77).

<sup>193</sup> *Quota Bidding Measures*, Article 7 (Exhibit JE-77).

<sup>194</sup> *Quota Bidding Measures*, Article 9 (Exhibit JE-77).

<sup>195</sup> *Quota Bidding Measures*, Article 9 (Exhibit JE-77); *Quota Bidding Implementation Rules*, Article 4 (Exhibit JE-78).

<sup>196</sup> *Quota Bidding Implementation Rules*, Article 5 (Exhibit US-78).

<sup>197</sup> *Quota Bidding Measures*, Article 16 (Exhibit JE-77); *Quota Bidding Implementation Rules*, Article 7 (Exhibit JE-78).

<sup>198</sup> *Quota Bidding Measures*, Article 17 (Exhibit JE-77); *Quota Bidding Implementation Rules*, Article 8 (Exhibit JE-78).

- (i) drafting a plan of quota bidding for a particular good, taking into consideration the views expressed by the relevant industry;
- (ii) reexamining whether the bidders satisfy the requisite qualifications;
- (iii) participating in the opening and the evaluation of the bids;
- (iv) inspecting the proper collection of the security deposits and of the total award price;
- (v) accepting and approving applications for assignment of unused quotas;
- (vi) tracking and checking the export quota holders' use of their quotas, as well as the situation in the market and the exports of the relevant commodities and reporting the relevant information to the Bidding Committee;
- (vii) printing the relevant award certificates and issuing the same in accordance with the relevant regulations; and
- (viii) handling any other bidding-related matters entrusted by the Bidding Committee of MOFCOM.

The Bidding Offices are also authorized to submit to the Bidding Committee their opinions on the qualifications that bidders should have for future bidding procedures.<sup>199</sup>

144. Thus, China assigns the CCCMC a direct role in the administration of the export quota bidding regime. This is reinforced by the Charter of the CCCMC, which provides that its functions include responsibility, with MOFCOM's authorization, for the concrete implementation tasks of inviting bids for export quotas.<sup>200</sup>

## ii. Eligibility Criteria

145. In order to qualify to participate in quota bidding, enterprises must apply and, as part of that application, must demonstrate that they satisfy certain eligibility criteria. Only enterprises that satisfy the requisite criteria are eligible to participate in the export quota bidding process and therefore to receive a portion of the quota for export.<sup>201</sup>

---

<sup>199</sup> *Quota Bidding Measures*, Article 10 (Exhibit JE-77); *Quota Bidding Implementation Rules*, Article 5 (Exhibit JE-78).

<sup>200</sup> 1994 CCCMC Charter, Article 6(6) (Exhibit JE-86); 2001 CCCMC Charter, Article 6(6) (Exhibit JE-87); *See also* Charter of the China Association of Enterprises with Foreign Investment, Article 6(4), providing that one of that organization's functions is to "organize and coordinate the participation of members in calls for bids for export product quotas" (Exhibit JE-92).

<sup>201</sup> *Quota Bidding Implementation Rules*, Article 6 (Exhibit JE-78).

146. The eligibility criteria that apply depend on the type (or “mode”) of bidding procedure to which the material is subject. As set forth above, the mode of bidding that applies to the export quotas on bauxite, fluorspar, and silicon carbide is public bidding.

147. The *Quota Bidding Measures*, in conjunction with the *Quota Bidding Implementation Rules*, set forth certain general eligibility criteria that bidders must satisfy. MOFCOM subsequently issued regulations governing the specific rounds of bidding in 2009. Those regulations provide further detail regarding the criteria that bidders must satisfy in order to export.<sup>202</sup> As will be discussed below, China also establishes different eligibility criteria for foreign-invested enterprises and wholly Chinese-owned enterprises.

148. The general criteria in the *Quota Bidding Measures* provide that all enterprises seeking to export, including foreign-invested enterprises must be:

- (i) qualified for engaging in export;
- (ii) registered with the business administration authority;
- (iii) members of the relevant chamber of commerce for import and export (in case of foreign-invested enterprises, members of China Association of Enterprises with Foreign Investment); and
- (iv) have exported or supplied for export volumes of the relevant commodity that “reach[] a certain level.”<sup>203</sup>

The *Quota Bidding Measures* do not provide further guidance on the term “certain level” or explain what quantity of export or export supply would be sufficient to satisfy this requirement. Article 12 of the *Quota Bidding Measures* simply provides that a bidder’s qualifications shall be examined preliminarily by the relevant local bureau of MOFCOM. The enterprises’ qualifications are subsequently reexamined by the relevant Bidding Office, which issues its opinion regarding whether the enterprises satisfy the requisite qualifications to the Bidding Committee.<sup>204</sup>

149. The *Quota Bidding Implementation Rules* reinforce many of the qualifications set forth in the *Quota Bidding Measures* and also add two additional criteria.<sup>205</sup> First, they require that a

---

<sup>202</sup> 2009 First Round Bidding Invitation (Exhibit JE-90); 2009 Second Round Bidding Invitation (Exhibit JE-91).

<sup>203</sup> *Quota Bidding Measures*, Article 11, (Exhibit JE-77).

<sup>204</sup> *Quota Bidding Measures*, Article 12 (Exhibit JE-77).

<sup>205</sup> *Quota Bidding Implementation Rules*, Article 6 (I), (Exhibit JE-78).

bidder must “have reached certain levels in terms of registered capital”.<sup>206</sup> Second, they provide that “other enterprises that satisfy the relevant government requirements and have been approved by MOFTEC may participate in public biddings.”<sup>207</sup> The measure does not provide further elaboration regarding which companies would be permitted to participate in public biddings under this last category. With respect to the registered capital requirement, China has issued measures governing individual rounds of export quota bidding, which elaborate on the eligibility criteria including registered capital.

150. With respect to the export quotas applicable to bauxite, fluorspar, and silicon carbide in 2009, China allocated the export quotas in two separate rounds of bidding. For each round of bidding, China issued measures setting forth additional procedures.<sup>208</sup>

151. **Eligibility Criteria for 2009 First Round of Bidding.** In the 2009 First Bidding Invitation, issued by MOFCOM, China set forth additional criteria that bidding enterprises were required to satisfy in order to participate in the bidding. As a general matter, this measure reinforces some of the criteria in the measures outlined above. For example, Article III(I)i of the *2009 First Round Bidding Invitation* provides that a bidding enterprise must have been registered with the appropriate government department, be qualified for importing and exporting, and “possess independent corporate capacity.”<sup>209</sup> The *2009 First Round Bidding Invitation* contains other general criteria related to compliance with environmental and insurance regulations, and labor and social security laws. The measure further specifies that where a bidder is a distribution enterprise, the goods procured by it must be supplied by a manufacturing enterprise that has satisfied all necessary requirements. Finally, the *2009 First Round Bidding Invitation* provides that a bidder may not have been involved in any violations of “relevant national laws and regulations” during the preceding three years.<sup>210</sup>

152. In addition to this provision, other provisions of the *2009 First Round Bidding Invitation* set forth additional criteria that enterprises were required to satisfy in order to qualify to participate in the first round of bidding. These criteria are specific to the material being exported.

153. **Bauxite.** A bidding enterprise must: (1) have a registered capital of RMB 4 million; (2) where the bidder is a trading company, have exported an average annual volume of 1,200 metric tons in the period 2006-2007; and (3) where the bidder is a manufacturing enterprise, have exported an average annual volume of 500 metric tons during the period 2006-07 or an average annual volume of supply for export of 20,000 metric tons during period 2006-07.

---

<sup>206</sup> *Quota Bidding Implementation Rules*, Article 6 (I), (Exhibit JE-78).

<sup>207</sup> *Quota Bidding Implementation Rules*, Article 6 (I), (Exhibit JE-78).

<sup>208</sup> *2009 First Round Bidding Invitation* (Exhibit JE-90); *2009 Second Round Bidding Invitation* (Exhibit JE-91).

<sup>209</sup> *2009 First Round Bidding Invitation*, Article III(I)(i) (Exhibit JE-90).

<sup>210</sup> *2009 First Round Bidding Invitation*, Article III (Exhibit JE-90).

154. **Fluorspar.** A bidding enterprise must: (1) have a registered capital of RMB 5 million; and (2) have achieved an average annual volume of export of 4,000 metric tons during the period 2005-07 or have an average annual volume of supply for export of 10,000 metric tons during the period 2005-07.

155. **Silicon carbide.** A bidding enterprise must: (1) have a minimum registered capital of RMB 4 million; (2) where the bidder is a trading company, have achieved an annual average volume of export of 600 metric tons during the period 2005-07; (3) where the bidder is a manufacturing enterprise, have exported an average annual volume of export of 300 metric tons during the period 2005-07 or have supplied for export an average annual volume of 1,200 metric tons during the period 2005-07; and (4) where the bidder is an export enterprise, the average unit export price of such commodity must exceed \$1,300 per metric ton.

156. Foreign-Invested Enterprises: The *2009 First Round Bidding Invitation* also establishes different rules for the participation of foreign-invested enterprises in the export quota bidding process. In order to qualify to bid, foreign-invested enterprises are required to have been approved by MOFCOM and have a certain export capacity. The relevant measures do not specify, however, the level of export capacity that is considered necessary to qualify to bid.<sup>211</sup>

157. In addition to satisfying these requirements and the additional eligibility criteria set out above, the *2009 First Round Bidding Invitation* also states that MOFCOM will reassess the export experience requirements that foreign-invested enterprises must satisfy for the second round of bidding in 2009.<sup>212</sup> Consistent with this provision, MOFCOM issued new eligibility criteria that foreign-invested enterprises must satisfy in order to participate in the second round of bidding. These eligibility criteria relate primarily to prior export experience.

158. **Eligibility Criteria for 2009 Second Round of Bidding.** In the *2009 Second Round Bidding Invitation*, China states that the eligibility criteria for Chinese enterprises can be found in the 2009 First Round Bidding Invitation. Thus, those criteria did not change for the second round of bidding.<sup>213</sup>

159. By contrast, for foreign-invested enterprises, China sets forth new export experience requirements that such enterprises must satisfy in order to export the materials during the second round of bidding for 2009. While the export experience requirements for the first round of bidding are based on a three-year period as set forth above, the export experience requirements that must be satisfied for the second round of bidding are based only on one year of exports.<sup>214</sup>

---

<sup>211</sup> *2009 First Round Bidding Invitation*, Article III (I)(ii) (Exhibit JE-90).

<sup>212</sup> *2009 First Round Bidding Invitation*, Article III (I)(ii) (Exhibit JE-90).

<sup>213</sup> *2009 Second Round Bidding Invitation*, Article III (Exhibit JE-91).

<sup>214</sup> *2009 Second Round Bidding Invitation*, Article III (Exhibit JE-91).

160. **Bauxite.** A bidding enterprise's export volume in 2008 must have reached 500 metric tons or the volume of supply for export in 2008 must have reached 20,000 metric tons.<sup>215</sup>

161. **Fluorspar.** A bidding enterprise's export volume in 2008 must have reached 1,000 metric tons, or the volume of supply for export must have reached 10,000 metric tons in 2008.<sup>216</sup>

162. **Silicon carbide.** A bidding enterprise's export volume in 2008 must have reached 200 metric tons, or the volume of supply for export must have reached 1,200 metric tons.<sup>217</sup>

### iii. Review of Qualifications

163. The relevant Chinese measures also set forth a two-part process for assessing the qualifications of enterprises seeking to bid for the right to export under the quota.

164. First, the relevant regional, municipal, or provincial office of MOFCOM is directed to preliminarily examine the qualifications of local bidding enterprises and provide the relevant materials to the relevant Bidding Office. The Bidding Office is then directed to reexamine the qualifications of bidding enterprises within the specified period, and report the outcome of such reexamination to the Bidding Committee for examination and approval.<sup>218</sup> As set forth above, the Bidding Office's participation in the evaluation of bidders' criteria makes clear the involvement of the CCCMC, whose head serves as director of the Bidding Office.

165. The relevant Chinese measures also provide a list of documents that must be submitted and reviewed by the relevant authority in order to determine whether an applicant can participate in the bidding process.

166. Specifically, the *2009 First Round Bidding Invitation* requires local enterprises to submit a Statement of Enterprise Applying for Participation in Bidding, which was attached as Appendix 2 to this measure, as well as the Statistics of Qualifications of Bidding Enterprises, which was attached as Appendix 3 to this measure.<sup>219</sup> Additionally, the *2009 First Round Bidding Invitation* also requires the following documents to be submitted:

- (i) a balance sheet and income statement for the most recently completed financial year, together with an audit certificate issued by a certified public accounting firm;

---

<sup>215</sup> *2009 Second Round Bidding Invitation*, Article III(6) (Exhibit JE-91).

<sup>216</sup> *2009 Second Round Bidding Invitation*, Article III(3) (Exhibit JE-91).

<sup>217</sup> *2009 Second Round Bidding Invitation*, Article III(5) (Exhibit JE-91).

<sup>218</sup> *Quota Bidding Measures*, Article 12 (Exhibit JE-77); *See also Quota Bidding Implementation Rules*, Article 15 (Exhibit JE-78); *2009 First Round Bidding Invitation*, Article V(I)1 (Exhibit JE-90); *2009 Second Round Bidding Invitation*, Article IV(2) (Exhibit JE-91).

<sup>219</sup> *2009 First Round Bidding Invitation*, Article V(I)3 (Exhibit JE-90).

(ii) certificates issued by the competent labor and social security departments confirming the timely and full payment of all relevant fees and premiums to the social security and workers' rights funds; and

(iii) for companies producing the raw materials, certificates and environmental monitoring reports confirming their compliance with the Chinese environmental and pollution control rules and regulations.<sup>220</sup>

#### iv. Awarding the Quota

167. In addition to satisfying the eligibility criteria set out above and being approved by MOFCOM to participate in export quota bidding, an enterprise must also be awarded a portion of the export quota as part of the bidding process in order to export.

168. Bidding enterprises are required to submit a bid price and bid quantity in conformity with certain strict rules prescribed by the relevant measures. The bid price represents the amount per metric ton of the relevant material that a bidding enterprise is willing to pay to obtain the right to export the material. The bid quantity represents the quantity of the relevant material that the enterprise intends to export under the quota.

169. The Bidding Committee, which conducts the bidding process, establishes rules governing this element of the process including setting the minimum and maximum bid quantities, and setting the base, or minimum, bid price.<sup>221</sup> In order to be awarded a portion of the quota, the bidding enterprises' bid price must meet or exceed the base bid price that has been set by MOFCOM. Their bid quantities must conform with the rules governing bid quantities including being above the minimum and below the maximum bid quantity.

170. Based on the bidding enterprises' bid prices and bid quantities, the Bidding Committee determines the successful bidding enterprises. The Bidding Committee begins by ranking the bid prices of all qualified bidding enterprises in descending order, and adding up the bid quantities proposed by the bidding enterprises one after another from the beginning of the ranking. When the total bid quantity is equal to the total quantity of quota available, the enterprises whose bid quantities are included in the total quantity of the quota shall be the successful bidding enterprises. If the sum of the bid quantities of the enterprises whose bid prices are equal to or above the base bid price exceeds the quantity of remaining quotas, all of those enterprises are

---

<sup>220</sup> 2009 First Round Bidding Invitation, Article V(1)3.(2) (Exhibit JE-90). See also 2009 Second Round Bidding Invitation, Article IV.1(3)(2) (Exhibit JE-91).

<sup>221</sup> See 2009 First Round Fluorspar Bidding Procedures (Exhibit JE-93); 2009 First Round Bauxite Bidding Procedures (Exhibit JE-94); 2009 First Round Silicon Carbide Bidding Procedures (Exhibit JE-95).

nevertheless awarded a portion of the quota in proportion to their bid quantity.<sup>222</sup>

171. The rules governing the bid price and bid quantity vary depending on whether a material is subject to public bidding or negotiated bidding. As mentioned above, China subjects bauxite, flourspar, and silicon carbide to the public bidding procedures.

172. The Bidding Committee may, but is not required to, determine and announce the base bid price in advance of the bidding “to prevent the occurrence of unreasonably low bid prices. A bidding enterprise may decide its bid price “on its own discretion” provided that it is above the “base bid price” announced by the Bidding Committee. If an enterprise’s bid price is excessively high or “obviously deviates from the law of price,” the enterprise’s bid is treated as invalid.”<sup>223</sup> The relevant measures do not provide additional guidance regarding the criteria for determining whether a bid price should be deemed acceptable.

173. With respect to the bid quantity, China requires that the Bidding Committee set a maximum and minimum bid quantity.<sup>224</sup> However, the measures provide little guidance regarding the guidelines that govern the establishment of the maximum or minimum quantity. For example, the Measures of Quota Bidding merely state that the minimum or maximum bid quantity shall be set “according to the conditions of the particular commodity.”<sup>225</sup> To make clear that the maximum and minimum bid quantity set by the Bidding Committee is binding, the same provision provides that any bid quantity above the maximum or below the minimum “shall be deemed invalid.”<sup>226</sup>

174. While Chinese enterprises may choose their bid quantity between the minimum and maximum at its own discretion, the maximum bid quantity submitted by a foreign-invested enterprises must conform to a strict formula.<sup>227</sup>

#### v. Total Award Price

---

<sup>222</sup> *Quota Bidding Measures*, Article 19 (Exhibit JE-77); *See also Quota Bidding Implementation Rules*, Article 13 (Exhibit JE-78).

<sup>223</sup> *Quota Bidding Measures*, Article 16 (Exhibit JE-77); *See also Quota Bidding Implementation Rules*, Article 7, (Exhibit JE-78).

<sup>224</sup> *Quota Bidding Measures*, Article 17 (Exhibit JE-77).

<sup>225</sup> *Quota Bidding Measures*, Article 17 (Exhibit JE-77). *See also Quota Bidding Implementation Rules*, Article 8 (Exhibit JE-78).

<sup>226</sup> *Quota Bidding Measures*, Article 17 (Exhibit JE-77).

<sup>227</sup> *Quota Bidding Implementation Rules*, Article 8(I) (Exhibit JE-78) (The formula for determining the maximum bid quantity for a foreign-invested enterprise is:  $A=BxZ-C$ , where A is the maximum bid quantity allowed for the company, B is the company's annual export capacity approved by China's Ministry of Commerce, C is the quantity awarded to the company during the current negotiated bidding and Z is the percentage of the quantity offered for the current bidding in the total quantity to be offered for bidding throughout the whole year and must be more than 0, but less than 1).

