

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

**(DS394, DS395, DS398)**

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

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| <i>Argentina – Leather (Panel)</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>Australia – Salmon (AB)</i>                               | Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998   |
| <i>Brazil – Aircraft (AB)</i>                                | Appellate Body Report, <i>Brazil – Export Financing Programme for Aircraft</i> , WT/DS46/AB/R, adopted 20 August 1999  |
| <i>Brazil – Tyres (Panel)</i>                                | Panel Report, <i>Brazil – Measures Affecting Imports of Tyres</i> , WT/DS332/R, adopted 17 December 2007, as modified by the Appellate Body Report, WT/DS332/AB/R  |
| <i>Brazil – Tyres (AB)</i>                                   | Appellate Body Report, <i>Brazil – Measures Affecting Imports of Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007   |
| <i>Canada – Import Restrictions on Ice Cream and Yoghurt</i> | GATT Panel Report, <i>Canada – Import Restrictions on Ice Cream and Yoghurt</i> , BISD 36S/68, adopted 5 December 1989   |
| <i>Chile – Price Band System (AB)</i>                        | Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/AB/R, adopted 23 October 2002  |
| <i>China – Audiovisual Products (Panel)</i>                  | Panel Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/R, adopted 19 January 2010 as modified by the Appellate Body Report, WT/DS363/AB/R |
| <i>China – Audiovisual Products (AB)</i>                     | Appellate Body Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/AB/R, adopted 19 January 2010   |
| <i>Dominican Republic – Cigarettes (AB)</i>                  | Panel Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/AB/R, adopted 19 May 2005  |

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|---|---|
| <i>EC – Bananas III (AB)</i>  | Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997   |
| <i>EC – Biotech</i>   | Panel Report, <i>European Communities – Measures Affecting the Approval and Marketing of Biotech Products</i> , WT/DS291/R, WT/DS292/R, WT/DS293/R, adopted 21 November 2006                                      |
| <i>EC – Customs Matters</i>   | Panel Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/AB/R, adopted 11 December 2006  |
| <i>EC – Information Technology Products</i>                             | Panel Report, <i>EC – Tariff Treatment of Certain Information Technology Products</i> , WT/DS375/R, adopted 21 September 2010   |
| <i>EC – Tariff Preferences (Panel)</i>                                  | Panel Report, <i>European Communities – Conditions for Granting Tariff Preferences to Developing Countries</i> , WT/DS246/R, adopted 20 April 2004, as modified by the Appellate Body Report, WT/DS246/AB/R       |
| <i>EEC – Restrictions on Imports of Dessert Apples</i>                  | GATT Panel Report, <i>EEC – Restrictions on Imports of Dessert Apples</i> , BISD 36S/93, adopted 22 June 1989   |
| <i>India – Additional Duties (Panel)</i>                                | Panel Report, <i>India – Additional and Extra-Additional Duties on Imports from the United States</i> , WT/DS360/R, adopted 17 November 2008 as modified by WT/DS360/AB/R   |
| <i>India – Additional Duties (AB)</i>                                   | Appellate Body Report, <i>India – Additional and Extra-Additional Duties on Imports from the United States</i> , WT/DS360/AB/R, adopted 17 November 2008  |
| <i>India – Quantitative Restrictions (Panel)</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 – Film (Panel)</i>   | Panel Report, <i>Japan – Measures Affecting Consumer Photographic Film and Paper</i> , WT/DS44/R, adopted 22 April 1998   |
| <i>Japan – Restrictions on Imports of Certain Agricultural Products</i> | GATT Panel Report, <i>Japan – Restrictions on Imports of Certain Agricultural Products</i> , BISD 35S/163, adopted 2 February 1988  |



|                                      |  |
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| <i>Korea – Beef (AB)</i>             | Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001         |
| <i>Turkey – Rice Licensing</i>       | Panel Report, <i>Turkey – Measures Affecting the Importation of Rice</i> , WT/DS334/R, adopted 22 October 2007   |
| <i>US – Certain EC Products (AB)</i> | Appellate Body Report, <i>United States – Import Measures on Certain Products from the European Communities</i> , WT/DS165/AB/R, adopted 10 January 2001           |
| <i>US – Cotton Subsidies (AB)</i>    | Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R, adopted 21 March 2005  |
| <i>US – Gambling (AB)</i>            | Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/R, adopted 20 April 2005      |
| <i>US – Gasoline (AB)</i>            | Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996                              |
| <i>US – Shrimp (AB)</i>              | Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998                     |
| <i>US – Wool Shirts (AB)</i>         | Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R and Corr.1, adopted 23 May 1997 |

**TABLE OF EXHIBITS**

| <b>Joint Exhibit No.</b> | <b>Description</b>   |
|--------------------------|--|
| JE-152                   | Magnesium Key Facts  |
| JE-153                   | Manganese Key Facts  |
| JE-154                   | Zinc Report  |
| JE-155                   | USGS Circular 1196-H, Manganese Recycling in the United States in 1998   |
| JE-156                   | 2008 Minerals Yearbook: Magnesium [Advance Release]  |
| JE-157                   | Coke Report  |
| JE-158                   | Dr. Gene Grossman, Ph.D. and Dr. Mark Watson, Ph.D.: Critique of China's Economic Analysis of the Export Restraints on Several Raw Materials   |
| JE-159                   | Curriculum Vitae and Background for Dr. Gene Grossman, Ph.D. and Dr. Mark Watson, Ph.D.  |
| JE-160                   | Definition of essential  |
| JE-161                   | Silicon Carbide Report   |
| JE-162                   | <i>Shanxi Industry Adjustment and Revitalization Plan for New Materials</i>  |
| JE-163                   | Curriculum Vitae of Dr. Eugene Thiers  |
| JE-164                   | Market Research on Fluorspar and Selected Fluorochemicals (October 2010)   |
| JE-165                   | Bauxite Report   |
| JE-166                   | <i>Analytical Report and Recommendations Regarding the 2010 Mining Quantity Control Targets Applicable to High-Alumina Clay and Fluorspar (Ministry of Land and Resources, March 24, 2010)</i>               |
| JE-167                   | <i>Circular of the State Council's General Office on the Adoption of Comprehensive Measures to Control the Mining and Production of Fireclay and Fluorspar (State Council [2010] No. 1, January 2, 2010)</i> |

|        |  |
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| JE-168 | <i>Circular on the Allocation of the 2010 Mining Control Targets Applicable to High-Alumina Clay Ore and Fluorspar Ore</i> (Ministry of Land and Resources (2010) No. 187, April 20, 2010)                               |
| JE-169 | <i>Circular on the Allocation of Production Quantity Control Targets Applicable to High-Alumina Clay and Fluorspar for the Year 2010</i> (MIIT (2010) no. 244, May 19, 2010)   |
| JE-170 | <i>Announcement No. 54, 2007 Releasing the Catalogue of Indium and Molybdenum Products Subject to Export Quotas Licensing Administration</i> (Ministry of Commerce and General Administration of Customs, June 11, 2007) |
| JE-171 | Committee on Market Access, Note by the Secretariat: Notifications of Quantitative Restrictions G/MA/NTM/QR/1Add.11 (April 11, 2008)   |
| JE-172 | Catalogue of Products Subject to Export (Quota) License (2007 QRs of China final)  |
| JE-173 | China Yellow Phosphorus Exports Average Monthly Price January 2006-January 2010 (World Trade Atlas)  |
| JE-174 | “China to adjust export tax for some steel, nonferrous metals products,” <i>Xinhua News Agency</i> (June 7, 2010)  |
| JE-175 | Keith Bradsher, “Business in China Never Easy Gets Harder: Foreign firms complain of protectionism in trade, manufacturing rules,” <i>International Herald Tribune</i> (May 17, 2010)                                    |

## I. INTRODUCTION

1. Despite commitments made by China when it acceded to the World Trade Organization (WTO), China maintains a number of restraints on the exportation of important raw materials. China's policies of imposing export restraints on these raw materials are driven by and help to fuel the dramatic expansion of China's industries, to the detriment of the industries and workers of other WTO Members. The export restraints at issue in this dispute are, however, inconsistent with WTO rules. Those rules provide a firm foundation for international trade and development; contrary to China's argumentation, China's pursuit of its economic objectives neither justifies China's breach of those rules nor provides a basis for reading the WTO Agreement so as to weaken or nullify those rules.

2. In addition to their inconsistency with WTO rules, China's export restraints distort the playing field on which WTO Members compete. Specifically, the export restraints provide Chinese producers preferential access to raw material inputs. At the same time, the export restraints drive up world prices and limit access to these raw materials for producers outside China, thereby conferring a competitive disadvantage for them.

3. 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>1</sup> China is a leading producer of each of the Raw Materials. These Raw Materials are inputs for industries including steel, aluminum, and a variety of chemicals. At the heart of the dispute are the export duties and export quotas that China maintains on these products. China fails to rebut the complainants' claims that the export restraints are inconsistent with China's commitments in its Protocol of Accession to the WTO ("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"), and its obligations under the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"). In fact, China largely concedes the inconsistency of the export restraints with the relevant obligations. As we will demonstrate, while China invokes certain exceptions of the GATT 1994 to justify its measures, China's reliance on these exceptions is unavailing.

4. China invokes Article XX(b) in an attempt to portray certain of the discriminatory export restraints as necessary for protection of health. But, a review of the facts confirms that China's defense does not withstand scrutiny. Similarly, China's invocation of the exception related to conservation in Article XX(g) to justify certain of the export restraints also fails. Finally, China has also failed to demonstrate that one of its export quotas for which it invokes Article XI:2(a) is justified pursuant to that provision.

5. China's statements in the course of this dispute have confirmed that the export restraints have the objective of ensuring China's continued economic growth. As China states: "The

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<sup>1</sup> See 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.

imposition of export restrictions will allow China to develop its economy in the future . . .”<sup>2</sup>  
This, and other statements that we will discuss, belie China’s arguments in support of its defenses.

6. Finally, China administers its export restraints in a WTO-inconsistent manner through the use of export licensing, restrictions on the right to export, and minimum export pricing. China has also failed to rebut these claims.

## **II. CHINA’S EXPORT DUTIES ARE INCONSISTENT WITH CHINA’S OBLIGATIONS UNDER PARAGRAPH 11.3 OF THE ACCESSION PROTOCOL**

### **A. The Prima Facie Case**

7. China imposes export duties on various forms of bauxite, coke, fluorspar, magnesium, manganese, silicon metal, yellow phosphorus and zinc.<sup>3</sup>

8. Paragraph 11.3 of the Accession Protocol provides, in relevant part, that China “shall eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 . . . .” Annex 6 of the Accession Protocol sets forth a list of 84 products by HS code for which China reserved the right not to eliminate export duties. The Annex 6 list also indicates, for each product, the maximum export duty rate that China may impose.

9. The bauxite, coke, fluorspar, magnesium, manganese, silicon metal, and zinc products on which China imposes export duties of 5 to 40 percent are not included in Annex 6’s list of reserved products. Yellow phosphorus, on which China impose[d] export duties of 70 percent, consisting of a special export duty of 50 percent in addition to a 20 percent ordinary export duty, is listed in Annex 6. The export duties on yellow phosphorus exceed the 20 percent maximum export duty rate permitted under Annex 6.

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

11. China does not contest that these export duties are inconsistent with paragraph 11.3 of the Accession Protocol. In fact, China does not attempt to defend the duties that it imposes on bauxite, silicon metal, and one form of manganese (ores and concentrates) or the special export duties it imposes on yellow phosphorus. Instead, China attempts only to justify the export duties it imposes on coke and fluorspar (which it imposes in combination with export quotas),

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<sup>2</sup> Comments on the Panel Questions Following the First Substantive Meeting, prepared by Dr. Olarreaga (Exhibit 442), para. 19.

<sup>3</sup> See Chart of Raw Materials Subject to Export Duties (Exhibit JE-5).

magnesium scrap, manganese scrap, and zinc scrap, and magnesium metal, and manganese metal, under exceptions provided in Article XX of the GATT 1994.<sup>4</sup>

12. However, the particular obligation at issue is contained in the Accession Protocol, not the GATT 1994, and the GATT Article XX exceptions are not available as justifications for breaches of this particular Protocol commitment. Even aside from the fact that GATT Article XX exceptions are not applicable to paragraph 11.3 of the Accession Protocol, China would fail to meet the requirements of the particular Article XX exceptions that it has invoked.

**B. Article XX Is Not Applicable to China’s Export Duty Commitments in Paragraph 11.3 of the Accession Protocol**

13. For the reasons set forth in the complainants’ first oral statement, the exceptions in Article XX are not available as a defense to a breach of the export duty commitments in paragraph 11.3 of the Accession Protocol. Therefore, China’s reliance on the exceptions contained in Article XX of the GATT 1994 to justify its export duties on coke, fluorspar, magnesium and manganese metal, and magnesium, manganese, and zinc scrap is unavailing. An analysis of the text of paragraph 11.3, the Appellate Body’s reasoning in *China – Audiovisual Products*, and the relevant context of China’s export duty commitment all support the conclusion that Article XX is not applicable to paragraph 11.3 of the Accession Protocol.

14. The text of Article XX in the GATT 1994 is clear. The *chapeau* of Article XX states in relevant part: “nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . .” The referenced “Agreement” is the GATT 1994. The Appellate Body’s reasoning in *China – Audiovisual Products* makes clear that if Article XX is to apply to an obligation in a WTO agreement other than the GATT 1994, the language and context of that obligation must provide a basis for the applicability of Article XX.

15. In that case, the Appellate Body considered the invocation of Article XX as a defense to a breach of China’s trading rights commitment in paragraph 5.1 of the Accession Protocol. In finding that the exceptions in Article XX were applicable to the trading rights commitment, the Appellate Body grounded its reasoning in the specific language of the commitment at issue. Specifically, paragraph 5.1 of the Accession Protocol begins: “Without prejudice to China’s right to regulate trade in a manner consistent with the WTO Agreement . . .” Thus, the Appellate Body found that the explicit reservation of a right to regulate trade in a manner consistent with the WTO Agreement” provided a basis for finding that the exceptions in Article XX were available as a defense for a breach of the trading rights commitment.<sup>5</sup>

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<sup>4</sup> For fluorspar, China argues that its export duty is justified under Article XX(g) of the GATT 1994. For magnesium scrap, manganese scrap, and zinc scrap, and magnesium metal, manganese metal, and coke China contends that its export duties are justified by Article XX(b).

<sup>5</sup> Appellate Body Report, *China – Audiovisual Products*, paras. 218-23.

16. In contrast, paragraph 11.3 contains no such reservation as the one provided for in paragraph 5.1 of the Accession Protocol. Instead, paragraph 11.3 contains its own exceptions to the commitment to “eliminate all taxes and charges applied to exports. . . .” The first exception is Annex 6, which provides a list of products for which China reserved the right to impose export duties and a maximum rate which the export duties may not exceed. The second exception is for “taxes and charges . . . applied in conformity with the provisions of Article VIII of the GATT 1994.” There is no textual basis in paragraph 11.3 for applying the exceptions in Article XX to the export duty commitment.

17. Nevertheless, China argues that the Appellate Body’s reasoning supports the applicability of Article XX to the commitment in paragraph 11.3 of the Accession Protocol. In doing so, China relies heavily on the Appellate Body’s reference to an abstract “right to regulate” out of context from the remainder of the Appellate Body’s analysis. For example, in its first oral statement, China states “because the right to regulate derives from an ‘inherent power’ vested in States, and is not ‘bestowed by international treaties such as the *WTO Agreement*’, the inclusion of this phrase was not necessary to enable China to regulate through recourse to Article XX. Likewise, China’s right to regulate export trade through conservation-related and public health measures is not bestowed by affirmative language in the *WTO Agreement*, including the *Accession Protocol*.”<sup>6</sup> There are a number of flaws with China’s argument.

18. The first flaw is that while China claims to be anchoring its argument in the Appellate Body’s reasoning in *China – Audiovisual Products*, China’s argument is in fact completely divorced from the point the Appellate Body was making with respect to Members’ right to regulate. Thus, it is important to examine the Appellate Body’s reasoning in full. The Appellate Body stated:

We read the phrase ‘in a manner consistent to the WTO Agreement’ as referring to the *WTO Agreement* as a whole, including its Annexes. We note, in this respect, that we see the ‘right to regulate’, in the abstract, as an inherent power enjoyed by a Member’s government, rather than a right bestowed by international treaties such as the *WTO Agreement*. With respect to trade, the *WTO Agreement* and its Annexes instead operate to, among other things, discipline the exercise of each Member’s inherent power to regulate by requiring WTO Members to comply with the obligations that they have assumed thereunder. When what is being regulated is trade, then the reference in the introductory clause to ‘consistent with the WTO Agreement’ constrains the exercise of that regulatory power such that China’s regulatory measures must be shown to conform to WTO disciplines.<sup>7</sup>

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<sup>6</sup> China’s First Opening Statement, para. 70 citing Appellate Body Report, *China – Audiovisual Products*, para. 222.

<sup>7</sup> Appellate Body Report, *China – Audiovisual Products*, para. 222.

19. Contrary to China’s argument, this passage makes clear that the Appellate Body’s conclusion that Article XX was available as a defense to the commitment in paragraph 5.1 was in fact grounded in the specific language in that provision *i.e.*, “without prejudice to China’s right to regulate trade in a manner consistent with the WTO Agreement . . . .”

20. The second flaw is that China’s argument turns the logic of the Appellate Body’s reasoning on its head. The Appellate Body’s reasoning reflects an understanding that because WTO Members have an inherent right to regulate, it was necessary for the Members to agree on rules to constrain that right in the context of trade. Where WTO Members regulate trade, therefore, those regulations “must be shown to conform to WTO disciplines.” However, China appears to argue the opposite. China appears to argue that because it has an inherent right to regulate in the abstract, such a right trumps the prescribed WTO rules that are in fact intended to constrain that right in the context of trade. Under that line of reasoning, there would be no rules-based trading system, because all WTO obligations would be superseded by Members’ inherent right to regulate in the abstract. China’s argument is untenable and should not be accepted.<sup>8</sup>

21. The third flaw is that while China’s reference to the regulation of “export trade through conservation and public health” measures is an apparent attempt to connect Article XX with paragraph 11.3, there is no textual basis for such a connection. As set forth above, the text of the commitment at issue in a WTO agreement other than the GATT 1994 must provide a basis for finding that the exceptions in Article XX of the GATT 1994 are applicable. No such textual basis exists in paragraph 11.3. And, contrary to China’s contentions, nothing in the Note of Annex 6 provides such a basis. According to China, Annex 6 authorizes China to breach its export duty commitments under “exceptional circumstances.”<sup>9</sup> In fact, nothing in Annex 6 provides China with such authorization, but rather states that “China confirmed that the tariff levels included in this Annex are maximum levels which will not be exceeded. China confirmed furthermore that it would not increase presently applied rates except under exceptional circumstances.”<sup>10</sup> Indeed, Members of the Working Party would likely find it surprising that China now considers that it is authorized to exceed the “maximum” rates in Annex 6 or impose export duties on products not listed in Annex 6 for that matter.

22. China’s reliance on paragraph 170 of the Working Party Report is also unavailing. Paragraph 170 of the Working Party Report states that: “The representative of China confirmed that upon accession, China would ensure that its laws and regulations relating to all fees, charges or taxes levied on imports and exports would be in full conformity with its WTO obligations, including Articles I, III:2 and 4, and XI:1 of the GATT 1994, and that it would also implement such laws and regulations in full conformity with these obligations.” China relies on the

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<sup>8</sup> See U.S. Answers to the First Set of Questions from the Panel, paras. 46-49; U.S. Comments on China’s Answers to the First Set of Questions from the Panel, para. 51.

<sup>9</sup> China’s Answers to the First Set of Questions from the Panel, para. 71.

<sup>10</sup> Exhibit JE-2 (emphasis added).



language “taxes levied on imports and exports would be in full conformity with its WTO obligations,” and asserts that this language “is similar to Paragraph 5.1 of the *Accession Protocol*, which states China’s commitment to ensure that its regulation of trade would be ‘consistent with the WTO Agreement’.”<sup>11</sup> However, contrary to China’s argument, there is no analogy between paragraph 170 of the Working Party Report and paragraph 5.1 of the *Accession Protocol*.

23. Paragraph 5.1 contains a commitment, the trading rights commitment, and an explicit reservation that the commitment was subject to China’s right to regulate trade in a manner consistent with the WTO Agreement. Paragraph 170 of the Working Party Report neither contains the commitment at issue nor an explicit reservation for that commitment. Paragraph 170 simply affirms China’s obligations under the WTO Agreement; it does not make applicable to the commitments in the Protocol any of the exceptions under the GATT 1994. Paragraph 11.3 of the *Accession Protocol* sets forth the relevant commitment and the exceptions applicable to that commitment, Annex 6 and taxes and charges applied in conformity with Article VIII of the GATT 1994. There is no textual basis for concluding that Article XX is an exception to the commitment in paragraph 11.3, and paragraph 170 of the Working Party Report does not change that fact.

24. In addition, the text of paragraphs 11.1 and 11.2 of the *Accession Protocol* confirms that Article XX is not applicable to paragraph 11.3. While paragraphs 11.1 and 11.2 of the *Accession Protocol* affirm China’s obligation to apply or administer certain measures “in conformity with the GATT 1994,” paragraph 11.3 sets out an entirely separate obligation, not contained in the GATT 1994.

25. Finally, the context provided by paragraphs 155 and 156 of the Working Party Report confirms that Members did not intend for the Article XX exceptions to apply to China’s Protocol commitments on export taxes and charges. In paragraphs 155 and 156, members of the Working Party voiced concerns over China’s practice of applying taxes and charges exclusively to exports. Paragraph 155 states that in the view of some members of the Working Party, “such taxes and charges should be eliminated unless applied in conformity with GATT Article VIII or listed in Annex 6 to” what was then the draft Protocol.”<sup>12</sup> This paragraph follows the same structure as paragraph 11.3 and identifies the same exceptions to the obligation set out therein. In addition, at the time, China responded that it maintained export duties on 84 items, and therefore, 84 items were reserved by China in Annex 6. However, in the *2009 Tariff Implementation Plan*, China imposes export duties on 337 products, more than 4 times the number of items on Annex 6. Nothing in the Protocol or Working Party Report provides that the exceptions in Article XX of the GATT 1994 should apply to paragraph 11.3 so as to make possible such an expansion of the list of products on which China may impose export duties.<sup>13</sup>

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<sup>11</sup> China’s First Opening Statement, para. 73.

<sup>12</sup> Exhibit JE-3.

<sup>13</sup> See Complainants’ First Oral Statement, paras. 64-65.

26. For the foregoing reasons, Article XX of the GATT 1994 is not applicable to China’s export duty commitment in paragraph 11.3 of the Accession Protocol. Accordingly, China’s attempt to justify the export duties that contravene the commitment in paragraph 11.3 through recourse to Article XX fails.

**C. Even Aside from the Fact that the GATT Article XX Exceptions Do Not Apply to Paragraph 11.3, China Would Not Satisfy the Requirements of the Article XX Exceptions It Has Asserted**

27. China asserts that its export duty on fluorspar is justified pursuant to Article XX(g) of the GATT 1994 and that its export duties on magnesium scrap, manganese scrap, and zinc scrap and magnesium metal, manganese metal, and coke are justified under Article XX(b). Even aside from the fact that Article XX of the GATT 1994 is not available as a justification for breaches of the commitment in paragraph 11.3 of the Accession Protocol, China would not meet the conditions required by Article XX(g) and Article XX(b).

**1. Analysis under Article XX of the GATT 1994**

28. Article XX provides for certain limited and conditional exceptions to the substantive obligations set forth in the GATT 1994.<sup>14</sup> In addition, the burden of establishing that an otherwise GATT-inconsistent measure satisfies the requirements of one of the exceptions in Article XX lies with the party invoking the defense.<sup>15</sup>

29. Article XX sets forth requirements both in its chapeau and in its 10 delineated sub-paragraphs. The chapeau of Article XX applies to all Article XX exceptions, and requires that any measure that is otherwise inconsistent with the GATT 1994 must not be “applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.” The Article XX sub-paragraphs each set forth a different basis for excepting otherwise non-conforming measures.

30. As noted in the U.S. First Oral Statement,<sup>16</sup> the Appellate Body reasoned in *US – Gasoline* that the analysis under Article XX is “two-tiered: first, provisional justification by reason of characterization of the measure under [the sub-paragraph]; second, further appraisal of the same measure under the introductory clauses of Article XX.”<sup>17</sup>

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<sup>14</sup> Appellate Body Report, *US – Shrimp*, para. 157.

<sup>15</sup> Appellate Body Report, *US – Gasoline*, p. 22-23.

<sup>16</sup> Complainants’ First Oral Statement, para. 69.

<sup>17</sup> Appellate Body Report, *US – Gasoline*, p. 22.

31. China does not contest that the export duties on fluorspar, coke, magnesium, manganese, and zinc scrap are inconsistent with paragraph 11.3 of the Accession Protocol (nor does China contest that the export quotas on bauxite, coke, and silicon carbide discussed below are inconsistent with Article XI:1 of the GATT 1994). In order to justify these inconsistent export restraints, it is China's burden to demonstrate that each measure at issue satisfies the specific conditions set out in sub-paragraph (g) or sub-paragraph (b) of Article XX, and that each measure also satisfies the requirements of Article XX's chapeau.

**2. China's Export Duties on Magnesium Scrap, Manganese Scrap, and Zinc Scrap, and Coke, Magnesium Metal, and Manganese Metal Are Not Justified by Article XX(b) of the GATT 1994**

32. China has failed to establish that its export duties on certain forms of coke, magnesium, manganese, and zinc would have been justified by Article XX(b) in any event.

**a. Introduction**

33. Article XX(b) of the GATT 1994 provides that: "Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures...(b) necessary to protect human, animal or plant life or health."

34. China divides the products for which it asserts an Article XX(b) defense into two categories and asserts a separate defense under Article XX(b) for each category. First, China's assertion that its export duties on magnesium scrap, manganese scrap, and zinc scrap<sup>18</sup> are justified under Article XX(b), appears to be premised on the theory that production of magnesium metal, manganese metal, and zinc from scrap (*i.e.*, secondary production) is less environmentally harmful than production of magnesium metal, manganese metal, and zinc from ores (*i.e.*, "primary production"). Therefore, according to China, the export duties on scrap are necessary to ensure a steady supply of scrap and thereby facilitate a shift from primary production to secondary production.<sup>19</sup>

35. Second, China contends that its export duties on magnesium metal, manganese metal, and coke are justified under Article XX(b) on the grounds that production of these products are

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<sup>18</sup> China imposes export duties on three forms of zinc: "zinc waste and scrap" (HS # 7902.0000), "hard zinc spelter" (2620.1100), and "other zinc ash and residues" (HS# 2620.1900). *See* Exhibit JE-5. China refers to "zinc scrap" throughout the section of its first written submission addressing its defense under Article XX(b) as it relates to scrap products. We understand China's references to "zinc scrap" to encompass the three zinc products identified above.

<sup>19</sup> China's First Written Submission, paras. 316-17.

environmentally harmful. The export duty on these products, according to China, will lead to a reduction of production of these metals (because of the reduced demand for them outside China) and therefore a reduction of the pollution associated with their production.<sup>20</sup>

36. As we will discuss in this section of the submission, China fails to satisfy the requirements of a defense under Article XX(b) for a number of reasons. Before turning to these arguments in more detail, it is important to examine a few overarching flaws with China's line of argument as it relates to Article XX(b). First, contrary to China's arguments, the Chinese export duties are not designed to address the health risks associated with environmental pollution. Rather, that is merely a *post hoc* rationalization developed solely for purposes of this dispute. China's export duties are designed to promote increased production of high value-added downstream products that use the raw materials at issue in this dispute as inputs. The export duties serve to lower the price for these inputs in China and thereby facilitate the production of downstream products. Numerous statements in high-level Chinese documents and statements made in the course of this dispute confirm this fact. This fact is also confirmed by the dramatic growth in China's exports of steel and aluminum.<sup>21</sup>

37. As the complainants explained in their first oral statement, China's environmental argument as it relates to the export restraints at issue is illogical and untenable. This is because the export of the products at issue is completely unrelated to environmental pollution. Even according to China, it is the production of these products, not their export, that causes pollution. Indeed, the environmental effect of producing a unit of raw material is exactly the same whether or not that unit of raw material is used domestically or exported to other Members. The raw materials used domestically and used for export are fungible, and the environmental effects of the production of a unit of raw material are the same regardless of the destination of the raw material. If China wishes to reduce the environmental impact associated with production of a raw material, China can simply adopt production restrictions or pollution controls on primary production that would affect equally both domestic and foreign users. Thus, China cannot present any environmental justification for discriminating against industrial users located outside of China in favor of industrial users within China.<sup>22</sup>

38. China does, however, have an economic reason for imposing these export duties. China's export restraints ensure that domestic users have preferential access to the raw materials compared to their foreign counterparts. This helps fuel the tremendous expansion of China's downstream industries producing more sophisticated, higher value-added products. Numerous statements by China in high-level documents of the government and in the course of this litigation expose this true motive behind the export duties.<sup>23</sup> For example, China's economist,

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<sup>20</sup> China's First Written Submission, paras. 257-59.

<sup>21</sup> See Magnesium Key Facts at Tables 20 and 21, p. 19-20. (Exhibit JE-152).

<sup>22</sup> Complainants' First Oral Statement, paras. 11-13, 97-98.

<sup>23</sup> See U.S. First Written Submission, paras. 29-31.

Dr. Olarreaga provides a response to Question 43 of the Panel, which asks why China prefers export restraints over production restrictions for purposes of environmental protection. He states:

[t]he imposition of export restrictions will allow China to develop its economy in the future . . . The reason for this is that export restraints encourage the domestic consumption of these basic materials in the domestic economy. Consumption of the basic materials at issue by downstream industries (such as the steel, aluminum, and chemical industries, and those industries further processing steel, aluminum and chemicals into), and the consequent additional production and export of higher value-added products, will help the entire Chinese economy grow faster and, in the longer run, move towards a more sophisticated production bundle, away from heavy reliance on natural resource, labor-intensive, highly polluting manufacturing. This move towards higher-tech, low-polluting, high value-added industries, in turn, will increase growth opportunities for the Chinese economy, generating positive spillovers beyond those to firms directly participating in these markets.<sup>24</sup>

Thus, the objective of China’s export restraints is clear – China’s economic growth. While China considers that this economic growth, in turn, may have indirect environmental benefits, the primary objective of the export duties is to encourage the production of sophisticated high value-added products.

39. The measures imposing the export restraints at issue do not make any mention of an environmental concern in connection with the imposition of the export restraints. The only document that China refers to in its first written submission supposedly in support of the notion that the export restraints do have an environmental objective is the *National Eleventh Five-Year Plan for Environmental Protection*. Contrary to China’s arguments, this document does not establish an environmental rationale for the export duties at issue in this dispute.<sup>25</sup>

40. Subsequently, in Annex A to its comments on the complainants’ answers to the Panel’s questions, China submitted a chart of high-level Chinese documents supposedly detailing a

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<sup>24</sup> Comments on Panel Questions Following the First Substantive Meeting, prepared by Dr. Olarreaga (Exhibit CHN-442), para. 19.

<sup>25</sup> See Section IV, Article 2, para. 1. (Exhibit CHN-123) China points to the statement indicating that “environmental protection requirements will be taken into account when introducing or reforming resource tax, consumption tax and import and export tax.” This makes no mention of the products at issue in this dispute, or any specific products for that matter. Moreover, it is entirely unclear what the implications are of taking environmental protection requirements “into account” or how they might affect a particular measure including export restraints. China also points to the statement: “China will explore the establishment of environmental taxation system and employ tax lever to facilitate the development of a resource saving and environmental-friendly society.” Exhibit CHN-123, Section (IV), Article 2, para. 1. This statement makes no mention of any type of trade measure. Indeed, the ensuing discussion following this statement concerns domestic measures to improve environmental protection.

connection between the export restraints at issue in this dispute and China’s supposed environmental goals.<sup>26</sup> A review of the documents listed reveals that no such connection is presented in those documents. Most of the documents referenced in Annex A do not even mention the specific products at issue in this dispute.<sup>27</sup> Instead, in many cases, the documents make general statements about “control[ling] the export” of certain products, in some cases highly polluting products. However, “controlling the export” of products whose production causes environmental pollution is not necessarily evidence of an environmental protection objective. As set forth above, and as reflected in Question 43 from the Panel, it is the production of these products, not their export, that causes pollution. If China sought to address these environmental harms, China would impose restrictions (including in the form of pollution controls) on the production of the products, not their exports. The export restrictions on these raw materials in fact allow China to leverage the production of the raw materials to promote increased production of higher value-added products, which are subsequently exported. This is demonstrated in the dramatic expansion of China’s aluminum and steel industries in recent years, which we will further detail below. As the economic analysis prepared by Professors Gene Grossman and Mark Watson (“Grossman-Watson Report”) explains, the analysis presented by China’s economist ignores the fact that the downward pressure on domestic prices resulting from the export restraints stimulates additional downstream production, which itself has harmful environmental impacts if not subject to effective environmental controls.<sup>28</sup>

41. For example, China points to Article 6 of the *Guidance for Enhancing the Management of Raw Materials Industries*, which states “[w]e will strictly control the export of ‘highly energy-consuming, highly polluting and resource-intensive’ products.”<sup>29</sup> In addition to the fact that this statement makes no mention of any product at issue in this dispute,<sup>30</sup> that provision also

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<sup>26</sup> China’s Comments on the Complainants’ Answers to the First Set of Questions from the Panel, Annex A.

<sup>27</sup> See e.g. *Law of the People’s Republic of China on the Prevention and Control of Environmental Pollution by Solid Wastes* (Exhibit CHN-270); *Policies and Actions to Address Climate Change* (Exhibit CHN-420) (also referring to a policy of “Adjusting the Economic Structure to Promote the Optimizing and Upgrading of the Industrial Structure”); *State Will Adjust Tariff Rates from June 1 to Control the Export of High-Energy Consumption Products* (Exhibit CHN-453) (referring *inter alia* to export duty on manganese ores and unwrought zinc. China has asserted no defense for the former, and the latter is not at issue); *General Work Plan for Energy Conservation and Pollutant Discharge Reduction* (Exhibit CHN-145); *Energy Conservation Law of the PRC* (Exhibit CHN-272) Article 63.

<sup>28</sup> Dr. Gene Grossman, Ph.D. and Dr. Mark Watson, Ph.D.: Critique of China’s Economic Analysis of the Export Restraints on Several Raw Materials (“Grossman-Watson Report”) (Exhibit JE-158); See also Curriculum Vitae and Background for Dr. Grossman and Dr. Watson (Exhibit JE-159)..

<sup>29</sup> Exhibit JE-10, Article 6.

<sup>30</sup> We note that China refers to magnesium metal, manganese metal, coke, and silicon carbide as “energy-intensive, high-polluting, and resource-based” or “EPR” products throughout this dispute. This appears to be an apparent attempt to connect the use of similar terms in high-level documents of the Chinese government to the products at issue in this dispute. However, China does not point to any document that sets out a definition of so-called EPR products, or any evidence that the term “highly energy-consuming, highly polluting and resource-

expresses a goal to “at the same time” “actively research and promote tariff adjustment policies, encourage the export of high value-added products and deep processed products.”<sup>31</sup> Similarly, many of the other documents express a simultaneous intention to “control the export” of certain products that are polluting or energy-intensive and to move to develop a service industry and “high-tech” industry.<sup>32</sup> Thus, China’s efforts to “control the export” of certain products is designed to serve China’s economic advancement goals. Indeed, the data show that the raw materials at issue in this dispute continue to be produced and exported in the form of higher value-added downstream products.<sup>33</sup> In addition, China does not point to a single document that makes any mention of health concerns arising from environmental pollution in relation to any of the products at issue. Instead, this supposed link between pollution associated with the production of these products and the export restraints appears to be presented for the first time in China’s first written submission.

42. Thus, contrary to China’s assertions, the export duties at issue do not bear a direct relationship to environmental protection. They do, however, bear a direct relationship to the economic goal of moving exports up the value chain. The economic analysis provided by Drs. Grossman and Watson discusses this in detail.<sup>34</sup>

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intensive” products is defined as including the products in this dispute.

<sup>31</sup> *Guidance for Enhancing the Management of Raw Materials Industries* (Exhibit JE-10), Article 6.

<sup>32</sup> *2008 Work Arrangement for Energy Conservation and Pollutant Discharge Reduction* (Exhibit CHN-287), Section II. *See also Guidelines of the Eleventh Five-Year Plan for National Economic and Social Development*, p. 41: “ Section I Optimize Export Structure . . . Support the export of independent high tech products, electromechanical products and high value added labour intensive products. Strictly execute labour, safety and environmental protection standards and control high energy consumption, high pollution and resource products. Improve processing trade policy, continue develop processing trade, make efforts to enhance industrial level and processing depth, reinforce domestic ability to provide the auxiliary items and promote domestic industrial upgrading.” (Emphasis added). *See also State will Further Adjust Customs Import and Export Tariff as of Jan 1 2009* (Exhibit CHN-100), para. 3. China’s reproduction of part of paragraph 3 omits certain elements of the relevant language. Contrary to China’s suggestion, the document does not link environmental protection to export tariffs. Instead, paragraph 3 of this statement from the Government of China’s website states: In order to effectively bring into play the tariff policy’s economic leverage, promote the adjustment of economic structure and the change of economic development mode, further increase the import of advanced technologies, equipments and key parts and components, fulfill the need of domestic economic and social development, promote resource saving and environmental protection, and to improve people’s standard of living, the State will implement relatively low interim import tariff rates on over 670 types of commodities next year . . .” (Emphasis added).

Separately, with respect to export tariffs, the website states: “In the meanwhile, in order to further restrict the export of high-energy-consumption and high pollution products, the State will continue to levy export tariff on coke, crude oil, metal ores, ferro-alloys, steel billets, etc. in the form of interim tariff rate, and continue to levy special export tariff on compound fertilizers and other chemical fertilizers as well as raw materials thereof, but at reduced tariff rates.”

<sup>33</sup> *See Magnesium Key Facts*, Tables 20 and 21, p. 19-20 (Exhibit JE-152).

<sup>34</sup> Grossman-Watson Report (Exhibit JE-158), p. 5.

43. In addition to the flaws in China’s assertion of an environmental justification, China’s arguments under Article XX(b) also raise serious systemic concerns. As explained above, China’s argument under Article XX(b) with respect to the export duties on magnesium metal, manganese metal, and coke is that the export duties lead to reduced production of those products. Reduced production, in turn, leads to reduced pollution associated with that production. However, even if the export duties were resulting in less production of magnesium metal, manganese metal, and coke – which the data do not show – China’s argument would allow export restraints on any product whose production causes pollution. The problematic implications of this line of reasoning are further illustrated by the fact that China’s downstream production of aluminum and steel, which can also have deleterious environmental effects, is occurring at very high levels. This approach to Article XX(b) is illogical and should not be sustained.

44. Similarly, with respect to scrap, China’s defense is premised on the notion that the export of any economically advantageous and energy efficient industrial input can be restricted in order to maintain a steady supply of scrap for the downstream industries that consume it. This approach to Article XX(b) would permit all WTO Members to impose export restraints on any industrial input merely on the basis that the input brings certain environmental advantages. China is not – we would hope – advocating such an approach to XX(b). In any event as we will discuss, the Grossman-Watson Report explains that China’s approach fails to account for the fact that China imposes export restraints simultaneously on scrap products and ores, the input for production of the primary metals. Contrary to the assertions of China’s economist, the export duties on the ores, which have the effect of stimulating additional primary production, very likely offset the impact of the export duties on the scrap products.<sup>35</sup> Thus, China’s assertion that the export duties on scrap are based on an environmental rationale, rather than an economic one, does not withstand scrutiny.

#### **b. Meaning of Article XX(b)**

45. In order to establish a defense under Article XX(b), China must demonstrate that the export duties at issue are “necessary to protect human, animal or plant life or health.” To show that a measure is “to protect” life or health, the responding party must show that (i) there is a risk to human, animal, or plant life or health; and (ii) the underlying objective of the measure is to reduce the risk. If so, the Panel should conclude that the measure’s policy falls within the range of policies designed to protect human, animal, or plant life or health.<sup>36</sup>

46. In addition, in analyzing the meaning of “necessary” in Article XX, the Appellate Body has stated that “an assessment of ‘necessity’ involves ‘weighing and balancing’ a number of distinct factors relating both to the measure sought to be justified as ‘necessary’ and to possible

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<sup>35</sup> Grossman-Watson Report (Exhibit JE-158), p. 7-9.

<sup>36</sup> Panel Report, *Brazil – Tyres*, para. 7.43; *See also* Panel Report, *EC – Tariff Preferences*, para. 7.199.



alternative measures that may be reasonably available to the responding Member to achieve its desired objective.”<sup>37</sup> The Appellate Body provided further elaboration stating that the factors to be weighed and balanced include the contribution of the measure to the realization of the ends pursued by it.<sup>38</sup> Moreover, in *Korea – Beef*, the Appellate Body reasoned that in order for a measure to be ‘necessary,’ it must be located significantly closer to the pole of ‘indispensable’ than to the opposite pole of simply ‘making a contribution to’.<sup>39</sup>

47. The Appellate Body has also recognized that a measure may be considered “necessary” under Article XX(b), if the measure is “apt to produce a material contribution to the achievement of its objective.”<sup>40</sup> In circumstances where it is “difficult to isolate the contribution to public health or environmental objectives of one specific measure from those attributable to the other measures that are part of the same comprehensive policy” and “the results obtained from certain actions . . . may manifest themselves only after a certain period of time . . .”<sup>41</sup>, the Appellate Body noted that “the demonstration [of a material contribution] could consist of quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence.”<sup>42</sup> Thus, in order to satisfy the meaning of necessary by showing that a measure is “apt to produce a material contribution to the achievement of its objective,” the responding Member must provide evidence of the relationship between the policy tool and the objective. It is not sufficient to simply assert that the measure at issue will bring about a particular result in the future. Instead, there must be evidence that the measure can bring about a material contribution to the Member’s stated objective.

48. China’s export duties on magnesium scrap, manganese scrap, and zinc scrap and coke, magnesium metal, and manganese metal would not be justified by Article XX(b) even if it were applicable to paragraph 11.3 of the Protocol. We will begin by addressing China’s defense under Article XX(b) as it relates to the export duties on the scrap products. We will then turn to China’s defense under Article XX(b) as it relates to the export duties on magnesium metal, manganese metal, and coke.

**c. China’s Export Duties on Magnesium Scrap, Manganese Scrap, and Zinc Scrap Are Not Justified by Article XX(b)**

**i. Introduction**

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<sup>37</sup> Appellate Body Report, *China – Audiovisual Products*, para. 239 citing Appellate Body Report, *Korea – Various Measures on Beef*; Appellate Body Report, *US – Gambling*; Appellate Body Report, *Brazil – Tyres*.

<sup>38</sup> Appellate Body Report, *China – Audiovisual Products*, para. 240.

<sup>39</sup> Appellate Body Report, *Korea – Various Measures on Beef*, para. 161.

<sup>40</sup> Appellate Body Report, *Brazil – Tyres*, para. 151.

<sup>41</sup> Appellate Body Report, *Brazil – Tyres*, para. 151.

<sup>42</sup> Appellate Body Report, *Brazil – Tyres*, para. 151.

49. As set forth above, China contends that the export duties on magnesium scrap, manganese scrap, and zinc scrap are justified under Article XX(b). China argues that production of magnesium metal, manganese metal, and zinc from crude ores (*i.e.*, primary production) results in significant environmental pollution.<sup>43</sup> In contrast, production of these metals from scrap (*i.e.*, “secondary production”) is significantly less polluting, according to China.<sup>44</sup> China contends that its export restraints on the scrap products are necessary to ensure a “steady supply” of scrap for secondary production.<sup>45</sup> According to China, this will bring about a shift from primary production to secondary production for magnesium metal, manganese metal and zinc, and therefore less environmental pollution associated with primary production.

50. China’s export duties on magnesium scrap, manganese scrap, and zinc scrap are in fact not justified under Article XX(b). First, as discussed in the previous section, the export duties at issue are not designed to protect human, animal or plant life or health. Instead, they are, as China explains, designed to ensure a “steady supply” of scrap for use by downstream industries, such as aluminum and steel industries, whose products are then exported. China states that:

The export duties guarantee a steady and guaranteed supply of scrap, which is essential to the development and use of a strong and sustainable secondary industry. In the longer term, the promotion of secondary facilities encourages additional recycling of exhausted consumer and industrial products. In sum, China imposes export duties to ensure the necessary supply of non-ferrous metal scrap products to Chinese domestic non-ferrous metal producers.<sup>46</sup>

Thus, China’s rationale for the export duties is an economic one, *i.e.*, to promote the growth of a downstream industry in China. If China’s rationale were environmental, China could simply impose restrictions on primary production of the metals, require that producers of the metals shift to secondary production, or provide for controls on the pollution itself.

51. Second, the export duties on the scrap products are not making a material contribution to China’s stated environmental objective, nor are they apt to do so in the future. In support of China’s assertion that the export duties are making a material contribution to the stated environmental objective, China fails to present any evidence that the export duties are resulting in any secondary production. Instead, China presents projections of supposed increases in secondary production that would result from the imposition of export duties. The supposed increases are modest, even under the terms of China’s own arguments, and therefore, undermine China’s assertion that the export duties are making a “material contribution” to China’s stated environmental objective. In addition, the projections are based on a fundamentally flawed

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<sup>43</sup> China’s First Written Submission, paras. 230-47.

<sup>44</sup> China’s First Written Submission, paras. 249-52.

<sup>45</sup> China’s First Written Submission, para. 258.

<sup>46</sup> China’s First Written Submission, paras. 258-59.

economic analysis that is unreliable. In addition, China's analysis of secondary production also neglects certain relevant factors regarding the feasibility of secondary production for the materials at issue. In this regard, China's heavy reliance on information regarding secondary production of aluminum and steel in support of its defense under Article XX(b) is in fact of little relevance to an analysis of secondary production of magnesium metal, manganese metal, and zinc. Furthermore, China's defense as it relates to the scrap products is further undermined by the fact that primary production of the metals continues to expand in China. Third, there are a number of reasonably available alternatives that would more directly address China's stated objectives, and not raise the same issues of WTO inconsistency as China's export duties.

**ii. The export duties on magnesium scrap, manganese scrap, and zinc scrap are not making a material contribution to China's supposed objective of protecting human, animal or plant life or health**

52. China's defense under Article XX(b) relies on the assertion that the export duties on scrap are making a material contribution to a reduction of health risks associated with primary production of magnesium metal, manganese metal, and zinc by promoting increased levels of secondary production. However, China fails to present any evidence that secondary production of magnesium metal, manganese metal, or zinc is occurring in China, let alone at increased levels since the imposition of export duties.<sup>47</sup> Instead, China's contention that the export duties are presently making a material contribution to China's stated objective is based almost exclusively on an economic analysis prepared for China by Dr. Olarreaga solely for purposes of this dispute estimating the increased secondary production that will supposedly occur in the future. Thus, the Panel has no evidence that the export duties are resulting in increased levels of secondary production or making a material contribution to China's supposed environmental objectives.<sup>48</sup> China's estimates of the supposed reduction in pollution that will result from increased levels of secondary production rely on Dr. Olarreaga's projections of increased levels of secondary production, and therefore similarly do not support the proposition that the export duties are presently making a material contribution to China's supposed environmental objectives.<sup>49</sup>

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<sup>47</sup> China's First Written Submission, paras. 268-272; Exhibit CHN-124.

<sup>48</sup> As the Appellate Body noted in *Brazil – Tyres*, in order to be justified under Article XX(b), "a panel must be satisfied that it brings about a material contribution to the achievement of its objective. Such a demonstration can of course be made by resorting to evidence or data, pertaining to the past or the present, that establish that the import ban at issue makes a material contribution to the protection of public health or environmental objectives pursued." Appellate Body Report, *Brazil – Tyres*, para. 151 (emphasis added). China's reliance on a news article in *China Mining* (Exhibit CHN-119) does not support China's position. China points to the statement by the Chairman of the Recycling Metal Branch of the China Nonferrous Metals Industry Association, estimating the energy savings associated with the recycling activities for all non-ferrous metals. China's First Written Submission, para. 252. Although China suggests that the statement refers to metals including those subject to this dispute, the statement does not reference any specific metals. Thus, this statement does not evidence any energy savings associated with secondary production of the products at issue in this dispute.

<sup>49</sup> China's First Written Submission, paras. 272-74.

53. Furthermore, China has also failed to establish that its export duties are apt to make a material contribution to its objective in the future. Neither Dr. Olarreaga’s quantitative projections nor any of the qualitative reasoning presented by China withstands scrutiny. As we will discuss, Dr. Olarreaga’s economic analysis suffers from a number of fundamental flaws that render his projections unreliable. However, even if China’s economic analysis were accepted on its own terms, it fails to support China’s defense under Article XX(b). First, the estimated increase in secondary production of magnesium metal, manganese metal, and zinc that supposedly could result from the export duties is decidedly modest. As the complainants have set forth previously, China’s estimated increase in secondary production of magnesium metal (963 MT) represents approximately 0.2 percent of China’s 2009 primary magnesium production. China’s estimate of increased secondary production of zinc is 2.730 MT, approximately .06 percent of China’s 2009 primary zinc production.<sup>50</sup> Finally, China estimates that the increased secondary production of manganese metal will be 5,736 tons or .5 percent of China’s 2009 primary manganese production.<sup>51</sup> Even if these estimates were reliable, the minor increases in secondary production belie China’s argument that the export duties at issue are making a “material contribution” to China’s health objectives, or that they could make a material contribution in the future. In fact, these minor increases reveal that it is through the imposition of other measures in China – including development of a recycling infrastructure and controls on primary production – that China can more effectively promote the availability of scrap supply and the development of secondary production.

54. Before turning to such alternative measures, we will discuss a number of additional flaws in China’s arguments. First, China’s analysis, including the economic analysis of Dr. Olarreaga are premised on a number of unsupported assumptions. Because these assumptions are lacking in validity, the analysis flowing from those assumptions are similarly unreliable. Second, the continued growth of primary production in China contradicts China’s assertions that the export duties on scrap will contribute to a shift away from primary production. Third, China’s arguments regarding the supposed supply constraints for scrap do not support China’s defense.

**(a) *Flaws in China’s discussion of recycling***

55. China’s projections of secondary production levels related to manganese are fundamentally flawed. The “Metal Scrap” report, prepared by Dr. Humphreys for purposes of this dispute, estimates the energy savings associated with production of magnesium and zinc from scrap compared to production of those metals for ores.<sup>52</sup> With respect to manganese, however, Dr. Humphreys is unable to produce such an estimate. As the complainants have set

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<sup>50</sup> Complainants’ First Oral Statement, para. 105, U.S. Answers to the First Set of Questions from the Panel, paras. 70-71. The United States notes that percentages provided in paragraph 105 of the First Oral Statement were incorrect and have been corrected for this submission.

<sup>51</sup> China’s First Written Submission, para. 270, Table 2.

<sup>52</sup> Exhibit CHN-11, p. 5-6, China’s First Written Submission, para. 251.

forth previously, this is because production of manganese metal from scrap simply does not occur. Dr. Humphreys acknowledges this in a footnote stating: “Manganese is almost always used and reused in alloy form; it is rarely recovered as manganese metal. The energy savings indicated here are derived from the energy savings associated with the principal products in which manganese is used – namely, aluminum and steel.”<sup>53</sup> This is also confirmed in documents prepared by the U.S. Geological Survey (“USGS”). The USGS states in its 2010 Mineral Commodity Summary for Manganese: “Manganese was recovered as a minor constituent of ferrous and non-ferrous scrap; however, scrap recovery specifically for manganese was negligible.”<sup>54</sup> This fact reveals that China’s entire defense under Article XX(b) as it relates to manganese scrap fails.

56. In addition, while Dr. Humphreys’ statement referred to above regarding manganese acknowledges the distinction between secondary production of aluminum and steel and other products, China makes a number of other assertions regarding recycling of magnesium metal, manganese metal and zinc that rely on factors specific to aluminum and steel.<sup>55</sup> However, the feasibility of recycling and the use of recycled metal vary with the technical characteristics of a particular product. Thus, the reliance on an analysis of recycling aluminum and steel, two products not at issue in this dispute, are of limited utility in analyzing the potential for recycling magnesium metal, manganese metal, and zinc in China. For example, Dr. Humphreys asserts that “there is no occurrence of ‘downcycling’, or quality losses, involved in the recycling of metals.”<sup>56</sup> However, in order to support this statement, Dr. Humphreys then cites to a number of

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<sup>53</sup> Exhibit CHN-11 p. 5, n. 26.

<sup>54</sup> *Mineral Commodities Summaries 2010*, U.S. Geological Survey, January 2010, p. 98 (Exhibit JE-43), (emphasis added). See also Manganese Key Facts, p. 14 (Exhibit JE-153). In regard to the HS category for manganese scrap, the USGS also states: “In chapter 81 of the Harmonized Tariff Schedule for U.S. imports, the part that pertains to “Other base metals” contains a “Waste and scrap” subcategory (8111.00.3000) for manganese. The quantity of imports reported in this subcategory typically is about 200 t or less, most of which is from Canada. The nature of the material being reported under this subcategory is not well known and probably consists of various manganese-bearing drosses, residues, and steel and/or iron items or perhaps none of these. This material is not included within the manganese materials flow discussed in this report except that the 215 t of so-called manganese waste and scrap reported as having been imported is assigned an average manganese content of 50 percent and, on that basis, is included within total manganese imports.”) USGS Circular 1196-H, Manganese Recycling in the United States in 1998 (Exhibit JE-155), p. H5. In China, the export duty is applied at the 8-digit HS level to an HS category that contains both manganese metal and manganese waste and scrap. See Exhibit JE-21. For purposes of this dispute, however, China asserts two separate defenses under Article XX(b) with respect to the export duty on two different products classified at the 10-digit level, manganese waste and scrap (HS 8111001010) and manganese metal (HS 8111001090).

<sup>55</sup> Exhibit CHN-11, pp. 6-9; China’s First Written Submission, para. 252, n. 349.

<sup>56</sup> Exhibit CHN-11, p. 9. Dr. Humphreys indicates that the U.S. Geological Survey agrees with this pointing out the interchangeability of secondary metals and primary metals. However, the source is in fact the EU Analysis of Economic Indicators of the EU Metals Industry: the Impact of Raw Materials and Energy Supply on Competitiveness, 2006 (Exhibit CHN-114) p. 112. This document also points out that the efficiency recycling “depend[s] on the metal.”

documents relating to the recycling of aluminum and steel, not the products at issue in this dispute.<sup>57</sup> Thus, this statement is unrelated to the products at issue in this dispute.

57. In fact, Dr. Humphreys acknowledges this as it relates to manganese, by pointing out that recycling of manganese for purposes of manganese metal production does not occur.<sup>58</sup> This illustrates the flaws of relying on facts related to the secondary production of aluminum and steel. Furthermore, secondary production of magnesium metal also faces certain limitations. For example, recycling of pure magnesium is very limited.<sup>59</sup> These facts further demonstrate the limited utility of factors related to the recycling of aluminum and steel scrap.

**(b) Flaws in China’s economic analysis**

58. The economic analysis presented by Dr. Olarreaga’s model estimates the decrease in exports of the scrap products and the increase in domestic consumption of scrap that would result from the export duties.<sup>60</sup> Dr. Olarreaga’s analysis is based on a number of unsupported assumptions. Because those assumptions are unsupported, his analysis flowing from those assumptions is similarly lacking in validity.

59. First, Dr. Olarreaga assumes a baseline of 10 percent rate of secondary production in China.<sup>61</sup> This assumption is unsupported by any evidence relating to the products at issue. Instead, this assumption is based on recycling rates for steel and aluminum in China.<sup>62</sup> China contends that for manganese metal, reliance on recycling rates for steel and aluminum is reasonable because “manganese is mostly recovered in alloy form, associated with steel and aluminum.”<sup>63</sup> However, this statement is misleading as steel or aluminum-base scrap containing manganese would be considered aluminum scrap or steel scrap, not manganese scrap, and would not be used to produce manganese scrap. Therefore, even if production of manganese metal from manganese scrap were feasible, the recycling rate for aluminum and steel scrap are not appropriate benchmarks for determining the recycling rate for manganese scrap. Similarly,

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<sup>57</sup> Exhibit CHN-11, p. 9 n. 48. In particular, Dr. Humphreys cites to *UNEP, Green Jobs: Towards decent work in a sustainable, low-carbon world* (2008), p. 181 (Exhibit CHN-116). Dr. Humphreys reproduces the cite as follows: “The recycling content of [metals] can be close to 100 percent, as there are no technical limitations, relatively limited processing losses, and recycled [metal] is as strong and durable as [metal] from [ore]”). The references to “metals” in brackets were changed by Dr. Humphreys and were in fact references to “steel” in the original document. In addition, the reference to “ore” was also changed; the original document referred to “iron ore.” Thus, contrary to Dr. Humphreys’ suggestion, this statement bears no relationship to the feasibility of recycling scrap for secondary production for the products at issue in this dispute.

<sup>58</sup> Exhibit CHN-11, p. 5 n. 26.

<sup>59</sup> Magnesium Key Facts, p. 2 (Exhibit JE-152).

<sup>60</sup> Exhibit CHN-124; China’s First Written Submission, paras. 269-70.

<sup>61</sup> China’s First Written Submission, para. 269-70, n. 367.

<sup>62</sup> China’s First Written Submission, para. 269 n. 367.

<sup>63</sup> China’s First Written Submission, para. 269 n. 369.

China's assertion that the recycling rate for aluminum is an appropriate benchmark for the recycling rate for magnesium is fundamentally flawed for the same reason.<sup>64</sup> Aluminum-base scrap containing magnesium is not the same as magnesium scrap, and would not be used in the production of magnesium metal.<sup>65</sup> Accordingly, the recycling rate for aluminum base scrap is not an appropriate benchmark for determining the recycling rate for magnesium scrap.

60. Second, Dr. Olarreaga assumes 100 percent recycling. In other words, he assumes that 1 ton of scrap of each of the scrap products produces roughly 1 ton of secondary metal.<sup>66</sup> He provides no support for this assumption, and the assumption therefore lacks credibility. As discussed above, this assumption is inconsistent with the fact that secondary production of manganese does not occur.

61. As set forth in the Grossman-Watson Report, Dr. Olarreaga's estimates are also unreliable for two additional reasons.<sup>67</sup>

62. The first flaw identified in the Grossman-Watson Report is that Dr. Olarreaga's model ignores the important upstream-downstream linkages between the secondary inputs for the metals (scrap), the primary inputs for the metals (ores), and the metals themselves. China maintains export restraints on these products at various stages of the production process. With respect to magnesium, China maintains export duties on magnesium scrap and magnesium metal.<sup>68</sup> China also maintains export duties on manganese ore, manganese scrap, and manganese metal.<sup>69</sup> Finally, China imposes export duties on zinc scrap, an export prohibition on zinc ores, and other export restraints on zinc metal.<sup>70</sup> As the Grossman-Watson Report explains, to understand the economic effects of China's export restraints, one must consider the totality of these production processes. In addition, the Grossman-Watson Report explains that "the environmental impact of these policies is best assessed by viewing the policies as a package, considering the important interrelationships that link the upstream and downstream markets."<sup>71</sup> The Grossman-Watson report further explains that while Dr. Olarreaga contends that the export restrictions on scrap will encourage consumption of scrap in China, he neglects the fact that export duties on ores will also affect the use of scrap, by encouraging the consumption of ores, and therefore increased primary

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<sup>64</sup> China's First Written Submission, para. 269 n. 367.

<sup>65</sup> Magnesium Key Facts, p. 3 (Exhibit JE-152).

<sup>66</sup> China's First Written Submission, para. 271 n. 372.

<sup>67</sup> Grossman-Watson Report, p. 9-14 (Exhibit JE-158).

<sup>68</sup> See Chart of Raw Materials Subject to Duties (Exhibit JE-5); See also U.S. First Written Submission, paras. 78-82.

<sup>69</sup> See Chart of Raw Materials Subject to Duties (Exhibit JE-5); See also U.S. First Written Submission, paras. 78-82.

<sup>70</sup> Chart of Raw Materials Subject to Duties (Exhibit JE-5) and Chart of Raw Materials Subject to Licensing and Quotas (Exhibit JE-6); See also U.S. First Written Submission, paras. 78-82, 131.