175. Enterprises that are awarded a portion of the quota for export must satisfy certain other requirements before exporting including payment of a “total award price” and applying for an export license. A successful bidding enterprise’s total award price represents the enterprise’s unit award price multiplied by the enterprise’s unit award quantity.<sup>228</sup> An enterprise’s unit award price is its bid price, and its unit award quantity is its bid quantity. After being awarded a portion of the quota, successful bidding enterprise is required to pay a security deposit, which shall not exceed 20% of the total award price.<sup>229</sup> Subsequently, the enterprise pays the balance of the total award price to a bank account, designated by the Bidding Committee, before applying for an export license.

176. After a successful bidding enterprise pays the total award price, the relevant Bidding Office is required to issue to that enterprise a Certificate Supporting Application for Export License for Commodities Subject to Bidding.<sup>230</sup> This certificate is one of the elements that an enterprise must submit as part of its application for an export license.<sup>231</sup>

#### vi. Material-Specific Bidding Procedures

177. In addition to the rules outlined above, the Bidding Committee also publishes procedures governing each round of export quota bidding for individual materials.

178. The material-specific bidding invitations specify the amount of the quota that will be available for bidding in the particular round at issue, how bidders can submit their bids, the maximum and minimum bid quantities, the procedures for determining the successful bids, and the amount of the security deposit that successful bidding enterprises must pay in order to export.

179. Significantly, with respect to the base bid price, the procedures merely state that “[a] base price of bid is set up for this invitation for bid.”<sup>232</sup> This provision further provides that a bidding enterprise may directly accept the base price for bid determined by the Bidding Invitation Committee. However, the procedures do not set out the actual base bid price. In addition, each of the bidding invitations state that a bid quantity that exceeds the maximum or is lower than the

---

<sup>228</sup> See *Quota Bidding Measures*, Article 20 (Exhibit JE-77); *Quota Bidding Implementation Rules*, Article 14 (Exhibit JE-78).

<sup>229</sup> *Quota Bidding Implementation Rules*, Article 20 (Exhibit JE-78); See also *Quota Bidding Measures*, Article 25 (Exhibit JE-77).

<sup>230</sup> *Quota Bidding Implementation Rules*, Article 21 (Exhibit JE-78); *Quota Bidding Measures*, Article 26 (Exhibit JE-77).

<sup>231</sup> *Quota Bidding Measures*, Article 32-33 (Exhibit JE-77); *Quota Bidding Implementation Rules*, Articles 29-30 (Exhibit JE-78).

<sup>232</sup> *2009 First Round Fluorspar Bidding Procedures* (Exhibit JE-93); *2009 First Round Bauxite Bidding Procedures* (Exhibit JE-94); *2009 First Round Silicon Carbide Bidding Procedures* (Exhibit JE-95).

minimum will be rejected.<sup>233</sup>

180. The material-specific bidding issued by the Bidding Invitation Committee in 2009 provided for the following procedures.

181. **Bauxite.** The first round of public bidding for the 2009 export quota for bauxite was held in December 2008, and the amount of the export quota subject to the bidding was 465,000 metric tons. The Bidding Invitation Committee set the minimum bid quantity at 100 metric tons, and the maximum bid quantity was based on the average annual amount of export goods supplied by the bidding enterprise from 2006 to 2008.<sup>234</sup>

182. **Fluorspar.** The first round of public bidding for the 2009 export quota for fluorspar was held in December 2008. The quantity of the export quota subject to the bidding was 350,000 metric tons. In addition, the Bidding Invitation Committee specified that the minimum bid quantity was 100 metric tons, while the maximum bid quantity was based on the average annual amount of export supplied by the bidding enterprise from 2006 to 2008.<sup>235</sup>

183. **Silicon carbide.** The first round of public bidding for the 2009 export quota on silicon carbide was held in December 2008; the quantity of the export quota that was subject to the bidding was 108,000 metric tons. China set the minimum bid quantity at 100 metric tons, and the maximum bid quantity was based on the average annual amount of export supplied by the bidding enterprise from 2005 to 2007.<sup>236</sup> Subsequently, in September 2009, China held the second invitation for public bidding for 12,000 metric tons of silicon carbide. The minimum bid quantity was set at 100 metric tons and the maximum bid quantity was determined based on the bidding enterprise's yearly average export and supply volumes over the 2006-2008 period.<sup>237</sup>

## 5. Conclusion

184. China subjects the exportation of bauxite, coke, fluorspar, silicon carbide, and zinc to export quotas. The export quotas on coke and zinc are allocated directly, while the export quotas on bauxite, fluorspar, and silicon carbide are allocated through a quota bidding system. As part of these quota administration regimes, China maintains strict control over the enterprises that seek to export these materials as outlined above.

---

<sup>233</sup> 2009 First Round Fluorspar Bidding Procedures (Exhibit JE-93); 2009 First Round Bauxite Bidding Procedures (Exhibit JE-94); 2009 First Round Silicon Carbide Bidding Procedures (Exhibit JE-95).

<sup>234</sup> 2009 First Round Bauxite Bidding Procedures (Exhibit JE-94).

<sup>235</sup> 2009 First Round Fluorspar Bidding Procedures (Exhibit JE-93).

<sup>236</sup> 2009 First Round Silicon Carbide Bidding Procedures (Exhibit JE-95).

<sup>237</sup> 2009 Second Round Silicon Carbide Bidding Procedures (Exhibit JE-131); See also 2009 Announcement of Second Bidding Round for Talc and Silicon Carbide (Exhibit JE-132).

## F. Export Licensing Administration and Requirements

185. China controls and restricts the exportation of bauxite, coke, fluorspar, manganese, silicon carbide, and zinc through an export licensing system that conditions the issuance of licenses and the usage of those licenses in the various ways described below.<sup>238</sup>

### 1. Types of Export Licenses

186. An “export license” is defined in the *Import and Export Regulations* to include the various types of certificates and documents of an export permitting nature that are required by law and administrative guidelines.<sup>239</sup> The term covers both export licenses that are required to export goods subject only to restricted export through licensing and export licenses required to export goods that are also subject to quantitative restrictions in the form of quotas (sometimes called “quota licenses”).<sup>240</sup>

187. There are three types of non-automatic export licenses that may be granted for the exportation of goods subject to restricted exportation. These are:

- (1) “One license per customs house” licenses;
- (2) “One batch, one license” licenses; and
- (3) “Not one batch, one license” licenses.

“One license per customs house” licenses can only be declared at one particular customs house. “One batch, one license” licenses can be used only once during their period of validity. “Not one batch, one license” licenses can be used multiple times within their period of validity, not to exceed twelve times. The “not one batch, one license” licenses may be granted for: goods subject to export license administration to be exported by foreign invested enterprises (FIEs); goods subject to export license administration in the compensation trade; and goods subject to export license administration that are designated for “not one batch, one license” licenses which, in 2009 also included goods subject to the processing trade as well as certain agricultural, energy, and manufactured products.<sup>241</sup>

---

<sup>238</sup> As set forth above, for purposes of the discussion of China’s non-automatic export licensing, the terms “bauxite,” “coke,” “fluorspar,” “manganese,” “silicon carbide,” and “zinc” cover the forms of each of these Raw Materials listed in Chart of Raw Materials Subject to Export Licensing and Quotas (Exhibit JE-6) and in the table in Section III.D.2 above.

<sup>239</sup> *Import and Export Regulations*, Article 43 (Exhibit JE-73).

<sup>240</sup> *Export License Measures*, Article 6 (Exhibit JE-74).

<sup>241</sup> *Export License Measures*, Article 22 (Exhibit JE-74); *2009 Export Licensing List Notice*, Section VI (Exhibit JE-22).

## 2. Application Procedures

### a. License Issuing Entities

188. Exporters intending to export goods subject to export license administration must apply for an export license at the license-issuing agency designated in the *2009 List of Export Licensing Entities*.<sup>242</sup> MOFCOM issued the *2009 List of Export Licensing Entities Notice*<sup>243</sup> on December 10, 2008.

189. The Bureau of Quota License (“License Bureau”) is authorized by MOFCOM to manage the country’s export license issuance work in a uniform way and is responsible to MOFCOM.<sup>244</sup> The License Bureau is responsible for managing, supervising, and inspecting the work of all license issuing entities.<sup>245</sup> The entities authorized to issue export licenses within their respective authorized jurisdictions include: the License Bureau itself; local accredited representatives’ offices under MOFCOM (“Accredited Representatives’ Offices”); and the commercial offices and commissioners’ offices of foreign trade and economic cooperation of all provinces, autonomous regions, municipalities directly under the central government, cities under state planning, and other provincial capital cities authorized by MOFCOM (“Local License Issuing Entities”).<sup>246</sup>

190. The *2009 List of Export Licensing Entities Notice* provides that the Accredited Representatives’ Offices are responsible for issuing export licenses for 33 types of goods, including bauxite, coke, fluor spar, silicon carbide, and certain forms of zinc that are also subject to export quotas. The Local License Issuing Entities are responsible for issuing export licenses for 11 types of goods, including manganese and certain forms of zinc, which are subject only to export licensing. The License Bureau is responsible for issuing export licenses for six types of goods and for all applicant enterprises under the administration of the central government in Beijing.<sup>247</sup>

### b. Application Materials

191. Exporters are required to submit the following documents when applying for an export

---

<sup>242</sup> Exhibit JE-96, Attachment

<sup>243</sup> Exhibit JE-96.

<sup>244</sup> *Export License Measures*, Article 4 (Exhibit JE-74); *Measures for Administration of Licensing Entities*, Article 2 (Exhibit JE-75).

<sup>245</sup> *Export License Measures*, Article 4 (Exhibit JE-74); *Measures for Administration of Licensing Entities*, Article 3 (Exhibit JE-75); *Export Licensing Rules*, Article 2 (Exhibit JE-97).

<sup>246</sup> *Export License Measures*, Article 5 (Exhibit JE-74); *Measures for Administration of Licensing Entities*, Article 4 (Exhibit JE-75); *Export Licensing Rules*, Article 3 (Exhibit JE-97).

<sup>247</sup> *2009 List of Export Licensing Entities Notice*, Articles 1(1) and 2, Attachment at 1-2 (Exhibit JE-96).

license:

- (1) a completed application form that is chopped (stamped or affixed with a seal),<sup>248</sup>
- (2) relevant quota documents or other relevant documents of approval,<sup>249</sup>
- (3) a copy of the export contract,<sup>250</sup>
- (4) the “Entrusted Agency Agreement” if the exporter is not the consignor;<sup>251</sup>
- (5) other materials required by MOFCOM;<sup>252</sup>

and, if it is the first application of the year for the export license:

- (6) the business license of the exporter,<sup>253</sup> and
- (7) the Form of Archival Filing and Registration of Foreign Trade Operators that is chopped, or the Qualification Certificate of the Import and Export Enterprises of China, or a photocopy of the certificate of approval for FIEs.<sup>254</sup>

### 3. Issuance of Export Licenses

192. Pursuant to the *Export License Measures*, license issuing entities shall issue export licenses in light of the provisions of Chapter III of the *Export License Measures* on the basis of the scope provided in *2009 Export Licensing List Notice* and *2009 List of Export Licensing Entities Notice*.<sup>255</sup>

193. For goods subject only to export license administration, the license issuing entities shall

---

<sup>248</sup> *Export License Measures*, Article 8 (Exhibit JE-74); *Export Licensing Rules*, Article 5(1) (Exhibit JE-97).

<sup>249</sup> *Export License Measures*, Article 9 (Exhibit JE-74); *Export Licensing Rules*, Article 5(2) (Exhibit JE-97).

<sup>250</sup> *Export Licensing Rules*, Article 5(3) (Exhibit JE-97).

<sup>251</sup> *Export Licensing Rules*, Article 5(4) (Exhibit JE-97).

<sup>252</sup> *Export Licensing Rules*, Article 5(5) (Exhibit JE-97).

<sup>253</sup> *Export Licensing Rules*, Article 6(1) (Exhibit JE-97).

<sup>254</sup> *Export License Measures*, Article 10 (Exhibit JE-74); *Export Licensing Rules*, Article 6(2) (Exhibit JE-97).

<sup>255</sup> *Export License Measures*, Article 11 (Exhibit JE-74).

issue export licenses on the basis of the documents of approval issued by MOFCOM in addition to the export contracts.<sup>256</sup>

194. For goods that are also subject to quotas, the license issuing entities shall take into consideration additional materials and factors that demonstrate the applicant exporter has a right to export under the relevant quotas. For goods subject to direct quotas (*i.e.*, quotas not allocated through bidding), the license issuing entities shall issue export licenses on the basis of the quota documents issued by MOFCOM or its relevant offices and the export contracts.<sup>257</sup> For goods subject to quota bidding, the license issuing entities issue export licenses on the basis of the list of bid winners and the quantities of bids won that is issued by MOFCOM; the certificate for the application for export license of commodities subject to quota bidding or the certificate for the transfer and acceptance of commodities applying quota bidding; and the export contracts of the bid winning enterprises.<sup>258</sup>

195. For foreign-invested enterprises seeking export licenses for goods subject to the administration of export quotas allocated directly, license issuing entities shall issue an export license to such an foreign-invested enterprise on the basis of the quantity of the export quota that is granted by MOFCOM specifically for foreign-invested enterprises.<sup>259</sup> For foreign-invested enterprises seeking export licenses to export goods subject only to export license administration or goods subject to quota bidding, license issuing entities decide whether to grant an export license on the same bases that apply to non-foreign-invested enterprise applicants.<sup>260</sup>

196. The *Export Licensing Rules* provide that license issuing entities shall examine the following content in the export license applications in deciding whether to issue an export license:

- (1) Whether the exporter has management qualifications;
- (2) Whether the documents of approval for export submitted are complete and valid;
- (3) Whether the relevant content of the application form complies with the provisions on the administration of export goods and licenses, and with the documents of approval for export, the export contract, and whether the content in the note column is complete and valid; and

---

<sup>256</sup> *Export License Measures*, Article 11(7) (Exhibit JE-74).

<sup>257</sup> *Export License Measures*, Article 11(1) (Exhibit JE-74).

<sup>258</sup> *Export License Measures*, Article 11(2) (Exhibit JE-74).

<sup>259</sup> *Export License Measures*, Article 13(1) (Exhibit JE-74).

<sup>260</sup> *Export License Measures*, Article 13(1) and (2) (Exhibit JE-74).

- (4) Whether other materials to be submitted comply with the pertinent provisions.<sup>261</sup>

Neither the required management qualifications, documents of approval for export, or other materials to be submitted are further identified or defined in the *Export Licensing Rules* or related licensing measures.

197. License issuing entities are strictly prohibited from issuing licenses where there is no quota or issuing licenses that exceed quotas.<sup>262</sup> License issuing entities that do so shall be sanctioned through circulation of a notice of criticism; suspension of the power to issue licenses for that one type of good; or the termination of the power to issue licenses for all goods.<sup>263</sup> The individual responsible for violating these rules shall have his/her post changed and is subject to penalties ranging from a circulation of a notice of criticism, a warning, a demerit on the record, a special demerit on the record, demotion, dismissal, dismissal from public office, in addition to incurring liability for the leader of the entity, and potential criminal liability.<sup>264</sup>

198. The *Import and Export Regulations* provide that license issuing entities must decide whether to grant a license within 30 days of receiving a license application.<sup>265</sup> However, other measures provide that each license issuing entity shall issue an export license within three business days from the date of receiving a conforming application.<sup>266</sup>

#### 4. Period of Validity

199. Once issued, an export license is valid for a maximum period of six months<sup>267</sup> not to extend beyond December 31 of the year of issuance.<sup>268</sup> License issuing entities shall issue export licenses for a given year, in accordance with the quota amount announced by MOFCOM for goods subject also to export quotas, beginning from December 10 of the previous year, with the licenses becoming valid on January 1.<sup>269</sup> Exporters must use an export license within the period

---

<sup>261</sup> *Export Licensing Rules*, Article 8 (Exhibit JE-97).

<sup>262</sup> *Export License Measures*, Article 21 (Exhibit JE-74); *Measures for Administration of Licensing Entities*, Article 11 (Exhibit JE-75).

<sup>263</sup> *Measures for Administration of Licensing Entities*, Article 40 (Exhibit JE-75).

<sup>264</sup> *Measures for Administration of Licensing Entities*, Article 41 (Exhibit JE-75).

<sup>265</sup> *Import and Export Regulations*, Article 43 (Exhibit JE-73).

<sup>266</sup> *Export License Measures*, Article 19 (Exhibit JE-74); *Export Licensing Rules*, Article 10 (Exhibit JE-97).

<sup>267</sup> *Export License Measures*, Article 30 (Exhibit JE-74); *Export Licensing Rules*, Article 14 (Exhibit JE-97).

<sup>268</sup> *Export License Measures*, Articles 28 and 30 (Exhibit JE-74).

<sup>269</sup> *Export License Measures*, Article 29 (Exhibit JE-74); *Export Licensing Rules*, Article 13 (Exhibit JE-97).

of validity, otherwise the license is invalid and Customs shall not release the goods for exportation.<sup>270</sup>

200. The period of validity of an export license and the time for applying for a license may be adjusted by MOFCOM under specific circumstances.<sup>271</sup>

201. In addition, exporters may apply for an extension of the period of validity of an export license if, for some reason, they fail to use the export license within the period of validity, but such application must be made within the original period of validity of the export license.<sup>272</sup> Exporters may also apply for an extension of the period of validity of an export license if, for some reason, they fail to fully use the license (e.g., export the full amount permitted under the license) within the valid period. However, such application must also be made within the original period of validity.<sup>273</sup> For export licenses for goods also subject to export quotas, extensions of the period of validity cannot extend beyond December 31 of that year.<sup>274</sup> Applications that are filed outside of the original period of validity of the export license will be rejected.<sup>275</sup>

202. An exporter applying for an extension must submit to the relevant license issuing entity, a completed Application Form for Cancellation (Change) of an Export Licenses of the People's Republic of China, affixed with the exporter's seal, in addition to the original export license and the relevant materials submitted with the original application.<sup>276</sup>

203. License issuing entities that extend the period of validity of a license in violation of these measures governing quotas and licenses are subject to penalties.<sup>277</sup>

## 5. Conclusion

204. China restricts the exportation of bauxite, coke, fluorspar, manganese, silicon carbide,

---

<sup>270</sup> *Export License Measures*, Article 30 (Exhibit JE-74); *Export Licensing Rules*, Article 14 (Exhibit JE-97).

<sup>271</sup> *Export License Measures*, Article 30, para. 3 (Exhibit JE-74); *Export Licensing Rules*, Article 14 (Exhibit JE-97).

<sup>272</sup> *Export License Measures*, Article 31 (Exhibit JE-74); *Export Licensing Rules*, Article 15 (Exhibit JE-97).

<sup>273</sup> *Export License Measures*, Article 31, para. 2 (Exhibit JE-74); *Export Licensing Rules*, Article 15 (Exhibit JE-97).

<sup>274</sup> *Export License Measures*, Article 31, para. 3 (Exhibit JE-74); *Export Licensing Rules*, Article 16 (Exhibit JE-97).

<sup>275</sup> *Export License Measures*, Article 31, para. 4 (Exhibit JE-74).

<sup>276</sup> *Export Licensing Rules*, Article 17 (Exhibit JE-97).

<sup>277</sup> *Measures for Administration of Licensing Entities*, Article 40 chapeau and (2) (Exhibit JE-75).

and zinc through export licensing. By means of the export licensing system described above, China can and does control nearly all aspects of the exportation of these materials, including: whether the material can be exported at all; how much can be exported; who can export; how often exports can take place; when exports can take place; the costs related to the exportation; and at what price the materials can be exported.

## **G. Minimum Export Price Requirement**

205. China restrains the exportation of bauxite, coke, fluorspar, magnesium, silicon carbide, yellow phosphorus, and zinc by imposing a minimum price requirement on their exportation.<sup>278</sup> China implements this restraint through a non-transparent system that, in industry trade journals, is acknowledged to exist, but is characterized as being based on informal statements and oral agreements of traders and export regulators.<sup>279</sup> Based on statements made by China and documents submitted by Chinese exporters in U.S. courts, as detailed below, it appears that export prices that are set by the CCCMC are observed by exporters through an official “system of self-discipline” and further reinforced through the availability of penalties imposed by MOFCOM, China’s licensing authorities, and Customs.

### **1. The CCCMC**

206. The CCCMC is one of China’s Chambers of Commerce. It was established in Beijing on September 1, 1988.<sup>280</sup> It is a representative association made up of industry members. Members of the CCCMC must be legally listed and registered entities engaged in the import and export, or other trade-related activities, of metals, minerals, and chemicals (which includes the Raw Materials).<sup>281</sup> Based on the most recent data, the CCCMC has more than 4000 members,<sup>282</sup> consisting of foreign trade companies, trade and manufacturing companies, joint venture companies, private enterprises and research institutes operating businesses in ferrous metals, non-ferrous metals, non-metallic minerals and products, construction materials, coal and coal products, oil and oil products, chemicals, plastics, fine chemicals, agro-chemicals, rubber products, etc.<sup>283</sup>

207. According to MOFCOM’s statements of its official view, unlike trade associations and

---

<sup>278</sup> See Chart of Raw Materials Subject to Minimum Export Prices (Exhibit JE-7) for products subject to minimum export price requirements.

<sup>279</sup> See Industrial Minerals Articles (2009) (Exhibit JE-126); and “Import and Export and Production of Magnesium between January and August This Year,” China Magnesium Materials Network website (Inmo.gov.cn) (October 7, 2008) (Exhibit JE-133).

<sup>280</sup> CCCMC Brochure at 2, para. 1 (Exhibit JE-89).

<sup>281</sup> 2001 CCCMC Charter, Article 8 (Exhibit JE-87).

<sup>282</sup> CCCMC Website Pages at 1 (Exhibit JE-88).

<sup>283</sup> CCCMC Website Pages at 1 (Exhibit JE-88); CCCMC Brochure at 2, paras. 2 and 3 (Exhibit JE-89).

other private organizations that might typically be called “Chambers of Commerce” in other economies, China’s Chambers of Commerce are organizations representing private members that also function as entities under MOFCOM’s direct and active supervision and, accordingly, play a central role in regulating the trade of China’s industries.<sup>284</sup>

208. In 2006, MOFCOM took the unprecedented step<sup>285</sup> of intervening as *amicus curiae* in a U.S. court proceeding involving allegations by private litigants of price fixing and other anti-competitive behavior by certain Chinese exporters of vitamin C. In the *amicus curiae* brief it submitted in that case, MOFCOM referenced the various provisions of the *Measures for Administration of Trade Social Organizations*<sup>286</sup> and the *Regulations for Personnel Management of Chambers of Commerce*,<sup>287</sup> which apply generally to MOFCOM’s authority over China’s social organizations, including China’s Chambers of Commerce. Noting in particular Article 14 of the *Measures for Administration of Trade Social Organizations*,<sup>288</sup> MOFCOM described its own authority over the relevant Chamber of Commerce in that case as “plenary” and asserted its official view<sup>289</sup> that the Chamber of Commerce is “the instrumentality through which [MOFCOM] oversees and regulates the business of importing and exporting [] products in China.”<sup>290</sup> It is on the basis of these and related representations made by MOFCOM, that the

---

<sup>284</sup> Brief of Amicus Curiae: MOFCOM. *In Re Vitamin C Antitrust Litigation* (E.D. NY Jun. 26, 2006) at 5 (Exhibit JE-98).

<sup>285</sup> As the U.S. Judge in that proceeding noted, “The Chinese government’s appearance as *amicus curiae* is unprecedented. It has never . . . come before the United States as *amicus* to present its views.” Opinion *In re Vitamin C Antitrust Litigation*, 584 F. Supp. 2d 546 (E.D. NY Nov. 6, 2008), at 547-55 (Exhibit JE-103).

<sup>286</sup> Exhibit JE-101.

<sup>287</sup> Exhibit JE-102.

<sup>288</sup> Brief of Amicus Curiae: MOFCOM at 9 (Exhibit JE-98).

<sup>289</sup> Two years later, in June 2008, MOFCOM intervened again in the same U.S. court proceeding to reiterate that its 2006 *amicus curiae* brief reflected MOFCOM’s official views and that MOFCOM had participated actively in the drafting of the brief and that the brief “was reviewed and edited word-for-word in Beijing by officials of the Ministry and the U.S. counsel engaged by the Ministry.” MOFCOM Statement in *In re Vitamin C Antitrust Litigation* (June 9, 2008) at 4, para. 2 (Exhibit JE-104)

<sup>290</sup> Brief of Amicus Curiae: MOFCOM at 9 (Exhibit JE-98). In October 2009, in a separate U.S. court proceeding in which private litigants are alleging price fixing and other anti-competitive behavior by certain Chinese exporters of bauxite, the defending Chinese exporters of bauxite, who are members of the CCCMC, asserted, consistently with MOFCOM’s views expressed in its 2006 *amicus curiae* brief in the vitamin C proceeding, that the CCCMC and its members are “directly subject to the direction, control and influence of the Chinese government.” Memorandum in Support of Defendants’ Joint Motion to Dismiss First Amended Complaint in *Resco Products, Inc. v. Bosai Minerals Group and CMP Tianjin Co.* (Oct. 7, 2008) at 9 (Exhibit JE-105). Similarly, in June 2009, in yet another, separate U.S. court proceeding in which private litigants are alleging price fixing and other anti-competitive behavior by certain Chinese exporters of magnesite (also known as magnesium carbonate), the defending Chinese exporters of magnesite, who are also members of the CCCMC, asserted that the CCCMC is “an instrument of the Chinese government for the purposes of regulating export trade.” Memorandum in Support of Motion to Dismiss Plaintiffs’ First Amended Class Action Complaint by Defendants, China Minmetals Corp. and China National Minerals Co. in *Animal Science Products, Inc. v. China National Metals and Minerals Import and Export Corp.* (D. NJ Jun. 26, 2009) at 11 (Exhibit JE-106).

United States understands that the CCCMC's export-price related functions and responsibilities described below are attributable to China.

209. The CCCMC's functions are generally described as providing services in the form of coordination, guidance, and consultation to its members in the minerals, metals, and chemicals industries.<sup>291</sup> With respect to its export-related functions, the CCCMC broadly offers “coordination service in metals, minerals, chemicals exports.”<sup>292</sup>

210. The CCCMC's export coordination functions are set out in the *CCCMC Export Coordination Measures*.<sup>293</sup> The content of the CCCMC's export coordination includes export quotas and volume, sales markets and customers, product quality, trademarks, and commercial disputes.<sup>294</sup> Two of the key areas in which the CCCMC coordinates export activities are: (1) the administration and implementation of the export quota and export quota bidding system, and (2) the coordination of export prices for commodities in the CCCMC's jurisdiction.<sup>295</sup> (The CCCMC's role and responsibilities related to export quotas and export quota bidding are discussed in detail in Section III.E above.

## 2. Establishing Export Prices

211. In the early 1990s, the State Council tasked Chambers of Commerce with coordinating and managing the export prices of export commodities in effecting reform and improvement to China's export trade.<sup>296</sup> In 1998, in the wake of the Asian financial crisis, MOFCOM issued a circular instructing the Chambers of Commerce to redouble their efforts in export coordination by, among other things, evaluating and adjusting coordinated export prices in order to improve the competitiveness of Chinese exports and enhance the normal development of China's export trade.<sup>297</sup> The coordination of export prices by the CCCMC has also been encouraged as a way to enhance the reputation of Chinese exports, to avoid anti-dumping actions by other countries, and

---

<sup>291</sup> *1994 CCCMC Charter*, Articles 3 and 6 (Exhibit JE-86); *2001 CCCMC Charter*, Articles 3 and 6 (Exhibit JE-87). See also CCCMC Website Pages, para. 3 (Exhibit JE-88).

<sup>292</sup> CCCMC Website Pages, para. 3 (Exhibit JE-88).

<sup>293</sup> Exhibit JE-107.

<sup>294</sup> *CCCMC Export Coordination Measures*, Article 4 (Exhibit JE-107).

<sup>295</sup> *CCCMC Export Coordination Measures*, Article 4 (Exhibit JE-107). See also *1994 CCCMC Charter*, Article 6 (Exhibit JE-86); *2001 CCCMC Charter*, Article 6 (Exhibit JE-87); *CCCMC Bauxite Branch Coordination Measures*, Article 2 (Exhibit JE-108); MOFTEC Assistant Minister Liu Xiangdong's Speech to the Third Congress of the CCCMC, paras. 10-11 (Exhibit JE-109); MOFTEC Circular on Strengthening the Job in the Coordination of Export Commodities (1998), paras. 2 and 4 (Exhibit JE-110); CCCMC Website Pages, para. 3 (Exhibit JE-88); CCCMC Brochure, para. 4 (Exhibit JE-89).

<sup>296</sup> *Measures for Administration of Trade Social Organizations*, Section 7 (Exhibit JE-110); *Regulations for Personnel Management of Chambers of Commerce*, Section II (Exhibit JE-111).

<sup>297</sup> *MOFTEC Circular on Strengthening the Job in the Coordination of Export Commodities* (1998), para. 2 (Exhibit JE-110).

to maximize the profitability of China’s trade in valuable, non-renewable raw material resources.<sup>298</sup>

212. The means by which the CCCMC coordinates export prices, or exports more generally, is not at all transparent. In a U.S. court proceeding involving allegations by private litigants of price fixing and other anti-competitive behavior by Chinese exporters of magnesite (also known as magnesium carbonate), defendant Chinese exporters submitted a copy of the *CCCMC Export Coordination Measures*.<sup>299</sup> According to these Measures, all commodities subject to coordination require an annual coordination program that covers, among other things, the coordination of export prices.<sup>300</sup>

213. The *CCCMC Export Coordination Measures* provide that commodity-specific sub-units of the CCCMC called “Branches” or “Coordination Groups” shall be established to assume CCCMC’s coordination functions with respect to specific commodities.<sup>301</sup> Established branches of the CCCMC relating to the Raw Materials are:<sup>302</sup>

- the Branch of Bauxite;
- the Branch of Coke;
- the Branch of Fluorspar;
- the Coordination Group of Magnesium;
- the Branch of Silicon Carbide;
- the Branch of Phosphorus and Phosphorus Products;
- the Coordination Group of Yellow Phosphorus; and
- the Branch of Lead and Zinc.

These Branches and Coordination Groups carry out the CCCMC’s export coordination functions for bauxite, coke, fluorspar, magnesium, silicon carbide, yellow phosphorus, and zinc. These functions include, among other things, formulating or revising specific import-export product

---

<sup>298</sup> MOFTEC Assistant Minister Liu Xiangdong’s Speech to the Third Congress of CCCMC, paras. 11 and 12 (Exhibit JE-109).

<sup>299</sup> Exhibit JE-107. *See also supra* note 283.

<sup>300</sup> *CCCMC Export Coordination Measures*, Article 10 and Chapter 5 (JE-107).

<sup>301</sup> *CCCMC Export Coordination Measures*, Articles 3 and 5 (JE-107).

<sup>302</sup> CCCMC Brochure at 14 (Exhibit JE-89); CCCMC Website Pages at 3-5 (Exhibit JE-88).

coordination regulations; formulating or revising export price coordination plans; coordinating export quotas and quota bidding invitations, administration, and allocation; implementing, monitoring, and supervising coordination measures and the coordinated prices set by the CCCMC; and making suggestions on dealing with problems arising from coordination and violations of coordinated rules by members.<sup>303</sup>

214. Some additional detail on how the CCCMC and its Branches coordinate export prices is provided in the *Bauxite Coordination Measures*,<sup>304</sup> which Chinese exporters of bauxite submitted in a U.S. court proceeding involving private allegations of price fixing and anti-competitive behavior by Chinese exporters of bauxite. According to the *CCCMC Bauxite Branch Coordination Measures*, the governing body of the Bauxite Branch coordinates the bauxite industry's export price once every half year. The Bauxite Branch's governing body is permitted to adjust the coordinated export price at other times as well, for example, if a large variation in price occurs in the international market.<sup>305</sup> The Branch is then responsible for notifying the industry coordinated export price to its members<sup>306</sup> as well as reporting it to the CCCMC to be sent to each license issuing entity to serve as the basis for issuing licenses, and reporting it to MOFCOM for filing.<sup>307</sup>

### 3. Coordinated Export Price As a Minimum Export Price

215. The export price coordinated by the CCCMC serves as a floor below which exports are not permitted. Again, although the precise means by which the CCCMC-coordinated export price is implemented as a minimum export price are not transparent, it appears that the systems and mechanisms, which are described below, comprise or contribute to these means.

#### a. System of “Self-Discipline”

216. In August 2009, in a further official intervention that MOFCOM made in the U.S. court proceeding related to alleged anti-competitive behavior by Chinese exporters of vitamin C, MOFCOM explained that a “system of self-discipline” among exporters is an “actual specific measure[] taken by China to effect its regulatory policies.”<sup>308</sup> According to MOFCOM,

This system [of self-discipline] has a long history in China and has been well known to,

---

<sup>303</sup> See 1994 CCCMC Charter, Article 26 (Exhibit JE-86); CCCMC Export Coordination Measures, Articles 3, 4, 5, and 10 (Exhibit JE-107); CCCMC Bauxite Branch Coordination Measures, Article 2 (Exhibit JE-108).

<sup>304</sup> Exhibit JE-108.

<sup>305</sup> CCCMC Bauxite Branch Coordination Measures, Article 4 (Exhibit JE-108).

<sup>306</sup> CCCMC Bauxite Branch Coordination Measures, Article 4 (Exhibit JE-108).

<sup>307</sup> CCCMC Bauxite Branch Coordination Measures, Article 7 (Exhibit JE-108).

<sup>308</sup> MOFCOM Statement in *In re Vitamin C Antitrust Litigation* (Aug. 31, 2009), para. 3 (Exhibit JE-111).

and complied with by, Chinese companies. Self-discipline does not mean complete voluntariness or self-conduct. In effect, self-discipline refers to a system of regulation under the supervision of a designated agency acting on behalf of the Chinese government. Under this regulatory system, the parties involved consult with each other to reach consensus on coordinated activities for the purpose of reaching the objectives and serving the interest as set forth under Chinese laws and policies. Persons engaged in such required self-discipline are well aware that they are subject to penalties for failure to participate in such coordination, or for non-compliance with self-discipline, including forfeiting their export right.<sup>309</sup>

217. Indeed, according to the *CCCMC Export Coordination Measures* and the *Bauxite Coordination Measures*, the industry coordinated export price is considered “a collective contract” that industry members must abide by.<sup>310</sup> These measures, in addition to the *2001 CCCMC Charter* and the *Bauxite Branch Charter*, identify the promotion of industry “self-discipline” as a key part of the CCCMC’s mission.<sup>311</sup> The “self-discipline” appears to encompass: inspection by the CCCMC (or its Branches) of its members’ compliance with its coordination programs (including coordinated export prices);<sup>312</sup> rewarding members that do comply and, as explicitly referenced in MOFCOM’s August 2009 statement in the vitamin C litigation, imposing penalties on members that do not comply with coordination programs, including the industry coordinated price.<sup>313</sup> These penalties include warnings; suspension of membership or expulsion from the CCCMC;<sup>314</sup> circulating a notice of criticism; payment of fines; or in the most severe cases, recommendations to MOFCOM for revocation of an exporter’s right to trade, to bid on export quotas, and to receive export tax rebates, policy-oriented financial support, and other such penalties.<sup>315</sup>

## b. MOFCOM Penalties

---

<sup>309</sup> MOFCOM Statement in *In re Vitamin C Antitrust Litigation* (Aug. 31, 2009), para. 3 (Exhibit JE-111).

<sup>310</sup> *CCCMC Export Coordination Measures*, Article 18 (JE-107); *CCCMC Bauxite Branch Coordination Measures*, Article 10 (Exhibit JE-108).

<sup>311</sup> See *2001 CCCMC Charter*, Article 6(3) (Exhibit JE-87); *CCCMC Bauxite Branch Charter* Articles 8 and 45 (Exhibit JE-112); *CCCMC Bauxite Branch Coordination Measures*, Article 1 (Exhibit JE-108); *State Council Decision on Reform of the Foreign Trade System*, Section (1) para. 1 (Exhibit JE-99); *CCCMC Export Coordination Measures*, Article 2 (JE-107).

<sup>312</sup> *CCCMC Export Coordination Measures*, Articles 19-20 (JE-107).