<sup>71</sup> Grossman-Watson Report, p. 8 (Exhibit JE-158).

production, in China. This flaw renders Dr. Olarreaga’s estimates of increased secondary production unreliable.<sup>72</sup>

63. Question 48 from the Panel asks China to address this very issue. However, China fails to respond to the Panel’s question and instead merely elides the issue through a technical, but apparently inaccurate, statement about the products. China states that: “zinc, magnesium, manganese scrap are not strictly substitutes for zinc, magnesium and manganese ores, but rather must be seen as possible substitutes for the primary raw materials produced from ores . . .”<sup>73</sup> But, China’s entire argument under Article XX(b) as it relates to scrap products is that the export duties on scrap will bring about a shift from primary production of the metals *i.e.*, production of metals from ores, to secondary production *i.e.*, production of the metals from scrap. China appears to contradict itself by arguing in response to Question 48 that scrap and ores are not substitutes in the production of the metals.<sup>74</sup>

64. Similarly, when asked whether the imposition of export restraints on ores would offset the simultaneous imposition of export restraints on metal scrap, China failed to engage with the Panel’s question. China responded by asserting that “no countervailing effect from the export restraints on manganese and zinc ores can be witnessed, because China exports no appreciable quantities of zinc and manganese ores....no effects ensuing from the export tariffs on zinc and manganese ore can be expected . . .”<sup>75</sup> This assertion does not make sense. First, the low volume of exports on zinc and manganese ores may be attributable to the imposition of export restraints on those products. Indeed, China maintains an export prohibition on zinc ores.<sup>76</sup> Thus, the export restraints are very likely having an effect on manganese and zinc ores by substantially decreasing exports of those products, and thereby making available to China’s downstream industries preferential access to manganese and zinc ores. Second, since China contends that a small quantity of exports on a product on which export restraints are imposed means that the export restraints are having no effect, then the small quantities of scrap exports must lead to the same conclusion. Exports of magnesium scrap and zinc scrap in 2009 were 240 MT and 26 MT respectively.<sup>77</sup> Under China’s line of reasoning, the export restraints on the scrap products are also having no effect since China’s exports of those products are negligible. Since the export restraints are having no effect, they cannot be making a material contribution to the achievement of China’s supposed environmental objective. As set forth in the Grossman-Watson Report, China and Dr. Olarreaga’s failure to take account of the upstream-downstream linkages among

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<sup>72</sup> Grossman-Watson Report, p. 7-10 (Exhibit JE-158).

<sup>73</sup> Additional Expert Statement by Dr. Humphreys (Exhibit CHN-443), p. 4. *See also* China’s Answers to the First Set of Questions from the Panel, para. 244.

<sup>74</sup> *See also* Grossman-Watson Report, n. 4 (Exhibit JE-158).

<sup>75</sup> China’s Answers to the First Set of Panel Questions, para. 247.

<sup>76</sup> China’s Answers to the First Set of Questions from the Panel, para. 37.

<sup>77</sup> Product Data (Exhibit CHN-289).



the products at issue on which China simultaneously imposes export restraints is a fundamental flaw that renders Dr. Olarreaga’s analysis unreliable.<sup>78</sup>

65. The second flaw is that Dr. Olarreaga uses demand and supply elasticities and baseline quantities that are based on inappropriate data or, in some cases, based on no data whatsoever. The Grossman-Watson Report explains this flaw in Dr. Olarreaga’s analysis in detail. One of the points discussed in the Grossman-Watson Report is that rather than apply the supply and demand elasticities for each of the products *i.e.*, magnesium scrap, manganese scrap, and zinc scrap, Dr. Olarreaga calculates the supply and demand elasticities for coke and uses the coke estimate as the numerical value for the elasticity of magnesium scrap, manganese scrap and zinc scrap. However, he provides no basis for the assumption that the elasticities for coke are appropriate in analyzing the scrap products other than to say that all of the products at issue are “basic materials.”<sup>79</sup> In fact, as the Grossman-Watson Report explain, this assumption is unwarranted and constitutes another reason that Dr. Olarreaga’s analysis is unreliable.<sup>80</sup>

**(c) *Flaws in China’s discussion of the supposed scarcity of scrap***

66. Another argument China makes to support its defense under Article XX(b) is the supposed scarcity of scrap in China. These arguments reflect inaccuracies regarding the market situation for the specific scrap products at issue and, in any event, fail to support China’s defense.

67. China contends that “[t]he challenge of scrap recycling . . . is scarcity of non-ferrous metal scrap and the consequent instability and unpredictability of supply.”<sup>81</sup> According to China, there are three main reasons for the supposed scarcity of scrap metal. First, China’s resource base is low because of “the sheer size of the country, its developing country status, and the fact that its economic ascent began relatively recently.” Second, recyclable scrap is oftentimes ‘tied up’ in durable products or consumer goods and thus must be ‘liberated’ at the end of their useful life. Third, there is strong international competition for scrap on world markets.<sup>82</sup>

68. However, none of these supposed supply constraints justifies the imposition of export restraints. Even if China were correct that recyclable scrap may be “tied up” and must be “liberated,” such a factor is beside the point as it relates to the export duties. Instead, this serves to demonstrate that there are measures that China must undertake domestically to set up the

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<sup>78</sup> Grossman-Watson Report, p. 7-10 (Exhibit JE-158).

<sup>79</sup> Additional Expert Statement by Dr. Olarreaga (Exhibit CHN-442), para. 24.

<sup>80</sup> Grossman-Watson Report, p. 9-14 (Exhibit JE-158). In footnote 11, the Grossman-Watson Report responds directly to Dr. Olarreaga’s answer to Question 50 from the Panel, which is set forth in Exhibit CHN-442.

<sup>81</sup> China’s First Written Submission, para. 263.

<sup>82</sup> China’s First Written Submission, paras. 264.

infrastructure necessary to facilitate the development of scrap supply.<sup>83</sup> The development of secondary production must depend in large part on the development of infrastructure necessary to facilitate recycling of scrap.<sup>84</sup> In addition, this is a factor affecting all Members. All WTO Members may have an interest in securing greater access to scrap, because of its environmental benefits. We do not think that China is arguing, however, that this would justify all WTO Members maintaining export restraints in order to ensure access to an industrial input that brings environmental benefits.

69. China’s statement also ignores the fact that there is a significant amount of scrap that is a byproduct of primary production processes (*i.e.*, “new scrap”), which would not be “tied up” in consumer goods. In many cases, new scrap would be used by the same production facility that generated the scrap and therefore would be unlikely to be exported in any event.<sup>85</sup>

70. The supposed strong international competition for scrap on world markets is a factor that affects all WTO Members. As discussed above, China’s line of reasoning would permit all WTO Members to impose discriminatory export restraints to “guarantee” a steady supply of an industrial input for that Member. With respect to the first supposed supply constraint, China is also not the only country with a large geographic area or the only country experiencing economic growth. These factors do not uniquely entitle China to breach its WTO obligations in order to secure preferential access to raw materials.

71. With respect to the improvement of recycling infrastructure, China contends that it is in the process of developing the infrastructure necessary for increased secondary production, but that such a process will require additional time.<sup>86</sup> However, this does not explain how the imposition of WTO-inconsistent export restraints will assist in the improvement of this infrastructure within China. Indeed, as set forth above, the downward pressure on the price of scrap in China would appear to reduce the incentive to collect scrap and invest in recycling. In addition, China’s contention that the “export duties will safeguard stable and predictable markets for scrap”<sup>87</sup> is belied by the fact that China’s exports of scrap have consistently been low.<sup>88</sup> It is not foreign demand for scrap that is preventing the development of a secondary production industry in China. Thus, China’s contention that the export duties on scrap products are apt to make a material contribution to the realization of China’s supposed environmental objectives is similarly flawed.

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<sup>83</sup> See also Grossman-Watson Report, p. 3-7 (Exhibit JE-158) (stating that if China seeks to encourage recycling, China should do so directly rather than through trade measures).

<sup>84</sup> See *e.g.*, Zinc Report prepared by Dr. Eugene Thiers, p. 21-23. (Exhibit JE-154). *Curriculum Vitae* of Dr. Eugene Thiers (Exhibit JE-163).

<sup>85</sup> Magnesium Key Facts, p. 2-3 n. 9. (Exhibit JE-152); Zinc Report, p. 5 (Exhibit JE-154)..

<sup>86</sup> China’s First Written Submission, para. 281.

<sup>87</sup> China’s First Written Submission, para. 282.

<sup>88</sup> Product Data (Exhibit CHN-289).

**(d) China's primary production industries for magnesium metal, manganese metal, and scrap continue to grow in spite of the export duties on scrap products**

72. China's defense under Article XX(b) as it relates to the scrap products is further weakened by the fact that China's primary production of magnesium metal, manganese metal, and zinc continue to experience tremendous growth. These facts undermine China's contention that the export duties on scrap are related to the supposed objective of reducing the adverse environmental or health impact associated with primary production.

73. **Magnesium.** China has been the leading producer of magnesium since at least 2005.<sup>89</sup> In 2009, when magnesium production decreased in the face of a global economic downturn, China continued to be the leading producer of magnesium accounting for 77 percent of global production.<sup>90</sup> In addition, in January 2008, China announced 50 projects to add magnesium metal, alloy, and diecasting capacities in China, totaling more than 3 million metric tons of new primary production capacity in China.<sup>91</sup> Moreover, Shanxi Province, China's leading provincial producer of magnesium,<sup>92</sup> announced on May 31, 2009 its *Industry Adjustment and Revitalization Plan for New Materials*. Shanxi states in its *Plan* that it intends to increase its production of alloy magnesium to 700,000 MT by 2011.<sup>93</sup> Similarly, China's production of dolomite, the main input for the primary production of magnesium,<sup>94</sup> has remained at steadily high levels since 2000. The substantial increase in production capacity for primary magnesium in China and production of the inputs for primary magnesium production belie China's contention that it seeks to shift from primary to secondary production.

74. **Manganese.** Assuming for the sake of argument that secondary production of manganese were feasible, China's production of primary manganese metal also continues to grow, further weakening China's assertion that it imposes export duties on the scrap products to reduce the environmental harm of primary production. Manganese ore is the input used for production of primary manganese. China went from the world's fifth largest producer of manganese ore in 2005 to the leading producer of manganese ore in 2009.<sup>95</sup> China's imports of manganese ore have also increased steadily from 2000 to 2009 from under 2 million tons to over 9 million tons.<sup>96</sup> In addition, China's production of manganese metal increased by 900% between 200 and

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<sup>89</sup> Magnesium Key Facts, Table 4, p. 7 (Exhibit JE-152).

<sup>90</sup> Magnesium Key Facts, p. 6 (Exhibit JE-152).

<sup>91</sup> 2008 Minerals Yearbook: Magnesium [Advance Release], p. 45.4 (Exhibit JE-156).

<sup>92</sup> Magnesium Key Facts, Table 6, p. 8 (Exhibit JE-152).

<sup>93</sup> Shanxi Industry Adjustment and Revitalization Plan for New Materials, May 31, 2009 (Exhibit JE-162).

<sup>94</sup> Exhibit CHN-12 at 8.

<sup>95</sup> Manganese Key Facts Table 1, p. 5 (Exhibit JE-153).

<sup>96</sup> Manganese Key Facts, p. 4; Table 6, p. 8 (Exhibit JE-153).

2009 (from 120,000 MT in 2000 to 1.15 MT in 2009).<sup>97</sup> China currently accounts for 96 percent of global production capacity for manganese metal, and China’s production of manganese metal in 2009 accounted for 95 percent of global production.<sup>98</sup>

75. **Zinc.** China’s production of zinc ores, the input for primary production of zinc, has also increased significantly from 2000 to 2009.<sup>99</sup> Similarly, China’s imports of zinc ores have increased from 36,000 MT in 2000 to 1,720,000 MT in 2009.<sup>100</sup> At the same time, China has maintained an export prohibition on zinc ores and concentrates.<sup>101</sup> These facts illustrate the fallacy of China’s contention that it is committed to an elimination of the environmental harm associated with primary production.

**iii. WTO-consistent reasonably-available alternatives exist that would more effectively address China’s objectives**

76. China makes very explicit the discriminatory nature of the export restraints at issue stating that “export duties reduce foreign demand . . . .”<sup>102</sup> Domestic demand, on the other hand, is stimulated by China’s discriminatory measures, and China acknowledges this. China states “the imposition of an export duty reduces exports and stimulates domestic consumption.”<sup>103</sup> It is the next step in China’s analysis that fails to withstand scrutiny. For the reasons discussed above, the export restraints on scrap are not contributing to increased secondary production in China or a reduction of the negative health effects associated with primary production. If China were in fact interested in reducing the health effects associated with primary production, China could impose restrictions or effective pollution controls on primary production of magnesium, manganese and zinc. Instead, as discussed in the previous section, China’s production of primary magnesium, manganese, and zinc continues to expand.

77. Dr. Olarreaga asserts in response to Question 43 from the Panel<sup>104</sup> that trade policies are an efficient means for achieving the type of environmental objective that is supposedly motivating China. The Grossman-Watson Report explains why this assertion is flawed. Their report explains that governments have a number of policy tools to address environmental externalities such as the one identified by China in relation to the production of magnesium metal, manganese metal, and coke. However, trade policies on their own are rarely the most efficient means for achieving such environmental objectives. Instead, from an economic

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<sup>97</sup> Manganese Key Facts, p. 10 (Exhibit JE-153).

<sup>98</sup> Manganese Key Facts, p. 10 (Exhibit JE-153).

<sup>99</sup> Zinc Report, p. 9 Figure 2 (Exhibit JE-154).

<sup>100</sup> Zinc Report, p. 14, Figure 8 (Exhibit JE-154).

<sup>101</sup> U.S. First Written Submission, para. 131.

<sup>102</sup> China’s First Written Submission, para. 317.

<sup>103</sup> China’s First Written Submission, para. 266.

<sup>104</sup> Additional Expert Statement by Dr. Olarreaga (Exhibit CHN-442), paras. 11-13

perspective, the Grossman-Watson Report explains that China’s supposed environmental objectives may be more efficiently addressed through non-trade measures. As their report explains, “[a]n efficient policy to correct any market distortion is one that eliminates the wedge between the private and social costs and benefits without creating additional distortions.”<sup>105</sup> Export restrictions are likely to be inefficient because they create incentives for local consumers to consume more of the good whose exports are restricted, and for local firms to produce less of it. But, according to the Grossman-Watson Report, both of these effects are rarely desirable. “In situations where greater consumption (of, say, scrap materials) is deemed desirable, an efficient policy would stimulate greater local demand without discouraging local supply. By doing so, the adverse effect on consumers in the rest of the world would be mitigated.”

78. While China contends that it maintains environmental regulations related to primary production,<sup>106</sup> China provides no evidence regarding the operation of such measures as they relate to the specific products at issue or their impact on pollution levels in China. Many of the measures direct other components of national or provincial governments in China to establish environmental standards, but the regulations do not make clear that the standards are in place, let alone effective.<sup>107</sup> Indeed, most of the measures to which China points make no mention of the products at issue in this dispute. Regardless, even if such environmental regulations are in place, they fail to buttress China’s position that export duties on scrap are necessary to address environmental pollution. Instead, it may be the case that the environmental standards need to be made more effective. For example, primary production of zinc can occur through two processes – electrolytic or pyrometallurgic. The pyrometallurgic process causes significantly greater environmental harm than the electrolytic process. However, China continues to produce the majority of its zinc using a type of pyrometallurgical process.<sup>108</sup>

79. In addition, China could address the obstacles to recycling in China and require manufacturers in China to switch to secondary production. Even China concedes that the availability of “appropriate production technologies” is a critical factor in the development of a

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<sup>105</sup> Grossman-Watson Report, p. 4 (Exhibit JE-158).

<sup>106</sup> China’s First Written Submission, paras. 225-26; Annex A.

<sup>107</sup> See e.g., *Law of the People’s Republic of China on the Prevention and Control of Water Pollution* (Exhibit CHN-269) (“The people’s government of a province, autonomous region, or municipality directly under the Central Government may, in light of the water quality of its administrative region and the requirements of the water pollution prevention and control work, determine the important water pollutants whose total discharge is subject to reduction and control.”); *Environmental Protection Law of the People’s Republic of China* (Exhibit CHN-88) Article 10 (“The environmental protection administrative department of the State Council shall formulate national pollutant discharge standards on the basis of national environmental quality standards and the country’s economic and technological conditions.”); *Law of the People’s Republic of China on the Prevention and Control of Environmental Pollution by Solid Wastes* (Exhibit CHN-270) Article 17 (“No entity or individual may dump solid wastes into or pile them up at rivers, lakes, ditches, reservoirs, bottomlands, banks or slopes under the highest waterline or other places where the waste isn’t allowed to be dumped or piled up according to laws and regulations.”).

<sup>108</sup> Zinc Report (Exhibit JE-154), p. 3-4.

recycling metal industry.<sup>109</sup> Yet, this bears no relationship to the export duties at issue. China then contends that it requires a “furnace-ready” supply of scrap to “reenter the domestic cycle”.<sup>110</sup> Such an assertion is contradicted by the fact that China has exported very small amounts of scrap in previous years<sup>111</sup>; therefore, there is very little scrap that can “reenter” the market. In addition, a significant amount of scrap generated from production processes for these materials are reused by the primary production facility itself because of the efficiency of such an approach.<sup>112</sup> Thus, export restraints would not help to increase the availability of scrap from such sources. Secondary production of alloy magnesium is also limited, as not all scrap generated may be used in the production of magnesium metal.<sup>113</sup>

80. In light of the fact that the export restraints on scrap can have at most a small, indirect environmental effect, these alternatives, which do not present the same issues of consistency with WTO obligations, could be employed to more directly address China’s supposed environmental objectives. Limiting primary production or adopting or strengthening measures to control the environmental harms associated with primary production would more directly target China’s stated environmental objective without discriminating against other Members. Instead, China is simply controlling who may have access to inputs for secondary production through the use of WTO-inconsistent export duties.

#### iv. Conclusion

81. For the foregoing reasons, China’s export duties on scrap products are not justified under Article XX(b) of the GATT 1994. First, China has presented no evidence that the export duties on scrap products have made any contribution, let alone a material contribution, to increased levels of secondary production. China relies instead on projections of supposed increases in secondary production in the future. Second, Dr. Olarreaga’s economic analysis setting forth such projections is fundamentally flawed and therefore unreliable. Third, even if Dr. Olarreaga’s analysis were taken on its own terms, the increases in secondary production that would supposedly result from the export duties are modest and belie China’s contention that the measures can make a “material contribution” to the stated environmental objective. Fourth, many of China’s arguments are premised on factual inaccuracies regarding the products themselves. Fifth, China’s assertion of supposed supply constraints – to the extent they are relevant to an analysis under Article XX(b) – fail to support China’s defense. Sixth, primary production of magnesium metal, manganese metal, and zinc continue to expand in China further undercutting China’s assertion that it seeks to shift to increased secondary production. Seventh,

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<sup>109</sup> Additional Expert Statement by Dr. Humphreys (Exhibit CHN-443), p. 5.

<sup>110</sup> China’s Answers to the First Set of Questions from the Panel, para. 243.

<sup>111</sup> Product Data (Exhibit CHN-289).

<sup>112</sup> Magnesium Key Facts, p. 2-3 (Exhibit JE-152).

<sup>113</sup> Magnesium Key Facts, p. 2-3 (Exhibit JE-152).

there are a number of WTO-consistent reasonably available alternatives that China could employ to more directly address China’s stated environmental objectives.

**4. China’s Export Duties on Magnesium Metal, Manganese Metal, and Coke Are Not Justified by Article XX(b) of the GATT 1994**

**a. Introduction**

81. China contends that its export duties on magnesium metal, manganese metal, and coke are justified under Article XX(b), because the export duties will result in decreased production of the products and therefore less environmental pollution associated with their production. As set forth above, China’s defense under Article XX(b) as it relates to these products raises a serious systemic concern. Under China’s line of reasoning, a WTO Member could impose a WTO-inconsistent export restraint on any product whose production causes pollution. In addition, China has failed to establish any connection between the export of these products and the supposed environmental objective. As China states, it is the production of these products, not their export, that causes environmental harm. China has failed to establish that the export duties on magnesium metal, manganese metal, and coke are making a material contribution, let alone necessary, to accomplish China’s supposed environmental objectives. As we will demonstrate, this is most clearly illustrated by the fact that magnesium metal, manganese metal, and coke continue to be exported in significant quantities in the form of higher value-added downstream products, including aluminum and steel. The increased production of downstream products also results in environmental pollution, and such production is occurring at very high and increasing levels. In addition to the expansion of the downstream industries, China’s economic analysis of the supposed decrease in production of magnesium metal, manganese metal, and coke that would result from the export duties is flawed and unreliable. Finally, a number of WTO-consistent, reasonably-available methods could be employed to more directly address China’s supposed environmental objective.

**b. China’s export duties on magnesium metal, manganese metal, and coke are not necessary to accomplish China’s stated environmental objective**

82. China’s defense under Article XX(b) relies on the assertion that the export duties on magnesium metal, manganese metal, and coke are making a material contribution to a reduction of health risks associated with primary production of these metals, because the export duties will result in decreased levels of production of these products. However, China fails to present any evidence that primary production of magnesium metal, manganese metal, or coke is occurring at decreased levels in China, let alone that the export duties have resulted in decreased levels of primary production.<sup>114</sup> Instead, the evidence confirms the opposite, that production levels

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<sup>114</sup> China’s First Written Submission, paras. 268-272; Exhibit CHN-124.

continue to rise for these products and their downstream products for which they are used as inputs. China's contention that the export duties are presently making a material contribution to China's stated objective is based almost exclusively on an economic analysis presented by Dr. Olarreaga estimating the decreased production levels that will supposedly occur in the future. Thus, the Panel has no evidence that the export duties are resulting in decreased production of magnesium metal, manganese metal, or coke, or that they are making a material contribution to China's supposed environmental objectives.<sup>115</sup> China's estimates of the supposed reduction in pollution that will result from decreased levels of primary production rely on the same flawed projections of decreased levels of primary production, and therefore similarly do not support the proposition that the export duties are presently making a material contribution to China's supposed environmental objectives.<sup>116</sup>

83. Furthermore, China has also failed to establish that its export duties are apt to make a material contribution to its objective in the future. Neither Dr. Olarreaga's quantitative projections nor any of the qualitative reasoning presented by China withstands scrutiny. As we will discuss, Dr. Olarreaga's economic analysis suffers from a number of fundamental flaws that render his projections unreliable. However, even if China's economic analysis were accepted on its own terms, it fails to support China's defense under Article XX(b).

**i. Production of magnesium metal, manganese metal, and coke continue to increase**

84. As set forth above, production of magnesium metal and manganese metal continue to increase in China, with China being the leading producer of both products. Similarly, coke production has also increased dramatically in recent years.

85. **Magnesium.** In 2009, when magnesium production decreased in the face of a global economic downturn, China continued to be the leading producer of magnesium accounting for 77 percent of global production.<sup>117</sup> In addition, in January 2008, China announced 50 projects to add magnesium metal, alloy, and diecasting capacities in China, totaling more than 3 million metric tons of new primary production capacity in China.<sup>118</sup> Moreover, Shanxi Province, China's leading provincial producer of magnesium,<sup>119</sup> announced on May 31, 2009 its *Industry Adjustment and Revitalization Plan for New Materials*. Shanxi states in its *Plan* that it intends to

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<sup>115</sup> As the Appellate Body noted in *Brazil – Tyres*, in order to be justified under Article XX(b), “a panel must be satisfied that it brings about a material contribution to the achievement of its objective. Such a demonstration can of course be made by resorting to evidence or data, pertaining to the past or the present, that establish that the import ban at issue makes a material contribution to the protection of public health or environmental objectives pursued.” Appellate Body Report, *Brazil – Tyres*, para. 151 (emphasis added).

<sup>116</sup> China's First Written Submission, paras. 272-74.

<sup>117</sup> Magnesium Key Facts, p. 6 (Exhibit JE-152).

<sup>118</sup> 2008 Minerals Yearbook: Magnesium [Advance Release], p. 45.4 (Exhibit JE-156).

<sup>119</sup> Magnesium Key Facts, Table 6 (Exhibit JE-152).



increase its production of alloy magnesium to 700,000 MT by 2011.<sup>120</sup> Similarly, China's production of dolomite, the main input for the primary production of magnesium,<sup>121</sup> has remained at steadily high levels since 2000.<sup>122</sup> The substantial increase in production capacity for magnesium and production of the inputs for primary production belie China's contention that it seeks to decrease primary production of magnesium.

86. **Manganese.** China's production of manganese also continues to expand, further weakening China's stated environmental rationale for the export duties. Manganese ore is the input used for production of primary manganese metal. China went from the world's fifth largest producer of manganese ore in 2005 to the leading producer of manganese ore in 2009.<sup>123</sup> China's imports of manganese ore have also increased steadily from 2000 to 2009 from under 2 million tons to over 9 million tons.<sup>124</sup> In addition, China's production of manganese metal increased by 900% between 2000 and 2009 (from 120,000 MT in 2000 to 1.15 million MT in 2009).<sup>125</sup> China currently accounts for 96 percent of global production capacity for manganese. In 2009, China's production of manganese metal accounted for 95 percent of global production.<sup>126</sup>

87. **Coke.** According to China, China's coke production increased dramatically by more than 260 percent from 2000 to 2009.<sup>127</sup>

88. These facts illustrate that China is not seeking to curtail production of the products at issue, but rather the production of these products continue to grow and fuels China's dramatic expansion of its aluminum and steel industries.

**ii. Magnesium metal, manganese metal, and coke continue to be exported in the form of higher value-added downstream products**

89. The fact that the export duties on magnesium metal, manganese metal, and coke are not leading to decreased levels of production is also illustrated clearly by the fact that China's downstream industries, including for aluminum and steel production, have grown dramatically in recent years.

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<sup>120</sup> *Shanxi Industry Adjustment and Revitalization Plan for New Materials*, May 31, 2009 (Exhibit JE-162).

<sup>121</sup> Exhibit CHN-12 at 8.

<sup>122</sup> Magnesium Key Facts, Table 1, p. 4 (Exhibit JE-152).

<sup>123</sup> Manganese Key Facts Table 1, p. 5 (Exhibit JE-153).

<sup>124</sup> Manganese Key Facts, p. 4; Table 6, p. 8 (Exhibit JE-153).

<sup>125</sup> Manganese Key Facts, p. 10, Table 7 (Exhibit JE-153).

<sup>126</sup> Manganese Key Facts, p. 10 (Exhibit JE-153).

<sup>127</sup> Product Data (Exhibit CHN-289) *See also* Coke Report (Exhibit JE-157) p. 4, Figure 3.

90. Magnesium is used to produce *inter alia* aluminum and steel, with aluminum alloying accounting for the largest single application for magnesium.<sup>128</sup> Similarly, manganese is used in the production of both aluminum and steel, with 90 percent of manganese used to produce steel as an alloying element.<sup>129</sup> Finally, one of the primary applications of coke is in the production of steel.<sup>130</sup> China is the world’s leading producer of both aluminum and steel. From 2000 to 2009, while global production of aluminum increased 10.4 percent, Chinese production increased nearly 364 percent.<sup>131</sup> Similarly, while global production of steel increased 6.64 percent from 2005 to 2009, Chinese steel production increased nearly 61 percent during that same time period.<sup>132</sup>

91. Not only are aluminum and steel production experiencing dramatic expansion in China, but the exports of aluminum and steel have also increased dramatically. Chinese exports of aluminum increased 708 percent from 2000 to 2008.<sup>133</sup> Similarly, Chinese exports of steel sheet and plate increased from 3.47 million MT to 28.79 million MT from 2000 to 2008.<sup>134</sup> Thus, even if China were correct that there was an environmental rationale for curbing the export of magnesium metal, manganese metal, and coke, the evidence shows that China continues to export these materials in significant quantities in the form of higher value-added downstream products. The production of steel and aluminum, which is occurring at much higher levels, is of course also harmful to the environment.

92. In the context of its export restrictions on scrap, China states that, “the imposition of an export duty reduces exports and stimulates domestic consumption.”<sup>135</sup> Yet somehow, China ignores the downstream effects in the context of the export duties on magnesium metal, manganese metal, and coke. The Grossman-Watson Report explains that China’s approach is flawed because China ignores the environmental impact of additional domestic consumption of these metals resulting from the downward price pressure created by the export restraints.<sup>136</sup>

93. Question 52 from the Panel asks China to address the issue of pollution associated with downstream production. Dr. Humphreys makes a surprising assertion, namely that “the

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<sup>128</sup> Magnesium Key Facts, p. 1-2 (Exhibit JE-152).

<sup>129</sup> Manganese Key Facts, p. 1 (Exhibit JE-153).

<sup>130</sup> Coke Report, p. 6. (Exhibit JE-157)

<sup>131</sup> Magnesium Key Facts, p. 16 (Exhibit JE-152), Table 16.

<sup>132</sup> Key Facts Manganese, p. 13 (Exhibit JE-153), Table 14. *See also* Coke Report, Figure 7, p. 6. (Exhibit JE-157).

<sup>133</sup> Magnesium Key Facts, p. 13; Table 20, p. 19 (Exhibit JE-152).

<sup>134</sup> Magnesium Key Facts, Table 21, p. 20 (Exhibit JE-152).

<sup>135</sup> China’s First Written Submission, para. 266.

<sup>136</sup> Grossman-Watson Report, p. 3 (“In our opinion, the environmental impact of these policies is best assessed by viewing the policies as a package, considering the important interrelationships that link the upstream and downstream markets”).

downstream production of higher-value added materials produced, in part, from the increased availability of various . . . [products] . . . is not particularly relevant or important relative to the pollution savings generated by the *decreased* production of EPR products resulting from the export restraints in the first place.<sup>137</sup>

94. China’s attempt to belittle the downstream effects of the export duties is surprising particularly in light of the fact that the downstream impact of the export duties on scrap is critical to China’s defense as it relates to the scrap products. According to China, increased availability of scrap in China will lead to increased secondary *i.e.*, less polluting, production of magnesium metal, manganese metal, and zinc. Increased availability of magnesium metal, manganese metal, and coke will similarly lead to increased production of products using the metals as inputs. Yet, China asserts that this is not relevant.

95. First, Dr. Humphreys contends that production of magnesium metal, manganese metal, and coke are the most polluting step in the production process, and less polluting than production of steel.<sup>138</sup> This assertion by Dr. Humphreys is unsupported by any evidence regarding the pollution associated with downstream production, and therefore, lacks credibility. Second, Dr. Humphreys presents a number of other assertions unsupported by any evidence whatsoever. For example, he asserts that the increased availability of manganese “could merely result in a change of the *quality* rather than of the increased *volume* of steel that China would otherwise have produced.”<sup>139</sup> He goes to say that in order to assess the pollution effect of the increased availability of manganese metal, “one would need to have a very precise understanding of the difference between the production processes for ferritic and austenitic stainless steels . . . to get a full view of the production consequences.”<sup>140</sup> This assertion is completely lacking in validity for two reasons. The first reason is that we recall the Appellate Body’s statement in *Brazil – Tyres* that in order to show that a measure would be apt to make a material contribution to a responding Member’s objective, that Member could rely on “qualitative reasoning based on hypotheses that are tested and are supported by sufficient evidence.”<sup>141</sup> Contrary to this standard, Dr. Humphreys’ assertions amount to speculative and theoretical pronouncements of one possible way in which China could make use of the increased availability of manganese and then does not even draw any connection to environmental concerns, but rather states that the environmental implications are unknown. The second reason is that this assertion reflects an inherent contradiction in China’s defense. In the context of China’s arguments relating to magnesium metal, manganese metal, and coke, China considered that it was in a position to present detailed quantitative estimates of the environmental pollution that results from the production of these products and the decreased pollution supposedly resulting from the curtailment of production.

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<sup>137</sup> Additional Expert Statement by Dr. Humphreys (Exhibit CHN-443) (emphasis original) p. 6.

<sup>138</sup> Additional Expert Statement by Dr. Humphreys (Exhibit CHN-443), p. 6.

<sup>139</sup> Additional Expert Statement by Dr. Humphreys (Exhibit CHN-443) p. 7.

<sup>140</sup> Additional Expert Statement by Dr. Humphreys (Exhibit CHN-443) p.7.

<sup>141</sup> Appellate Body Report, *Brazil – Tyres*, para. 151.

Therefore, China’s contention that the environmental impact of downstream production is unknowable and therefore irrelevant is contradictory to China’s entire defense under Article XX(b).

96. China then asserts that increased domestic magnesium availability could result in increased use of magnesium in place of steel in certain applications, which may have certain environmental benefits, such as increasing fuel efficiency.<sup>142</sup> But, this too is a speculative assertion, that lacks any evidentiary basis, regarding the ways in which magnesium may be used if additional magnesium is available in China. Thus, China’s attempt to minimize the importance of the downstream impact of its measures does not withstand scrutiny.

### iii. Flaws in China’s economic analysis

97. The Grossman-Watson Report also identifies a number of additional flaws with Dr. Olarreaga’s projections of the supposed decreased production resulting from the export duties on magnesium metal, manganese metal, and coke.

98. First, as set forth above in the context of scrap, China ignores the upstream-downstream linkages between the export restraints imposed on the products at various stages of production.<sup>143</sup> While the imposition of an export restraint on manganese metal, for example, may result in decreased production of manganese metal, the export restraint on manganese ore will stimulate demand for ore by the metals producer because of the downward pressure on the price for manganese ore. The second flaw relates to magnesium metal and manganese metal, and was discussed in the previous section. The Grossman-Watson report explains that Professor Olarreaga uses demand and supply elasticities and baseline quantities that are based on inappropriate data or, in some cases, based on no data whatsoever. The Grossman-Watson Report explains this flaw in Dr. Olarreaga’s analysis in detail. One of the points discussed in the Grossman-Watson Report is that rather than apply the supply and demand elasticities for each of the products *i.e.*, magnesium metal and manganese metal, Dr. Olarreaga calculates the supply and demand elasticities for coke and uses the coke estimate as the numerical value for the elasticity of magnesium metal and manganese metal. However, he provides no basis for the assumption that the elasticities for coke are appropriate in analyzing these metal products other than to say that all of the products at issue are “basic materials.”<sup>144</sup> In fact, as the Grossman-Watson Report explains, this assumption is unwarranted and constitutes another reason that Dr. Olarreaga’s analysis is unreliable.<sup>145</sup>

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<sup>142</sup> Additional Expert Statement by Dr. Humphreys (Exhibit CHN-443), p. 7.

<sup>143</sup> Grossman-Watson Report, p. 7-9 (Exhibit JE-158).

<sup>144</sup> Additional Expert Statement by Dr. Olarreaga (Exhibit CHN-442).

<sup>145</sup> Grossman-Watson Report, p. 9-14 (Exhibit JE-158).

99. Third, with respect to coke, the Grossman-Watson Report explains that although Dr. Olarreaga uses the supply and demand elasticities for coke for magnesium and manganese, he does not use the same elasticities to assess the impact of the export duty on coke. Instead, Dr. Olarreaga presents estimates of the effects of the export duties on production and consumption of coke based on a regression model, that is “badly flawed.” The Grossman-Watson Report explains that this regression analysis suffers from a number of methodological errors that renders Dr. Olarreaga’s analysis unreliable.<sup>146</sup>

100. Because of the flaws in Dr. Olarreaga’s methodology for assessing the effect of the export duties, his estimates of supposed decreases in production are similarly unreliable. China’s assertions of the supposed environmental benefits resulting from the export duties flow from this economic analysis, and are therefore also lacking in foundation.

101. Even if China were correct that the export duties on magnesium metal, manganese metal, and coke are resulting in decreased production and therefore decreased pollution, there are a number of WTO-consistent, reasonably available alternatives that would more directly address China’s stated environmental objectives without discriminating against other WTO Members.

**c. WTO-consistent reasonably available alternatives exist that would more directly address China’s stated environmental objectives**

102. As the complainants have set forth previously, according to China, it is the production, not the export, of magnesium metal, manganese metal, and coke that result in pollution.<sup>147</sup> By controlling the export of these products, China is exercising control over who may use the raw material, but is not addressing the environmental impact of production. Accordingly, if China’s objective were reduction of pollution associated with that production, then China should impose restrictions on the production of these products, not on their export.

103. As discussed in the previous section, the Grossman-Watson report explains that while governments have a number of policy tools to address environmental externalities such as the one identified by China in relation to the production of magnesium metal, manganese metal, and coke, trade policies on their own are rarely the most efficient means for achieving such environmental objectives. Instead, from an economic perspective, they explain that China’s supposed environmental objectives may be more efficiently addressed through non-trade measures. As they explain, “[a]n efficient policy to correct any market distortion is one that eliminates the wedge between the private and social costs and benefits without creating additional distortions.”<sup>148</sup> Export restrictions are likely to be inefficient because they create

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<sup>146</sup> Grossman-Watson Report, p. 15-19 (Exhibit JE-158).

<sup>147</sup> Complainants’ First Oral Statement, paras. 97-98.

<sup>148</sup> Grossman-Watson Report, p. 4 (Exhibit JE-158).

incentives for local consumers to consume more of the good whose exports are restricted, and for local firms to produce less of it. But, according to the Grossman-Watson Report, both of these effects are rarely desirable. “[I]n situations in which reduced domestic production might yield environmental gains, there is typically no reason to encourage domestic consumption at the same time, and doing so harms consumers elsewhere in the world. This is true, for example, of China’s restrictions on exports of metals, which encourages local use of these metals while elevating world prices.”<sup>149</sup> The Grossman-Watson also specifically responds to Dr. Olarreaga’s contention that export restrictions are an economically efficient means of accomplishing China’s environmental objectives.

104. The Grossman-Watson also respond to Dr. Olarreaga’s assertion that overall economic growth will lead to improved environmental standards.<sup>150</sup> As they explain, Dr. Olarreaga’s discussion reflects certain inaccuracies regarding the relevant economic literature.<sup>151</sup> In addition, Dr. Olarreaga’s statements reveal, once again, that the objective of China’s WTO-inconsistent export restraints is to “facilitate economic growth.”<sup>152</sup>

105. China contends that the export duties on these products are “an integral part of China’s comprehensive environmental policy aimed at reducing the health risks related to the production of these products.”<sup>153</sup> China then points to a number of measures supposedly aimed at reducing environmental pollution.<sup>154</sup> However, as discussed above, China provides neither any explanation of how these measures operate in relation to the specific products at issue, nor any evidence of their impact on environmental pollution. Many of these supposed regulations express an intention to establish certain environmental standards or direct a national or provincial component of the Government of China to establish such standards, but the regulations do not make clear that such controls are in place, much less effective.<sup>155</sup> In addition, many of the

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<sup>149</sup> Grossman-Watson Report, p. 4 (Exhibit JE-158).

<sup>150</sup> See Additional Statement by Dr. Olarreaga (Exhibit CHN-442) paras. 15-22.

<sup>151</sup> Grossman-Watson Report, p. 6-7 (Exhibit JE-158).

<sup>152</sup> Additional Statement by Dr. Olarreaga (Exhibit CHN-442) at 5.

<sup>153</sup> China’s First Written Submission, para. 308.

<sup>154</sup> China’s First Written Submission, paras. 224-26; Annex A.

<sup>155</sup> See e.g., *Law of the People’s Republic of China on the Prevention and Control of Water Pollution* (Exhibit CHN-269) (“The people’s government of a province, autonomous region, or municipality directly under the Central Government may, in light of the water quality of its administrative region and the requirements of the water pollution prevention and control work, determine the important water pollutants whose total discharge is subject to reduction and control.”); *Environmental Protection Law of the People’s Republic of China* (Exhibit CHN-88) Article 10 (“The environmental protection administrative department of the State Council shall formulate national pollutant discharge standards on the basis of national environmental quality standards and the country’s economic and technological conditions.”); *Law of the People’s Republic of China on the Prevention and Control of Environmental Pollution by Solid Wastes* (Exhibit CHN-270) Article 17 (“No entity or individual may dump solid wastes into or pile them up at rivers, lakes, ditches, reservoirs, bottomlands, banks or slopes under the highest waterline or other places where the waste isn’t allowed to be dumped or piled up according to laws and regulations.”).

supposed environmental regulations to which China points do not even mention the specific products at issue. Nevertheless, in response to Question 43 from the Panel, China contends that such regulations “interact” with and are “complementary to” the export duties at issue.<sup>156</sup> China then lists a number of measures it is supposedly taking domestically to control environmental pollution, and includes the export restraints as one of its efforts to reduce pollution. The measures setting forth the export duties at issue in this dispute are explicitly targeted at specific products, and clearly restrict the exportation of these products. By contrast, the supposed domestic environmental regulations to which China points do not draw any connection between the exportation of the products at issue and the supposed environmental goals. The mere inclusion of export restraints in a list along with the supposed domestic regulations is not sufficient to establish the complementarity or interaction between the export restraints and the claim domestic environmental regulations that China asserts.

106. In Question 43, the Panel asks China why it prefers export measures to production restrictions or environmental regulations to address environmental externalities. Of course, China does not have any domestic production restrictions in place. However, China asserts that China’s overall environmental policy “consists of multiple regulations that restrict and restrain environmental pollution in connection with the production of the . . . products at issue.”<sup>157</sup> This assertion is lacking in credibility. China fails to explain how these regulations are restricting production of the products at issue since, as set forth above, most of them do not even mention the products at issue. Nor does China provide any evidence that such measures are in fact “restricting” or “restraining” the production of the products at issue. Moreover, the existence of such domestic regulations, even if they are helping to curtail pollution, would still not support the imposition of export restraints on the products at issue, because the discrimination against foreign consumers of magnesium metal, manganese metal, and coke is still not necessary to contribute to China’s supposed objective. It may be the case that the domestic environmental regulations are not sufficiently robust to address China’s stated health objectives. But, this would not justify the imposition of export restraints.

107. In light of the fact that the export restraints on the products at issue can have no direct effect on the reduction of environmental pollution, China should employ WTO-consistent measures to address its stated environmental concerns. China’s statements in the course of this dispute that it is imposing environmental regulations to control environmental pollution and that China “has adopted a comprehensive environmental regulatory framework”<sup>158</sup> demonstrates that China considers such alternatives to be feasible.

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<sup>156</sup> China’s Answers to the First Set of Questions from the Panel, paras. 193-216.

<sup>157</sup> China’s Answers to the First Set of Questions from the Panel, para. 192.

<sup>158</sup> China’s First Written Submission, para. 309.

#### **d. Conclusion**

108. For the foregoing reasons, China's export duties on magnesium metal, manganese metal, and coke are not justified under Article XX(b). First, China has presented no evidence that the export duties on magnesium metal, manganese metal, or coke have made any contribution, let alone a material contribution, to decreased levels of production of those products. China relies instead on projections of supposed increases in secondary production in the future. Second, primary production of the metals has in fact increased, and these products continue to be exported at significant levels in the form of downstream, higher-value added products. Third, Dr. Olarreaga's economic analysis setting forth such projections is fundamentally flawed and therefore unreliable. Fourth, there are a number of WTO-consistent reasonably available alternatives that China could employ to more directly address China's stated environmental objectives. Thus, China's defense under Article XX(b) relating to magnesium metal, manganese metal, and coke should not be sustained.

#### **D. China's Export Duties on Fluorspar Are Not Justified by Article XX(g) of the GATT 1994**

##### **1. Background**

109. Fluorspar is a rocklike mineral used as the source of fluorine for a variety of downstream chemical products and also used in the production of aluminum and steel. China is the world's largest producer of fluorspar, producing 59% of the world's supply in 2009.<sup>159</sup>

110. China began subjecting the exportation of fluorspar to export quotas in the mid-1990s.<sup>160</sup> Over time the quota amounts decreased drastically, making the quotas increasingly restrictive. China then added an additional restraint to this export restriction, subjecting the exportation of fluorspar to export duties of 10 percent for the first time in November 2006. China raised the export duty rate for fluorspar to 15 percent in January 2008.

111. China does not attempt to justify the export quota on fluorspar. During the pendency of this proceeding, and for reasons it has not articulated, China chose not to impose the export quota for fluorspar in 2010. China focuses its efforts only on defending the export duty for fluorspar as a measure justified on the basis of conservation goals.

##### **2. Article XX(g) of the GATT 1994**

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<sup>159</sup> Market Research on Fluorspar and Selected Fluorochemicals at 6 (Exhibit JE-164).

<sup>160</sup> See *Implementing Rules of Export Quota Bidding for Fluorspar (Powder)(Trial)* (Ministry of Foreign Economic Relations and Trade March 1, 1994).



112. Sub-paragraph (g) of Article XX provides an exception for otherwise non-conforming measures:

relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

113. In order to justify the 15 percent export duty on fluorspar under Article XX(g), China must demonstrate that the export duty: (1) relates to the conservation of exhaustible natural resources and (2) is made effective in conjunction with restrictions on domestic production or consumption.

**a. “Relating to the conservation of exhaustible natural resources”**

114. For a measure to “relate to” conservation, it must bear a relationship to the goal of conservation. The Appellate Body has interpreted this phrase as requiring a “substantial relationship”<sup>161</sup> and not “merely incidentally or inadvertently aimed at” conservation.<sup>162</sup> The Appellate Body has also described this relationship as “a close and genuine relationship of ends and means”<sup>163</sup> which requires an examination of the relationship between the general structure and design of a measure and the policy goal it purports to serve.<sup>164</sup> Here, such an examination will require understanding the relationship between the 15 percent export duty on fluorspar and the goal China has purported that it serves – the conservation of fluorspar.

115. “Conservation,” specifically in terms of natural resources, is defined as “[t]he preservation of the environment, esp. of natural resources.”<sup>165</sup> More generally, “conservation” is defined as “[t]he action of keeping from harm, decay, loss, or waste; careful preservation.”<sup>166</sup> The New Shorter Oxford English Dictionary defines the verb “conserve” as: “Keep from harm, decay, loss, or waste, esp. with a view to later use; preserve with care.”<sup>167</sup> The New Shorter Oxford English Dictionary defines “preservation” as “[t]he action of preserving or protecting something; the fact of being preserved”<sup>168</sup> and defines the verb to “preserve” as “keep safe from harm, injury, take care of, protect.”<sup>169</sup>

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<sup>161</sup> Appellate Body Report, *U.S. – Gasoline*, p. 18.

<sup>162</sup> Appellate Body Report, *U.S. – Gasoline*, p. 18.

<sup>163</sup> Appellate Body Report, *U.S. – Shrimp*, para. 135

<sup>164</sup> Appellate Body Report, *U.S. – Gasoline*, para. 136.

<sup>165</sup> New Shorter Oxford English Dictionary (1993), vol. 1 at 485.

<sup>166</sup> New Shorter Oxford English Dictionary (1993), vol. 1 at 485.

<sup>167</sup> New Shorter Oxford English Dictionary (1993), vol. 1 at 485.

<sup>168</sup> New Shorter Oxford English Dictionary (1993), vol. 2 at 2341.

<sup>169</sup> New Shorter Oxford English Dictionary (1993), vol. 2 at 2342.

116. The term “care,” central to both “conservation” and “preservation,” is defined as “[c]harge, protective oversight, guardianship.”<sup>170</sup> Accordingly, “conservation of exhaustible natural resources,” as it is used in Article XX(g), means keeping exhaustible natural resources from harm, loss, or waste<sup>171</sup> through protective oversight.

117. China is incorrect to argue that context confers on the word “conservation” the meaning that a Member’s sovereign rights over its natural resources must be exercised in the interests of a Member’s own social and economic development.<sup>172</sup> According to China, the sovereignty of a State over its natural resources, coupled with the interests a State has in furthering its development, should inform the interpretation of the term “conservation” such that Article XX(g) permits WTO Members to deviate from WTO rules in order to promote and realize their own self-interested economic goals.<sup>173</sup>

118. China’s interpretation of the word “conservation” is fundamentally flawed and leads to a direction contradiction of the basic principle of the multilateral trading system, which requires WTO Members to abide by WTO rules in order that they might enjoy mutual economic benefits.

119. China invokes the principle of sovereignty over natural resources in its attempt to tie the concept of self-interested economic behaviors to the concept of “conservation of exhaustible natural resources.” However, a Member’s sovereign rights over its natural resources are not at issue under Article XX(g) of the GATT 1994. What is broadly at issue under Article XX(g) is whether a Member has satisfied the conditions of that provision when it maintains an otherwise GATT-inconsistent measure affecting the trade in its natural resources. Nothing about that inquiry is inconsistent with any notion of “sovereignty” that China invokes. Further, China’s ability to enter into trade agreements (or agreements of any other kind) is an incident of China’s sovereignty over its natural resources. Nothing about sovereignty permits China to absolve itself of the consequences of the agreements into which it enters. Indeed, to the extent that China is arguing for the proposition that it cannot enter into, or be held to, an agreement relating to its natural resources (such as the WTO Agreement’s rules on export quotas and export duties at issue in this dispute), China is in fact arguing against its own sovereignty. Moreover, given that China obtained significant market access benefits for its products as a result of its accession to the WTO, China is in no position to suggest that it need not abide by the obligations that accession also brought.

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<sup>170</sup> New Shorter Oxford English Dictionary (1993), vol. 1 at 338.

<sup>171</sup> “Waste” is defined as “[u]seless expenditure or consumption; extravagant or ineffectual use (of money, goods, time, effort, etc.).” New Shorter Oxford English Dictionary (1993), vol. 2 at 3631.

<sup>172</sup> China’s First Written Submission, paras 112-142.

<sup>173</sup> See China’s First Written Submission, para. 142.

120. In fact, one of the documents that China refers to for context, a GATT negotiating group document from 1988,<sup>174</sup> supports the point that “conservation” under Article XX(g) is not a license to service one’s own economic and social at the expense of one’s trading partners. In that document, the EU (then the European Communities) observed that “[n]atural resources are by their very nature unequally distributed throughout the world, but equally essential to every country’s economy.”<sup>175</sup> The EU then underscored the need for the cooperation facilitated by the multilateral trading system with respect to trade in natural resources: “No contracting party, developing or otherwise, possesses sufficient quantities of all industrial natural resources. Consequently, the possibility of acquiring the products they need is vital for all contracting parties.”<sup>176</sup>

121. China’s interpretative attempt to incorporate into “conservation” the notion of exercising rights over natural resources “in the interests of a Member’s own social and economic development”<sup>177</sup> appears to be in hopes of reshaping Article XX(g) into an exception based on a WTO Member’s desire to create opportunities for growth for its downstream processing industries. To the extent that the interests of a Member’s downstream industry might form the basis for an exception to the GATT 1994 prohibition on export restraints imposed on industrial input materials, it is already explicitly provided in Article XX(i).

122. Article XX(i) provides an exception for measures:

involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; *Provided* that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination.<sup>178</sup>

Article XX(i) permits export restrictions on domestic materials imposed to guarantee supplies to a domestic processing industry but only during a period of time when a governmental stabilization plan is in place holding down the price of such materials. Furthermore, Article XX(i) subjects the permissibility of measures involving export restrictions on “domestic

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<sup>174</sup> GATT, Negotiating Group on Natural Resource-Based Products, *Communication from the European Communities* MT.GNG/NG.3/W/11 (February 12, 1988) (Exhibit CHN-54).

<sup>175</sup> GATT, Negotiating Group on Natural Resource-Based Products, *Communication from the European Communities* MT.GNG/NG.3/W/11 (February 12, 1988) at 1 (Exhibit CHN-54).

<sup>176</sup> GATT, Negotiating Group on Natural Resource-Based Products, *Communication from the European Communities* MT.GNG/NG.3/W/11 (February 12, 1988) at 3 (Exhibit CHN-54)

<sup>177</sup> China’s First Written Submission para. 142.

<sup>178</sup> GATT 1994, Art. XX(i) (emphasis in original).

materials necessary to ensure essential quantities of such materials to a domestic processing industry” to a very strict proviso. That proviso explicitly emphasizes that any export restrictions on domestic materials that might be excepted under Article XX(i) are still unequivocally subject to the core GATT principles of a level playing field (“restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry”) and non-discrimination (“shall not depart from the provisions of this Agreement relating to non-discrimination”).

123. Article XX(i) thus provides important context for Article XX(g): it helps to make clear why Article XX(g) cannot be used to justify China’s export duties on fluorspar as a measure that limits the availability of fluorspar to foreign users in order to provide increased availability of fluorspar to China’s domestic users. Article XX(g) does not, on its face, provide for an exception to GATT rules on a basis other than “conservation.” In particular, as discussed above, “conservation” does not mean what China wants it to mean – i.e., ensuring that downstream domestic processors have a guaranteed source of supply. If it did, Article XX(i) would be largely superfluous, as the situation contemplated in it would be a subset of the situations covered by China’s (incorrect) reading of Article XX(g).

124. However, invoking Article XX(i) as an exception would require a respondent to demonstrate a number of matters, including that: (1) the export restrictions are “necessary to” ensure “essential quantities” of such materials to a domestic processing industry; (2) there exists a governmental stabilization plan holding the price of the materials below the world price; (3) the restrictions are “not operat[ing] to increase the exports of or the protection afforded to such domestic industry;” and (4) the restrictions do not discriminate. These comprehensive requirements in Article XX(i) argue strongly against an interpretation of Article XX(g) that would authorize the same kind of restrictions but with a different (and less stringent) set of prerequisites.

125. China does not invoke Article XX(i) as a justification for the export duty on fluorspar, or for any other export restraint on any raw material in this dispute.<sup>179</sup>

**b. “Made effective in conjunction with restrictions on domestic production or consumption”: the requirement of even-handedness**

126. In addition to “relating to the conservation of exhaustible natural resources,” in order to be justified under Article XX(g), a measure must also be “made effective in conjunction with restrictions on domestic production or consumption.” This second clause of Article XX(g) requires that “restrictions on domestic production or consumption” exist and that the non-conforming measure at issue be “made effective in conjunction with” such restrictions.

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<sup>179</sup> China’s Answers to the Panel’s First Set of Question, Question 54, para. 273.

### *Restrictions on Domestic Production or Consumption*

127. The term “restriction” is defined as: “A thing which restricts someone or something, a limitation on action, a limiting condition or regulation” and as “[t]he action or fact of limiting or restricting someone or something,” specifically “[d]eliberate limitation of industrial output.”<sup>180</sup> The verb to “restrict” is defined as “[l]imit, bound, confine.”<sup>181</sup> In turn, the verb to “limit” is defined as: “appoint, fix definitely, specify,” and “[c]onfine within limits, set bounds to; restrict.” “Limit” is defined as a noun as: “a boundary or terminal point considered as confining or restricting,” and “[a]ny of the fixed points between which the possible or permitted extent, amount, duration, etc., of something is confined; a bound which may not be passed or beyond which something ceases to be possible or allowable.”<sup>182</sup>

128. “Restrictions” on domestic production or consumption are, therefore, actions confining or fixing definitely the extent, amount, duration, etc. of domestic production or consumption that is permitted.

129. Notably, despite China’s many references to various dictionaries for definitions of the terms that are used in the provisions of Article XX that it invokes, China does not address the ordinary meaning of the term “restriction.”

### *Made Effective in Conjunction with*

130. The phrase “made effective in conjunction with” has been interpreted by GATT and WTO panels and the Appellate Body. The Appellate Body’s interpretation is that the phrase means become operative, in force or come into effect in association with or in combination with.<sup>183</sup>

### *“Even-Handedness”*

131. Taking the two phrases of the second clause of Article XX(g) together, “made effective in conjunction with restrictions on domestic production or consumption” requires that the non-conforming measure at issue: be operative, in force or effective in combination with operative, in force, or effective actions or facts that confine or fix definitely the permitted extent, amount, duration, etc. of domestic production or consumption. In justifying the export duties on fluorspar under Article XX(g), China must demonstrate that the export duties are effective in combination with deliberate actions confining or fixing definitely the permitted extent, amount, etc. of China’s domestic production or consumption of fluorspar.

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<sup>180</sup> New Shorter Oxford English Dictionary (1993), vol. 2 at 2569.

<sup>181</sup> Id.

<sup>182</sup> New Shorter Oxford English Dictionary (1993), vol. 1 at 1591.

<sup>183</sup> Appellate Body Report, *US – Gasoline*, p. 20-21.

132. The Appellate Body has interpreted the second clause of Article XX(g) to be a “requirement of *even-handedness* in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources.”<sup>184</sup> The Appellate Body in *US – Gasoline* noted that, while there is “no textual basis for requiring identical treatment of domestic and imported products . . . if *no* restrictions on domestically-produced like products are imposed at all, and all limitations are placed upon imported products *alone*, the measure cannot be accepted as primarily or even substantially designed for implementing conservationist goals.”<sup>185</sup>

133. China argues that the Appellate Body’s observation that this clause does not require “identical” treatment of domestic and foreign interests leads to the conclusion that the clause permits severely lopsided treatment of domestic and foreign interests. China’s argument is incorrect.

134. In *US – Gasoline*, the measure at issue affected imports of gasoline and was challenged as being inconsistent with the national treatment in Article III:4 of the GATT 1994. The Appellate Body’s observation regarding identical treatment was made in the context of identifying the boundaries of the “even-handedness” requirement. The Appellate Body considered that the situation at one end of the spectrum, *i.e.*, where domestic and foreign interests were being treated strictly identically, presented a simple analysis where parties would likely not find themselves disputing the consistency of a measure because, “where there is identity of treatment – constituting real, not merely formal, equality of treatment – it is difficult to see how inconsistency with Article III:4 would have arisen in the first place.”<sup>186</sup>

135. The Appellate Body then considered the situation at the other end of the spectrum, *i.e.*, where only foreign interests were being negatively affected and domestic interests suffered no negative impact. The Appellate Body found that this situation also presented a simple analysis under Article XX(g) because in such a circumstance, the responding party would not have even a colorable argument that the measure at issue would meet the “even-handedness” requirement. As the Appellate Body concluded, in a situation where no restrictions are imposed on domestic interests and restrictions are only being imposed on foreign interests, the measure at issue “cannot be accepted as primarily or even substantially designed for implementing conservationist goals. The measure would simply be naked discrimination for protecting locally-produced goods.”<sup>187</sup>

136. The Appellate Body’s discussion of the even-handedness requirement in *US – Gasoline* only identifies the logical boundaries of the requirement. The Appellate Body did not address

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<sup>184</sup> Appellate Body Report, *U.S. – Gasoline*, p. 20-21 (emphasis in original).

<sup>185</sup> Appellate Body Report, *U.S. – Gasoline*, p. 21.

<sup>186</sup> Appellate Body Report, *U.S. – Gasoline*, p. 21.

<sup>187</sup> Appellate Body Report, *U.S. – Gasoline*, p. 21.

what relative treatment of domestic and foreign interests, within those logical boundaries, was required in order to qualify as “even-handed.”

137. The Appellate Body’s reasoning in *US – Gasoline* certainly does not stand for the proposition that China argues it stands for, *i.e.*, that Article XX(g) permits a Member to impose measures that advantage their own domestic interests at the expense of the interests of other Members as long as it imposes some level of restriction on domestic supply that is greater than nothing.<sup>188</sup> And, as will be shown in the following subsections, China does not treat domestic and foreign interests even-handedly and therefore has not made its export restrictions “effective in conjunction with” domestic restrictions.

**c. China’s 15 percent export duty on fluorspar does not relate to the conservation of fluorspar**

138. In examining whether China’s export duty on fluorspar relates to conservation of fluorspar, the operative question is whether there is a close and genuine relationship of ends and means between the goal of fluorspar conservation and the means presented by the export duty.<sup>189</sup> The answer to this question is no.

139. As noted in the First Oral Statement of the Co-Complainants,<sup>190</sup> the measures imposing the export duty on fluorspar do not speak to the relationship between the export duty and the goal of conservation. In its First Written Submission, China does not squarely address the relationship between the export duty on fluorspar and the goal of fluorspar conservation. To the extent that China attempts to address this relationship, China presents a highly misleading passage from an exhibit: “As the State Council has stated, the export duty ‘fulfill[s] the need of domestic economic and social development, promote[s] resource saving and environmental protection, and . . . improve[s] people’s standard of living’,” citing to an article posted on China’s Central Government Website in December 2008.<sup>191</sup> The article China submitted as Exhibit CHN-100 actually states:

In order to effectively bring into play the tariff policy’s economic leverage, promote the adjustment of economic structure and the change of economic development mode, further increase the import of advanced technologies, equipments and key parts and components, fulfill the need of domestic economic and social development, promote resource saving and environmental protection,

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<sup>188</sup> China’s First Written Submission, paras. 149-153.

<sup>189</sup> Appellate Body Report, *U.S. – Shrimp*, para. 135.

<sup>190</sup> Joint Oral Statement of the Co-Complainants at the First Substantive Meeting of the Panel with the Parties, para. 75.

<sup>191</sup> China’s First Written Submission, para. 190 (citing to Exhibit CN-100).

and to improve people’s standard of living, the State will implement relatively low interim import tariff rates on over 670 types of commodities next year . . . .<sup>192</sup>

The passage China quotes in its one attempt to present an explicit policy link between its imposition of an export duty on fluorspar and the goal of conservation of fluorspar is actually about the lowering of import duty rates on products such as coal, fuel oil, epoxide resin, the chassis of heavy wreckers, and automatic bobbin winders.<sup>193</sup>

140. Indeed, the most relevant statement in Exhibit CN-100 in understanding the ends to which the fluorspar export duty serves as means is the attribution of “economic leverage” to “tariff policy.” The 15 percent duty on fluorspar exports imposes an additional cost for foreign users of fluorspar purchasing from China. The relationship between a measure that increases the cost of fluorspar only to foreign users and the goal of conservation of fluorspar, *i.e.*, keeping fluorspar from harm, loss, or waste through protective oversight, is not readily apparent, but the relationship between such a measure and the goal of exercising economic leverage in the international market is obvious.