<sup>313</sup> *1994 CCCMC Charter*, Article 14 (Exhibit JE-86); *2001 CCCMC Charter*, Article 14 (Exhibit JE-87); *CCCMC Export Coordination Measures*, Article 21 (JE-107); *CCCMC Bauxite Branch Coordination Measures*, Article 8 (Exhibit JE-108); *CCCMC Bauxite Branch Charter* Article 20(3) (Exhibit JE-112).

<sup>314</sup> *1994 CCCMC Charter*, Article 14 (Exhibit JE-86); *2001 CCCMC Charter*, Article 14 (Exhibit JE-87); *CCCMC Export Coordination Measures*, Article 21 (JE-107); *CCCMC Bauxite Branch Charter* Article 20 (Exhibit JE-112).

<sup>315</sup> *Bauxite Coordination Measures*, Article 8 (Exhibit JE-108); *CCCMC Export Coordination Measures*, Article 21 (JE-107).

218. MOFCOM is authorized independently to impose penalties on exporters that export below acceptable prices. The *Export Price Penalties Regulations*, which was issued in 1996 and remains in effect, provides for all exporting enterprises to submit to the coordination of the various Chambers of Commerce and take part in setting export prices that are suitable to the importing markets.<sup>316</sup> The *Export Price Penalties Regulations* also assign MOFCOM responsibility for punishing specifically the conduct of “exporting at lower than normal prices”<sup>317</sup> and gives MOFCOM the authority to impose a variety of sanctions on enterprises that engage in such conduct. Those sanctions include those which the CCCMC is authorized to recommend to MOFCOM – *i.e.*, circulating a notice of criticism or issuing a warning; imposition of fines; suspension or revocation of the right to bid for export quotas of related products; suspension or revocation of export licenses; or suspension or revocation of the right to trade.

219. The *Export Price Penalties Regulations* also provide MOFCOM with the authority to investigate and assign liability to the legal representative of any exporting enterprise found responsible for exporting at lower than normal prices.<sup>318</sup> MOFCOM may also choose to delegate to the relevant Chamber of Commerce the authority to carry out such an investigation.<sup>319</sup>

### c. Licensing Authorities

220. China’s licensing authorities appear to play a role in enforcing coordinated export prices as minimum prices required for exportation. Exporters of bauxite, coke, fluorspar, silicon carbide, and zinc (products subject to non-automatic licensing) must apply for and obtain an export license before they are permitted to export the raw material at issue.

221. As evidenced in the *CCCMC Bauxite Branch Coordination Measures*, coordinated export prices are notified to China’s license issuing entities to enable those authorities to issue licenses on the basis of those prices.<sup>320</sup> The *Measures for Administration of Licensing Entities* also provide that license issuing entities that fail to issue export licenses in accordance with the coordinated export prices are subject to sanctions from MOFCOM.<sup>321</sup> Those sanctions include circulation of a notice of criticism, suspension of the authority to issue licenses to the same type of goods, or termination of the authority to issue licenses to all goods.<sup>322</sup>

---

<sup>316</sup> *Export Price Penalties Regulations*, Article 4 (Exhibit JE-113).

<sup>317</sup> *Export Price Penalties Regulations*, Article 3 (Exhibit JE-113).

<sup>318</sup> *Export Price Penalties Regulations*, Article 6 (Exhibit JE-113).

<sup>319</sup> *Export Price Penalties Regulations*, Article 9 (Exhibit JE-113).

<sup>320</sup> *Bauxite Coordination Measures*, Article 7 (Exhibit JE-108).

<sup>321</sup> *Measures for Administration of Licensing Entities*, Article 40(3) (Exhibit JE-75).

<sup>322</sup> *Measures for Administration of Licensing Entities*, Article 41 (Exhibit JE-75).

#### d. Customs and the Price Verification and Chop Procedure

222. According to references in the *2002 PVC Notice*<sup>323</sup> and in the *2004 PVC Notice*,<sup>324</sup> in 1997, MOFCOM issued three measures: the *Notice of the Rules on Price Reviews of Export Products by the Customs* (Ministry of Foreign Trade and Economic Cooperation guanzonghanzi No. 21, 1997) (“*Customs Export Price Review Rules*”), the *Rules for Coordination with Respect to Customs Price Review of Export Products* (Ministry of Foreign Trade and Economic Cooperation guanzonghanzi No. 21, 1997) (“*Customs Export Price Review Coordinating Rules*”), and the *Provisional Rules on Export Price Verification and Chop for Key Products Subject to Price Review* (Ministry of Foreign Trade and Economic Cooperation guanzonghanzi No. 21, 1997) (“*Provisional Rules on Export PVC*”). Despite diligent attempts, these measures could not be located and appear not to be published, although all three appear to continue to be in effect.

223. Based on the titles of these measures and the references made to them in the *2002 PVC Notice* and the *2004 PVC Notice*, it appears that these measures subject the exportation of certain products to price review by Customs as part of the export clearance process. For these products, which includes yellow phosphorus, the Chambers of Commerce are required to administer the Price Verification and Chop (“PVC”)<sup>325</sup> procedure, whose goals include: (1) facilitating the ability of the Chambers of Commerce to coordinate export prices and enforce industry self-discipline, and (2) promoting the development of Chinese industries and exports.<sup>326</sup>

224. The PVC procedure requires exporters of yellow phosphorus to submit their export contracts to the CCCMC for “verification.” The CCCMC is required to examine the export contracts and verify that the contracts comply with relevant regulations and industry coordination, including the industry coordinated export price. Where the CCCMC verifies the elements of a particular export contract, in particular the export price, are in compliance, it must affix its PVC chop (*i.e.*, its seal or stamp) to a special PVC form<sup>327</sup> and to the export contract where the prices and quantities are indicated. The CCCMC must return the contract to the exporter within three days. Once the exporter receives the verified export contract bearing the CCCMC’s PVC chop, it must declare the contract to Customs for clearance.<sup>328</sup> Customs is required to deny clearance for any export contracts that do not bear the CCCMC’s PVC chop.<sup>329</sup> Exporters forging PVC chops on non-conforming contracts are subject to penalties imposed by

---

<sup>323</sup> Exhibit JE-121.

<sup>324</sup> Exhibit JE-122.

<sup>325</sup> MOFCOM referred to this procedure as the “Verification and Chop” system in 2006. Brief of Amicus Curiae: MOFCOM at 14-15 (Exhibit JE-98).

<sup>326</sup> *2002 PVC Notice*, Article 4 (Exhibit JE-121).

<sup>327</sup> See *CCCMC PVC Rules*, Annex 3 (Exhibit JE-127).

<sup>328</sup> *2004 PVC Notice*, para. 4 (Exhibit JE-122).

<sup>329</sup> *2004 PVC Notice*, para. 2 (Exhibit JE-122).

Customs and the Chambers of Commerce.<sup>330</sup>

225. Over time, the PVC system administered by the CCCMC permitted exporters to submit export contract information electronically for verification.<sup>331</sup> Exporters of yellow phosphorus are instructed to log onto the CCCMC's website with their usernames and passwords and enter their contract information for verification.<sup>332</sup> The CCCMC website provides instructions in the *Online PVC Instructions*, which includes instructions that make clear that the coordinated export price operates as a minimum export price:

If the contract price type is in CIF, etc., but the coordinate price type is FOB, you must also separately fill out the transport fee (the unit of the transportation fee must be consistent with the unit used in the contract unit price).

At this time, you will pass the price-review only if the contract price less the transportation fee is greater or equal to the coordinated price.<sup>333</sup>

226. A computer screen shot, downloaded in 2008, of the online interface for an exporter submitting contract information for CCCMC verification and chop for an export transaction for yellow phosphorus shows that the exporter is instructed to input the contract price for the export, while the screen displays that the industry coordinated price as US\$8000 per metric ton FOB.<sup>334</sup> The notes to the user appearing at the bottom of the screen state that whenever the contract price is more than or equivalent to the coordinated price, it will be approved.<sup>335</sup>

227. It appears that China formally repealed the *2004 PVC Notice* on May 26, 2008.<sup>336</sup> However, there is evidence that administration of the PVC procedure continued after that date. A printout of the online PVC form that is dated May 28, 2008, two days after the formal repeal of *2004 PVC Notice*, shows that as of that date, the PVC procedure continued to be enforced.<sup>337</sup> In

---

<sup>330</sup> *2004 PVC Notice*, para. 4 (Exhibit JE-122).

<sup>331</sup> See *Online PVC Instructions* (Exhibit JE-123).

<sup>332</sup> Exhibit JE-123, Sections 1 and 4.

<sup>333</sup> Exhibit JE-123, Section 9(2).

<sup>334</sup> CCCMC PVC Online Input Screen Shots (May 2008) at 1-2 (Exhibit JE-124). This form was obtained from a Chinese exporter in May 2008. The blank form already identified the export price of \$8,000. Note that the form is identified as a print-out of "V\_C\_Value\_Add.asp." The extension ".asp" indicates that the document was generated from a web page using "Active Server Pages" or "Classic ASP" technology. This technology enables the user to produce an interactive web page. That is, the ".asp" printout is the printout of an interactive web page. Web pages containing ASP cannot simply be accessed through a web browser. The page must be requested by a server that supports ASP.

<sup>335</sup> CCCMC PVC Online Input Screen Shots (May 2008) at 3-4 (Exhibit JE-124).

<sup>336</sup> See *Communication* (Ministry of Commerce and General Administration of Customs, (2008) No. 33, May 26, 2008) (Exhibit JE-125).

<sup>337</sup> CCCMC PVC Online Input Screen Shots (May 2008) at 3-4 (Exhibit JE-124).

addition, CCCMC measures implementing the PVC procedure, *i.e.*, the *CCCMC PVC Rules*<sup>338</sup> and *Online Verification and Certification Operating Steps*, remained posted on its website until at least October 15, 2009.<sup>339</sup>

228. Furthermore, it appears that the measures authorizing the *2002 PVC Notice* and the *2004 PVC Notice*, including the *Customs Export Price Review Rules*, the *Customs Export Price Review Coordinating Rules*, and the *Provisional Rules on Export PVC*, which do not appear to be published, remain in effect.

#### **4. Conclusion**

229. China’s minimum export price system is not transparent. However, based on the explicit statements that MOFCOM has made and the related documents and measures submitted by Chinese exporters and members of the CCCMC, it appears that export prices are coordinated by the CCCMC for bauxite, coke, fluor spar, magnesium, silicon carbide, yellow phosphorus and zinc, and that those prices are enforced as minimum export prices through a combination of CCCMC’s “system of self-discipline,” which MOFCOM has stated is a measure taken by China to effect its regulatory policies,<sup>340</sup> penalties that MOFCOM is authorized to impose for exporting at low prices, and enforcement by China’s licensing authorities and Customs.

### **IV. LEGAL DISCUSSION**

#### **A. China’s Export Duties Are Inconsistent with China’s Obligations under Part I Paragraph 11.3 of the Accession Protocol**

##### **1. Paragraph 11.3 of the Accession Protocol**

230. The second sentence of paragraph 1.2 of the Accession Protocol states, “This Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement.” As an integral part of the WTO Agreement, the provisions of the Accession Protocol are enforceable in WTO dispute settlement pursuant to Article 1.1 of the DSU.<sup>341</sup>

---

<sup>338</sup> Exhibit JE-127.

<sup>339</sup> See Exhibit JE-127 (Chinese version captured from website).

<sup>340</sup> See MOFCOM Statement in *In re Vitamin C Antitrust Litigation* (Aug. 31, 2009) (Exhibit JE-111), para. 3.

<sup>341</sup> It is understood that the provisions of the Accession Protocol and the commitments in paragraph 342 of the Working Party Report are subject to WTO dispute settlement. Panel Report, *China – Audiovisual Products*, paras. 7.229-7.232. Article 1.1 of the DSU provides that the rules and procedures of the DSU shall apply to “the consultations and the settlement of disputes between Members concerning their rights and obligations” under the provisions of the WTO Agreement and of the DSU “taken in isolation or in combination with any other covered agreement.”

231. Part I, Section 11 of the Accession Protocol contains China’s binding commitments on taxes and charges levied on imports and exports. Part I, paragraph 11.3 states:

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

232. Annex 6 of the Accession Protocol is a list of 84 products, each listed sequentially by HS number and accompanied by a description of the product and an export duty rate listed as an *ad valorem* percentage. The Note to Annex 6 states:

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

233. Accordingly, paragraph 11.3 contains a commitment by China to “eliminate all taxes and charges applied to exports” except in two specific situations: (1) where the taxes and charges are covered by Article VIII and applied consistently with the requirements of Article VIII; and (2) where the taxes and charges are imposed on products listed in Annex 6 at a rate less than or equal to the *ad valorem* percentage specified for those products in Annex 6.

## **2. China’s “Temporary” Export Duties Are Inconsistent with China’s Obligations under Paragraph 11.3 of the Accession Protocol**

234. China imposes “temporary” export duties at *ad valorem* rates ranging from 10 to 40 percent on various forms of bauxite, coke, fluorspar, magnesium, manganese, silicon metal, and zinc.<sup>342</sup> These duties are charges applied to exports that are termed “export duties” in China’s measures.<sup>343</sup>

235. The export duties resulting from the application of these duty rates are not applied “in conformity with the provisions of Article VIII of the GATT 1994” because export duties do not fall within the scope of that Article. Article VIII:1(a) applies to “[a]ll fees and charges of whatever character (*other than . . . export duties . . .*) imposed by contracting parties on or in connection with . . . exportation . . .” (emphasis added). None of the other provisions of Article

---

<sup>342</sup> 2009 Tariff Implementation Program (Exhibit JE-21). As set forth above, for purposes of the discussion of China’s export duties, the terms “bauxite,” “coke,” “fluorspar,” “magnesium,” “manganese,” “silicon metal,” “yellow phosphorus,” and “zinc” cover the forms of each of these Raw Materials listed in Chart of Raw Materials Subject to Export Duties (Exhibit JE-5) and in the table in Section III.C.3 above.

<sup>343</sup> See 2009 Tariff Implementation Program (Exhibit JE-21).

VIII applies to export duties either. Furthermore, none of the products on which these export duties are imposed is listed in Annex 6. Therefore, neither of the two exceptions in paragraph 11.3 of the Accession Protocol applies to these duties.

236. Accordingly, China's maintenance of the temporary export duties applied to the exportation of bauxite, coke, fluorspar, magnesium, manganese, silicon metal, and zinc is inconsistent with China's commitment under paragraph 11.3 of the Accession Protocol to eliminate all taxes and charges applied to exports.

### **3. China's Special Export Duty Is Inconsistent with China's Obligations under Paragraph 11.3 of the Accession Protocol**

237. China imposes a "regular" *ad valorem* export duty at a rate of 20 percent on yellow phosphorus. In addition to this regular export duty, China imposes a "special" export duty at a rate of 50 percent on yellow phosphorus.<sup>344</sup> As provided in the *May 2008 Tariff Commission Special Export Duties Notice*<sup>345</sup> and the *May 2008 Customs Special Export Duties Notice*,<sup>346</sup> in May 2008, China first imposed a special export duty rate of 100 percent on exports of yellow phosphorus, in addition to the 20 percent regular export duty rate, raising the total export duty rate applicable to yellow phosphorus to 120 percent. In November 2008, the *December 2008 Export Duties Notice*<sup>347</sup> adjusted the special export duty rate to 75 percent, resulting in a total export duty rate of 95 percent for yellow phosphorus from December 1, 2008 through December 31, 2009. However, in December 2008, through the *2009 Tariff Implementation Program*,<sup>348</sup> China subsequently further adjusted the special export duty rate for yellow phosphorus to 50 percent, resulting in a total export duty rate of 70 percent effective January 1, 2009.

238. The export duty resulting from the application of these duty rates to exports of yellow phosphorus is explicitly excluded from the coverage of Article VIII of the GATT 1994.

239. Yellow phosphorus is listed as item no. 11 in Annex 6, however, the maximum *ad valorem* export duty rate permitted to be applied to yellow phosphorus under Annex 6 is 20 percent.<sup>349</sup>

240. Accordingly, China's maintenance of a combined regular and special export duty rate of 70% applied to the exportation of yellow phosphorus is inconsistent with China's commitment under paragraph 11.3 of the Accession Protocol, as further elaborated in the note to Annex 6, to

---

<sup>344</sup> *2009 Tariff Implementation Program* (Exhibit JE-21).

<sup>345</sup> Exhibit JE-69.

<sup>346</sup> Exhibit JE-70.

<sup>347</sup> Exhibit JE-71.

<sup>348</sup> Exhibit JE-21.

<sup>349</sup> Accession Protocol, Annex 6 (Exhibit JE-2).

limit the export duties applied to products listed in Annex 6 to rates at or below the levels indicated in Annex 6.

#### **4. Conclusion**

241. The export duties China imposes on the exportation of bauxite, coke, fluorspar, magnesium, manganese, silicon metal, yellow phosphorus, and zinc are inconsistent with China's obligations under paragraph 11.3 of the Accession Protocol.

#### **B. China's Export Quotas Are Inconsistent with China's Obligations under Article XI:1 of the GATT 1994**

##### **1. Article XI:1 of the GATT 1994**

242. Article XI:1 of the GATT 1994 is titled "General Elimination of Quantitative Restrictions" and states, in relevant part:

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

243. The obligation in Article XI:1 applies to a spectrum of different types of measures. In particular, one of the types of measures that Article XI:1 explicitly prohibits Members from instituting or maintaining is a restriction made effective through a quota on the exportation of any product.

##### **2. China Uses Quotas to Restrict or Prohibit the Exportation of Certain Raw Materials**

244. Quotas are explicitly identified in Article XI:1 as a measure prohibited under that provision of the GATT 1994. As set forth in Section III.E above, China subjects the exportation of various forms of bauxite, coke, fluorspar, silicon carbide, and zinc to quotas.<sup>350</sup> These quotas prohibit exportation of these materials above certain quantities, and accordingly restrict the exportation of these materials.