141. Taking into account fluorspar production, consumption, and export statistics, the picture that emerges demonstrates a complete lack of any relationship between the export duty on fluorspar and the goal of fluorspar conservation and a close and genuine relationship between the export duty and China’s economic goals. While China has imposed increasing and increasingly restrictive restraints on the exportation of fluorspar, it has imposed no detectable controls on domestic production or consumption. Since 1984, China has been the world’s largest producer of fluorspar and, since at least 2000, China has produced more of the world’s supply of fluorspar than the other four major producing countries or regions combined. At the same time, China is also the world’s largest consumer of fluorspar.<sup>194</sup> Over the course of the last 10 years, China’s consumption of fluorspar for the production of key downstream fluorochemicals has grown over 300 percent.<sup>195</sup>

142. While China has been imposing export quotas on fluorspar since the mid-1990s and export duties on fluorspar since 2006, China has maintained virtually no restraints on the exportation of these downstream fluorochemical products. Exports of two key downstream fluorochemicals from China increased over 700 percent between 2000 and 2008.<sup>196</sup> In 2008, although far less fluorspar was exported from China in its raw material form than in 2000, more

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<sup>192</sup> Exhibit CHN-100 at 1, para. 3 (emphasis added).

<sup>193</sup> Appellate Body Report, *U.S. – Gasoline*, p. 21.

<sup>194</sup> Market Research on Fluorspar and Selected Fluorochemicals (October 2010) at 6.

<sup>195</sup> Market Research on Fluorspar and Selected Fluorochemicals (October 2010) at 9.

<sup>196</sup> Market Research on Fluorspar and Selected Fluorochemicals (October 2010) at 11-12.



fluorspar in total was exported from China than in 2000 due to the substantial increase in exports of downstream products containing fluorspar.<sup>197</sup>

143. During the time that China has imposed export duties on fluorspar, in combination with the export quota China imposed on fluorspar through 2009, the export price for fluorspar nearly doubled.<sup>198</sup> This trend is entirely consistent with the goal articulated in a Chinese government policy document that does provide an explicit link between the imposition of export restraints on fluorspar and the policy goal of increasing the profitability of fluorspar exports. The *2001 National Mineral Resources Plan* provides:

In accordance with the principle of comparative benefits, the configuration of mineral product import and export should be adjusted to increase the profitability of imports and exports. The total export of tungsten, tin, antimony, rare earth, fluorspar, barite and other minerals with an export advantage should be further regulated, and the ordinary course of their export should be more strictly controlled.<sup>199</sup>

144. Accordingly, the 15 percent export duty on fluorspar appears to bear a close and genuine relationship to the goal of creating economic leverage for China’s fluorspar exports. In addition, the imposition of restraints on the export of fluorspar in the absence of similar or similarly extensive restraints on the export of downstream fluorochemicals demonstrates another close and genuine relationship between the export duty on fluorspar and the goal of fostering the growth and exports of value added, downstream products. As noted in the Joint Oral Statement of the Co-Complainants at the First Substantive Meeting of the Panel with the Parties, China’s *Eleventh Five-Year Plan for Social and Economic Development* states:

We will support the export of independent high-tech products, electromechanical products, and high-value added and labor-intensive products. . . . We shall strengthen the dynamic supervision of the price, quality, and quantity of export commodities, so as to build a quality and efficiency-oriented system for the promotion and regulation of foreign trade.<sup>200</sup>

145. The “substantial relationship” between the 15 percent export duty on fluorspar and these economic goals is striking in comparison with the apparent lack of any relationship between the

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<sup>197</sup> Market Research on Fluorspar and Selected Fluorochemicals (October 2010) at 13.

<sup>198</sup> Market Research on Fluorspar and Selected Fluorochemicals (October 2010) at 11, 38-39.

<sup>199</sup> *National Mineral Resources Plan*, section 7(5).

<sup>200</sup> *Eleventh Five Year Plan Outline for Social and Economic Development*, Part 9, Chapter 35, Section 1, JE-8 at 17 (emphasis added).

export duty and the goal of fluorspar conservation. Accordingly, China has failed to demonstrate that its export duty on fluorspar “relates to the conservation of” fluorspar.

**d. China’s 15 percent export duty on fluorspar is not made effective in conjunction with restrictions on domestic production or consumption**

146. China also fails to demonstrate that its export duty on fluorspar is “made effective in conjunction with restrictions on domestic production or consumption.” China asserts that it has a “conservation policy” consisting of a number of measures “to manage the supply, production, and use of fluorspar.”<sup>201</sup> As discussed below, these measures do not constitute “restrictions on domestic production or consumption.” The export duty on fluorspar therefore is not “made effective in conjunction with” such restrictions.

*The Measures China Proffers Are Not “Restrictions” on Production or Consumption*

147. China lists eight measures that it argues “restrict[] or burden[] the current exploitation, production, and use of its own fluorspar.”<sup>202</sup> China appears to consider “burdens” on exploitation, production, and use to be distinct from “restrictions,” however, China does not explain what this difference might be or which aspects of which measures “restrict” rather than “burden.” China also does not explain how the terms “burden” and “restrict” relate to the term “restriction” in Article XX(g).

148. As discussed above, a “restriction” is a deliberate limitation on industrial output, the action or fact of confining or binding the extent, amount, duration, etc. of permitted – in the case of Article XX(g) – domestic production or consumption.

149. The eight measures that China asserts as relevant to Article XX(g) as restrictions on domestic production or consumption are:

*Mineral Resources Law*

*Environmental Protection Law*

*Provisional Regulations on Resource Tax and 1994 Detailed Rules for the Implementation of the Provisional Regulations on Resource Tax*

*Provisions on the Administration of Collection of the Mineral Resources Compensation Fees*

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<sup>201</sup> China’s First Written Submission, paras. 166 and 167

<sup>202</sup> China’s First Written Submission para. 168

*Measures for the Administration of Registration of Mining of Mineral Resources*

*National Mineral Resources Plan (2001)*

*Notice of the General Office of the State Council on Forwarding the Opinions of the Ministry of Land and Resources and other Authorities on the Integration of Exploitation of Mineral Resources*

*National Mineral Resources Plan (2008-2015)*

Most of these measures do not specifically address the production or consumption of fluor spar, much less “restrict” such production or consumption.

150. The *Environmental Protection Law*, according to China, provide a legal basis for developing policies and measures to further environmental protection and instructed the State Council to formulate standards and mechanisms in this vein. Even under China’s description of this measure, there is no concrete link between this measure and the production or consumption of fluor spar, much less “restrictions” on such production or consumption.

151. The *National Mineral Resources Plan (2001)* and the *National Mineral Resources Plan (2008-2015)* are state planning documents that provide high level policy guidance. China describes these measures as “re-emphasiz[ing]” key tenets of China’s mineral resources policy.<sup>203</sup> Based on China’s description, these measures do not impose obligations or requirements and do not “restrict” production or consumption of fluor spar.

152. According to China, the *Mineral Resources Law* provides for requirements or standards for mining enterprises to operate efficiently, abide by safety and environmental requirements as a condition for obtaining mining licenses. The *Notice of the General Office of the State Council on Forwarding the Opinions of the Ministry of Land and Resources and other Authorities on the Integration of Exploitation of Mineral Resources* “obliges” small mining enterprises to consolidate in order to improve efficiency and regulatory compliance. The *Measures for the Administration of Registration of Mining of Mineral Resources* provide for monitoring mining license holders for compliance with standards for development and use of mineral resources and environmental protection and for reporting by mining license holders on their compliance. None of these measures, however, “restricts” the production or consumption of fluor spar in the sense of deliberately confining or binding the production or consumption of fluor spar. Assuming that mining enterprises comply with the various standards, these measures do not directly limit the amounts of fluor spar that mining enterprises may produce.

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<sup>203</sup> China’s First Written Submission, paras. 177 and 179.

153. Two of the eight measures do appear to address aspects relating to the production specifically of fluorspar. China appears to impose a resource tax on entities exploiting mineral products through the *Provisional Regulations on Resource Tax*<sup>204</sup> and the *Detailed Rules for the Implementation of the Provisional Regulations on Resource Tax*.<sup>205</sup> According to China, the objective of the mineral resources tax “is to increase extraction costs and, hence, prices of the mineral,”<sup>206</sup> however, China does not provide a citation to a provision of either of these two measures or any other measure and a review of the provisions of these two measures does not reveal any support for this assertion. Regardless of whether this, revenue generation, or some other objective is meant to be served the mineral resources tax, the tax rate applicable to fluorspar in 2009 was 3 RMB per MT (approximately 0.45 USD per MT).<sup>207</sup>

154. Furthermore, it does not appear the resource tax is necessarily systematically applied. According to Art. 7 of the *Provisional Regulations on Resource Tax*, the resource tax may be reduced or exempted for mining entities suffering large losses due to accidents or natural disasters in a particular year, or pursuant to unspecified reductions or exemptions stipulated by the State Council.<sup>208</sup> Even if the resource tax were systematically applied to entities mining fluorspar, a tax rate so low would not directly limit or bind the amount of fluorspar produced, especially when the export price of fluorspar in 2009 was 460 USD and the unit trade value was 338 USD.<sup>209</sup>

155. China describes its *Provisions on the Administration of Collection of the Mineral Resources Compensation Fees*<sup>210</sup> as providing for a mineral resources compensation fee to be paid by mining enterprises on the sales of extracted minerals “that are no longer in their natural state.”<sup>211</sup> The compensation fee is calculated pursuant to the following formula:

$$\text{Compensation Fee} = \text{sales income of mineral product} \times \text{Compensation rate} \times \text{coefficient of mining recovery rate}$$

In turn, the coefficient of mining recovery rate is determined by the following ratio:

Approved Mining Recovery Rate

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<sup>204</sup> Exhibit CHN-88.

<sup>205</sup> Exhibit CHN-91.

<sup>206</sup> China’s First Written Submission, para. 172.

<sup>207</sup> *Detailed Rules for the Implementation of the Provisional Regulations on Resource Tax*, Appendix (Exhibit CHN-91).

<sup>208</sup> *Provisional Regulations on Resource Tax*, Art. 7 (Exhibit CHN-88).

<sup>209</sup> Market Research on Fluorspar and Selected Fluorochemicals (October 2010) at 38-39.

<sup>210</sup> Exhibit CHN-92.

<sup>211</sup> *Provisions on the Administration of Collection of the Mineral Resources Compensation Fees*, Art. 3 (Exhibit CHN-92).

$$\text{Coefficient} = \frac{\text{-----}}{\text{Actual Mining Recovery Rate}}$$

where the approved mining recovery rate is prescribed by the approved design of the mine at issue.<sup>212</sup> The mineral resources compensation fee rate designated for “fluorite” is 2 percent.<sup>213</sup>

156. As with the resource tax, it is unclear whether the mineral resources compensation fee is systematically collected. Mining entities may be exempted from paying the fee, upon joint approval of the relevant departments responsible for mineral resources and for finance: (1) if the mineral product is recovered from barren rock; (2) where “non-security left-over ore bodies of closed mines are mined upon approval pursuant to the relevant provisions of the State;” and (3) under unspecified “other circumstances.”<sup>214</sup>

157. Even if it were systematically collected, a compensation rate so low would not limit or bind the amount of fluorspar production. Furthermore, the manner in which the compensation fee is calculated also demonstrates that the compensation fee does not restrict the production of fluorspar. The compensation fee is calculated by multiplying the sales income of fluorspar by 2 percent and by the coefficient of the mining recovery rate. The coefficient of the mining recovery rate is calculated by dividing the approved mining recovery rate for a particular mine, based on the design of the mine, by the actual mining recovery rate. Assuming that mining entities regarding the approved mining recovery rate as a maximum rate which they would not exceed (although the provisions of the *Provisions on the Administration of Collection of the Mineral Resources Compensation Fees* do not provide that such approved rate may not be exceeded), mining entities are rewarded for recovering fluorspar at as high a rate as their mines are approved for. This incentive structure would not directly lead to a minimization or reduction of fluorspar output but rather to a maximization of fluorspar output.

158. China as not demonstrated that it maintains any restrictions on the production or consumption of fluorspar as required by Article XX(g).

*The Export Duty Is Not Made Effective in Conjunction with: the Absence of Even-Handedness*

159. As a result, China’s export duty on fluorspar is not “made effective in conjunction with” restrictions on domestic production or consumption. To the contrary, China’s export duty on fluorspar presents the situation the Appellate Body alluded to in *US – Gasoline*, where “no

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<sup>212</sup> *Provisions on the Administration of Collection of the Mineral Resources Compensation Fees*, Art. 5 (Exhibit CHN-92).

<sup>213</sup> *Provisions on the Administration of Collection of the Mineral Resources Compensation Fees*, Appendix (Exhibit CHN-92).

<sup>214</sup> *Provisions on the Administration of Collection of the Mineral Resources Compensation Fees*, Art. 12 (Exhibit CHN-92).

restrictions on domestic[] [interests] are imposed at all, and all limitations are placed upon [foreign interests] *alone*.”<sup>215</sup> As the Appellate Body concluded, in such a scenario, “the measure cannot be accepted as primarily or even substantially designed for implementing conservationist goals. The measure would simply be naked discrimination . . . .”<sup>216</sup>

160. Even if one or some of the measures China has put forward could be considered as limiting or binding the amount of fluorspar produced, China would still not have demonstrated that the export duty on fluorspar was “made effective in conjunction with” such restrictions because the relative impact on domestic and foreign users of fluorspar would still not be “even-handed.”

161. To the extent any measure China has proffered as evidence of restrictions on domestic production or consumption is relevant at all to the production or consumption of fluorspar, it would be relevant only to the mining or “production” of fluorspar. If such a measure were considered to “restrict” fluorspar production, a restriction on production would affect both domestic and foreign users of fluorspar. As China observes in its own description of the resource tax, the tax is charged “irrespective of whether it is sold for processing and consumption in China or abroad.”<sup>217</sup> However, foreign users of fluorspar are also subjected to the export duty and the export quota on fluorspar, which domestic users are not. In order for its measure to be even-handed, therefore, it seems as though China would need to counter-balance the impact of the export duty on foreign users with some measure that similarly affects domestic users of fluorspar without imposing a “double” burden on foreign users.

162. Here, any plausible “restriction” on domestic production would derive either from very general mining entity compliance standards or from extremely low coefficients or multipliers applied to sales volumes of fluorspar that only incidentally discourages output and would affect both domestic and foreign users. When juxtaposed with an export duty of 15 percent (and export quota) on fluorspar that only foreign users must bear, the severe lopsidedness of any such production “restrictions” would be self-evident. Accordingly, even if China had demonstrated the existence of restrictions on domestic production or consumption, China would still not have demonstrated the requisite even-handedness to justify its export duty on fluorspar under Article XX(g).

**e. Even if China’s 2010 Measures Related to Fluorspar and High Alumina Clay Were Relevant to the Panel’s Review, China’s 15 Percent Export Duty on Fluorspar Would Still Not Be Justified under Article XX(g)**

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<sup>215</sup> Appellate Body Report, *U.S. – Gasoline*, p. 21.

<sup>216</sup> Appellate Body Report, *U.S. – Gasoline*, p. 21.

<sup>217</sup> China’s First Written Submission, para. para. 172.

163. The United States sets forth its arguments regarding the measures within the Panel’s terms of reference and the appropriate measures on which the Panel’s findings and recommendations should be made below. Should the Panel, *arguendo*, review the export restraints as applied by China in 2010,<sup>218</sup> and should the Panel consider the measures China implemented over the course of this proceeding’s pendency through the summer of 2010<sup>219</sup> relevant to that review *arguendo*, the United States addresses the export duty on fluorspar applied in 2010 in light of those measures below. As the United States demonstrates, the measures China has introduced over the course of 2010 do not alter the fact that China’s export duty on fluorspar is not justified under Article XX(g) of the GATT 1994.

*Related to the Conservation of Exhaustible Natural Resources*

164. In 2010, the export duty applied to fluorspar continues to be 15 percent, however, there is no export quota imposed on fluorspar. For the reasons discussed above, the export duty on fluorspar does not “relate to” conservation.

*Restrictions on Domestic Production or Consumption of Fluorspar*

165. China asserts that four measures it introduced over the course of 2010 are measures that comprise part of its policy to burden or restrict the extraction, production, and use of fluorspar. China introduced these measures for the very first time in 2010. The four measures are:

*Circular of the General Office of the State Council on Taking Comprehensive Measures to Control the Extraction and Production of High Alumina Clay and Fluorspar*<sup>220</sup>

*2010 Public Notice on Fluorspar Industry Entrance Standards*<sup>221</sup>

*2010 Circular of the Ministry of Land and Resources on Passing Down the Controlling Quota of the 2010 Total Extraction Quantity of High Alumina Clay and Fluorspar*<sup>222</sup>

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<sup>218</sup> The United States notes that the export duty on fluorspar was applied on January 1, 2010 as it was applied on December 21, 2009. However, the export quota on fluorspar, which applied on December 21, 2009, no longer applied on January 1, 2010.

<sup>219</sup> China introduced measures related to the mining and production of fluorspar on March 1, 2010, April 20, 2010, May 19, 2010, and June 1, 2010.

<sup>220</sup> Exhibit JE-167 (Exhibit CHN-87).

<sup>221</sup> Exhibit CHN-96.

<sup>222</sup> Exhibit JE-168 (Exhibit CHN-97).

*2010 Circular on Passing Down the Controlling Quota of the 2010 Total  
Extraction Production Quantity of High Alumina Clay and Fluorspar*<sup>223</sup>

In addition, China issued an additional measure on June 1, 2010, raising the rate of the resource tax on fluorspar.<sup>224</sup> None of these measures restricts the production or consumption of fluorspar within the meaning of Article XX(g). Even if they did, they would not do so in an even-handed manner.

166. Pursuant to the *Circular of the State Council’s General Office on the Adoption of Comprehensive Measures to Control the Mining and Production of Fireclay and Fluorspar*, China raised the resource tax rate for fluorspar on June 1, 2010.<sup>225</sup> Although China has not conceded explicitly that it considered the resource tax that was previously set at 3 RMB per MT to be too low to constitute a “restriction” on fluorspar production, China decided to raise the tax to 20 RMB per MT on June 1, 2010 (approximately 3 USD per MT). Nevertheless, for the same reasons discussed above, and in light of the reported price for fluorspar of 533 USD in 2009,<sup>226</sup> China has still not demonstrated that the resource tax limits or binds the amount of fluorspar production in China.

167. According to China, the *Public Notice on Fluorspar Industry Entrance Standards*, introduced on March 1, 2010, sets forth conditions and standards for enterprises wishing to engage in the “extraction and production” of basic fluorspar products<sup>227</sup> pertaining to rates and standards for the mining and milling of fluorspar ores, the use of technologies, product quality and other operating standards. None of these conditions “restricts” fluorspar production in the sense of directly limiting or binding the amount of fluorspar that can be produced.

168. China asserts that the *Circular on the Allocation of the 2010 Mining Control Targets Applicable to High Alumina Clay Ore and Fluorspar Ore*, which China introduced for the first time on April 20, 2010, establishes “quotas” on fluorspar exploitation and production.

169. As an initial matter, the United States addresses the terminology that China uses in its First Written Submission and in its translations of the measures that China calls: *Circular of the General Office of the State Council on Taking Comprehensive Measures to Control the*

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<sup>223</sup> Exhibit JE-169 (Exhibit CHN-98).

<sup>224</sup> *Notice Adjusting the Applicable Tax Rates of Resource Taxes of Refractory Grade Clay and Fluorspar* Cai Shui [2010] No. 20 (Ministry of Finance and the General Administration of Taxation, effective June 1, 2010) (Exhibit CHN-90).

<sup>225</sup> *Notice Adjusting the Applicable Tax Rates of Resource Taxes of Refractory Grade Clay and Fluorspar* Cai Shui [2010] No. 20 (Ministry of Finance and the General Administration of Taxation, effective June 1, 2010) (Exhibit CHN-90).

<sup>226</sup> Market Research on Fluorspar and Selected Fluorochemicals (October 2010) at 38-39.

<sup>227</sup> China’s First Written Submission para. 181.



*Extraction and Production of High Alumina Clay and Fluorspar*,<sup>228</sup> *Circular of the Ministry of Land and Resources on Passing Down the Controlling Quota of the 2010 Total Production Quantity of High-alumina Refractory-Grade Bauxite and Fluorspar*,<sup>229</sup> and *Circular on Passing Down the 2010 Controlling Quota of Total Extraction Quantity of High Alumina Clay and Fluorspar*.<sup>230</sup> The United States notes that what China terms “quotas” on extraction and production are more accurately translated as “quantity control targets.” The word “targets” has a different connotation from “quotas.” A “target” suggests a standard to aim for, but not a binding limit – which is connoted by the term “quotas.”

170. Additionally, China’s measures address the “extraction” and “production” of fluorspar. The United States understands the term “extraction” to be equivalent, as a translation, to “mining,” as reflected in Exhibits JE-166, JE-167, JE-168, and JE-169. In turn, China’s measures address separately the “production” of fluorspar. This production takes place after the fluorspar is mined (or “extracted” from the ground) and turns the mined ore into fluorspar “blocks” and “powder.” Accordingly, the mining of fluorspar is the activity that “produces” fluorspar that can be used.

171. The *Circular of the State Council’s General Office on the Adoption of Comprehensive Measures to Control the Mining and Production of Fireclay and Fluorspar*<sup>231</sup> and *Circular on the Allocation of the 2010 Mining Control Targets Applicable to High-Alumina Clay Ore and Fluorspar Ore*<sup>232</sup> set the mining quantity control target for fluorspar at 11 million MT for 2010. While it may appear superficially that these measures “restrict” the production of fluorspar and limit or bind the amount of fluorspar that is permitted to be produced, a closer examination of the measures reveal that this is not in fact the case.

172. The target number for fluorspar mining is set at such a high level that the target is not likely to bind or reduce the amount of fluorspar produced in China in 2010. The target for fluorspar mining in 2010 is set at 11 million MT while China states that 9.4 million MT of

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<sup>228</sup> Exhibit CHN-87. See *Circular of the State Council’s General Office on the Adoption of Comprehensive Measures to Control the Mining and Production of Fireclay and Fluorspar* (State Council [2010] No. 1, January 2, 2010) (Exhibit JE-167).

<sup>229</sup> Exhibit CHN-98. See *Circular on the Allocation of Production Quantity Control Targets Applicable to High-Alumina Clay and Fluorspar for the Year 2010* (MIIT (2010) no. 244, May 19, 2010) (Exhibit JE-169).

<sup>230</sup> Exhibit CHN-97. See *Circular on the Allocation of the 2010 Mining Control Targets Applicable to High-Alumina Clay Ore and Fluorspar Ore* (Ministry of Land and Resources (2010) No. 187, April 20, 2010) (Exhibit JE-168).

<sup>231</sup> Exhibit CHN-87. See *Circular of the State Council’s General Office on the Adoption of Comprehensive Measures to Control the Mining and Production of Fireclay and Fluorspar* (State Council [2010] No. 1, January 2, 2010) (Exhibit JE-167).

<sup>232</sup> Exhibit CHN-97. See *Circular on the Allocation of the 2010 Mining Control Targets Applicable to High-Alumina Clay Ore and Fluorspar Ore* (Ministry of Land and Resources (2010) No. 187, April 20, 2010) (Exhibit JE-168).

fluorspar was mined in 2009, when no target number had been set and no attempt at restricting production had been made.<sup>233</sup> Accordingly, this target number is not set with the intention of binding or limiting the amount of fluorspar produced in 2010. The measures acknowledge this fact on their face.<sup>234</sup>

173. Despite the introduction of these measures, therefore, China has not demonstrated the existence of restrictions on domestic production of fluorspar, even in 2010

*Made Effective in Conjunction with*

174. Because China has not demonstrated the existence of restrictions on domestic production or consumption, China has not demonstrated that its export duty on fluorspar is imposed in an even-handed manner as required by Article XX(g).

175. Furthermore, even if certain of these 2010 measures could be considered “restrictions” on fluorspar production, China has still not demonstrated that they are “even-handed.” These 2010 measures continue to affect the production of fluorspar – which impact both domestic and foreign users of fluorspar. The relative impact of the export duty “in conjunction with” these measures on production continue to impose a double burden on foreign users in a lopsided manner that fails to satisfy the requirements of Article XX(g).

**E. Even if China’s Export Duties Were Justified by Article XX(b) or (g), the Export Duties Fail to Satisfy the Requirements of the Chapeau**

176. A GATT-inconsistent measure for which a Member invokes Article XX must satisfy both the subparagraph of Article XX that the Member invokes and the *chapeau* of Article XX. In other words, in addition to meeting the paragraph-specific criteria of Article XX(b) or XX(g) (as the case may be), the measure must also “not be applied in a manner which would constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a

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<sup>233</sup> Exhibit CHN-86.

<sup>234</sup> *Analytical Report and Recommendations Regarding the 2010 Mining Quantity Control Targets Applicable to High-Alumina Clay and Fluorspar* (Ministry of Land and Resources, March 24, 2010), Section II.2 (“our preliminary recommendation is to maintain the 2010 fluorspar mining quantity control target at the level of the 2009 effective mining quantity . . . .” (Exhibit JE-166)). See also Exhibit CHN-86.

disguised restriction on international trade.”<sup>235</sup> The burden of establishing conformity with the relevant subparagraph and the *chapeau* lie with the party invoking the defense.<sup>236</sup>

177. As discussed above, in regard to the export duties that China maintains on magnesium scrap, manganese scrap, and zinc scrap, and magnesium metal, manganese metal, and coke that are inconsistent with paragraph 11.3 of the Accession Protocol, China asserts a defense under Article XX(b) of the GATT 1994. China has failed to establish that these export duties are justified pursuant to the paragraph-specific requirements of Article XX(b), even if Article XX(b) were applicable to those commitments. China also maintains export duties on fluorspar that are inconsistent with China’s obligations in paragraph 11.3 of the Accession Protocol. With respect to these export duties, China invokes Article XX(g) of the GATT 1994 as a defense. Similarly to the discussion immediately above, even if Article XX(g) were applicable to those commitments, China has failed to establish that the export duties on fluorspar satisfy the paragraph-specific requirements of Article XX(g). Furthermore, even if the export duties at issue were consistent with the particular paragraph of Article XX that China invokes, the export duties also fail to satisfy the *chapeau* of Article XX.

178. In China’s first written submission and its oral statement to the Panel at the first meeting, China made no serious attempt to satisfy its burden of establishing that the export duties satisfy the *chapeau*. Instead, in its first written submission China first states that the export duties are not applied in a manner that constitutes arbitrary or unjustifiable discrimination, because “it is applied in the same manner irrespective of the destination” of the particular material at issue.<sup>237</sup> However, this reflects a misstatement of the applicable standard. The requirement that a measure not be “applied in a manner which would constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail” is a requirement that the measure not discriminate between other Members or between other Members and the Member maintaining the measure. The Appellate Body’s statements in *US – Gasoline* confirm this interpretation.<sup>238</sup>

179. Thus, China has articulated the incorrect legal standard under the *chapeau*. This renders China’s statement that the export duties at issue do not discriminate between export destinations insufficient to satisfy its burden.

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<sup>235</sup> Appellate Body Report, *US – Gasoline*, para. 22 (“In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions - paragraphs (a) to (j) - listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. The analysis is, in other words, two-tiered: first, provisional justification by reason of characterization of the measure under [the subparagraph] second, further appraisal of the same measure under the introductory clauses of Article XX.”)

<sup>236</sup> Appellate Body Report, *US – Gasoline*, p. 22-23.

<sup>237</sup> China’s First Written Submission, paras. 193-95, 283-84, 337-38

<sup>238</sup> Appellate Body Report, *US – Gasoline*, p. 23-24.

180. China also asserts that the export duties do not constitute a disguised restriction on international trade because they are “not applied in a manner that constitutes a *concealed* or *unannounced* restriction or discrimination in international trade.”<sup>239</sup> China fails to present any evidence or argumentation to substantiate this assertion. This is insufficient to satisfy China’s burden of demonstrating that its measures satisfy the requirements of the *chapeau*. Furthermore, as the Appellate Body stated in *US – Gasoline*, “It is . . . clear that concealed or unannounced restriction or discrimination in international trade does not exhaust the meaning of “disguised restriction.”<sup>240</sup> Thus, the mere assertion that a measure does not constitute a “concealed or unannounced restriction or discrimination in international trade” clearly falls short of the showing required under this element of the *chapeau*.

181. In its oral statement to the Panel, China asserts that measures taken in pursuit of its sovereign right to natural resources cannot fall afoul of the *chapeau*, because (according to China) they are taken “in the exercise of a Member’s sovereign right over natural resources” and to pursue objectives explicitly sanctioned by the covered agreements.”<sup>241</sup> This argument reflects a complete misunderstanding of the role of the *chapeau* in Article XX. All WTO Members have the sovereign right to take measures to protect human and animal life and health. All WTO Members have the sovereign right to take measures to conserve natural resources. By listing those objectives in Article XX(b) and (g) of the GATT, the WTO Agreement recognizes (“sanctions”, if one wishes to adopt China’s wording) that WTO Members may pursue those objectives. But none of that changes the fact that measures to protect human and animal life and health, and measures to conserve exhaustible natural resources, cannot satisfy the requirements of Article XX unless they are applied in accordance with the *chapeau*. Therefore, even if it were the case that a measure “taken in the exercise of China’s sovereign right over natural resources” satisfied the paragraph-specific requirements of Article XX(g) or (b) for that reason alone (which, as explained above, is not the case), such a measure would still have to be scrutinized under the *chapeau*. China’s unsupported assertion to the contrary is incorrect.

182. For these foregoing reasons, China has failed to establish that its export duties satisfy the requirements of the *chapeau*.

### **III. CHINA’S EXPORT QUOTAS ARE INCONSISTENT WITH CHINA’S OBLIGATIONS UNDER ARTICLE XI:1 OF THE GATT 1994 AND PARAGRAPHS 162 AND 165 OF THE WORKING PARTY REPORT**

#### **A. The Prima Facie Case**

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<sup>239</sup> See e.g. China’s First Written Submission, para. 558 (Emphasis original).

<sup>240</sup> Appellate Body Report, *US – Gasoline*, p. 25.

<sup>241</sup> China’s First Oral Statement, para. 48.