245. China maintains numerous general measures that establish an export quota regime. First, Article 19 of the *Foreign Trade Law* provides in relevant part that the "state applies quota and

---

<sup>350</sup> For purposes of the discussion of China's export quotas, the terms "bauxite," "coke," "fluorspar," "silicon carbide," and "zinc" cover the forms of each of these Raw Materials listed in Chart of Raw Materials Subject to Export Licensing and Quotas (Exhibit JE-6) and in the table in Section III.E.2 above.

licensing system to the management of goods subject to . . . export restrictions . . . .”<sup>351</sup> Second, Article 36 of the *Import and Export Regulations* provides that “[g]oods restricted from exportation that are subject to quantitative restrictions by the state are subject to the administration of quotas.”<sup>352</sup> Third, the *Export Quota Measures* provide that MOFCOM “applies export quota administration with respect to the commodities restricted from export by the State.”<sup>353</sup>

246. As the government agency responsible for administering the export quotas, MOFCOM, in collaboration with Customs, identifies the goods subject to export quotas on a list published annually.<sup>354</sup> For the export quotas taking effect on January 1, 2009, MOFCOM and Customs published the *2009 Export Licensing List Notice*, which identifies coke and zinc as products subject to export quotas that are allocated directly. In addition, the *2009 Export Licensing List Notice* identifies bauxite, fluorspar, and silicon carbide as products subject to export quotas that are allocated through a bidding system.<sup>355</sup> The 2009 quota amounts for these materials are set forth in Section III.E.3 above.<sup>356</sup>

247. The export quotas China applies to bauxite, coke, fluorspar, silicon carbide, and zinc ores and concentrates, are measures that make effective a restriction on the exportation of these products. They do so by limiting the quantity of each product that may be exported. These export quotas are therefore in breach of China’s obligations under Article XI:1 of the GATT 1994.

### 3. China Maintains a Prohibition on the Exportation of Zinc

248. Article XI:1 explicitly identifies “prohibitions . . . made effective through quotas . . . on the exportation . . . of any product” as a measure that is inconsistent with that provision of the GATT 1994.

249. China subjects the exportation of zinc to an export quota as set forth above. However, China does not publish any quota, in terms of quantity or value, for the exportation of zinc. China also does not publish any procedures for enterprises to apply to be allocated a portion of any zinc export quota. Finally, China does not publish any announcements listing enterprises that have been allocated any quantity of zinc for export pursuant to the export quota. Thus, China effectively sets the export quota for zinc at zero.

---

<sup>351</sup> *Foreign Trade Law*, Article 19 (Exhibit JE-72).

<sup>352</sup> *Import and Export Regulations*, Article 36 (Exhibit JE-73).

<sup>353</sup> *Export Quota Measures*, Article 3 (Exhibit JE-76).

<sup>354</sup> *Foreign Trade Law*, Article 18 (Exhibit JE-72); *Import and Export Regulations*, Article 35 (Exhibit JE-73); *Export Quota Measures*, Article 7 (Exhibit JE-76).

<sup>355</sup> *2009 Export Licensing List Notice* (Exhibits JE-22).

<sup>356</sup> *See also 2009 Export Quota Amounts* (Exhibit JE-79).

250. As a result, China prohibits the exportation of zinc. This prohibition is in contravention of China’s obligations under Article XI:1 of the GATT 1994.

**4. China’s Export Quotas Are Also Inconsistent with China’s Obligations under Paragraphs 162 and 165 of the Working Party Report**

251. Paragraphs 162 and 165 of the Working Party Report contain enforceable commitments with respect to the elimination of export restrictions.

252. Paragraph 1.2 of China’s Accession Protocol states in pertinent part: “This Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement.”<sup>357</sup> Paragraph 342 of the Working Party Report contains a reference to both Paragraphs 162 and 165.<sup>358</sup>

253. Paragraph 162 of the Working Party Report states in pertinent part: “The representative of China confirmed that China would abide by WTO rules in respect of non-automatic export licensing and export restrictions. The Foreign Trade Law would also be brought into conformity with GATT requirements. Moreover, export restrictions and licensing would only be applied, after the date of accession, in those cases where this was justified by GATT provisions.”<sup>359</sup>

254. Additionally, paragraph 165 of the Working Party Report provides: “The representative confirmed that upon accession, remaining non-automatic restrictions on exports would be notified to the WTO annually and would be eliminated unless they could be justified under the WTO Agreement or the Protocol.”<sup>360</sup>

255. However, as set forth above, China did not eliminate its export restrictions upon accession. In addition to non-automatic export licensing, China continues to maintain additional export restrictions including export quotas on bauxite, coke, fluorspar, silicon carbide, and zinc. These export quotas are not in conformity with WTO rules including *inter alia* Article XI of the GATT 1994. Accordingly, China’s export quotas are also inconsistent with paragraphs 162 and 165 of the Working Party Report and paragraph 1.2 of China’s Accession Protocol.

---

<sup>357</sup> Exhibit JE-2.

<sup>358</sup> Exhibit JE-3.

<sup>359</sup> Exhibit JE-3.

<sup>360</sup> Exhibit JE-3.

**C. China’s Administration and Allocation of Its Export Quotas Is Inconsistent with China’s Obligations under the Accession Protocol, the Working Party Report, and the GATT 1994**

**1. China’s Measures Restricting Access to the Export Quotas Are Inconsistent with China’s Trading Rights Obligations**

**a. Introduction**

256. During its accession to the WTO, China committed to provide all enterprises in China and all foreign enterprises and foreign individuals the right to trade in all goods except those listed in Annex 2A or Annex 2B of China’s Accession Protocol. As none of the Raw Materials is listed in either Annex, these commitments extend to all of the Raw Materials including those subject to quotas.

257. China’s trading rights commitments are expressed in Part I, paragraphs 5.1 and 5.2 of the Accession Protocol, as well as in Part I, paragraph 1.2 of the Accession Protocol, to the extent that it incorporates the commitments referred to in paragraphs 83 and 84 of the Working Party Report.

258. In addition to restricting the exportation of certain of the Raw Materials through export quotas, China also restricts the right of enterprises to export certain of those materials by requiring enterprises to satisfy certain criteria in order to be eligible to receive a quota allocation. For the reasons described below, the measures establishing China’s current trading rights regime for the materials subject to export quota are, therefore, inconsistent with China’s obligations contained in Part I, paragraphs 5.1 and 1.2 of the Accession Protocol, as well as in paragraphs 83 and 84 of the Working Party Report.

**b. China’s Trading Rights Commitments**

**i. Paragraphs 5.1, 5.2 and 1.2 of the Accession Protocol and Paragraphs 83 and 84 of the Working Party Report**

259. Part I, Section 5 of the Accession Protocol contains enforceable commitments on China with respect to the right to trade. Part I, paragraph 5.1 of the Accession Protocol provides:

Without prejudice to China’s right to regulate trade in a manner consistent with the WTO Agreement, China shall progressively liberalize the availability and scope of the right to trade, so that, within three years after accession, all enterprises in China shall have the right to trade in all goods throughout the customs territory of China, except for those goods listed in Annex 2A which continue to be subject to state trading in accordance with this Protocol. Such right to trade shall be the right to import and export goods...For those goods listed in Annex 2B, China shall phase out limitation on the grant of trading rights

pursuant to the schedule in that Annex. China shall complete all necessary legislative procedures to implement these provisions during the transition period.

260. Paragraph 5.2 of Part I of the Accession Protocol further states:

Except as otherwise provided for in this Protocol, all foreign individuals and enterprises, including those not invested or registered in China, shall be accorded treatment no less favourable than that accorded to enterprises in China with respect to the right to trade.

261. Paragraph 1.2 of Part I of the Accession Protocol also states in pertinent part:

This Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement.

262. Paragraph 83 of the Working Party Report, which is referred to in paragraph 342, explains, in relevant part:

(a) The representative of China confirmed that, upon accession, China would eliminate for both Chinese and foreign-invested enterprises any export performance, trade balancing, foreign exchange balancing and prior experience requirements, such as in importing and exporting, as criteria for obtaining or maintaining the right to import and export.

(b) With respect to wholly Chinese-invested enterprises, the representative of China stated that although foreign-invested enterprises obtained limited trading rights based on their approved scope of business, wholly Chinese-invested enterprises were now required to apply for such rights and the relevant authorities applied a threshold in approving such applications. In order to accelerate this approval process and increase the availability of trading rights, the representative of China confirmed that China would reduce the minimum registered capital requirement (which applied only to wholly Chinese-invested enterprises) to obtain trading rights to RMB 5,000,000 for year one, RMB 3,000,000 for year two, RMB 1,000,000 for year three and would eliminate the examination and approval system at the end of the phase-in period for trading rights.

(d) The representative of China also confirmed that within three years after accession, all enterprises in China would be granted the right to trade. Foreign-invested enterprises would not be required to establish in a particular form or as a separate entity to engage in importing and exporting nor would new business licence encompassing distribution be required to engage in importing and exporting.

263. Finally, paragraph 84, which likewise is referred to in paragraph 342 of the Working Party Report, states:

(a) The representative of China reconfirmed that China would eliminate its system of examination and approval of trading rights within three years after accession. At that time, China would permit all enterprises in China and foreign enterprises and individuals, including sole proprietorships of other WTO Members, to export and import all goods (except for the share of products listed in Annex 2A to the Draft Protocol reserved for importation and exportation by state trading enterprises) throughout the customs territory of China. Such right, however, did not permit importers to distribute goods within China. Providing distribution services would be done in accordance with China’s Schedule of Specific Commitments under the GATS.

(b) With respect to the grant of trading rights to foreign enterprises and individuals, including sole proprietorships of other WTO members, the representative of China confirmed that such rights would be granted in a non-discriminatory and non-discretionary way. He further confirmed that any requirements for obtaining trading rights would be for customs and fiscal purposes only and would not constitute a barrier to trade. The representative of China emphasized that foreign enterprises and individuals with trading rights had to comply with all WTO-consistent requirements related to importing and exporting, such as those concerning import licensing, TBT and SPS, but confirmed that requirements relating to *minimum capital and prior experience would not apply*. Emphasis added.

264. Read together, these provisions establish that all enterprises in China, all foreign enterprises and all foreign individuals shall have the right to export almost all products from China, following a transition period. That transition period ended on December 11, 2004, more than five years ago. And, as described further below, the products to which this obligation relates include all of the Raw Materials.

265. However, China has failed to abide by these commitments. First, China subjects enterprises to an examination and approval system before they may export coke. As part of that examination and approval process, the enterprises must satisfy certain criteria relating to prior export experience and minimum registered capital. Second, for the materials subject to export quota bidding administration – *i.e.*, bauxite, fluorspar, and silicon carbide – China also requires enterprises to satisfy certain criteria, including those relating to prior export experience and registered capital, in order to obtain the right to participate in the export quota bidding process.

**ii. The Right to Trade for All Enterprises in China and All Foreign Enterprises and Individuals**

266. China committed to providing all enterprises in China the right to trade in the Raw Materials via paragraph 5.1 of the Accession Protocol and paragraphs 83(d) and 84(a) of the Working Party Report. Paragraph 5.1 states three relevant elements to this obligation. China shall: (1) grant the “right to trade” to “all enterprises in China;” (2) grant the right to trade with respect to “all goods” except for those listed in Annexes 2A and 2B; and (3) “complete all

necessary legislative procedures to implement” its trading rights commitments “within three years after accession.” Each element is addressed in turn below.

267. With respect to the first element, the “right to trade” is defined in the second sentence of paragraph 5.1 as the “right to import and export goods.” Paragraph 5.1 further specifies that the right to trade applies throughout the customs territory of China. Thus, the right to trade includes the right to export goods from the entire customs territory of China.

268. The first element of paragraph 5.1 also identifies the entities to which China has committed to grant the right to trade, *i.e.*, “all enterprises in China.” Every enterprise throughout the entire customs territory of China, without exception, shall have the right to trade. As long as an enterprise is in China, the obligation in paragraph 5.1 contains no additional conditions or restrictions on which enterprises shall have the right to trade.

269. Therefore, China may not reserve the right to trade to a sub-set of enterprises in China. Likewise, any limitations on who may exercise the right to trade, based on criteria such as sources of investment, would be inconsistent with China’s trading rights commitments.

270. The second element of the obligation contained in paragraph 5.1 provides that the right to trade applies to “all goods” except those listed in Annexes 2A and 2B. Annex 2A consists of two parts – Annex 2A1 entitled “Products Subject to State Trading (Import)” and Annex 2A2 entitled “Products Subject to State Trading (Export).” As the U.S. claim of inconsistency regarding China’s obligations contained in paragraph 5.1 concerns the right to export, only Annex 2A2 is relevant here. None of the Raw Materials is covered by Annex 2A2.<sup>361</sup>

271. Annex 2B identifies a list of six product headings – natural rubber, timber, plywood, wool, acrylic, and steel – that are divided into 245 products according to their eight-digit HS number. Trading rights for all of these products were to be “liberalized within three years” following China’s accession to the WTO, *i.e.*, by December 11, 2004.<sup>362</sup> Annex 2B is not relevant to these proceedings for two reasons. First, none of the Raw Materials is covered by Annex 2B; second, this limitation is no longer applicable to China’s trading rights commitments, since it expired in 2004.

272. Thus, all enterprises in China now should have the right to export from China *all* goods, except those listed in Annex 2A2 of the Accession Protocol, none of which includes any of the Raw Materials. To limit the right to export any goods not listed in that Annex, including the Raw Materials, would be inconsistent with China’s trading rights commitments.

273. The third element of paragraph 5.1 established that within three years after accession

---

<sup>361</sup> Accession Protocol, WT/L/432, Annex 2A2, p. 20 (Exhibit JE-2).

<sup>362</sup> Accession Protocol, WT/L/432, Annex 2B, p. 30 (Exhibit JE-2).

China was required to complete all necessary legislative procedures to implement its obligations with respect to the right to trade. This three-year period referred to in the first sentence of paragraph 5.1 expired on December 11, 2004, the third year anniversary of China’s accession to the WTO.

274. Paragraph 83(d) of the Working Party Report confirms the obligation contained in paragraph 5.1 of the Accession Protocol – *i.e.*, that China committed to provide trading rights to *all* enterprises in China by December 11, 2004. China also specifically committed in paragraph 83(d) not to impose requirements with respect to the form and scope of operation of foreign-invested enterprises engaging in importation and exportation in China.

275. Paragraph 84(a) of the Working Party Report likewise confirms China’s obligations with respect to trading rights, as set forth in paragraph 5.1 of the Accession Protocol. Paragraph 84(a) provides that China’s trading rights obligations apply to all enterprises in China, as of December 11, 2004, with regard to all products outside Annex 2A. As noted above, none of the Raw Materials are listed in Annex 2A and all of the Raw Materials are, therefore, covered by the right to export. Paragraph 84(a) also confirms China’s commitment to eliminate its “examination and approval” system of trading rights within three years after accession.

276. Paragraphs 83(a) and 83(b) prohibit China from imposing certain specific restrictions on the right to trade. Specifically, paragraph 83(a) makes clear China’s commitment not to impose on Chinese and foreign-invested enterprises any prior experience requirements in exporting as criteria for obtaining or maintaining the right to export.

277. Furthermore, paragraph 83(b) confirms China’s commitment to eliminate the “examination and approval” system for enterprises to be granted trading rights including by eliminating any minimum registered capital requirements. Paragraph 84(b) also confirms that in granting trading rights to foreign enterprises in China, China committed to eliminate prior experience and minimum registered capital requirements.<sup>363</sup>

**c. China’s Measures Allocating the Coke Export Quota Are Inconsistent with China’s Trading Rights Commitments**

278. As part of its administration of the coke export quota, China restricts enterprises’ right to export by requiring enterprises to satisfy certain criteria in order to be eligible to export under the quota.

279. The *Import and Export Regulations* provides that MOFCOM is responsible for the administration of export quotas, that enterprises seeking to export under the quota must apply to

---

<sup>363</sup> See Panel Report, *China – Audiovisual Products*, paras. 7.249-7.252, 7.260-7.266, 7.285-7.299, 7.313-314, 7.318-324.

do so, and that the relevant administrative authorities must decide whether to grant those applications.<sup>364</sup> The *2009 Coke Export Quota Application Procedures*, issued by MOFCOM, governs the application process for Chinese enterprises. This measure prescribes several criteria that Chinese enterprises must satisfy in order to be eligible to export under the quota. One of those criteria is that the enterprise have exported the requisite amount of coke in the previous year, or have supplied for export the requisite amount of coke in the previous three-year period.<sup>365</sup> In addition, trading companies are also required to have a registered capital of at least RMB 50 million.<sup>366</sup>

280. China then requires the CCCMC and the China Coking Industry Association to conduct an examination of whether the applicant enterprises comply with the requirements. Based on the CCCMC's advice, MOFCOM then publishes a list of companies that have applied for coke export quotas and those that comply with the necessary criteria.<sup>367</sup> Thus, companies that do not satisfy the relevant criteria – including with respect to prior export experience and minimum registered capital – are not permitted to export under the quota. This conclusion is confirmed by the notice allocating the second batch of coke export quota in 2009, which states that the batch is being allocated to companies fulfilling the conditions for the 2009 coke export quotas.<sup>368</sup>

281. In allocating the coke quota to foreign-invested enterprises, China also subjects such enterprises to an application procedure. The notices allocating the coke export quota to foreign-invested enterprises in 2009 make reference to an application procedure that includes an examination of the applicant enterprises' "export scale."<sup>369</sup>

282. Through these measures, China limits the right of enterprises to export coke. Only by complying with certain conditions – including having the requisite prior export experience and minimum registered capital – can an enterprise export coke under the quota. The relevant commitments in the Working Party Report explicitly call for the elimination of prior export experience requirements and for the elimination of the examination and approval system in respect of the grant of trading rights. China's administration of the export quotas on coke is directly contrary to these commitments.

283. Accordingly, China's measures limiting the right to export coke are inconsistent with China's trading rights commitments in Part I, paragraph 5.1 of the Accession Protocol as well as

---

<sup>364</sup> *Import and Export Regulations*, Articles 36-40 (Exhibit JE-73); *See also Export Quota Measures*, Articles 13-16 (Exhibit JE-76).

<sup>365</sup> *2009 Coke Export Quota Application Procedures* (Exhibit JE-85).

<sup>366</sup> *2009 Coke Export Quota Application Procedures* (Exhibit JE-85).

<sup>367</sup> *2009 Coke Export Quota Application Procedures*, Article II (Exhibit JE-85).

<sup>368</sup> *2009 Second Batch Coke Export Quota for Chinese Enterprises* (June 29, 2009) (Exhibit JE-81).

<sup>369</sup> *2009 First Batch Coke Export Quota for FIEs* (Exhibit JE-82); *2009 Second Batch Coke Export Quota for FIEs* (Exhibit JE-83).

Part I, paragraph 1.2 of the Accession Protocol to the extent it incorporates paragraphs 83 and 84 of the Working Party Report.