183. As the United States set forth in its first written submission, China subjects the exportation of various forms of bauxite, coke, fluorspar, silicon carbide, and zinc to quotas.<sup>242</sup> With respect to zinc, the United States also explained that while China subjects the exportation of zinc to a quota, China does not set a quota amount for zinc. Thus, China effectively prohibits the exportation of zinc.<sup>243</sup> China has also confirmed that it maintains a prohibition on the exportation of zinc.<sup>244</sup>

184. As the United States set forth in its first written submission, the export quotas and the export prohibition on zinc are inconsistent with Article XI:1 of the GATT 1994.<sup>245</sup> Article XI:1 of the GATT 1994 provides in pertinent part: “No prohibitions or restrictions . . . whether made effective through quotas . . . shall be instituted or maintained by any Member . . . on the exportation or sale for export of any product destined for the territory of another Member.” China does not contest that the export quotas at issue are inconsistent with Article XI:1. In fact, China does not attempt to defend the export quotas that it imposes on fluorspar, zinc<sup>246</sup>, or certain forms of bauxite. Instead, China attempts only to justify the export duties it imposes on coke, silicon carbide, and one subset of one form of bauxite under exceptions provided in Article XX and Article XI:2(a) of the GATT 1994.<sup>247</sup> However, for the reasons discussed in the following sections, China has failed to establish that its export quotas meet the requirements of the exceptions that it has invoked. For the reasons set forth in the complainants’ first oral statement and in this submission, China’s export quotas on coke and silicon carbide do not satisfy the requirements of Article XX(b), and therefore, are not justified pursuant to that provision.

185. China’s export quotas and export prohibition on zinc are also inconsistent with paragraphs 162 and 165 of the Working Party Report and paragraph 1.2 of China’s Accession Protocol.<sup>248</sup> Paragraph 162 of the Working Party Report provides 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>249</sup> Additionally, paragraph 165 of the Working Party Report provides: “The

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<sup>242</sup> See U.S. First Written Submission, paras. 100-184; 242-47; (Exhibit JE-6).

<sup>243</sup> U.S. First Written Submission, paras. 249-50.

<sup>244</sup> China’s Answers to the First Set of Questions from the Panel, paras. 37, 111.

<sup>245</sup> U.S. First Written Submission, paras. 242-50.

<sup>246</sup> China Answers to the First Set of Questions from the Panel, paras. 37, 111; See also U.S. Comments on Answers, paras. 21-22; 44.

<sup>247</sup> China asserts that its export quotas on coke and silicon carbide are justified under Article XX(b) of the GATT 1994. For one subset of one form of bauxite, China asserts a defense under both Article XI:2(a) and Article XX(g) of the GATT 1994.

<sup>248</sup> See U.S. First Written Submission, paras. 251-55.

<sup>249</sup> Exhibit JE-3.

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>250</sup>

186. However, as set forth in the U.S. first written submission, China did not eliminate its export restrictions upon accession. Instead, China continues to maintain export restrictions including export quotas and prohibitions that are not in conformity with WTO rules including Article XI of the GATT 1994.

187. In the following sections, we will respond to China’s defenses in relation to the export quotas at issue. First, we will demonstrate that China has failed to establish that its export quota on one subset of one form of bauxite is justified pursuant to Article XI:2(a) or Article XX(g) of the GATT 1994. Second, we will demonstrate that China’s export quotas on coke and silicon carbide are not justified pursuant to Article XX(b) of the GATT 1994.

**B. China’s Export Quota on Bauxite Is Not Justified by Article XI:2(a) or Article XX(g) of the GATT 1994**

**1. Introduction: Product Definition**

188. In its First Written Submission, the United States described the specific products within the raw material category “bauxite” on which China imposes export restraints.<sup>251</sup> These are:

“Refractory clay,” falling under the Chinese HS number 2508.3000 and Chinese Commodity code number 25083000000, subject to a 15 percent export duty and, together with “aluminum ores and concentrates,” subject to export quota bidding licensing and an export quota allocated through bidding;

“Aluminum ores and concentrates” falling under the Chinese HS number 2606.0000 and Chinese Commodity Code number 2606000000, subject to a 15 percent export duty and, together with “refractory clay,” subject to export quota bidding licensing and an export quota allocated through bidding; and

“Aluminum ash and residues,” falling under the Chinese HS number 2620.4000, subject to a 10 percent export duty.

189. China has not contested that it imposes export duties on all three of these products or that it imposes an export quota allocated through bidding on refractory clay and aluminum ores and

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<sup>250</sup> Exhibit JE-3.

<sup>251</sup> See U.S. First Written Submission, paras. 33-36 and Exhibits JE-4, JE-5, and JE-6.

concentrates. Furthermore, China has not attempted to justify the export duties on any of these three products.<sup>252</sup>

190. With respect to the export quota on refractory clay and aluminum ores and concentrates, China has attempted to justify the export quota only as it applies to a particular product that China calls “refractory grade bauxite.”<sup>253</sup> What China means by “refractory grade bauxite,” however, is not obvious and requires a careful analysis and explanation.

**a. The Product China Calls “Refractory Grade Bauxite” and Its Relation to the “Bauxite” Products Subject to China’s Export Quota and Export Duties**

191. Based on China’s answers to the Panel’s questions, it appears that what China calls “refractory grade bauxite” is actually a clay, falling under the sub-category of “refractory clay” with HS number 2508.3000, that has bauxitic characteristics, *i.e.*, has high alumina content, and can therefore be used to make alumina refractories.<sup>254</sup> “Refractory clay” (2508.3000) includes other clays as well, with different chemical composition, including fireclays (with lower alumina content), flint clays, kaolin, etc.<sup>255</sup>

192. Products within the sub-category “aluminum ores and concentrates,” falling under the HS number 2606.0000, are commonly termed “bauxite” by geologists and others.<sup>256</sup> These aluminum ores and concentrates or “bauxites” are also differentiated on the basis of their alumina content into different grades.<sup>257</sup>

193. “Bauxites” – *i.e.*, aluminum ores and concentrates – with lower alumina content are termed “metallurgical bauxite” and commonly used to produce alumina (through the Bayer process).<sup>258</sup> Alumina is in turn generally used to produce aluminum metal, although alumina can also be used to make refractories.<sup>259</sup>

194. Aluminum ores and concentrates with higher alumina content are termed “non-metallurgical bauxite” and can be used directly to make alumina refractories (*i.e.*, refractories

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<sup>252</sup> See Exhibit JE-134.

<sup>253</sup> See China’s First Written Submission, Section VI.C.

<sup>254</sup> See China’s Answers to the First Set of Questions from the Panel, paras. 31-33.

<sup>255</sup> See Exhibit JE-22; China’s Answers to the First Set of Questions from the Panel, paras. 32 and 35; Bauxite Report, Exhibit JE-165 at 2-4.

<sup>256</sup> Bauxite Report, (Exhibit JE-165) at 3.

<sup>257</sup> Bauxite Report, (Exhibit JE-165) at 4-6.

<sup>258</sup> Bauxite Report, (Exhibit JE-165) at 6 and 10.

<sup>259</sup> Bauxite Report, (Exhibit JE-165) at 10-12.

with high alumina content), ceramics, etc.<sup>260</sup>, as well as alumina (which, as discussed above, is generally used to make aluminum although it can also be used to make refractories).<sup>261</sup> Non-metallurgical grade bauxite that can be used directly to make refractories is also commonly called “refractory grade bauxite.”<sup>262</sup> This has led to a significant amount of confusion in the present dispute.

195. The product that China calls “refractory grade bauxite,” which comprises part of the “basket” of products subject to export quota and for which China asserts a defense, is, based on China’s clarification, actually a subset of “refractory clay” (2508.3000) and not a product considered to be within “aluminum ores and concentrates” (2606.0000).<sup>263</sup> Because of the confusion engendered by the fact that a product that falls within “aluminum ores and concentrates” (2606.0000) with high alumina content is also commonly referred to as “refractory grade bauxite,” the United States will, for purposes of clarity and precision, refer to the product for which China asserts its defense, as “high alumina clay.” This terminology is also consistent with the more precise translation of the product addressed in Exhibits CN-86, CN-87, CN-98, as reflected in Exhibits JE-166, JE-167, and JE-168.

**b. Scope of China’s Defense for the Export Quota on “Bauxite”**

196. China argues that its export quota on what it calls “refractory grade bauxite” is justified under Article XI:2(a) or Article XX(g) of the GATT 1994. What this means is that China attempts to justify the export quota that it imposes on “bauxite” (*i.e.*, on both refractory clay (2508.3000/2508300000) and aluminum ores and concentrates (2606.0000/2606000000)) – but only to the extent that the quota applies to “high alumina clay.”<sup>264</sup> As discussed above, “high alumina clay” is considered to be a “refractory clay” (2508.3000/2508300000) but is only a subset of products covered by “refractory clay.”

197. Accordingly, China does not defend the export quota applied to “aluminum ores and concentrates” or the export quota applied to “refractory clay” other than “high alumina clay.”

198. China’s selective defense for the export quota imposed on “bauxite” has required a surgical parsing of the different products subject to the export quota and the different types of products covered by the separate HS numbers and commodity codes. This raises a number of questions regarding how China’s export quotas are allocated across the commodity codes that are subject to the quota. When China announces the export quota amount, China does not designate how much of the total quota will or can be filled by applicants seeking to export “refractory clay”

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<sup>260</sup> Bauxite Report, (Exhibit JE-165) at 4.

<sup>261</sup> Bauxite Report, (Exhibit JE-165) at 6, 9-10.

<sup>262</sup> Bauxite Report, (Exhibit JE-165) at 4.

<sup>263</sup> China’s Answers to the First Set of Questions from the Panel, paras. 31-36.

<sup>264</sup> China’s Answers to the First Set of Questions from the Panel, paras. 31, 35-36.



(2508.3000/2508300000) as opposed to “aluminum ores and concentrates” (2606.0000/2606000000) or, for that matter, applicants seeking to export “high alumina clay” as opposed to other types of “refractory clay.”

199. The export quota that China maintains is a quota that applies to the exportation of products that fall under the HS numbers/commodity codes 2508.3000/2508300000 and 2606.0000/2606000000. On the face of the legal instruments that establish this export quota, it does not appear that an export of “high alumina clay” subject to the quota is or could be differentiated from an export of another type of refractory clay or an export of “aluminum ores and concentrates.” If this is in fact the case, then China’s selective defense of the export quota imposed on “bauxite” only insofar as the quota applies to “high alumina clay” highlights the fact that China’s efforts are focused essentially on defending a non-existent or fictional measure. There is no export quota on high alumina clay. Because China does not defend the export quota on “bauxite” as a whole, China has already effectively conceded the inconsistency of that quota. Nevertheless, the United States will, in the sections below, proceed to address each of the defenses China asserts for the maintenance of the export quota on “bauxite” as it applies to high alumina clay.

200. To the extent that China has the ability to differentiate between “refractory clay” and “aluminum ores and concentrates” in allocating and administering the export quota on “bauxite,” another question arises. China has observed that there have been virtually no exports of “aluminum ores and concentrates” from China.<sup>265</sup> China does not elaborate on why this is so. The export statistics China cites raise the possibility and the serious concern that, through China’s allocation of the export quota on “bauxite,” China may be effecting an export prohibition on “aluminum ores and concentrates.”

## **2. China’s export quota on bauxite as applied to high alumina clay is not justified by Article XI:2(a) of the GATT 1994**

201. As the preceding section explains, China presents no defense for the WTO-inconsistent export quota that it imposes on various forms of bauxite. Instead, China presents a defense for its export quota as it relates only to a small subset of one form of bauxite subject to the export quota. The various forms of bauxite on which China imposes an export quota are “refractory clay” (HS Number/Commodity Code 2508.3000/2508300000), and “aluminum ores and concentrates” (HS Number/Commodity Code 2606.0000/2606000000). China’s defense under Article XI:2(a) relates only to a type of “refractory clay” *i.e.*, “high alumina clay.” For the reasons we will discuss, even if there were a measure imposing an export quota on “high alumina clay,” China’s defense under Article XI:2(a) as it relates to high alumina clay is without merit.

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<sup>265</sup> China’s Answers to the First Set of Questions from the Panel, para. 36 (referencing data in Exhibit CHN-441).

202. Article XI:2(a) provides that: “The provisions of paragraph 1 of this Article shall not extend to the following: (a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party.” China’s defense under Article XI:2(a) fails for a number of reasons.

203. First, China advocates an exceptionally broad meaning of the term “essential” products in Article XI:2(a) that would permit any industrial input to satisfy the meaning of “essential.” This is an incorrect reading of the term “essential.” Even if China’s reading of “essential” were correct, however, China’s argument is based on several factual inaccuracies regarding the role of high alumina clay in steel production. These factual inaccuracies confirm that China’s defense is unavailing. Second, China fails to properly analyze the meaning of the term “critical shortage,” and instead bases its defense under Article XI:2(a) merely on the limited availability of high alumina clay. By doing so, China reads the term “critical” out of Article XI:2(a) altogether. This approach is inconsistent with the text of Article XI:2(a). Third, the export quota is not “temporarily applied” within the meaning of Article XI:2(a).

204. Before turning to address these elements of China’s defense, we will respond to China’s threshold argument that a complaining party advancing a claim of inconsistency with Article XI:1 bears the burden of demonstrating, as part of its *prima facie* case, that the measure at issue does not satisfy the requirements of Article XI:2.<sup>266</sup>

**a. Article XI:2(a) is an affirmative defense for which China bears the burden of proof**

205. Contrary to China’s arguments, Article XI:2(a) is an affirmative defense, for which China bears the burden of adducing evidence and argumentation to establish the defense. Article XI:2(a) sets out an exception to the obligation in Article XI:1, not a separate obligation. As the complainants explained in their first oral statement, this analysis is confirmed by the reasoning in *U.S. – Shirts and Blouses*, where the Appellate Body said:

We acknowledge that several GATT 1947 and WTO panels have required such proof of a party invoking a defence, such as those found in Article XX or Article XI:2(c)(i), to a claim of violation of a GATT obligation, such as those found in

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<sup>266</sup> China’s First Written Submission, paras. 350-65. In this regard, we note that China’s argument regarding the supposed burden of proof under Article XI:2(a) is confusing. China asserts, on the one hand, that the complainants have failed to establish a *prima facie* case under Article XI:1 as it relates to any of the export quotas at issue because they fail to address the requirements of Article XI:2(a). But, China then contradicts this by conceding that its export quotas on coke and silicon carbide are inconsistent with its obligations in Article XI:1, and defending the export quotas under an exception in Article XX(b). Similarly, China concedes that it maintains an export prohibition on zinc and does not assert a defense for the inconsistency of its export prohibition under Article XI:1. Apparently, China’s arguments with respect to high alumina clay are simply offered “as an example” that “Article XI:1 does not apply to the export quota . . . by virtue of Article XI:2(a).” China’s First Written Submission, para. 365.

Articles . . . XI:1. Articles XX and XI:(2)(c)(i) are limited exceptions from obligations under certain other provisions of the GATT 1994, not positive rules establishing obligations in themselves. They are in the nature of affirmative defences. It is only reasonable that the burden of establishing such a defence should rest on the party asserting it.<sup>267</sup>

206. The Appellate Body’s reasoning regarding Article XI:2(c) also applies to China’s defense under Article XI:2(a), which similarly contains an exception to, rather than a separate obligation from, the obligation in Article XI:1. Thus, China, as the party invoking the exception under Article XI:2(a) bears the burden of demonstrating that its export quota satisfies all of the elements of the exception. For the reasons we will discuss, China has failed to do so.

207. In addition, China’s reliance on *Brazil – Aircraft* and *India – Duties* is misplaced. In *Brazil – Aircraft*, the Appellate Body concluded that in asserting a claim under Article 3.1(a) of the SCM Agreement against a developing country Member, the burden is on the complaining party to demonstrate that the responding party has not complied with one of the obligations in Article 27.4 of the SCM Agreement, which only apply to developing country Members. As China points out in its own first written submission, the Appellate Body’s conclusion was based in large part on the fact that Article 27 contains “positive obligations for developing country Members.”<sup>268</sup>

208. However, Article XI:2(a) does not bear the same relationship to Article XI:1. Article XI:2(a) does not set forth positive obligations with which a Member must comply in order to be exempt from the disciplines of Article XI:1. Article XI:2(a) instead carves out an exception from the disciplines of Article XI:1 for a category of measures defined in Article XI:2(a).

209. China’s reliance on *India – Additional Duties* is similarly flawed. China mischaracterizes the Appellate Body’s reasoning in that case by omitting certain important elements of the Appellate Body’s reasoning. The Appellate Body concluded that the establishment of a *prima facie* case under Article II:1(b) required the complaining party to set forth arguments and evidence that the measures were not justified under Article II:2(a). However, in making that

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<sup>267</sup> Appellate Body Report, *U.S. – Shirts and Blouses*, p. 16 citing *Japan - Restrictions on Imports of Certain Agricultural Products*, adopted 22 March 1988, BISD 35S/163, para. 5.1.3.7 (The Panel considered . . . that the burden of providing the evidence that all the requirements of Article XI:2(c)(i) . . . had been met must remain fully with the contracting party invoking that provision.); *EEC - Restrictions on Imports of Dessert Apples*, adopted 22 June 1989, BISD 36S/93, para. 12:3 (“The Panel recalled that a contracting party invoking an exception to the General Agreement bears the burden of proving that it has met all of the conditions of that exception. In the present case, therefore, it was incumbent upon the EEC to demonstrate that the measures applied to imports of apples met each and every one of the conditions under Article XI:2(c)(i) and XI:2(c) last paragraph, in order to qualify in terms of these provisions for exemption from Article XI:1.”); *Canada - Import Restrictions on Ice Cream and Yoghurt*, adopted 5 December 1989, BISD 36S/68, para. 59. See also Complainants’ First Oral Statement, paras. 128-29.

<sup>268</sup> Appellate Body Report, *Brazil – Aircraft*, para. 140; See also China’s First Written Submission, para. 356.

finding, the Appellate Body explicitly limited its conclusion to the circumstances of that dispute stating, “[n]ot every challenge under Article II:1(b) will require a showing with respect to Article II:2(a).” The Appellate Body reasoned that

[i]n the circumstances of this dispute, however, where the potential for application of Article II:2(a) is clear from the face of the challenged measures, and in light of our conclusions above concerning the need to read Articles II:1(b) and II:2(a) together as closely inter-related provisions,<sup>269</sup>

the complaining party was required to present arguments and evidence that the duties were not justified under Article II:2(a). Even if China were correct that the relationship between Article II:2(a) and II:1(b) were relevant to the present dispute, the relevant Chinese measures do not make clear the potential for application of Article XI:2(a) to warrant placing the burden on the complaining party to show inapplicability of Article XI:2(a). The measures at issue merely subject the exportation of various forms of bauxite to a quota. Accordingly, the reasoning in this Appellate Body report also fails to support China’s position.

210. For the foregoing reasons, the Panel should conclude that Article XI:2(a) is an affirmative defense for which China bears the burden of proof – and in particular, that China bears the burden of demonstrating that its export quota satisfies the requirements of that exception.

**b. The export quota is not temporarily applied to prevent or relieve a critical shortage of an essential product within the meaning of Article XI:2(a)**

211. China’s arguments under Article XI:2(a) regarding the export quota as it relates to high alumina clay betray the fact that the export quota is entirely unrelated to any “critical shortage” as that term is used in Article XI:2(a). To the contrary, China’s export quota is part of an effort to promote the expansion of China’s steel industry. Indeed, China’s own statements make this clear. For example, China states that it has:

fostered its own industrial development by using its own natural resources, including refractory-grade bauxite, as a motor to develop processing and value-added industries, resulting in economic diversification, growth, and corresponding social and economic benefits. China’s need to ‘secure supply of raw material minerals’ also requires action to ensure that its own natural resources are used for its own economic and social development. In particular, and as already noted,

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<sup>269</sup> Appellate Body Report, *India – Additional Duties*, para. 190.

refractory-grade bauxite has played an essential role in allowing China to develop a steel industry and other downstream industries relying on steel.<sup>270</sup>

212. Similarly, China also states: “Indeed, the export quota imposed on bauxite ensures that China captures the benefits of the limited supply of its own mineral wealth; this good husbanding of China’s own natural resources for its own development is fully reconcilable with its obligations under the WTO covered agreements, including under Articles XI:1 and XI:2(a).”<sup>271</sup>

213. These statements illustrate that the measure at issue falls squarely outside of the exception of Article XI:2(a): their objective is not to provide temporary relief of a short supply, but they are intended instead to provide economic advantages to a domestic industry. The text of Article XI:2(a), read in its context and in light of the object and purpose of the GATT, does not support an interpretation that stretches so far. In addition, a document submitted by China in fact confirms that the GATT Contracting Parties agreed that “restrictions used by a [Member] on the export of raw materials, in order to protect or promote a domestic fabricating industry” “fall[s] outside the exceptions provided for” in the GATT.<sup>272</sup> In short, China’s own statements make clear that the export quota at issue is imposed to promote its steel industry, and therefore, falls outside the exception provided for Article XI:2(a).

214. As we will discuss below, China’s additional arguments regarding the export quota as it relates to high alumina clay also fail to support China’s defense under Article XI:2(a).

**i. China fails to demonstrate that high alumina clay is an “essential” product**

**(a) Interpretation of “products essential to the exporting Member”**

215. China’s interpretation of “essential” products and the application of that interpretation to the export quota as it relates to high alumina clay are deeply flawed.

216. To recall, one of the requirements of Article XI:2(a) is that the export restriction at issue apply to “foodstuffs or other products essential to the exporting Member.” The dictionary definition of “essential” is “absolutely indispensable or necessary”; “constituting or forming part of a thing’s essence.”<sup>273</sup> In addition, while Article XI:2(a) may not be limited to products

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<sup>270</sup> China’s First Written Submission, para. 458.

<sup>271</sup> China’s First Written Submission, para. 488.

<sup>272</sup> Exhibit CHN-430, para. 11(iii).

<sup>273</sup> *New Shorter Oxford English Dictionary*, p. 852 (Exhibit JE-160)

essential for subsistence,<sup>274</sup> the inclusion of “foodstuffs” in Article XI:2(a) is important context for conveying the level of importance of the product that is contemplated by this provision.

217. One of China’s principal arguments in support of its contention that high alumina clay is essential to China is that “it is indispensable for the production of iron and steel, as well as of other products such as glass, ceramics, and cement.”<sup>275</sup> However, in addition to the factual flaws inherent in this statement that we will address below, under China’s line of reasoning, any industrial input would be considered an “essential” product. China does not appear to dispute that it is advocating such an expansive reading of “essential” in Article XI:2(a). China attempts to support that expansive reading through a consideration of the context of Article XI:2(a) and supplementary means of interpretation.<sup>276</sup> However, the arguments on which China relies do not support China’s position.

218. China points to paragraph 4 of the *Understanding on Balance of Payments* (“BOP Understanding”), which states the term “essential products shall be understood to mean products which meet basic consumption needs or which contribute to the Member’s effort to improve its balance-of-payments situation, such as capital goods or inputs needed for production.”<sup>277</sup> In other words, the BOP Understanding’s definition of “essential products” is anchored in the specific needs of a Member faced with a balance-of-payments crisis, which, by definition, affects a Member’s entire current account. That crisis situation is not present for a Member, such as China, that is not facing balance-of-payment difficulties; and what is “absolutely indispensable or necessary” in a balance-of-payments crisis is not necessarily “absolutely indispensable or necessary” in a different situation. Hence, the definition of “essential” in the BOP Understanding cannot be transferred to China’s situation or to Article XI:2(a).

219. China also asserts that Article XXXVI:5 of the GATT 1994 and its *Ad Note* support China’s interpretation of “essential products.” However, this assertion does not withstand scrutiny. As the United States set forth in response to Question 17 from the Panel, Article XXXVI:5 addresses certain principles of the GATT 1994 in relation to development and the needs of developing countries. The Members of the Working Party of China’s WTO Accession made certain special provisions for developing countries available to China in certain explicit circumstances. No such treatment is afforded to China in the context of Article XI of the GATT 1994.<sup>278</sup> In any event, while China invokes Article XXXVI:5 and its *Ad Note* as supposed relevant context for the meaning of “essential” products, that provision of the GATT 1994 in fact contains no reference to the concept of essential products, let alone support for the proposition that the term “essential products” may have different meaning for developing country Members

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<sup>274</sup> See China’s Answers to the First Set of Questions from the Panel, para. 24.

<sup>275</sup> China’s First Written Submission, para. 431.

<sup>276</sup> China’s Answers to the First Set of Questions from the Panel, para. 75.

<sup>277</sup> Emphasis added.

<sup>278</sup> U.S. First Closing Statement, para. 7.

than for developed country Members. Thus, the principles espoused in Article XXXVI:5 are beside the point in the context of China’s WTO-inconsistent measures in this dispute. In addition, China’s invocation of the concern expressed in Article XXXVI:5 for the development of manufacturing industries in developing countries confirms that China’s objective in imposing an export quota on bauxite as applied to high alumina clay is the growth of its own downstream industries.<sup>279</sup>

220. China also relies on Australia’s export restriction on merino sheep as support for its interpretation of “essential” in Article XI:2(a). As the United States explained in response to Question 17 from the Panel, the drafters’ discussion of the Australian export restriction on merino sheep did not address the meaning of the term “essential.” Instead, the drafters’ discussion concerned whether the conditions surrounding the export restriction constituted a “critical shortage.”<sup>280</sup> China suggests that because the drafters considered that the export restriction on merino wool satisfied the requirements of Article XI:2(a), that they must have also considered that a product that is valuable to a downstream industry satisfies the “essentialness” requirement in Article XI:2(a).<sup>281</sup> But, the drafters did not address the basis of the essentialness of merino wool. China’s reliance on other documents – whether published in 2009 or 1947 –

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<sup>279</sup> U.S. Answers to the First Set of Questions from the Panel, para. 33 n. 58. In invoking Article XXXVI:5, China also mentions a Note by the GATT Secretariat (Exhibit CHN-430) and the minutes of a discussion in the Uruguay Round Surveillance Body (Exhibits CHN-431 and CHN-432). These materials do not advance China’s cause. First, China does not use the Secretariat Note other than to assert that Article XXXVI relates to export restrictions and charges. In fact, paragraph 7 of the Secretariat Note (the paragraph cited by China) merely points out – correctly – that Article XXXVI:5 relates to developing country Members that “depend on the exportation of a limited range of primary products.” Exhibit 430, para. 7. Not only does China export far more than a “limited range” of primary products, but also China’s exports of high value-added products, such as steel and aluminum, have grown dramatically since 2000. See Magnesium Key Facts (Exhibit JE-152), Tables 20 and 21, p. 19-20. The Secretariat’s Note further draws attention to the analysis done by the GATT CONTRACTING PARTIES on the use of quantitative restrictions for protective and other commercial purposes, and notes that the CONTRACTING PARTIES concluded that export provisions were not intended to be “used by a contracting party on the export of raw materials, in order to protect or promote a domestic fabricating industry”. Exhibit CHN-430, para. 11. Even according to the terms of China’s own argument, the export quota is designed to promote China’s steel industry. Accordingly, this document confirms that China’s defense under Article XI:2(a) is without merit. Finally, China misunderstands the discussion in the Surveillance Body to which it refers. China’s First Opening Statement, paras. 26-29. Most importantly, the discussion did not enter into detail on the meaning of Article XXXVI:5 or its use as a potential basis either to justify export restrictions itself or as context for Article XI, nor were any conclusions reached. Delegations expressed a variety of views. Furthermore, China’s selective quotation of the European Communities’ statement to the Surveillance Body does not help its position either; as the Communities’ representative made clear, the discussion in the Surveillance Body related the Uruguay Round standstill: “In the context of this notification, the Community wanted to repeat its fundamental message that while all contracting parties had GATT rights and obligations, the purpose of the Surveillance Body was to examine fulfilment, or lack of fulfilment, of the *political commitments* to standstill and rollback and to make sure that no country tried to seek supplementary advantages in the Uruguay Round negotiations.” Exhibit CHN-432 (MTN.SB/3), para. 8 (emphasis added).

<sup>280</sup> Exhibit CHN-181, p. 6.

<sup>281</sup> China’s First Written Submission, paras. 385-86.

outside of the framework of the GATT or WTO asserting that merino sheep is valuable to the downstream industry<sup>282</sup> does not establish that the drafters considered this as the basis of the essentialness of merino sheep. The drafters’ discussion, on which China relies, simply does not address the meaning of “essential” in Article XI:2(a), and therefore, China’s reliance on it is beside the point.

**(b) Substitutability**

221. The remaining arguments advanced by China regarding the supposed “essentialness” of high alumina clay rely heavily on China’s assertions developed by Dr. Humphreys that there are no substitutes for high alumina clay in steel production.<sup>283</sup> These assertions are not founded in fact. There are a number of substitutes for high alumina clay in the production of refractories for steel production.<sup>284</sup>

222. In order to understand the flaws in China’s arguments regarding substitutability, it is important to understand the role that refractories play in steel and other production processes. “Refractories are heat-resistant materials that provide the linings for high temperature furnaces, reactors and other processing units . . . The most important characteristic of refractories is their ability to maintain their shape and strength at high temperatures under mechanical stress and attack by a variety of hot gases and liquids. . . . The iron and steel industries is the largest consumer of refractories.”<sup>285</sup>

223. While China is correct that steel production requires the use of refractories, the fundamental flaw in China’s argument is that high alumina clay is the only material that can be used to produce refractories for steel production. To the contrary, there is a wide range of raw materials that can be used as refractories in steel production.

224. As discussed above, China’s export quota on bauxite is applied to two HS/Chinese Commodity Code categories: “refractory clay” (2508.3000/2508300000), and “aluminum ores and concentrates” (2606.0000/2606000000). China’s defense under Article XI:2(a) relates only to a subset of products classified in 2508.3000/2508300000, which we have defined as “high alumina clay.” However, bauxite classified in 2606.0000/2606000000 – which is also subject to a WTO-inconsistent export quota for which China asserts no defense – can also be used to

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<sup>282</sup> China’s Answers to the First Set of Questions from the Panel, para. 80; China’s Comments on Complainants’ Answers to the First Set of Questions from the Panel, paras. 69-71.

<sup>283</sup> Exhibit CHN-10, p. 3.

<sup>284</sup> China’s assertions regarding the supposed essentialness of high alumina clay are also based largely on China’s reliance on studies prepared by the United States and the European Union. As discussed, these assessments do not address the requirements of Article XI:2(a); nevertheless, China adopts the methodology in those assessments as a substitute for an analysis of its own measures in light of the text of Article XI:2(a). Such an approach is untenable. Complainants’ First Oral Statement, paras. 137-38, 142.

<sup>285</sup> Bauxite Report (Exhibit JE-165) p. 7.



produce refractories. As discussed above, the bauxite classified in 2606.0000/2606000000 consists of bauxite ores with high alumina content (sometimes referred to as “non-metallurgical grade bauxite”), and bauxite ores with lower alumina content (commonly referred to as “metallurgical grade bauxite”).<sup>286</sup>

225. The non-metallurgical grade bauxite can be used directly to produce refractories for use in steel production.<sup>287</sup> In addition, metallurgical-grade bauxite, may also be used to produce alumina, by subjecting it to the Bayer process; this alumina can then also be used as a refractory in steel production.<sup>288</sup> Indeed, the trend in the steel industry in particular is towards the use of refractories made from alumina rather than from non-metallurgical grade bauxite.<sup>289</sup> China is the world’s largest producer of alumina.<sup>290</sup> There are also other refractory products that are used in the steel industry including magnesia-carbon, alumina-graphite and zirconia-graphite products. Although these refractories have a higher initial cost, they have longer useful lives than refractories made directly from refractory bauxite, so that they are more cost-effective.<sup>291</sup>

226. It is noteworthy that while Dr. Humphreys asserts that there are no substitutes for high alumina clay, he contradicts himself and admits that alumina refractories could be used in place of bauxite refractories.<sup>292</sup> He contends, however, that these substitutes do not exist in China, because alumina refractories are more expensive than bauxite refractories.<sup>293</sup> As just discussed, this assertion is without merit for two reasons. First, China is the world’s largest producer of alumina. Second, alumina refractories bring other advantages including a longer useful life. This is confirmed by the fact that there is a trend in the steel industry has been toward alumina refractories. China’s assertion that switching to substitutes would result in loss of performance or production is similarly unpersuasive, as steel industries faced with lower availability of refractory bauxite in the early 2000s turned to the use of high alumina refractories.<sup>294</sup> Moreover, a shift from bauxite refractories to alumina refractories in steel production would result in a mere 0.45 percent increase in the cost of producing steel. Even this increase is overstated, because it fails to account for the fact that alumina refractories have a longer useful life as discussed above.

227. In short, China’s assertion that there are no substitutes for high alumina clay in steel production is fundamentally flawed. The fact that there are a number of substitutes confirms that

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<sup>286</sup> Bauxite Report at 3-4 (Exhibit JE-165).

<sup>287</sup> Bauxite Report (Exhibit JE-165), p. 6.

<sup>288</sup> Bauxite Report (Exhibit JE-165) p. 6.

<sup>289</sup> Bauxite Report (Exhibit JE-165) p. 8, 29.

<sup>290</sup> Bauxite Report, Figure 4, p. 11.

<sup>291</sup> Bauxite Report (Exhibit JE-165), p 29.

<sup>292</sup> Exhibit CHN-10, p. 30.

<sup>293</sup> Exhibit CHN-10, p. 30.

<sup>294</sup> Bauxite Report, p. 30-31 (Exhibit JE-165).

China has failed to establish that high alumina clay is “essential” even under China’s interpretation of that term.

228. China goes on to assert that because the expansion of the steel industry is critical to China’s development, the supply of high alumina clay, for which China contends there are no substitutes, needs to be managed.<sup>295</sup> However, this argument is flawed for a number of reasons. First, China’s assertions regarding the lack of substitutes for high alumina clay is patently incorrect; the characterization of its role in China’s steel industry is therefore also flawed. Second, this statement reveals that the export restriction at issue bears no connection to the text of Article XI:2(a), but instead is merely intended to support China’s continued economic growth.

**ii. China fails to demonstrate that a critical shortage of high alumina clay exists**

229. China’s assertions of a supposed “critical shortage” of high alumina clay reveal that China in fact reads the word “critical” out of Article XI:2(a) altogether, and relies on mere “supply constraints” as sufficient to establish the requirements of its defense. Such an approach is inconsistent with the text of Article XI:2(a) and should not be sustained.

**(a) Interpretation of “critical shortage”**

230. Beginning with the text, we recall that “critical” means in the nature of or constituting a crisis or of decisive importance. In addition, “shortage” means a deficiency in quantity.<sup>296</sup> Thus, taking the terms together a “critical shortage” refers to a deficiency in quantity that is in the nature of or constituting a crisis or of decisive importance. Furthermore, certain statements of the negotiations shed light on the meaning of “critical shortage.” In considering certain examples of existing export restrictions, the negotiators explained that those measures “would suggest that [export restrictions] could be temporarily applied to cope with the consequences of a natural disaster, or to maintain year to year domestic stocks sufficient to avoid critical shortages of products . . . which are subject to alternate annual shortages and surpluses.”<sup>297</sup> These statements reflect the types of situations that were understood to constitute a “critical shortage” under Article XI:2(a). The situations identified by the drafters are in stark contrast to the mere limited availability of a product that is the basis for China’s assertion of a “critical shortage.”

231. In addition, in response to a proposal to delete the word “critical” from Article XI:2(a), a representative of the United Kingdom stated, “if you take out the word ‘critical’, almost any product that is essential will be alleged to have a degree of shortage and could be brought within

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<sup>295</sup> China’s First Written Submission, paras. 446-61.

<sup>296</sup> China’s First written Submission, paras. 391-92.

<sup>297</sup> Exhibit CHN-180, para. 19.

the scope of this paragraph.”<sup>298</sup> This statement highlights two important points. The first is that the “essential” products and “critical shortage” inquiries should not be conflated. The second is that a mere “degree of shortage” is not sufficient to satisfy the “critical shortage” standard in Article XI:2(a), and China’s approach would serve to read the term “critical” out of Article XI:2(a) altogether.

232. As we will discuss, however, China’s export quota fails to satisfy the “critical shortage” requirement, because it is based on a mere “degree of shortage.”

**(b) China’s assertions about available reserves are irrelevant**

233. China begins by discussing the supposed available reserves of high alumina clay. China contends that it has a 16-year reserve life for high alumina clay. China then states, “As a threshold matter, the very short remaining life span of this essential and exhaustible natural resource demonstrates the occurrence or risk of a critical shortage.”<sup>299</sup> However, as discussed in response to Question 16 from the Panel, the limited amount of reserves of a product is not a sufficient basis to establish a “critical shortage” under Article XI:2(a). The mere fact that the availability of a product is finite is not sufficient to constitute a shortage that is “in the nature of or constituting a crisis.”<sup>300</sup> Yet, China relies heavily on the mere limited availability of high alumina clay to support its defense under Article XI:2(a).<sup>301</sup>

234. Even if the limited amount of reserves of a product were sufficient to establish a “critical shortage,” as discussed in the Thiers Report, China’s assertions regarding reserves of high alumina clay are deeply flawed for two reasons. First, the reserves appear to be significantly understated. Dr. Humphreys reports China’s reserves of high alumina clay at approximately 5 percent of China’s total bauxite reserves. Similarly, high alumina clay also represents approximately 5 percent of total worldwide reserves of bauxite. If that is the case, the fact that China has become the world’s leading supplier of refractory bauxite is not consistent with these reported reserves figures.<sup>302</sup> As the Bauxite Report explains, China’s production capacity for non-metallurgical grade bauxite suggests a much higher ratio of non-metallurgical grade bauxite reserves to total bauxite reserves, and suggests that China’s reserves of non-metallurgical grade bauxite are set to last another 91 years.<sup>303</sup>

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<sup>298</sup> Exhibit CHN-181.

<sup>299</sup> China’s First Written Submission, para. 472.

<sup>300</sup> U.S. Answers to the First Set of Questions from the Panel, paras. 22-26.

<sup>301</sup> Complainants’ First Oral Statement, para. 144 citing China’s First Written Submission, paras. 444, 477, 469.

<sup>302</sup> Bauxite Report (Exhibit JE-165), p. 22-23.

<sup>303</sup> Bauxite Report (Exhibit JE-165), p. 23.

235. The second flaw in China’s reserves is related to the first flaw. China’s estimate of available reserves rests on the flawed assertions regarding the lack of substitutability for high alumina clay. In other words, figures for the available reserves of high alumina clay are of limited utility in assessing the availability of materials to produce refractories for steel production since, as discussed in the previous section, many other raw materials including metallurgical-grade bauxite can be used to produce refractories.

236. Thus, even if the limited amount of reserves of a product could establish a “critical shortage,” China’s assertions regarding the available reserves of high alumina clay are erroneous and do not support its position, because they do not represent the total amount of bauxite that can be used to produce refractories for steel.

237. China also relies on the supposed essentialness of high alumina clay to establish a critical shortage. China states “the more essential or important in use a product, and the greater the supply constraints, the more likely it is that a shortage will have critical implications for an economy.”<sup>304</sup> In the first place, it is not clear whether that statement is correct in the abstract. However, it is clear that argument is irrelevant in this dispute: given the discussion above of plentiful alternatives to high alumina clay, the premise for China’s argument – the supposed importance of high alumina clay – fails.

**(c) The supposed existence of “supply constraints” is not sufficient to establish a “critical shortage”**

238. China further relies on a series of supposed “supply constraints” as evidence of a critical shortage. This is another example of China attempting to weaken the standard under Article XI:2(a). The existence of the particular supply constraints that China lists,<sup>305</sup> which affect a wide range of commodities, is not sufficient to amount to a shortage that is “in the nature of or constituting a crisis” or of “decisive importance.” To put it another way, very few – if any – products are free of any natural or man-made supply constraints whatsoever. But that fact does not mean that all such products face a “critical shortage” within the meaning of Article XI:2(a).

239. The flaw in China’s argument is that China provides neither an explanation nor any evidence regarding how these factors are in fact, in the actual circumstances present within China, operating to further limit the supply of high alumina clay. China does not provide such an explanation or evidence because the available information in fact suggests the opposite. China’s

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<sup>304</sup> China’s First Written Submission, para. 463.

<sup>305</sup> The supposed supply constraints identified by China are: China’s own so-called “conservation” measures adopted “to manage its raw materials . . . so as to ensure their long-term availability and benefits”; China’s regulatory framework governing the industries that extract and process the product; the barriers to entering the mineral extractive and processing sector; the need to gain acceptance of local regional communities where mining occurs; international demand for the product; and the difficulty of exploiting reserves of bauxite. China’s First Written Submission, paras. 476-87.

production of refractory materials and steel, and China’s exports of those materials have expanded dramatically in recent years.<sup>306</sup> Indeed, China has become the world’s leading supplier of refractory bauxite since 2000. Thus, China has not shown how any regulatory framework or any other of the so-called supply constraints is limiting China’s access to high alumina clay.<sup>307</sup>

240. Finally, perhaps in recognition of the fact that a critical shortage does not exist, China also refers repeatedly to the “risk” of a critical shortage.<sup>308</sup> However, as the United States explained in its comment on China’s answer to Question 18, China’s export quota on bauxite as it relates to high alumina clay is not based on “risk.” It is based, instead, on the limited availability of the product, and China’s intention to maximize its own use of the product as long as it is available.<sup>309</sup> Thus, China has presented no evidence that a “risk” of critical shortage exists.

### iii. China’s export quota is not temporarily applied

241. China’s export quota at issue is also not temporarily applied within the meaning of Article XI:2(a). According to China, the “temporarily applied” requirement in Article XI:2(a) means that an export restriction may be applied so long as necessary to prevent or relieve a critical shortage.<sup>310</sup> Even if this were the correct interpretation of “temporarily applied”, China’s export quota fails to satisfy this requirement. For the reasons discussed above, there is no “critical shortage” of high alumina clay. Nor has China presented concrete evidence of circumstances that could give rise to a critical shortage. Thus, the export quota is not appropriately limited in time. Moreover, China’s discussion of the temporarily applied requirement in light of its own export quota is completely divorced from China’s stated understanding of that requirement. China states, based on other Members’ measures, that its own export quota is “temporarily applied” because it is set, reviewed, and applied on an annual basis.<sup>311</sup> But, this is not evidence that the export quota is applied only so long as necessary to prevent or relieve a critical shortage. Thus, even under the terms of China’s own understanding of the terms “temporarily applied,” China has failed to establish that it satisfies that element of Article XI:2(a).

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<sup>306</sup> Bauxite Report (Exhibit JE-165) at Figures 3, 4 and 12. *See also* Magnesium Key Facts, Table 21 (Exhibit JE-152).

<sup>307</sup> Separately, to the extent that China is arguing that its export restrictions are justified by its conservation objectives, as discussed below, China’s defense under Article XX(g) fails, in part because China has failed to demonstrate that these measures are in fact related to conservation.

<sup>308</sup> *See e.g.* China’s First Written Submission, paras. 472, 463, 475.

<sup>309</sup> U.S. Comments on the Complainants’ Answers to the First Set of Questions from the Panel, para. 42.

<sup>310</sup> China’s First Written Submission, para. 374.

<sup>311</sup> China’s First Written Submission, paras. 490-92.

242. Furthermore, as the United States explained in response to Question 16 from the Panel, the United States considers that an export quota applied on the basis of a limited amount of reserves of an exhaustible resource is not temporarily applied. This is because the available reserves would continually be depleted and the available reserves would, at any given point, be finite. Thus, the conditions giving rise to the supposed “critical shortage” would never cease to exist, and the export restriction could be applied permanently. This is clearly inconsistent with the requirement that the export restriction be “temporarily applied.”<sup>312</sup>

### **c. Conclusion**

243. For the foregoing reasons, China has failed to demonstrate that the export quota on bauxite as it relates to high alumina clay is justified pursuant to Article XI:2(a) of the GATT 1994.

## **3. China’s Export Quota on Bauxite, as Applicable to High Alumina Clay Exports, Is Not Justified by Article XX(g) of the GATT 1994**

### **a. Background**

244. “Bauxite,” generally speaking, is an aluminum-bearing material that is used to produce aluminum metal as well as to make abrasives, refractories, cement, and various chemicals.<sup>313</sup> Refractories, which can be made from materials that fall in the broad category of “bauxite,” are materials that can withstand very high temperatures and can be used to line kilns, furnaces, reactors, and incinerators.<sup>314</sup> Refractories are used predominantly by the iron and steel industries.<sup>315</sup>

245. China is one of the world’s leading producers of “bauxite.” The leading sources of the bauxitic materials used to make high alumina refractories are Guyana (non-metallurgical bauxite) and China (high alumina clay).<sup>316</sup>

246. China began subjecting the exportation of “bauxite” (including refractory clay (2508.3000/2508300000) and aluminum ores and concentrates (2606.0000/2606000000)) to export quotas in at least 2006. Over time the quota amounts decreased, making the quotas increasingly restrictive. In 2006, China began subjecting the exportation of “bauxite” to export duties (including refractory clay (2508.3000/2508300000), aluminum ores and concentrates

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<sup>312</sup> U.S. Answers to the First Set of Questions from the Panel, para. 26.

<sup>313</sup> See U.S. First Written Submission at 10-11.

<sup>314</sup> U.S. First Written Submission at 10-11.

<sup>315</sup> Bauxite Report, Exhibit JE-165 at 7.

<sup>316</sup> Bauxite Report, Exhibit JE-165 at 9-10.

(2606.0000/2606000000), and aluminum ash and residues (2620.4000)), and raised the duty rates in 2008.

247. China does not attempt to justify the export duties on refractory clay (2508.3000/2508300000), aluminum ores and concentrates (2606.0000/2606000000), and aluminum ash and residues (2620.4000). During the pendency of this proceeding, beginning January 1, 2010, for reasons it has not articulated, China stopped imposing these export duties. China focuses its efforts only on defending the export quota as it applies to exports of “high alumina clay,” a subset of refractory clay (2508.3000/2508300000), as a measure justified on the basis of conservation goals.

**b. Article XX(g) of the GATT 1994**

248. The United States refers to the discussion on Article XX(g) set forth above.

**c. China’s export quota on bauxite, as it is applied to high alumina clay, does not relate to the conservation of high alumina clay**

249. In examining whether China’s export quota on bauxite, as applied to high alumina clay, relates to the conservation of high alumina clay, the operative question is whether there is a close and genuine relationship of ends and means between the goal of high alumina clay conservation and the means presented by that part of the export quota that applies to exports of high alumina clay.<sup>317</sup> As above in the case of fluorspar, the answer to this question is also no.

250. As noted in the Co-Complainants’ Joint Oral Statement at the First Panel Meeting,<sup>318</sup> the measures imposing the export quota on “bauxite” generally do not speak to the relationship between the export quota and the goal of conservation and certainly do not speak to the relationship between the export quota, as it is applied to the subset product of high alumina clay, and the goal of conserving high alumina clay.<sup>319</sup> In its First Written Submission, China does not squarely address the relationship between the export quota, as it applies to high alumina clay, and the goal of conservation of high alumina clay, *i.e.*, keeping high alumina clay from harm, loss or waste through protective oversight.

251. Instead, taking into account the absence of restraints on the exportation of downstream products made from high alumina clay and the substantial growth reflected in export statistics, the picture that emerges demonstrates a complete lack of any relationship between the export quota on bauxite (or that subset of the quota as it applies to high alumina clay) and the goal of

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<sup>317</sup> Appellate Body Report, *US – Shrimp*, para. 135.

<sup>318</sup> Complainants’ Joint Oral Statement, para. 75.

<sup>319</sup> See Exhibits JE-22 and JE-79.

high alumina clay conservation; instead, the record shows a close and genuine relationship between the export quota and China’s economic goals.

252. Production numbers for “bauxite” in China do not differentiate between production of aluminum ores and concentrates (bauxite ores) and fireclay, which would include high alumina clay. In general, however, “bauxite” production in China, the world’s second largest producer, increased more than 400 percent from 2000 to 2009.<sup>320</sup> In addition, China’s exports of alumina refractory bricks, which high alumina clay is primarily used to produce, increased more than 600 percent. In the meantime, exports of refractory clay (which would include high alumina clay) from China have steadily decreased under the export restraints imposed. Taking into account the amount of high alumina clay incorporated into the alumina refractory bricks (and other alumina refractory products) exported from China in 2009, more high alumina clay was exported from China in the form of refractory products than in the form of high alumina clay (even assuming all refractory clay exports were high alumina clay exports).<sup>321</sup>

253. The imposition of restraints on the export of fluorspar in the absence of similar or similarly extensive restraints on the export of downstream refractory products demonstrates another close and genuine relationship between the export quota on bauxite, as applicable to high alumina clay, and the goal of fostering the growth and exports of value added, downstream products. As noted in the Joint Oral Statement of the Co-Complainants at the First Substantive Meeting of the Panel with the Parties, China’s Eleventh Five-Year Plan for Social and Economic Development states:

We will support the export of independent high-tech products, electromechanical products, and high-value added and labor-intensive products. . . . We shall strengthen the dynamic supervision of the price, quality, and quantity of export commodities, so as to build a quality and efficiency-oriented system for the promotion and regulation of foreign trade.<sup>322</sup>

254. During the period 2006 to 2009, while China imposed export quotas on bauxite (including high alumina clay), in combination with an export duty of 15 percent (applicable to refractory clay (2508.3000)), the export price for “refractory grade bauxite” from China (*i.e.*, high alumina clay) more than tripled from US\$150-160 to US\$480-535.<sup>323</sup>

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<sup>320</sup> Bauxite Report, Figure 3 (Exhibit JE-165).

<sup>321</sup> Bauxite Report at 26-27 (Exhibit JE-165).

<sup>322</sup> *Eleventh Five Year Plan Outline for Social and Economic Development*, Part 9, Chapter 35, Section 1, JE-8 at 17 (emphasis added).

<sup>323</sup> Bauxite Report, Figure 14 (Exhibit JE-165).



255. These trends and facts demonstrate the successful realization of economic goals, but have no connection to the goal of conserving high alumina clay

256. The “substantial relationship” between the export quota on “bauxite” and the goal of conserving high alumina clay seems to be even more lacking when considering the fact that the export quota applies to a much broader category of products than just high alumina clay. If the export quota were implemented to conserve high alumina clay, but not other types of refractory clay or aluminum ores and concentrates (which China does not defend as a conservation measure under Article XX(g)), it is not at all clear why the export quota applies to all of these products and does not distinguish between these many types of alumina-bearing materials.

257. Accordingly, China has failed to demonstrate that its export quota on bauxite “relates to the conservation of” high alumina clay.

**d. China’s export quota on bauxite, as it is applied to high alumina clay, is not made effective in conjunction with restrictions on domestic production or consumption**

258. China also fails to demonstrate that its export quota for bauxite, as it applies to high alumina clay, is “made effective in conjunction with restrictions on domestic production or consumption.” China asserts that it has a “conservation policy” consisting of a number of measures “to manage the supply, production, and use of [high alumina clay].”<sup>324</sup> As discussed below, these measures do not constitute “restrictions on domestic production or consumption.” The export quota, which applies to the raw material category “bauxite” including both “refractory clay” (2508.3000/2508.300000) and “aluminum ores and concentrates” (2606.0000/2606000000), is not “made effective in conjunction with” such restrictions on “high alumina clay” and therefore is not imposed “even-handedly” as Article XX(g) requires.

*The Measures China Proffers Are Not “Restrictions” on Production or Consumption*

259. China lists eight measures that it argues “restrict[] or burden[] the current exploitation, production, and use of its own [high alumina clay] resources.”<sup>325</sup> China appears to consider “burdens” on exploitation, production, and use to be distinct from “restrictions,” however, China does not explain what this difference might be or which aspects of which measures “restrict” rather than “burden.” China also does not explain how the terms “burden” and “restrict” relate to the term “restriction” in Article XX(g).

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<sup>324</sup> China’s First Written Submission, para. 501

<sup>325</sup> China’s First Written Submission, para. 502.

260. As discussed above, a “restriction” is a deliberate limitation on industrial output, the action or fact of confining or binding the extent, amount, duration, etc. of permitted – in the case of Article XX(g) – domestic production or consumption.

261. The eight measures that China asserts as relevant to Article XX(g) as restrictions on domestic production or consumption are:

*Mineral Resources Law*

*Environmental Protection Law*

*Provisional Regulations on Resource Tax and 1994 Detailed Rules for the Implementation of the Provisional Regulations on Resource Tax*

*Provisions on the Administration of Collection of the Mineral Resources Compensation Fees*

*Measures for the Administration of Registration of Mining of Mineral Resources*

*National Mineral Resources Plan (2001)*

*Notice of the General Office of the State Council on Forwarding the Opinions of the Ministry of Land and Resources and other Authorities on the Integration of Exploitation of Mineral Resources*

*National Mineral Resources Plan (2008-2015)*

Most of these measures do not specifically address the production or consumption of high alumina clay, much less “restrict” such production or consumption.

262. The *Environmental Protection Law*, according to China, provides a legal basis for developing policies and measures to further environmental protection and instructed the State Council to formulate standards and mechanisms in this vein. Even under China’s description of this measure, there appears to be no concrete link between this measure and the production or consumption of high alumina clay, much less “restrictions” on such production or consumption.

263. The 2001 *National Mineral Resources Plan* and the 2008 *National Mineral Resources Plan (2008-2015)* are state planning documents that provide high level policy guidance. China describes these measures as “re-emphasiz[ing]” key tenets of China’s mineral resources policy.<sup>326</sup>

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<sup>326</sup> China’s First Written Submission, paras. 177 and 179.

Based on China’s description, these measures do not impose obligations or requirements and do not “restrict” production or consumption of high alumina clay.

264. According to China, the *Mineral Resources Law* provides for requirements or standards for mining enterprises to operate efficiently, abide by safety and environmental requirements as a condition for obtaining mining licenses. The *Notice of the General Office of the State Council on Forwarding the Opinions of the Ministry of Land and Resources and other Authorities on the Integration of Exploitation of Mineral Resources* “obliges” small mining enterprises to consolidate in order to improve efficiency and regulatory compliance. The *Measures for the Administration of Registration of Mining of Mineral Resources* provide for monitoring mining license holders for compliance with standards for development and use of mineral resources and environmental protection and for reporting by mining license holders on their compliance. None of these measures “restricts” the production or consumption of high alumina clay in the sense of deliberately confining or binding the production or consumption of high alumina clay. Assuming that mining enterprises comply with the various standards, these measures do not limit the amounts of high alumina clay that mining enterprises may produce.

265. Two of the eight measures do appear to address aspects relating to the production of “bauxite” or “refractory clay,” however, neither of these measures addresses the production specifically of “high alumina clay.”

266. China appears to impose a resource tax on entities exploiting mineral products through the *Provisional Regulations on Resource Tax* and the *Detailed Rules for the Implementation of the Provisional Regulations on Resource Tax*. According to China, the objective of the mineral resources tax “is to increase extraction costs and, hence, prices of the mineral,”<sup>327</sup> however, China does not provide a citation to a provision of either of these two measures or any other measure. A review of the provisions of these two measures does not reveal any support for this assertion. Regardless of whether this, revenue generation, or some other objective is meant to be served the mineral resources tax, China asserts that the tax rate applicable to high alumina clay in 2009 was 3 RMB per MT (approximately 0.45 USD).<sup>328</sup>

267. Furthermore, it does not appear the resource tax is necessarily systematically applied. According to Article 7 of the *Provisional Measures*, the resource tax may be reduced or exempted for mining entities suffering large losses due to accidents or natural disasters in a particular year, or pursuant to unspecified reductions or exemptions stipulated by the State Council.<sup>329</sup> Even if

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<sup>327</sup> China’s First Written Submission, paras. 172 and 506 (referencing para. 172).

<sup>328</sup> China’s First Written Submission, para. 506 (citing to Exhibit CHN-91). The United States notes that the *Provisional Regulations on Resource Tax*, Exhibit CHN-91, provide for a resource tax of 3 RMB for “refractory clay” and not “high alumina clay” as indicated in China’s translation of Appendix 1, category IV(3), Exhibit CHN-91B.

<sup>329</sup> *Provisional Regulations on Resource Tax*, Art. 7 (Exhibit CN-91).

the resource tax were systematically applied to entities mining refractory clay, a tax rate so low would not limit or bind the amount of refractory clay (or a subset of refractory clay, high alumina clay) produced, especially when the export price of high alumina clay in 2009 was 470-535 USD per MT.<sup>330</sup>

268. China describes its *Provisions on the Administration of Collection of the Mineral Resources Compensation Fees* as providing for a mineral resources compensation fee to be paid by mining enterprises on the sales of extracted minerals “that are no longer in their natural state.”<sup>331</sup> The compensation fee is calculated pursuant to the following formula:

$$\text{Compensation Fee} = \text{sales income of mineral product} \times \text{Compensation rate} \times \text{coefficient of mining recovery rate}$$

In turn, the coefficient of mining recovery rate is determined by the following ratio:

$$\text{Coefficient} = \frac{\text{Approved Mining Recovery Rate}}{\text{Actual Mining Recovery Rate}}$$

where the approved mining recovery rate is prescribed by the approved design of the mine at issue.<sup>332</sup> The mineral resources compensation fee rate designated for “bauxite” is 2 percent and for “fireclay” is also 2 percent. Regardless of whether “high alumina clay” is considered as part of bauxite or fireclay, then, it appears that the relevant mineral resources compensation fee rate is 2 percent.<sup>333</sup>

269. As with the resource tax, it is unclear whether the mineral resources compensation fee is systematically collected. Mining entities may be exempted from paying the fee, upon joint approval of the relevant departments responsible for mineral resources and for finance: (1) if the mineral product is recovered from barren rock; (2) where “non-security left-over ore bodies of closed mines are mined upon approval pursuant to the relevant provisions of the State;” and (3) under unspecified “other circumstances.”<sup>334</sup>

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<sup>330</sup> Bauxite Report at 20 (Exhibit JE-165).

<sup>331</sup> *Provisions on the Administration of Collection of the Mineral Resources Compensation Fees*, Art. 3 (Exhibit CHN-92).

<sup>332</sup> *Provisions on the Administration of Collection of the Mineral Resources Compensation Fees*, Art. 5 (Exhibit CHN-92).

<sup>333</sup> *Provisions on the Administration of Collection of the Mineral Resources Compensation Fees*, Appendix (Exhibit CHN-92).

<sup>334</sup> *Provisions on the Administration of Collection of the Mineral Resources Compensation Fees*, Art. 12 (Exhibit CHN-92).

270. Even if it were systematically collected, a compensation rate so low would not limit or bind the amount of refractory clay (or its included subset product “high alumina clay”) production. Furthermore, the manner in which the compensation fee is calculated also demonstrates that the compensation fee does not restrict the production of refractory clay (and, in turn, high alumina clay). The compensation fee is calculated by multiplying the sales income of refractory clay by 2 percent and by the coefficient of the mining recovery rate. The coefficient of the mining recovery rate is calculated by dividing the approved mining recovery rate for a particular mine, based on the design of the mine, by the actual mining recovery rate. Assuming that mining entities regard the approved mining recovery rate as a maximum rate which they would not exceed (although the provisions of the measure *Provisions on the Administration of Collection of the Mineral Resources Compensation Fees* do not provide that such approved rate may not be exceeded), mining entities are rewarded for recovering flourspar at as high a rate as their mines are approved for. This incentive structure would not lead to a direct minimization or reduction of refractory clay (or high alumina clay) output but to a maximization of refractory clay (and presumably high alumina clay) output.

271. For these reasons, China has not demonstrated that it maintains any restrictions on the production or consumption of high alumina clay as required by Article XX(g).

*The Export Quota on Bauxite, as Applied to High Alumina Clay, Is Not “Made Effective in Conjunction with”: the Absence of Even-Handedness*

272. As a result, China’s export quota on bauxite, as it is applied to high alumina clay, is not “made effective in conjunction with” restrictions on domestic production or consumption. To the contrary, China’s export quota, as applied to high alumina clay, presents the situation the Appellate Body alluded to in *US – Gasoline*, where “no restrictions on domestic[] [interests] are imposed at all, and all limitations are placed upon [foreign interests] *alone*.”<sup>335</sup> As the Appellate Body concluded, in such a scenario, “the measure cannot be accepted as primarily or even substantially designed for implementing conservationist goals. The measure would simply be naked discrimination . . . .”<sup>336</sup>

273. Even if one or some of the measures China has put forward could be considered as limiting the amount of high alumina clay produced, China would still not have demonstrated that the export quota, as applied to high alumina clay, was “made effective in conjunction with” such restrictions because the relative impact on domestic and foreign users of high alumina clay would still not be “even-handed.”

274. To the extent any measure China has proffered as evidence of restrictions on domestic production or consumption is relevant at all to the production or consumption of high alumina

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<sup>335</sup> Appellate Body Report, *U.S. – Gasoline*, p. 21.

<sup>336</sup> Appellate Body Report, *U.S. – Gasoline*, p. 21.

clay, it would be relevant only to the mining or “production” of high alumina clay. If such a measure were considered to “restrict” high alumina clay production, a restriction on production would affect both domestic and foreign users of high alumina clay. As China observes in its own description of the resource tax, the tax is charged “irrespective of whether it is sold for processing and consumption in China or abroad.”<sup>337</sup> However, foreign users of high alumina clay are also subjected to the export quota, as it applies to high alumina clay, and the export duty, which domestic users are not. In order for its measure to be even-handed, China would need to counter-balance the impact of the export quota on foreign users with some measure that similarly affects domestic users of high alumina clay without imposing a “double” burden on foreign users.