**d. China’s Measures Administering the Export Quota Bidding System Are Inconsistent with China’s Trading Rights Commitments**

284. China also places restrictions on the right of enterprises to export the materials subject to the export quota bidding regime. As set forth above, enterprises seeking to export bauxite, fluorspar, and silicon carbide must satisfy certain eligibility criteria in order to qualify to participate in the bidding process.

285. The *Quota Bidding Measures* provide that only enterprises who, among other qualifications, have exported or supplied for export the requisite amount of the relevant commodity may be approved to participate in bidding.<sup>370</sup> These conditions for qualification are reinforced in the Implementation Rules on Export Quota Bidding.<sup>371</sup>

286. The invitations for bidding provide further elaboration on these qualifications. The *2009 First Round Bidding Invitation* prescribes certain registered capital and prior export experience requirements that enterprises must satisfy in order to export.<sup>372</sup> The *2009 Second Round Bidding Invitation* also sets forth certain prior export experience requirements that only apply to foreign-invested enterprises.<sup>373</sup>

287. By virtue of these prior export experience and minimum capital requirements, China does not grant all foreign-invested enterprises or all Chinese enterprises the right to export. Instead, China continues to subject enterprises seeking to export to an examination and approval system.

288. However, in the relevant commitments in the Working Party Report China explicitly committed to eliminate prior export experience and registered capital requirements and to eliminate the examination and approval system in respect of the grant of trading rights. China’s administration of the export quota bidding system is directly contrary to these commitments.

289. Accordingly, China’s measures limiting the right to export the materials subject to export quota bidding are inconsistent with China’s trading rights commitments in Part I, paragraph 5.1 of the Accession Protocol as well as Part I, paragraph 1.2 of the Accession Protocol to the extent it incorporates paragraphs 83 and 84 of the Working Party Report.

---

<sup>370</sup> *Quota Bidding Measures*, Article 11 (Exhibit JE-77).

<sup>371</sup> *Quota Bidding Implementation Rules*, Article 6(I) (Exhibit JE-78).

<sup>372</sup> *2009 First Round Bidding Invitation* Article III (Exhibit JE-90).

<sup>373</sup> *2009 Second Round Bidding Invitation* (Exhibit JE-91).

**e. Conclusion**

290. China not only subjects the exportation of coke, bauxite, fluorspar, and silicon carbide to quotas, China also further restricts the exportation of these materials by restricting the right of enterprises to export the materials. These restrictions are inconsistent with important commitments China made at the time of its accession to eliminate any examination and approval system and to eliminate registered capital and prior export experience as criteria for the right to export.

**2. China’s Administration of its Export Quotas Is Inconsistent with Article X:3(a) of the GATT 1994**

**a. Article X:3(a) of the GATT 1994**

291. Article X:3(a) provides:

Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.

The laws, regulations, decisions and rulings described in Article X:1 include, in relevant part, those “of general application, made effective by any contracting party, pertaining to . . . restrictions . . . on . . . exports.”

**b. China’s Administration of the Coke Export Quotas Is Not Impartial or Reasonable**

292. As a threshold matter, the measures establishing the export quota for coke are within the scope of Article X. The relevant measures apply generally to the exportation of goods subject to export quotas and those that apply to the exportation of coke under the applicable export quota. In addition, the measures affect all those seeking to export coke under the quota. None of the measures at issue is limited to the treatment of particular companies or particular shipments. Accordingly, the measures establishing the coke export quota are of general application subject to the disciplines of Article X.<sup>374</sup>

293. In addition, since the export quota for coke restrict the exportation of coke, the relevant measures are “pertaining to . . . restrictions . . . on exports” within the meaning of Article X:1.

---

<sup>374</sup> The Appellate Body found similar reasoning in its reports on *Underwear* and *Chicken Cuts*. Appellate Body Report, *EC – Chicken Cuts*, paras. 111 and 113; *see also* Appellate Body Report, *United States – Underwear*, p. 21 citing Panel Report, *United States – Underwear*, para. 7.65.

294. In administering its export quotas on coke, China empowers a private party – the CCCMC – to have direct involvement in the examination and approval of enterprises’ applications to export coke under the quota.

295. Enterprises seeking to export coke under the quota must apply to do so pursuant to procedures issued by China.<sup>375</sup> As part of that application process, enterprises submit a number of documents, including past export invoices.<sup>376</sup>

296. MOFCOM delegates to CCCMC the responsibility for reviewing these applications for export of coke under the quota and conducting an examination of whether the applicant enterprises satisfy the requisite conditions. The importance of the CCCMC’s role in this process is confirmed by the fact that MOFCOM publishes a list of the enterprises that satisfy the necessary conditions based on the CCCMC’s opinion.<sup>377</sup>

297. While the CCCMC assumes responsibilities in administering the export quota regime on behalf of the Chinese state, it is not a governmental entity. Instead, it is an association of private commercial participants in a common industry – *i.e.*, the metals, minerals, and chemicals industry. The CCCMC is a membership organization. Its membership, comprising over 4000 entities, comprehensively represent not just traders, but also researchers, as well as manufacturers of processed downstream products, all of whom are operating businesses in ferrous metals, non-ferrous metals, non-metallic minerals and their products, construction materials, coal and coal products, oil and oil products, chemicals, plastics, fine chemicals, agro-chemicals, rubber products, and so on.<sup>378</sup>

298. By virtue of its membership, the CCCMC represents competing enterprises applying to export coke under the quota. Since the CCCMC’s membership also includes manufacturers of downstream processed products, it likewise represents potential customers of the exporting enterprises as well as competitors of foreign customers. In addition, as part of administering the application process, the CCCMC obtains access to sensitive commercial information regarding past transactions and past exports in the form of the applicant enterprises’ past export invoices. Such documents contain critical commercial information, such as the terms and conditions of prior export transactions. Permitting the representatives of competing exporters and potential customers access to this type of confidential information creates an inherent conflict of interest averse to the interests of the exporter at issue and foreign buyers. Other exporters are provided an opportunity to learn the results of their competitors’ negotiations and gain access to information regarding potential foreign customers’ bottom line. At the same time, the domestic

---

<sup>375</sup> 2009 Coke Export Quota Application Procedures (Exhibit JE-85).

<sup>376</sup> 2009 Coke Export Quota Application Procedures Article III (Exhibit JE-85).

<sup>377</sup> 2009 Coke Quota Export Application Procedures, Article II (Exhibit JE-85).

<sup>378</sup> See CCCMC website (Exhibit JE-88) and CCCMC Brochure (Animal Science 99-4) at 2, paras. 2 and 3 (Exhibit JE-89).

manufacturers and processors are provided access to the details of their foreign competitors' purchasing, including identities of their suppliers, quantities, and prices. Thus, contrary to the requirements of Article X:3(a) of the GATT 1994, China's administration of the export quota for coke is not impartial or reasonable.

299. The panel in *Argentina – Leather* adopted similar reasoning. In that dispute, the panel examined a measure that permitted members of an industry association of producers of leather, leather manufactures, and related goods, to be present during the inspection, classification and valuation of leather goods declared for exportation by Customs. The panel found that the Argentine measure was both partial and unreasonable and, therefore, inconsistent with Article X:3(a).

300. Specifically, the panel stated:

Whenever a party with a contrary commercial interest, but no relevant legal interest, is allowed to participate in an export transaction such as this, there is an inherent danger that the Customs laws, regulations and rules will be applied in a partial manner so as to permit persons with adverse commercial interests to obtain confidential information to which they have no right.<sup>379</sup>

With respect to reasonableness, the panel articulated the following:

. . . 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.<sup>380</sup>

301. In the context of the participation of the leather manufacturers' industry association in the Customs clearance for leather exports from Argentina, the panel noted, "[industry association] representatives should not be able to see the pricing information of the suppliers to [the association's] members. . . . We also see no need for them to be made aware of the destination or quantities involves . . . ."<sup>381</sup>

302. As the panel further stated, "[t]he only parties that have a contractual legal interest in the product and transaction are the exporter (and his agent) and the foreign buyer."<sup>382</sup> That panel concluded that the presence and participation of representatives of the industry association representing producers of leather and leather products in the Customs clearance process for exports of leather constituted the partial administration of the Customs laws because it implicated

---

<sup>379</sup> Panel Report, *Argentina – Leather*, para. 11.100.

<sup>380</sup> Panel Report, *Argentina – Leather*, para. 11.86.

<sup>381</sup> Panel Report, *Argentina – Leather*, para. 11.92.

<sup>382</sup> Panel Report, *Argentina – Leather*, para. 11.98.

an inherent danger of the inappropriate flow of one private person’s confidential information to another as a result of the administration of the Customs law.<sup>383</sup> As the panel reasoned,

the [industry association] representatives have, outside of the measure in question itself, no legal relationship with either the products or the sales contract. [The industry association], in fact, represents an adverse commercial interest in that the exports are not in its members’ interests as such exports potentially drive up the costs of hides. Furthermore, [the industry association] members are competitors of the foreign buyers of the hides.<sup>384</sup>

303. Similarly, the CCCMC represents competitors of the individual applicant enterprises and of the foreign buyers. Thus, even if it were consistent with China’s obligations for China to require applicants to provide this sort of information (but, as explained in Section IV.C.1.c above, it is not), the CCCMC’s role in determining whether applicant enterprises satisfy the requisite conditions for the coke export quota results in the same conflict of interest that the panel found in *Argentina – Leather*. Accordingly, China’s administration of the coke export quota system is inconsistent with Article X:3(a) of the GATT 1994.

**c. China’s Administration of the Export Quota Bidding Regime Is Not Impartial or Reasonable**

304. As a threshold matter, the measures establishing the export quotas for the materials subject to bidding – bauxite, fluorspar, and silicon carbide – are within the scope of measures described in Article X:1. The measures apply generally to all exports of the materials subject to the quota bidding regime, and are not applied only to any particular shipments or particular enterprises. In addition, since the export quotas for bauxite, fluorspar, and silicon carbide restrict the exportation of those Raw Materials, the relevant measures are “pertaining to . . . restrictions . . . on exports” within the meaning of Article X:1.

305. China also assigns the CCCMC a direct role in the administration of the export quota bidding regime.

306. The Bidding Committee, which is composed of relevant officials of MOFCOM, is directed to establish bidding offices for the various commodities subject to bidding under the relevant chamber of commerce for import and export. Consistent with this requirement, the Bidding Offices are composed of *inter alia* representatives of the CCCMC.<sup>385</sup> Further solidifying the role of the CCCMC, China’s measures provide that the head of the CCCMC serves as the

---

<sup>383</sup> Panel Report, *Argentina – Leather*, paras. 11.98-101.

<sup>384</sup> Panel Report, *Argentina – Leather*, para. 11.98.

<sup>385</sup> *Quota Bidding Measures*, Article 9 (Exhibit JE-77) .

director of the Bidding Office and is responsible for the daily operation of the bidding office.<sup>386</sup>

307. China empowers its various Bidding Offices – and therefore the CCCMC – to carry out essential functions in the administration of the export quota bidding system. These functions include: examining whether bidders satisfy requisite qualifications to participate in bidding, collecting the total award price, accepting and approving applications for assignment of unused quotas, and issuing certificates to enterprises that are awarded a portion of the quota for export.<sup>387</sup>

308. The direct role of the CCCMC in the quota bidding administration is also explicitly provided for in its Charter, which provides that it is authorized by MOFCOM to be responsible for export quota bidding.<sup>388</sup>

309. Enterprises applying to participate in export quota bidding are required to submit a number of documents, including the enterprise's balance sheet and income statement. Enterprises must also fill out forms with detailed information including registered capital of the enterprise, sales revenue, net profits, and past import and export data.<sup>389</sup>

310. The direct involvement of the CCCMC in the administration of export quota bidding is relevant to an analysis under Article X:3(a) in two ways. First, by virtue of its membership, the CCCMC represents the competing exporting enterprises in a single organization. By permitting the members of the CCCMC to make decisions regarding whether the bidding enterprises can export materials subject to the quota bidding process, China creates a conflict of interest adverse to the interests of the individual exporters.

311. Second, as part of that decision-making process, the CCCMC obtains access to sensitive and confidential commercial information of competing enterprises, such as balance sheets and income statements. Such sensitive commercial documents 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 as set forth above. 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 quota bidding.

---

<sup>386</sup> *Quota Bidding Implementation Rules*, Article 5 (Exhibit JE-78).

<sup>387</sup> *Quota Bidding Measures*, Article 10 (Exhibit JE-77), *Quota Bidding Implementation Rules*, Article 5 (Exhibit JE-78).

<sup>388</sup> *1994 CCCMC Charter*, Article 6(6) (Exhibit JE-86); *2001 CCCMC Charter*, Article 6(6) (Exhibit JE-87).

<sup>389</sup> *2009 First Round Bidding Invitation*, Article V(1)3(2) (Exhibit JE-90); *2009 Second Round Bidding Invitation*, Article IV.1(3)(2) (Exhibit JE-91).

312. Similarly, as set forth above, the panel in *Argentina – Leather* examined an industry association’s access to information such as the pricing, quantity and destination of exports, as part of its participation in the customs clearance process. The panel found that such “information flows” were “unreasonable” under Article X:3 of the GATT 1994.<sup>390</sup>

313. For these reasons, and consistent with the analysis of the administration of the coke export quota, China’s administration of the quota bidding regime is partial and unreasonable in contravention of China’s obligations under Article X:3(a) of the GATT 1994.

#### **d. Conclusion**

314. Contrary to China’s commitments under Article X:3 of the GATT 1994, China’s administration of its export quotas on bauxite, coke, fluorspar, and silicon carbide through the direct involvement of the CCCMC is not impartial or reasonable.

### **3. China’s Total Award Price Requirement Under the Export Quota Bidding Regime Is Inconsistent with Article VIII:1(a) of the GATT 1994**

#### **a. Article VIII:1(a) of the GATT 1994**

315. As set forth in Section III.E.4.b above, China administers its export quotas on bauxite, fluorspar, and silicon carbide through a quota bidding system. Enterprises must bid and pay for the right to export under the quota. Successful enterprises that are awarded a portion of the quota must pay a total award price in order to export under the quota. For the reasons set forth below, the total award price requirement is inconsistent with Article VIII:1(a) of the GATT 1994.

316. Article VIII:1(a) of the GATT 1994 provides in relevant part as follows:

All fees and charges of whatever character (other than import and export duties and other than taxes within the purview of Article III) imposed by contracting parties on or in connection with . . . exportation shall be limited in amount to the approximate cost of services rendered . . .

317. In addition, Article VIII:4 of the GATT 1994 provides further guidance regarding the scope of Article VIII:1(a). Article VIII:4 states that: “The provisions of this Article shall extend to fees, charges, formalities, and requirements imposed by governmental authorities in connection with importation and exportation, including those relating to: . . . (b) quantitative restrictions; (c) licensing . . .”

---

<sup>390</sup> Panel Report, *Argentina – Leather*, para. 11.92.

318. For the reasons described below, the total award price that China requires enterprises to pay to export the materials subject to the quota bidding regime is inconsistent with Article VIII:1(a) of the GATT 1994.

**b. The Total Award Price Is a “fee or charge of whatever character . . . imposed . . . in connection with . . . exportation”**

319. The total award price represents a “fee or charge of whatever character . . . imposed . . . in connection with . . . exportation” within the meaning of Article VIII:1(a) of the GATT 1994. The meaning of this term is further elaborated upon in Article VIII:4 of the GATT 1994 as including “fees, charges, formalities, and requirements imposed by governmental authorities in connection with . . . exportation.”

320. For the materials subject to export quota bidding, China requires enterprises to bid for the right to export under the quota. Enterprises must submit a bid price and a bid quantity. China awards portions of the quota to enterprises beginning with those that submit the highest bid prices. An enterprise that is successfully awarded a portion of the quota is required to pay a “total award price” – *i.e.*, its bid price multiplied by its bid quantity – in order to be able to export under the quota. Only by paying the total award price can an enterprise export under the quota.

321. The *Import and Export Regulations* provide that for goods whose exportation is limited by quotas, exporters of those goods must present a certificate of quota issued by the relevant administrative authority to Customs for declaration and examination.<sup>391</sup> In addition, the *Quota Bidding Measures*<sup>392</sup> and the *Quota Bidding Implementation Rules*<sup>393</sup> provide that entities administering the quota bidding system will issue such certificates to enterprises only upon payment of the total award price. This certificate is also one of the requirements for applying for an export license.<sup>394</sup>

322. As enterprises are required to pay the total award price in order to export the materials, the total award price constitutes a “fee[], charge[], formalit[y], [or] requirement[]” that is “imposed . . . in connection with . . . exportation.”

323. Article VIII:4, in elaborating on the meaning of Article VIII:1(a), also explicitly includes within the scope of that subparagraph “fees and charges” relating to “quantitative restrictions” and “licensing”. As set forth above, the payment of the total award price is part of China’s administration of the export quotas on the materials at issue. China’s export quotas – which

---

<sup>391</sup> *Import and Export Regulations*, Article 41 (Exhibit JE-73).

<sup>392</sup> *Quota Bidding Measures*, Article 26 (Exhibit JE-77).

<sup>393</sup> *Quota Bidding Implementation Rules*, Article 21 (Exhibit JE-78).

<sup>394</sup> *Quota Bidding Measures*, Article 33 (Exhibit JE-77); *Quota Bidding Implementation Rules*, Article 30 (Exhibit JE-78).

restrict the quantity of certain of the Raw Materials that may be exported – are a type of quantitative restriction.<sup>395</sup> The payment of the total award price is also necessary for obtaining an export license, and therefore, is also a fee or charge “relating to . . . licensing” as provided for in Article VIII:4. Furthermore, the total award price is not an import or export duty or an internal tax in the sense of GATT Article III:2.

324. Accordingly, the total award price requirement is a “fee or charge of whatever character . . . imposed . . . in connection with . . . exportation” within the meaning of Article VIII:1(a) of the GATT 1994.

**c. The Total Award Price Is Not Limited to the Approximate Cost of Services Rendered**

325. The total award price is also not limited to the approximate cost of services rendered. Indeed, there does not appear to be any connection between the amount of the total award price and the cost of any service to the individual exporter.

326. The total award price depends on the price that bidding enterprises are willing to pay for the right to export the relevant materials and the quantity of the material the enterprise intends to export. The higher the bid price and bid quantity submitted by a bidding enterprise, the higher the total award price will be. In addition, the total award price will vary from enterprise to enterprise depending on each enterprise’s bid price and bid quantity. There is also no ceiling on the amount of the total award price that can be charged to these enterprises.

327. The total award price is not related to the cost of any service rendered to specific exporters. To the extent that China could be considered to be performing a service in the administration of the export quota bidding system, the cost of that service would not depend on the price an enterprise is willing to pay for the right to export, or the quantity an enterprise seeks to export, as the total award price does.<sup>396</sup> Moreover, the absence of a ceiling on the total award price demonstrates that it is not in proportion to the cost of any service rendered.

328. This analysis is consistent with the panel’s reasoning in *Argentina – Footwear*. In that dispute, Argentina imposed a tax on imports for “statistical services.” The fee varied depending on the price of the product being imported and Argentina did not provide for a fixed maximum fee. The panel found that the fee was inconsistent with Article VIII:1(a), stating that the fee “by

---

<sup>395</sup> This reading of the text of Article VIII:4 is supported by the context provided by Article XI:1 of the GATT 1994, which is entitled “General Elimination of Quantitative Restrictions,” and specifically identifies export “quotas” as one type of measure that can be subject to that provision’s disciplines.

<sup>396</sup> See GATT Panel Report, *United States – Customs Users Fee*, paras. 69, 80 (“limited in amount to the approximate cost of services rendered” is “actually a dual requirement, because the charge in question must first involve a ‘service’ rendered, and then the level of the charge must not exceed the approximate cost of that service.” The term “services rendered” means “services rendered to the actual importer in question.”)

its very nature, is not limited to the approximate cost of services rendered.”<sup>397</sup>

#### **d. Conclusion**

329. For the foregoing reasons, China’s requirement that successful bidding enterprises pay a total award price in order to export the materials subject to the quota bidding system is inconsistent with China’s obligations under Article VIII:1(a) of the GATT 1994.

330. Furthermore, the total award price requirement is also inconsistent with Part I, paragraph 11.3 of the Accession Protocol. Paragraph 11.3 of the Accession Protocol provides: “China shall eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of this Protocol or applied in conformity with the provisions of Article VIII of the GATT 1994.”<sup>398</sup> Annex 6 of the Accession Protocol is a list of 84 products, each listed sequentially by HS number and accompanied by a description of the product and an export duty rate listed as an *ad valorem* percentage. None of the products subject to export quota bidding – *i.e.*, bauxite, fluorspar, or silicon carbide – is listed in Annex 6. The total award price is therefore a tax or charge applied to exports that is not provided for in Annex 6 of the Accession Protocol. As set forth in this section, the total award price is also not applied in conformity with the provisions of Article VIII of the GATT 1994. Accordingly, the total award price is inconsistent with paragraph 11.3 of the Accession Protocol.

### **D. China’s Export Licensing for Products Subject to Restricted Exportation Is Inconsistent with China’s Obligations under Article XI:1 of the GATT 1994**

#### **1. Article XI:1 of the GATT 1994**

331. As explained above, Article XI:1 of the GATT 1994 is titled “General Elimination of Quantitative Restrictions” and states, in relevant part:

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

#### **2. China Uses Licensing to Subject the Exportation of Designated Products to Restriction**

332. Export licenses are explicitly identified in Article XI:1 as a measure that can have the effect of restricting exportation. China’s export licensing applied to bauxite, coke, fluorspar,

---

<sup>397</sup> Panel Report, *Argentina – Footwear*, paras. 6.74-6.77.

<sup>398</sup> Accession Protocol (Exhibit JE-2).

manganese, silicon carbide, and zinc restricts the exportation of these products and breaches China's obligations under Article XI:1.<sup>399</sup>

333. China subjects these products to a system of export licensing in order to administer restrictions on their exportation. Article 19 of the *Foreign Trade Law* provides that the state “applies . . . licensing system to the management of goods subject to . . . export restrictions.”<sup>400</sup> Article 36 of the *Import and Export Regulations* states: “Goods restricted from exportation that are subject to quantitative restrictions by the state are subject to the administration of quotas; other goods restricted from exportation are subject to the administration of licenses.”<sup>401</sup> Article 2 of the *Export Licensing Measures* states: “The state shall apply export licenses to goods restricted from exportation.”<sup>402</sup>

334. China identifies the goods subject to export restriction on a positive list published annually. Article 18 of the *Foreign Trade Law* and Article 35 of the *Import-Export Regulations* provide MOFCOM with the authority, in collaboration with any other relevant departments of the State Council, to formulate, adjust and publish a catalog of goods restricted or prohibited from exportation.<sup>403</sup> Article 3 of the *Export Licensing Measures* specifies that MOFCOM, together with Customs, shall formulate, adjust and publish this catalog in the form of an annual Catalog of Goods Subject to Export Licensing.<sup>404</sup> Article 35 of the *Import-Export Regulations* further provides that this catalog of goods restricted in exportation must, under ordinary conditions, be promulgated at least 21 days prior to its implementation.<sup>405</sup>

335. In accordance with these provisions of Chinese law, MOFCOM and Customs published the *2009 Export Licensing List*<sup>406</sup> on December 10, 2008, taking effect 22 days later on January 1, 2009. All of the goods identified in the *2009 Export Licensing List* are, pursuant to Article 18 of the *Foreign Trade Law*, Article 35 of the *Import and Export Regulations*, and Article 3 of the *Export Licensing Measures*, goods designated by MOFCOM as subject to restricted exportation.

336. Bauxite, coke, fluorspar, manganese, silicon carbide, and zinc are listed in the *2009*

---

<sup>399</sup> For purposes of the discussion of China's non-automatic export licensing, the terms “bauxite,” “coke,” “fluorspar,” “manganese,” “silicon carbide,” and “zinc” cover the forms of each of these Raw Materials listed in Chart of Raw Materials Subject to Export Licensing and Quotas (Exhibit JE-6) and in the table in Section III.D.2 above.

<sup>400</sup> *Foreign Trade Law* (Exhibit JE-72).

<sup>401</sup> *Import and Export Regulations* (Exhibit JE-73).

<sup>402</sup> *Export License Measures* (Exhibit JE-74).

<sup>403</sup> *Foreign Trade Law* (Exhibit JE-72); *Import and Export Regulations* (Exhibit JE-73).

<sup>404</sup> *Export Quota Measures* (Exhibit JE-74).

<sup>405</sup> *Import and Export Regulations* (Exhibit JE-73).

<sup>406</sup> *2009 Export Licensing List Notice* (Exhibit JE-22), Appendix 1.

*Export Licensing List* under item numbers. 18, 27, 21, 39, 32, 23, and 38 respectively.<sup>407</sup> Accordingly, the exportation of all of these products is designated by the state as restricted.

337. Pursuant to Article 19 of the *Foreign Trade Law*, Article 36 of the *Import and Export Regulations*, and Article 4 of the *Export Licensing Measures*, the administration of licenses for the exportation of these products is the means by which China controls and restricts their exportation.

### 3. China's Export Licensing Is Not Automatic

338. The export licensing for bauxite, coke, fluorspar, manganese, silicon carbide, and zinc restricts the exportation of these products in contravention of Article XI:1, because it is not automatic.

339. In contrast to the non-automatic export licensing system for bauxite, coke, fluorspar, manganese, silicon carbide, and zinc, China also maintains an automatic export licensing system. Article 14 of the *Foreign Trade Law* provides that the export of goods and technology from China is free and unrestricted unless otherwise provided by law or regulation.<sup>408</sup> Article 15 of the *Foreign Trade Law* further provides that, where required for monitoring purposes, MOFCOM may use a system of automatic export licensing for certain freely exported goods and publish a catalog of such products. Article 15 of the *Foreign Trade Law* instructs MOFCOM and its partner institutions to grant approval whenever exporters seeking to export the unrestricted goods subject to automatic licensing apply for the automatic licenses.<sup>409</sup>

340. In contrast, the *Foreign Trade Law* provides for a different export licensing system for goods whose exportation is designated for restriction, as discussed in Section IV.A.2.<sup>410</sup> The exportation of those goods, which are identified in the 2009 Export Licensing List, requires MOFCOM's approval but, unlike in the automatic export licensing system for unrestricted goods, MOFCOM is not required to grant its approval.<sup>411</sup> Instead, MOFCOM is authorized to impose various conditions on the exportation of the products subject to this system of licensing. These conditions include the quantities of the products that can be exported,<sup>412</sup> the price at which

---

<sup>407</sup> See 2009 *Export Licensing List Notice* (Exhibit JE-22), Appendix 1.

<sup>408</sup> *Foreign Trade Law* (Exhibit JE-72).

<sup>409</sup> *Foreign Trade Law* (Exhibit JE-72).

<sup>410</sup> *Foreign Trade Law*, Article 19, para. 2 (Exhibit JE-72).

<sup>411</sup> *Foreign Trade Law*, Article 19 (compare to Article 15) (Exhibit JE-72); See also *Export License Measures*, Article 11 (Exhibit JE-74); *Export Licensing Rules*, Article 5 (Exhibit JE-97).

<sup>412</sup> *Export License Measures*, Article 6 (export licenses governed by the measure include export quota licenses and export licenses) (Exhibit JE-74); *Export Quota Measures*, Article 25 (exporters of products subject to quotas must obtain export licenses in order to export) (Exhibit JE-76).

the products can be exported,<sup>413</sup> the qualifications that exporters must possess in order to export,<sup>414</sup> and any other conditions that MOFCOM decides it needs in order to provide its approval.<sup>415</sup>

341. As the panel in *India – Quantitative Restrictions* reasoned in the analogous context of import licensing:

in light of the terms of Article XI:1 and the[] adopted panel reports [in *Japan – Trade in Semiconductors*, *EEC – Quantitative Restrictions Against Imports of Certain Products from Hong Kong*, and *EEC – Programs of Minimum Import Prices, Licenses and Surety Deposits for Certain Processed Fruits and Vegetables*], we conclude that a discretionary or non-automatic import licensing requirement is a restriction prohibited by Article XI:1.<sup>416</sup>

342. China uses this export licensing system in order to subject the exportation of goods to restriction, which is made possible by the non-automatic nature of the licensing system. The export licensing China applied to bauxite, coke, fluorspar, metal, silicon carbide, and zinc is a measure that makes effective a restriction on the exportation of these products in contravention of China’s obligations under Article XI:1 of the GATT 1994.

#### **4. China’s Export Licensing Is Also Inconsistent with China’s Obligations under Paragraphs 162 and 165 of the Working Party Report**

343. Paragraphs 162 and 165 of the Working Party Report contain enforceable commitments with respect to the elimination of export restrictions.

344. Paragraph 1.2 of China’s Accession Protocol states in pertinent part: “[t]his Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement.”<sup>417</sup> Paragraph 342 of the Working Party Report contains a reference to both Paragraphs 162 and 165.

---

<sup>413</sup> *Measures for Administration of Licensing Entities*, Article 40(3) (license issuing entities subject to penalties for failing to issue licenses according to coordinated export prices) (Exhibit JE-75).

<sup>414</sup> *Measures for Administration of Trade Social Organizations*, Article 8(3) (listing management qualifications as a condition to be examined in issuing an export license) (Exhibit JE-101).

<sup>415</sup> *Measures for Administration of Trade Social Organizations*, Article 8(2) and (4) (listing undefined “documents of approval” and “other materials to be submitted” as bases for issuance of export licenses) (Exhibit JE-101).

<sup>416</sup> Panel Report, *India – Quantitative Restrictions*, para. 5.129.

<sup>417</sup> Accession Protocol (Exhibit JE-2).

345. Paragraph 162 of the Working Party Report states in pertinent part: “[t]he representative of China confirmed that China would abide by WTO rules in respect of non-automatic export licensing and export restrictions. The Foreign Trade Law would also be brought into conformity with GATT requirements. Moreover, export restrictions and licensing would only be applied, after the date of accession, in those cases where this was justified by GATT provisions.”<sup>418</sup>

346. Additionally, paragraph 165 of the Working Party Report provides: “[t]he representative confirmed that upon accession, remaining non-automatic restrictions on exports would be notified to the WTO annually and would be eliminated unless they could be justified under the WTO Agreement or the Protocol.”<sup>419</sup>

347. However, as set forth above, China did not eliminate its export restrictions upon accession. In addition to the export quotas, China continues to maintain restrictions on the exportation of bauxite, coke, fluorspar, manganese, silicon carbide, and zinc through export licensing. This export licensing is not in conformity with WTO rules including *inter alia* Article XI of the GATT 1994. Accordingly, China’s export quotas are also inconsistent with paragraphs 162 and 165 of the Working Party Report and paragraph 1.2 of China’s Accession Protocol.

#### **E. China’s Minimum Export Price Requirement Is Inconsistent with China’s Obligations under the GATT 1994**

348. China’s minimum export price requirement for bauxite, coke, fluorspar, magnesium, silicon carbide, yellow phosphorus, and zinc, as described above in Section III.G, constitutes a restriction on the exportation of these Raw Materials that is inconsistent with Article XI:1 of the GATT 1994.<sup>420</sup> Furthermore, the manner in which China administers the minimum export price requirement through the CCCMC contravenes China’s obligation to administer its laws, regulations, decisions, and rulings pertaining to restrictions on exports in a uniform, impartial and reasonable manner under Article X:3(a) of the GATT 1994. Finally, China’s failure to publish its laws, regulations, decisions, and rulings pertaining to the minimum export price requirement for these Raw Materials, is inconsistent with China’s obligations under Article X:1 of the GATT 1994.

##### **1. China’s Minimum Export Price Requirement Is Inconsistent with China’s Obligations under Article XI:1 of the GATT 1994**

349. China’s minimum export price system is largely opaque. It appears to be based on rules that are not published. Industry trade journals have observed that minimum export price

---

<sup>418</sup> Exhibit JE-3.

<sup>419</sup> Exhibit JE-3.

<sup>420</sup> See Chart of Raw Materials Subject to Minimum Export Prices (Exhibit JE-7) for products subject to minimum export price requirements.

requirements exist, but that understanding of the system is based on informal statements and oral agreements of traders and export regulators.<sup>421</sup> Nevertheless, based on the statements that MOFCOM has made of its official views and through documents submitted by Chinese exporters and members of the CCCMC in various U.S. court proceedings described in more detail in Section III.G above, China effects a minimum export price requirement for bauxite, coke, fluorspar, magnesium, silicon carbide, yellow phosphorus, and zinc through: (1) a system of “self-discipline” among exporters; (2) penalties imposed by MOFCOM; (3) China’s export license issuing entities; and (4) Customs. This requirement prohibits the exportation of bauxite, coke, fluorspar, magnesium, silicon carbide, yellow phosphorus, and zinc below the price coordinated by the CCCMC and its Branches. The minimum export price requirement thus restricts the exportation of these products and is inconsistent with Article XI:1 of the GATT 1994.

**a. Coordinated Export Prices**

350. As explained in Section III.G, it is MOFCOM’s official view that China’s Chambers of Commerce, which includes the CCCMC, oversee and regulate the business of importing and exporting products in China on behalf of MOFCOM.<sup>422</sup> According to the *1994 CCCMC Charter* and the *2001 CCCMC Charter*, among the CCCMC’s export-related oversight and regulation functions is the coordination of exports for metals, minerals, and chemicals products.<sup>423</sup> The *CCCMC Export Coordination Measures* provide that the scope of the CCCMC’s export coordination encompasses the coordination of industry export prices.<sup>424</sup> The *CCCMC Export Coordination Measures* require that commodity-specific Branches or Coordination Groups be established to carry out CCCMC’s coordination work for individual commodities. The CCCMC has established Branches and Coordination Groups for coordinating export matters, including export prices, for bauxite, coke, fluorspar, magnesium, silicon carbide, yellow phosphorus, and zinc.<sup>425</sup>

351. While the rules and coordination measures governing the setting of industry export prices by the CCCMC’s various Branches are not published, Chinese exporters of bauxite submitted a copy of the Coordination Measures of the Bauxite Branch in a U.S. court proceeding involving private allegations of price fixing and other anti-competitive behavior by Chinese exporters of

---

<sup>421</sup> See Industrial Minerals Articles (2009) (Exhibit JE-126); and “Import and Export and Production of Magnesium between January and August This Year,” China Magnesium Materials Network website (Inmo.gov.cn) (October 7, 2008) (Exhibit JE-133).

<sup>422</sup> Brief of Amicus Curiae: MOFCOM at 9 (Exhibit JE-98).

<sup>423</sup> *1994 CCCMC Charter*, Articles 3 and 6 (Exhibit JE-86); *2001 CCCMC Charter*, Articles 3 and 6 (JE-87).

<sup>424</sup> *CCCMC Export Coordination Measures*, Article 4(3) (Exhibit JE-107).

<sup>425</sup> CCCMC Brochure at 14 (Exhibit JE-89); CCCMC Website Pages at 3-5 (Exhibit JE-88).

bauxite.<sup>426</sup> According to the *Bauxite Coordination Measures*, the Bauxite Branch coordinates the bauxite industry’s export prices at least twice a year.<sup>427</sup> These prices are then required to be notified to MOFCOM and China’s export licensing authorities.<sup>428</sup>

#### **b. Observation of the Coordinated Export Prices by Exporters**

352. The export prices coordinated by the CCCMC Branches and Coordination Groups serve as a minimum export price by virtue of exporters’ adherence to these prices. According to MOFCOM, the system of “self-discipline” is an “actual specific measure[] taken by China to effect its regulatory policies,” under which exporters consult with each other to come to consensus on a matter. Exporters abide by the result of the consensus by virtue of their awareness of penalties that apply for failure to observe the consensus matter, including the forfeiture of their exporting rights.<sup>429</sup>

353. Consistent with MOFCOM’s explanation of how the system of “self-discipline” functions, the *CCCMC Export Coordination Measures* and the *Bauxite Coordination Measures* provide that the industry coordinated export price is a “collective contract” that all members must abide by.<sup>430</sup> These measures also provide for penalties for failure to comply with the coordinated export price, including warnings, suspension of membership or expulsion from the CCCMC, circulating a notice of criticism, fines, or in the most severe cases, recommendations to MOFCOM to revoke an exporter’s right to trade, to bid on export quotas, and to receive export tax rebates.<sup>431</sup> In addition, it appears that under the *CCCMC Export Coordination Measures*, exporters are also incentivized to observe the coordinated export prices through rewards such as an increase in the amount of the export quotas awarded to them.<sup>432</sup>

#### **c. MOFCOM Penalties for Exporting at Low Prices**

354. In addition, the *Export Price Penalties Regulations* require exporting enterprises to abide by the coordination of the Chambers of Commerce and appear to require them to take part in setting export prices.<sup>433</sup> According to the *Export Price Penalties Regulations*, exporters that

---

<sup>426</sup> Exhibit JE-108.

<sup>427</sup> *CCCMC Bauxite Branch Coordination Measures*, Article 4 (Exhibit JE-108).

<sup>428</sup> *CCCMC Bauxite Branch Coordination Measures*, Article 7 (Exhibit JE-108).

<sup>429</sup> MOFCOM Statement in *In re Vitamin C Antitrust Litigation* (Aug. 31, 2009), para. 3 (Exhibit JE-111).

<sup>430</sup> *CCCMC Export Coordination Measures*, Article 18 (Exhibit JE-107); *CCCMC Bauxite Branch Coordination Measures*, Article 10 (Exhibit JE-108).

<sup>431</sup> *CCCMC Export Coordination Measures*, Article 21 (Exhibit JE-107); *CCCMC Bauxite Branch Coordination Measures*, Article 8 (Exhibit JE-108).

<sup>432</sup> *CCCMC Export Coordination Measures*, Article 21 (Exhibit JE-107).

<sup>433</sup> *Export Price Penalties Regulations*, Article 4 (Exhibit JE-113).

export at prices that are too low are subject to penalties imposed by MOFCOM,<sup>434</sup> including warnings, fines, suspension or revocation of the right to bid for export quotas of related products, suspension or revocation of export licenses, and suspension or revocation of the right to import or export.<sup>435</sup>

**d. Issuance of Licenses on the Basis of Coordinated Prices**

355. China's licensing authorities issue export licenses for bauxite, coke, fluorspar, silicon carbide, and zinc, which are subject to non-automatic export licensing, on the basis of the coordinated export prices. Article 7 of the *Bauxite Coordination Measures*<sup>436</sup> requires that industry coordinated export prices be notified to export license issuing entities to enable such entities to issue licenses on the basis of these prices. In addition, China's license issuing entities are subject to punishment by MOFCOM if they fail to ensure that the coordinated export price is observed. Article 40(3) of the *Measures for the Administration of License Issuing Entities* provides that license issuing entities that fail to issue export licenses in accordance with the coordinated export prices are subject to sanctions.<sup>437</sup> These sanctions include circulation of a notice of criticism, suspension of the authority to issue licenses for the same type of goods, or termination of the authority to issue licenses for any goods.<sup>438</sup>

**e. Price Review by Customs and the PVC Procedure**

356. Customs enforces the coordinated export prices for at least yellow phosphorus. While all goods to be exported from China must be cleared by Customs before they are permitted to be exported,<sup>439</sup> yellow phosphorus is subject to additional rules – and in this case, those rules enforce minimum export prices.

357. In 1997, MOFCOM issued three measures that govern the review of export prices by Customs: the *Customs Export Price Review Rules*, the *Customs Export Price Review Coordinating Rules*, and the *Provisional Rules on Export PVC*. Despite not being published, these measures appear to continue to be in force and appear to continue to authorize review by Customs of export prices in the clearance process as a method of enforcing industry coordinated export prices as minimum export prices.

358. These three measures formed the basis for additional measures, the *2002 PVC Notice* and the *2004 PVC Notice*, which applied an enhanced minimum export price enforcement

---

<sup>434</sup> *Export Price Penalties Regulations*, Article 3 (Exhibit JE-113).

<sup>435</sup> *Export Price Penalties Regulations*, Article 6 (Exhibit JE-113).

<sup>436</sup> Exhibit JE-108.

<sup>437</sup> *Measures for Administration of Licensing Entities*, Article 40(3) (Exhibit JE-75).

<sup>438</sup> *Measures for Administration of Licensing Entities*, Article 40(3) (Exhibit JE-75).

<sup>439</sup> *Customs Law*, Articles 2, 9, and 23 (Exhibit JE-68).

mechanism called the PVC procedure to yellow phosphorus among other products. The PVC Procedure for yellow phosphorus relies on strengthened coordination between the CCCMC and Customs and requires Customs, in reviewing the prices of export products, to deny clearance for any proposed export whose contract price has not been verified by the CCCMC as meeting or exceeding the industry coordinated export prices.<sup>440</sup>

359. The PVC Procedure requires exporters of yellow phosphorus to submit their export contracts and special PVC forms to the CCCMC for verification. The PVC Procedure requires the CCCMC to review the exporters' documents and verify, among other things, that the price indicated on the export contract meets or exceeds the industry coordinated price. If the CCCMC verifies that the contract prices at issue comply with the industry coordinated export price, the CCCMC must affix its chop to the contracts where the prices are indicated. The PVC Procedure then requires that exporters obtaining the CCCMC's verification to approach Customs for export clearance and submit to Customs evidence of the CCCMC's verification. Customs is required to deny clearance to proposed exports whose contracts do not bear the CCCMC's chop, or seal.<sup>441</sup>

360. The *2004 PVC Notice*<sup>442</sup> superseded the *2002 PVC Notice*<sup>443</sup> and appears to have been repealed on May 26, 2008 by the *2008 PVC Notice*.<sup>444</sup> Nevertheless, CCCMC measures implementing the *2004 PVC Notice*, i.e., the *CCCMC PVC Rules* and the *Online PVC Instructions*, remained in force after May 26, 2008. Indeed, they were published on the CCCMC website until at least October 15, 2009,<sup>445</sup> serving as evidence that the PVC procedure continues to be applicable to exports of yellow phosphorus.

361. Furthermore, the *Notice of the Rules on Price Review of Export Products by the Customs*, the *Rules for Coordination with Respect to Customs Price Review of Export Products*, and the *Provisional Rules on Export Price Verification and Chop for Key Products Subject to Price Review* appear to continue to be in force and appear to continue to authorize review by Customs of export prices in the clearance process as a method of enforcing industry coordinated export prices as minimum export prices for all of the Raw Materials.

## f. Conclusion

362. As a result of China's minimum export price requirement, the exportation of coke, bauxite, fluorspar, magnesium, silicon carbide, yellow phosphorus, and zinc are prohibited if the export price does not meet the industry coordinated export price. This constitutes a restriction on

---

<sup>440</sup> *2004 PVC Notice*, paras. 2 and 4 (Exhibit JE-122).

<sup>441</sup> *2004 PVC Notice*, paras. 2 and 4 (Exhibit JE-122).

<sup>442</sup> Exhibit JE-122.

<sup>443</sup> Exhibit JE-121.

<sup>444</sup> Exhibit JE-125.

<sup>445</sup> See *CCCMC PVC Rules* (JE-127) (Chinese language printout).

the exportation of these materials in contravention of China’s obligations under Article XI:1 of the GATT 1994.

363. The reasoning of a *General Agreements on Tariff and Trade 1947* (“GATT 1947”) panel supports this analysis. In *EEC – Fruits and Vegetables*, that panel examined a minimum price requirement imposed on the importation of tomato concentrates by what was then the European Economic Community (“EEC”). The minimum import price requirement at issue in that dispute consisted of a regulation providing for the annual establishment of a minimum import price for tomato concentrates, which was enforced by an associated security system. The associated security system conditioned the issuance of import certificates for tomato concentrates on the lodging of an additional security in order to guarantee that the free-at-frontier price of imports plus the customs duty for the good together equaled or exceeded the minimum price that had been set for that year. In any case where tomato concentrates were imported at a price lower than the established minimum import price, the security would be forfeited.<sup>446</sup> The *EEC – Fruits and Vegetables* panel found that “the minimum import price system, as enforced by the additional security, was a restriction ‘other than duties[,] taxes or other charges’ within the meaning of Article XI:1.”<sup>447</sup>

**2. China’s Administration of the Minimum Export Price Requirement Is Inconsistent with China’s Obligations under Article X:3(a) of the GATT 1994**

364. China administers the minimum export price system for yellow phosphorus through the enhanced enforcement procedure known as the PVC procedure. The PVC procedure requires participation of the CCCMC in the export clearance process. Accordingly, China does not administer the minimum export price in an impartial and reasonable manner, and therefore contravenes its obligations under Article X:3(a) of the GATT 1994.

**a. Article X:3(a) of the GATT 1994**

365. Article X:3(a) provides:

Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.

---

<sup>446</sup> GATT Panel Report, *EEC – Fruits and Vegetables*, para. 4.9.

<sup>447</sup> GATT Panel Report, *EEC – Fruits and Vegetables*, para. 4.9 (“the Panel considered that the minimum import price system, as enforced by the additional security, was a restriction ‘other than duties taxes or other charges’ within the meaning of Article XI:1.”) Another GATT panel in *Japan – Semiconductors* found this reasoning of the *EEC – Fruits and Vegetables* panel to be “equally applicable to restrictions on exports below certain prices.” GATT Panel Report, *Japan – Semiconductors*, para. 105.

The laws, regulations, decisions and rulings described in Article X:1 are those “of general application, made effective by any contracting party, pertaining to . . . restrictions . . . on . . . exports.”

As a threshold matter, as discussed above, the laws and regulations establishing China’s minimum export price requirement pertain to an export restriction of general application. The minimum export price requirement applies to all products for which an export price has been coordinated.

**b. China’s Administration of the Minimum Export Price System through the PVC Procedure Is Not Impartial or Reasonable**

366. The PVC procedure provides the CCCMC a key role in reviewing and approving export prices in order for exports to be cleared through Customs, and the CCCMC’s membership structure leads to administration of rules in a way that is neither impartial nor reasonable. The PVC procedure thus constitutes administration of the minimum export price system that is inconsistent with Article X:3(a) of the GATT 1994.

367. In examining the impact of the CCCMC’s participation in the administration of the PVC procedure as described above in Section IV.E.1.e, it is crucial to take note of CCCMC’s role in that administration and the nature of CCCMC as an entity. While the CCCMC apparently assumes responsibilities in managing and coordinating trade on behalf of the state, unlike a regular governmental entity, it is also a membership association of private commercial participants in a common industry – i.e., the metals, minerals, and chemicals industry. Its membership of over 4000 entities comprehensively represent not just traders, but also researchers and manufacturers of processed downstream products, all of whom are operating businesses in ferrous metals, non-ferrous metals, non-metallic minerals and their products, construction materials, coal and coal products, oil and oil products, chemicals, plastics, fine chemicals, agro-chemicals, rubber products, and so on.<sup>448</sup> By virtue of its membership, the CCCMC represents an individual exporter’s competitors as well as competitors of the foreign buyer.

368. Despite the conflicts of interest lurking in its membership structure, the CCCMC plays a central role in the PVC procedure for enhanced enforcement of minimum export prices for yellow phosphorus. The PVC procedure requires that all export contracts for yellow phosphorus be submitted by the exporter to the CCCMC. As a result, the CCCMC (including its private membership) has access to a contract in its entirety, with all of its terms and conditions, and is then required to scrutinize in particular the prices and quantities negotiated and agreed between the exporter and its foreign buyer.<sup>449</sup> The CCCMC’s active role in reviewing export contracts for

---

<sup>448</sup> CCCMC Website Pages at 1 (Exhibit JE-88); CCCMC Brochure at 2, paras. 2 and 3 (Exhibit JE-89).

<sup>449</sup> The 2004 PVC Notice instructs the CCCMC to affix its chop, if it verifies the prices are in conformity with the industry coordinated export prices, on the contract where the price is indicated as well as where the quantity

export prices thus introduces the eyes and ears of these external, potentially adverse commercial interests into the private commercial transaction at issue in the export process.

369. The inherent risk that confidential information will be revealed through the PVC procedure makes it unreasonable under Article X:3(a). There is no reason why exporters should have to submit their entire contract for a process whose purpose is to verify only the export price. These exporters are forced to provide irrelevant but sensitive business information in order to obtain clearance for exportation. This information is thus unreasonably made available to parties who under normal circumstances would have no reason to see it.

370. Indeed, permitting the representatives of competing exporters and potential customers to have access to this type of confidential information creates an inherent conflict of interest adverse to the interests of the exporter at issue and foreign buyers. It permits these groups access to sensitive details regarding the terms and conditions of transactions negotiated between exporters and their foreign buyers. Other exporters are provided an opportunity to free-ride on the negotiations of their competitors and gain access to information regarding potential foreign customers' bottom line. At the same time, the domestic manufacturers and processors are provided access to the details of their foreign competitors' purchasing, including identities of their suppliers, quantities, and costs. This inherent conflict of interest renders the administration of the minimum export price requirement through the PVC procedure partial and therefore inconsistent with Article X:3(a).

371. The reasoning of the panel in *Argentina – Leather* supports the conclusion regarding the unreasonableness and partiality of China's PVC procedures. That panel concluded that the presence and participation of representatives of the industry association representing producers of leather and leather products in the Customs clearance process for exports of leather constituted the partial and unreasonable administration of the Customs laws because it implicated an inherent danger of the inappropriate flow of one private person's confidential information to another as a result of the administration of the Customs law.<sup>450</sup>

372. As that panel noted, in the context of the participation of the leather manufacturers' industry association in the Customs clearance for leather exports from Argentina, the clearance process required disclosure of information that was not relevant to the making of export classifications. The panel thus concluded that the administration of this process was unreasonable, because the "[industry association] representatives should not be able to see the pricing information of the suppliers to [the association's] members. . . . We also see no need for them to be made aware of the destination or quantities involves . . . ."<sup>451</sup> The requirement to disclose this confidential information, when it had no bearing on the administration of the law at

---

is indicated. Exhibit JE-122, Annex 2, para. A.

<sup>450</sup> Panel Report, *Argentina – Leather*, paras. 11.98-101.

<sup>451</sup> Panel Report, *Argentina – Leather*, para. 11.92.

issue, was found to be unreasonable.

373. The panel in *Argentina – Leather* also stated that “[t]he only parties that have a contractual legal interest in the product and transaction are the exporter (and his agent) and the foreign buyer.”<sup>452</sup> The panel further reasoned,

the [industry association] representatives have, outside of the measure in question itself, no legal relationship with either the products or the sales contract. [The industry association], in fact, represents an adverse commercial interest in that the exports are not in its members’ interests as such exports potentially drive up the costs of hides. Furthermore, [the industry association] members are competitors of the foreign buyers of the hides.<sup>453</sup>

This flow of confidential information to potentially adverse commercial interests led to partiality in administration of the export classification system.

374. The role of the CCCMC in verifying export contracts in the Customs clearance process prescribed by the PVC procedure has an inherent danger of the “inappropriate flow of one private person’s confidential information to another as a result of the administration the Customs laws”<sup>454</sup> and thus constitutes unreasonable and partial administration in contravention of the requirements of Article X:3(a) of the GATT 1994.

### **3. China’s Failure to Publish Measures Pertaining to the Minimum Export Price Requirement Is Inconsistent with China’s Obligations under Article X:1 of the GATT 1994**

#### **a. Article X:1 of the GATT 1994**

375. As explained above, Article X:1 provides, in relevant part:

Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to . . . restrictions or prohibitions on . . . exports . . . shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. . . .

Article X:1 thus requires that laws, regulations, decisions, and rulings that impact trade and traders generally must be made known to traders and other governments.

---

<sup>452</sup> Panel Report, *Argentina – Leather*, para. 11.98.

<sup>453</sup> Panel Report, *Argentina – Leather*, para. 11.98.

<sup>454</sup> Panel Report, *Argentina – Leather*, para. 11.99.

**b. China’s Minimum Export Price Requirements Are Rules of General Application**

376. As discussed above, the measures establishing the minimum export price requirement apply generally to the exportation of all products for which an export price has been coordinated. Accordingly, these measures are of general application and thus subject to the requirements of Article X.

**c. China Has Failed to Publish Important Measures and Provisions Relating to Minimum Export Prices**

377. The legal framework that appears to establish China’s minimum export price requirement is highly non-transparent. Articles in industry publications have characterized the regime as an “informal” one that relies on oral agreement or announcements by China’s export gatekeepers.<sup>455</sup> Specific rules and measures establishing the details of the minimum export price requirement are not published.

378. Despite the CCCMC’s apparent role in overseeing and regulating trade on behalf of the state, formal measures, in the form of laws or regulations or administrative rulings, providing rules and details on how the CCCMC coordinates export prices do not appear to be published. Specific coordination programs and Branch coordination measures prescribed under the *CCCMC Export Coordination Measures* are not published. The *Bauxite Coordination Measures* only became public when Chinese bauxite exporters filed the document with a U.S. court.

379. The *2001 CCCMC Charter* was not published on the CCCMC website until well into 2009, after the request for consultations in this dispute was made. There is also no evidence that it was published in any other way. This failure to publish promptly the *2001 CCCMC Charter* evidently resulted in the failure of Chinese traders to become acquainted with it: in the U.S. court proceeding alleging anti-competitive behavior by Chinese exporters of bauxite during the period from 2003 to the present, those exporters submitted a copy of the *1994 CCCMC Charter*, not the *2001 CCCMC Charter*.

380. Three measures related to export price review by Customs are referenced in the *2002 PVC Notice* and the *2004 PVC Notice*: 1) the *Notice of the Rules on Price Review of Export Products by the Customs*; (2) the *Rules for Coordination with Respect to Customs Price Review of Export Products*; and (3) the *Provisional Rules on Export Price Verification and Chop for Key Products Subject to Price Review*. These measures are apparently important parts of the legal framework for setting minimum export prices. Nevertheless, despite diligent attempts, these

---

<sup>455</sup> See Industrial Minerals Articles (2009) (Exhibit JE-126); and “Import and Export and Production of Magnesium between January and August This Year,” China Magnesium Materials Network website (Inmo.gov.cn) (October 7, 2008) (Exhibit JE-133).

measures could not be located and appear to be unpublished.

381. Accordingly, although evidence demonstrates that certain measures related to the establishment and functioning of the minimum export price requirement do exist, they remain unpublished or were not published promptly. By failing to publish these measures and provisions and by not publishing the *2001 CCCMC Charter* for eight years after it came into effect, China has acted inconsistently with the requirements of Article X:1 of the GATT 1994.

## **V. CONCLUSION**

382. For the reasons set forth in this submission, the United States respectfully requests the Panel to find that China's measures, as set out above, are inconsistent with China's obligations under the GATT 1994 and the Accession Protocol. The United States further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that China bring its measures into conformity with the GATT 1994 and the Accession Protocol.