275. Here, any plausible “restriction” on domestic production would derive either from very general mining entity compliance standards or from extremely low coefficients or multipliers applied to sales volumes of refractory clay (and its subset product, high alumina clay) that only incidentally discourage output, and would affect both domestic and foreign users. When juxtaposed with an export quota (and export duty) that restricts supply only to foreign users, the severe lopsidedness of any such production “restrictions” would be self-evident. Accordingly, even if China had demonstrated the existence of restrictions on domestic production or consumption, China would still not have demonstrated the requisite even-handedness to justify its export quota, as applied to high alumina clay, under Article XX(g).

**e. Even if China’s 2010 Measures Related to Fluorspar and High Alumina Clay Were Relevant to the Panel’s Review, China’s Export Quota, as Applied to High Alumina Clay, Would Still Not Be Justified under Article XX(g)**

276. The United States sets forth its arguments below regarding the measures within the Panel’s terms of reference and the appropriate measures on which the Panel’s findings and recommendations should be made. Should the Panel, *arguendo*, review the export restraints as applied by China in 2010,<sup>338</sup> and should the Panel consider the measures China implemented over the course of this proceeding’s pendency through the summer of 2010<sup>339</sup> relevant to that review, *arguendo*, the United States addresses the export quota on bauxite, as it is applicable to high alumina clay, applied in 2010 in light of those measures below. As the United States demonstrates, the measures China has introduced over the course of 2010 do not alter the fact

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<sup>337</sup> China’s First Written Submission, para. 506.

<sup>338</sup> The United States notes that the export duty on fluorspar was applied on January 1, 2010 as it was applied on December 21, 2009. However, the export quota on fluorspar, which applied on December 21, 2009, no longer applied on January 1, 2010.

<sup>339</sup> China introduced measures related to the mining and production of fluorspar on March 1, 2010, April 20, 2010, May 19, 2010, and June 1, 2010.

that China’s export quota on bauxite, as applied to high alumina clay, is not justified under Article XX(g) of the GATT 1994.

*Related to the Conservation of Exhaustible Natural Resources*

277. In 2010, the export quota on bauxite continued to be applied, however, there is no export duty imposed on bauxite (including refractory clay (2508.3000/2508300000), aluminum ores and concentrates (2606.0000/2606000000), and aluminum ash and residues (2620.4000)). For the reasons discussed above, the export quota on bauxite, as it applies to high alumina clay, does not “relate to” conservation.

*Restrictions on Domestic Production or Consumption of Fluorspar*

278. China asserts that four measures it introduced over the course of 2010 are measures that comprise part of its policy to burden or restrict the extraction, production, and use of high alumina clay. China introduced these measures for the very first time in 2010. The four measures are:

*Circular of the General Office of the State Council on Taking Comprehensive Measures to Control the Extraction and Production of High Alumina Clay and Fluorspar*<sup>340</sup>

*2010 Public Notice on Fluorspar Industry Entrance Standards*<sup>341</sup>

*2010 Circular of the Ministry of Land and Resources on Passing Down the Controlling Quota of the 2010 Total Extraction Quantity of High Alumina Clay and Fluorspar*<sup>342</sup>

*2010 Circular on Passing Down the Controlling Quota of the 2010 Total Extraction Production Quantity of High Alumina Clay and Fluorspar*<sup>343</sup>

In addition, China issued an additional measure on June 1, 2010, raising the rate of the resource tax on “high alumina bauxite (including refractory-grade bauxite, abrasive-grade bauxite, etc.) and flint clay under refractory grade clay)” and “other refractory grade clay.”<sup>344</sup> None of these

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<sup>340</sup> Exhibit JE-167 (Exhibit CHN-87).

<sup>341</sup> Exhibit CHN-96.

<sup>342</sup> Exhibit JE-168 (Exhibit CHN-97).

<sup>343</sup> Exhibit JE-169 (Exhibit CHN-98).

<sup>344</sup> *Notice Adjusting the Applicable Tax Rates of Resource Taxes of Refractory Grade Clay and Fluorspar* Cai Shui [2010] No. 20 (Ministry of Finance and the General Administration of Taxation, effective June 1, 2010) (Exhibit CHN-90).

measures restricts the production or consumption of high alumina clay within the meaning of Article XX(g). Even if they did, they would not do so in an even-handed manner.

279. Pursuant to the *Circular of the State Council’s General Office on the Adoption of Comprehensive Measures to Control the Mining and Production of Fireclay and Fluorspar*, China raised the resource tax rate for high alumina clay on June 1, 2010.<sup>345</sup> Although China has not conceded explicitly that it considered the resource tax that was previously set at 3 RMB per MT to be too low to constitute a “restriction” on fluorspar production, China decided to raise the tax to 20 RMB per MT (if high alumina clay is covered by “high-alumina bauxite (including refractory-grade bauxite, abrasive-grade bauxite, etc.) and flint clay under refractory grade clay”) or to 6 RMB per MT (if high alumina clay is covered by “other refractory grade clay”) on June 1, 2010 (approximately 0.9 USD per MT). Nevertheless, for the same reasons discussed above, and in light of the reported price for high alumina clay that was in the 470-535 USD per MT range in 2009,<sup>346</sup> China has still not demonstrated that the resource tax limits or binds the amount of fluorspar production in China.

280. According to China, the *Public Notice on Refractory Grade Bauxite (High Alumina Bauxite) Industry Entrance Standards*, introduced on March 1, 2010, sets forth conditions and standards for enterprises wishing to engage in the “extraction and production” of high alumina clay<sup>347</sup> pertaining to rates and standards for the mining and milling of high alumina clay, the use of technologies, product quality and other operating standards. None of these conditions “restricts” fluorspar production in the sense of directly limiting or binding the amount of fluorspar that can be produced.

281. China asserts that the *Circular on the Allocation of the 2010 Mining Control Targets Applicable to High Alumina Clay Ore and Fluorspar Ore*, which China introduced for the first time on April 20, 2010, establishes “quotas” on fluorspar exploitation and production.

282. As an initial matter, the United States addresses the terminology that China uses in its First Written Submission and in its translations of the measures that China calls: *Circular of the General Office of the State Council on Taking Comprehensive Measures to Control the Extraction and Production of High Alumina Clay and Fluorspar*,<sup>348</sup> *Circular of the Ministry of Land and Resources on Passing Down the Controlling Quota of the 2010 Total Production*

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<sup>345</sup> *Notice Adjusting the Applicable Tax Rates of Resource Taxes of Refractory Grade Clay and Fluorspar* Cai Shui [2010] No. 20 (Ministry of Finance and the General Administration of Taxation, effective June 1, 2010) (Exhibit CHN-90).

<sup>346</sup> Bauxite Report, Figure 14 (Exhibit JE-165).

<sup>347</sup> China’s First Written Submission para. 181.

<sup>348</sup> Exhibit CHN-87. See *Circular of the State Council’s General Office on the Adoption of Comprehensive Measures to Control the Mining and Production of Fireclay and Fluorspar* (State Council [2010] No. 1, January 2, 2010) (Exhibit JE-167).



*Quantity of High-alumina Refractory-Grade Bauxite and Fluorspar*,<sup>349</sup> and *Circular on Passing Down the 2010 Controlling Quota of Total Extraction Quantity of High Alumina Clay and Fluorspar*.<sup>350</sup> The United States notes that what China terms “quotas” on extraction and production are more accurately translated as “quantity control targets.” The word “targets” has a different connotation from “quotas.” A “target” suggests a standard to aim for, but not a binding limit – which is connoted by the term “quotas.”

283. Additionally, China’s measures address the “extraction” and “production” of high alumina clay. The United States understands the term “extraction” to be equivalent, as a translation, to “mining,” as reflected in Exhibits JE-166, JE-167, JE-168, and JE-169. In turn, China’s measures address separately the “production” of high alumina clay. This production takes place after the fluorspar is mined (or “extracted” from the ground) and turns the mined high alumina clay into “ore” and “chamotte.” Accordingly, the mining of high alumina clay is the activity that “produces” high alumina clay that can be used.

284. The *Circular of the State Council’s General Office on the Adoption of Comprehensive Measures to Control the Mining and Production of Fireclay and Fluorspar*<sup>351</sup> and *Circular on the Allocation of the 2010 Mining Control Targets Applicable to High-Alumina Clay Ore and Fluorspar Ore*<sup>352</sup> set the mining quantity control target for high alumina at 4.5 million MT for 2010. While it may appear superficially that these measures “restrict” the production of high alumina clay and limit or bind the amount of high alumina clay that is permitted to be produced, a closer examination of the measures reveal that this is not in fact the case.

285. The target number for high alumina clay mining is set at such a high level that the target is not likely to bind or reduce the amount of high alumina clay produced in China in 2010. The target for high alumina mining in 2010 is set at 4.5 million MT while China states that 2.4 million MT of high alumina clay was mined in 2009, when no target number had been set and no attempt at restricting production had been made.<sup>353</sup> Accordingly, this target number is not set

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<sup>349</sup> Exhibit CHN-98. See *Circular on the Allocation of Production Quantity Control Targets Applicable to High-Alumina Clay and Fluorspar for the Year 2010* (MIIT (2010) no. 244, May 19, 2010) (Exhibit JE-169).

<sup>350</sup> Exhibit CHN-97. See *Circular on the Allocation of the 2010 Mining Control Targets Applicable to High-Alumina Clay Ore and Fluorspar Ore* (Ministry of Land and Resources (2010) No. 187, April 20, 2010) (Exhibit JE-168).

<sup>351</sup> Exhibit CHN-87. See *Circular of the State Council’s General Office on the Adoption of Comprehensive Measures to Control the Mining and Production of Fireclay and Fluorspar* (State Council [2010] No. 1, January 2, 2010) (Exhibit JE-167).

<sup>352</sup> Exhibit CHN-97. See *Circular on the Allocation of the 2010 Mining Control Targets Applicable to High-Alumina Clay Ore and Fluorspar Ore* (Ministry of Land and Resources (2010) No. 187, April 20, 2010) (Exhibit JE-168).

<sup>353</sup> CHN-86.

with the intention of binding or limiting the amount of high alumina clay produced in 2010. The measures acknowledge this fact on their face.<sup>354</sup>

286. Despite the introduction of these measures, therefore, China has not demonstrated the existence of restrictions on domestic production of high alumina clay, even in 2010

*Made Effective in Conjunction with*

287. Because China has not demonstrated the existence of restrictions on domestic production or consumption, China has not demonstrated that its export quota on bauxite, as it is applicable to high alumina clay, is imposed in an even-handed manner as required by Article XX(g).

288. Furthermore, even if certain of these 2010 measures could be considered “restrictions” on high alumina clay production, China has still not demonstrated that they are “even-handed.” These 2010 measures continue to affect the production of high alumina clay – which impact both domestic and foreign users of high alumina clay. The relative impact of the export quota on bauxite, as it applies to high alumina clay, “in conjunction with” these measures on production continue to impose a double burden on foreign users in a lopsided manner that fails to satisfy the requirements of Article XX(g).

**C. China’s Export Quotas on Coke and Silicon Carbide Are Not Justified by Article XX(b) of the GATT 1994**

**1. Introduction**

289. China contends that the export quotas on coke and silicon carbide are justified pursuant to Article XX(b) of the GATT 1994. China’s arguments in support of this defense are the same as those advanced in the context of China’s export duties on coke, magnesium metal, and manganese metal. In other words, China argues that the production of coke and silicon carbide result in environmental pollution. The export quotas, according to China, are “necessary” to reduce production of these materials in China, and therefore reduce pollution.<sup>355</sup> China’s defense fails for the same reasons as discussed above in the context of the export duties on magnesium metal, manganese metal, and coke. In this section, we will briefly summarize those arguments and place those arguments in the context of the export quotas imposed on coke and silicon carbide.

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<sup>354</sup> *Analytical Report and Recommendations Regarding the 2010 Mining Quantity Control Targets Applicable to High-Alumina Clay and Fluorspar* (Ministry of Land and Resources, March 24, 2010), Section I.2 (“The Mineral Exploitation Administration Department recommends . . . to set the 2010 high alumina clay mining quantity control target at the level of the authorised production capacity of the prospecting rights to be converted into mining rights . . . .” (Emphasis added.)) (Exhibit JE-166) See also Exhibit CHN-86.

<sup>355</sup> China’s First Written Submission, paras. 528-58.

290. First, for the same reasons discussed above, the rationale underlying these export quotas is an economic one, not an environmental one. In addition, the United States notes that China makes reference to a measure adopted in 2010, that supposedly illustrates that China sets the quota amount for silicon carbide based on environmental considerations.<sup>356</sup> In fact, this document, “*Assessment on Relevant Issues Regarding Continued Application of Export Quota Administration to Silicon Carbide in 2010*,” reveals that China seeks to control the export of products, including silicon carbide, for economic reasons. The mere fact that this document makes reference to pollution is not sufficient to establish a connection between the export restrictions at issue and environmental objectives. This “Assessment” begins by noting China’s interest in improving environmental protection as a general matter without any reference to a specific product. The “Assessment” goes on to indicate that due to the recession, international demand decreased in 2009, and in light of that, China limited the exports of silicon carbide in 2009 even further than in previous years.<sup>357</sup> In other words, having identified the production of silicon carbide as polluting, China did not limit the production of silicon carbide, but merely its exports in 2009. According to China, this was based on a decline in foreign demand *i.e.*, unrelated to pollution. Indeed, according to China’s data, silicon carbide production increased in China by 150,000 tons in 2009.<sup>358</sup>

291. China confirms that the quota amount for silicon carbide is set for economic reasons in response to Question 26 where it states that China sets the amount based first on export demand, and then on domestic demand.<sup>359</sup> Then, China says that it measured the impact of its environmental regulations on the production of silicon carbide, but then provides no explanation as to how this consideration affected the level of the quota amount.<sup>360</sup> Thus, China has established no connection between its export quota on silicon carbide and environmental pollution.

292. When asked to explain how it sets quota amounts for coke, China asserts that it uses the same considerations as set forth for silicon carbide.<sup>361</sup> Yet, in support of this assertion, China does not point to a single measure related to coke or any evidence or argumentation explaining how the factors related to silicon carbide affect the coke export quota. China does note that the export quota on coke is based on the applications it receives for export.<sup>362</sup> In other words, the export quota is based on supply conditions, an economic factor.

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<sup>356</sup> China’s First Written Submission, para. 540 citing Exhibit CHN-286.

<sup>357</sup> Exhibit CHN-286, Section 2.

<sup>358</sup> Exhibit CHN-289 at 9.

<sup>359</sup> China’s Answers to the First Set of Questions from the Panel, paras. 144-45.

<sup>360</sup> China’s Answers to the First Set of Questions from the Panel, para. 146.

<sup>361</sup> China’s Answers to the First Set of Questions from the Panel, paras. 139-47.

<sup>362</sup> China’s Answers to the First Set of Questions from the Panel, para. 148.

293. Second, the fact that the export quotas are part of an economic, rather than environmental, policy is illustrated by the fact that China’s production of coke and silicon carbide have grown dramatically in recent years, and China’s production and export of the downstream products made from those products have also increased. In other words, coke and silicon carbide continue to be exported but in the form of higher value-added downstream products. Third, Dr. Olarreaga’s economic analysis also includes supposed projections of decreased production levels for coke and silicon carbide, and the flaws in that analysis render those projections unreliable. Fourth, there are WTO-consistent, reasonably available alternatives that China could employ to more directly address its environmental objectives.

**2. China’s export quotas on coke and silicon carbide are not necessary to accomplish China’s stated environmental objective**

294. China’s defense under Article XX(b) relies on the assertion that the export quotas on coke and silicon carbide are making a material contribution to a reduction of health risks associated with primary production of these metals, because the export duties will result in decreased levels of production of these products. However, China fails to present any evidence that production of coke and silicon carbide is occurring at decreased levels in China, let alone that the export duties have resulted in decreased levels of primary production.<sup>363</sup> Instead, the evidence confirms the opposite, that production levels continue to rise for these products and their downstream products for which they are used as inputs. China’s contention that the export duties are presently making a material contribution to China’s stated objective is based almost exclusively on an economic analysis presented by Dr. Olarreaga estimating the decreased production levels that will supposedly occur in the future. Thus, the Panel has no evidence that the export duties are resulting in decreased production of coke or silicon carbide, or that they are making a material contribution to China’s supposed environmental objectives.<sup>364</sup> China’s estimates of the supposed reduction in pollution that will result from decreased levels of primary production rely on the same flawed projections of decreased levels of primary production, and therefore similarly do not support the proposition that the export duties are presently making a material contribution to China’s supposed environmental objectives.<sup>365</sup>

295. Furthermore, China has also failed to establish that its export duties are apt to make a material contribution to its objective in the future. Neither Dr. Olarreaga’s quantitative projections nor any of the qualitative reasoning presented by China withstands scrutiny. As we will discuss, Dr. Olarreaga’s economic analysis suffers from a number of fundamental flaws that

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<sup>363</sup> China’s First Written Submission, paras. 524-56.

<sup>364</sup> As the Appellate Body noted in *Brazil – Tyres*, in order to be justified under Article XX(b), “a panel must be satisfied that it brings about a material contribution to the achievement of its objective. Such a demonstration can of course be made by resorting to evidence or data, pertaining to the past or the present, that establish that the import ban at issue makes a material contribution to the protection of public health or environmental objectives pursued.” Appellate Body Report, *Brazil – Tyres*, para. 151 (emphasis added).

<sup>365</sup> China’s First Written Submission, paras. 550-54.

render his projections unreliable. However, even if China's economic analysis were accepted on its own terms, it fails to support China's defense under Article XX(b).

**a. Production of coke and silicon carbide and production and export of their downstream products continue to increase**

296. **Coke.** As set forth above, China's coke production increased dramatically by more than 260 percent from 2000 to 2009.<sup>366</sup>

297. **Silicon Carbide.** According to the data China submitted, its silicon carbide production has also increased substantially in recent years, almost doubling from 850,000 tons in 2006 to 1,600,000 tons in 2009.<sup>367</sup>

298. These facts illustrate that China is not seeking to curtail production of the products at issue, but rather the production of these products continue to grow and fuels China's dramatic expansion of its downstream industries.

299. As set forth above, one of the primary applications of coke is in the production of steel.<sup>368</sup> In addition, the primary use of silicon carbide is as a refractory in several industries including the steel and aluminum industries. China is the leading producer of both aluminum and steel. From 2000 to 2009, Chinese production of aluminum increased significantly.<sup>369</sup> Similarly, Chinese steel production also increased from approximately 127 million MT to over 585 million MT.<sup>370</sup>

300. In addition, exports of aluminum and steel have also increased dramatically. Chinese exports of aluminum increased 708 percent from 2000 to 2008.<sup>371</sup> Similarly, Chinese exports of steel products increased from 27.5 million MT in 2000 to 60.5 million MT in 2008.<sup>372</sup> Thus, even if China were correct that there was an environmental rationale for curbing the export of coke and silicon carbide, the evidence shows that China continues to export these materials in significant quantities in the form of higher value-added downstream products. The production of steel and aluminum, which is occurring at much higher levels, can of course also cause harmful environment effects.

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<sup>366</sup> Exhibit CHN-289 *See also* Coke Report (Exhibit JE-157) p. 4, Figure 3.

<sup>367</sup> Exhibit CHN-289 at 9. As noted in the Silicon Carbide Report prepared by Dr. Eugene Thiers (Exhibit JE-161), China's production data for 2009 is 60 percent greater than total worldwide capacity to produce silicon carbide as reported in the report prepared by Dr. Humphreys. The reason for this discrepancy is unclear.

<sup>368</sup> Coke Report, p. 5. (Exhibit JE-157)

<sup>369</sup> Silicon Carbide Report, Figure 8. (Exhibit JE-161)

<sup>370</sup> Silicon Carbide Report, Figure 7. *See also* Coke Report, Figure 5, p. 6. (Exhibit JE-157).

<sup>371</sup> Magnesium Key Facts, Table 20, p. 19 (Exhibit JE-152).

<sup>372</sup> Coke Report, Figure 10 (Exhibit JE-157).

301. China contends that the downstream impacts of its WTO-inconsistent export measures are irrelevant.<sup>373</sup> China’s arguments in this regard are deeply flawed as discussed in the Grossman-Watson Report.<sup>374</sup> In addition, this attempt to minimize the downstream impact of its measures is at odds with China’s approach to the export duties on scrap products. In that context, China relies heavily on the downstream impact of increased availability of scrap products resulting from the export duties.

**b. Flaws in China’s economic analysis**

302. The Grossman-Watson Report also identifies a number of additional flaws with Dr. Olarreaga’s projections of the supposed decreased production resulting from the export quotas on coke and silicon carbide. The first flaw discussed in the previous sections relates to Dr. Olarreaga’s failure to account for the upstream-downstream linkages among the products at issue. As the Grossman-Watson Report explains, “the environmental impact of these policies is best assessed by viewing the policies as a package, considering the important interrelationships that link the upstream and downstream markets.”<sup>375</sup>

303. The second flaw relates to silicon carbide and was discussed in the previous section. The Grossman-Watson report explains that Professor Olarreaga uses demand and supply elasticities and baseline quantities that are based on inappropriate data or, in some cases, based on no data whatsoever. One of the points discussed in the Grossman-Watson Report is that rather than apply the supply and demand elasticities for each of the products, in this case silicon carbide, Dr. Olarreaga calculates the supply and demand elasticities for coke and uses the coke estimate as the numerical value for the elasticity of silicon carbide. However, he provides no basis for the assumption that the elasticities for coke are appropriate in analyzing silicon carbide other than to say that all of the products at issue are “basic materials.”<sup>376</sup> In fact, as the Grossman-Watson Report explain, this assumption is unwarranted and constitutes another reason that Dr. Olarreaga’s analysis is unreliable.<sup>377</sup>

304. Third, with respect to coke, the Grossman-Watson Report explains that although Dr. Olarreaga uses the supply and demand elasticities for coke for the other products at issue, he does not use the same elasticities to assess the impact of the export quota on coke. Instead, Dr. Olarreaga presents estimates of the effects of the export duties on production and consumption of coke based on a regression model, that is “badly flawed.” The Grossman-Watson Report

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<sup>373</sup> Comments on Panel Questions Following the First Substantive Meeting prepared by Dr. Humphreys (Exhibit CHN-443), p. 6.

<sup>374</sup> Grossman-Watson Report, p. 3-7 (Exhibit JE-158).

<sup>375</sup> Grossman-Watson Report, p. 8.

<sup>376</sup> Comments on Panel Questions Following the First Substantive Meeting (Exhibit CHN-442), para. 24.

<sup>377</sup> Grossman-Watson Report, p. 9-14 (Exhibit JE-158).

explains that this regression analysis suffers from a number of methodological errors that renders Dr. Olarreaga’s analysis unreliable.<sup>378</sup>

305. Because of the flaws in Dr. Olarreaga’s methodology for assessing the effect of the export quotas, his estimates of supposed decreases in production are similarly unreliable. China’s assertions of the supposed environmental resulting from the export duties, which flow from this economic analysis, are therefore also not credible.

306. Even if China were correct that the export quotas on coke and silicon carbide are resulting in decreased production and therefore decreased pollution, there are a number of WTO-consistent reasonably available alternatives that would more directly address China’s stated environmental objectives without discriminating against other WTO Members.

**c. WTO-consistent reasonably available alternatives exist that would more directly address China’s stated environmental objectives**

307. According to China, it is the production, not the export, of coke and silicon carbide that result in pollution. By controlling the export of these products, China is simply controlling who may use the raw material, but is not addressing the environmental impact of production. Accordingly, if China’s objective were reduction of pollution associated with that production, then China should impose restrictions on the production of these products, not on their export. The United States refers the Panel to the discussion of reasonably-available alternatives set forth above, which applies equally to the export quotas on coke and silicon carbide.

308. In light of the fact that the export restraints on the products at issue can have no direct effect on the reduction of environmental pollution, China should employ WTO-consistent measures. China’s statements in the course of this dispute that it is imposing environmental regulations to control environmental pollution and that China “has adopted a comprehensive environmental regulatory framework”<sup>379</sup> demonstrates that China considers such alternatives to be feasible.

**d. Conclusion**

309. For the foregoing reasons, China’s export quotas on coke and silicon carbide are not justified under Article XX(b).

**D. Even if China’s Export Quotas Were Justified by Article XX(b) or (g), the Export Quotas Fail to Satisfy the Requirements of the Chapeau**

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<sup>378</sup> Grossman-Watson Report, p. 15-19 (Exhibit JE-158).

<sup>379</sup> China’s First Written Submission, para. 309.

310. A GATT-inconsistent measure for which a Member invokes Article XX must satisfy both the subparagraph of Article XX that the Member invokes and the chapeau of Article XX. In other words, in addition to meeting the paragraph-specific criteria of Article XX(b) or XX(g) (as the case may be), the measure must also “not be applied in a manner which would constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade.”<sup>380</sup> The burden of establishing conformity with the relevant subparagraph and the chapeau lie with the party invoking the defense.<sup>381</sup>

311. As discussed in above, with respect to the export quotas that China maintains on coke, and silicon carbide that are inconsistent with Article XI:1 of the GATT 1994, China contends that the quota is justified pursuant to Article XX(b) of the GATT 1994. However, China has failed to establish that these export quotas are justified pursuant to the paragraph-specific requirements of Article XX(b). China also asserts a defense under Article XX(g) with respect to the export quota on bauxite (as it is applied to high alumina clay), which is similarly inconsistent with Article XI:1 of the GATT 1994. China has also failed to establish that this export quota satisfies the paragraph-specific requirements of Article XX(g). Furthermore, even if the export quotas at issue were consistent with the particular paragraph of Article XX that China invokes, the export quotas also fail to satisfy the chapeau of Article XX.

312. In China’s first written submission, and in its oral statement at the first panel meeting, China made no serious attempt to satisfy its burden of establishing that the export quotas satisfy the *chapeau*.<sup>382</sup> Instead, in its first written submission, China first states that the export quotas are not applied in a manner that constitutes arbitrary or unjustifiable discrimination, because “it is applied in the same manner irrespective of the destination” of the particular material at issue.<sup>383</sup> However, this reflects a misstatement of the applicable standard. The requirement that a measure not be “applied in a manner which would constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail” is a requirement that the measure not discriminate between other Members or between other Members and the Member maintaining the measure. The Appellate Body’s statements in *US – Gasoline* confirm this interpretation.<sup>384</sup>

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<sup>380</sup> Appellate Body Report, *US – Gasoline*, para. 22 (“In order that the justifying protection of Article XX may be extended to it, the measure at issue must not only come under one or another of the particular exceptions - paragraphs (a) to (j) - listed under Article XX; it must also satisfy the requirements imposed by the opening clauses of Article XX. The analysis is, in other words, two-tiered: first, provisional justification by reason of characterization of the measure under [the subparagraph] second, further appraisal of the same measure under the introductory clauses of Article XX.”)

<sup>381</sup> Appellate Body Report, *US – Gasoline*, p. 22-23.

<sup>382</sup> China’s First Written Submission, paras. 524-26; 557-58.

<sup>383</sup> China’s First Written Submission, paras. 524-26; 557-58.

<sup>384</sup> Appellate Body Report, *US – Gasoline*, p. 23-24.



313. Thus, China has articulated the incorrect legal standard under the *chapeau*. This renders China’s statement that the export restraints at issue do not discriminate between export destinations insufficient to satisfy its burden.

314. China also asserts that the export quotas do not constitute a disguised restriction on international trade because they are “not applied in a manner that constitutes a *concealed* or *unannounced* restriction or discrimination in international trade.”<sup>385</sup> China also fails to present any evidence or argumentation to substantiate this assertion. This is insufficient to satisfy China’s burden of demonstrating that its measures satisfy the requirements of the *chapeau*. Furthermore, as the Appellate Body stated in *US – Gasoline*, “It is . . . clear that concealed or unannounced restriction or discrimination in international trade does not exhaust the meaning of “disguised restriction.”<sup>386</sup> Thus, the mere assertion that a measure does not constitute a “concealed or unannounced restriction or discrimination in international trade” falls short of the showing required under this element of the *chapeau*.

315. In its first oral statement to the Panel, China asserts that measures taken in pursuit of its sovereign right to natural resources cannot fall afoul of the *chapeau*, because (according to China) they are taken “in the exercise of a Member’s sovereign right over natural resources” and to pursue objectives explicitly sanctioned by the covered agreements.”<sup>387</sup> This argument reflects a complete misunderstanding of the role of the *chapeau* in Article XX. All WTO Members have the sovereign right to take measures to protect human and animal life and health. All WTO Members have the sovereign right to take measures to conserve natural resources. By listing those objectives in Article XX(b) and (g) of the GATT, the WTO Agreement recognizes (“sanctions”, if one wishes to adopt China’s wording) that WTO Members may pursue those objectives. But none of that changes the fact that measures to protect human and animal life and health, and measures to conserve exhaustible natural resources, cannot satisfy the requirements of Article XX unless they are applied in accordance with the *chapeau*. Therefore, even if it were the case that a measure “taken in the exercise of China’s sovereign right over natural resources” satisfied the paragraph-specific requirements of Article XX(g) or (b) for that reason alone (which, as explained above, is not the case), such a measure would still have to be scrutinized under the *chapeau*. China’s unsupported assertion to the contrary is incorrect.

316. For these foregoing reasons, China has failed to establish that the export quotas for which it asserts a defense under Article XX satisfy the requirements of the *chapeau*.

#### IV. TERMS OF REFERENCE ISSUES RELATED TO CHINA’S EXPORT DUTIES AND EXPORT QUOTAS

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<sup>385</sup> See e.g. China’s First Written Submission, para. 558 (Emphasis original).

<sup>386</sup> Appellate Body Report, *US – Gasoline*, p. 25.

<sup>387</sup> China’s First Oral Statement, para. 48.

317. In this section, the United States will address China’s request that the Panel exercise its “discretion” and refrain from making findings on export duties on various forms of bauxite, coke, fluorspar, magnesium, manganese, silicon metal, yellow phosphorus, and zinc, and export quotas on various forms of bauxite, coke, fluorspar, silicon carbide, and zinc, under the following legal instruments:

*Notice Regarding the 2009 Tariff Implementation Program* (State Council Tariff Policy Commission, shuiweihui (2008) No. 40, January 1, 2009)

*Notice “2009 Export Licensing Management Commodities List”* (Ministry of Commerce and General Administration of Customs, Notice (2008) No.

*Notice Regarding 2009 Export Quota Amounts for Agricultural and Industrial Products* (Ministry of Commerce, Notice (2008) No. 83, January 1, 2009)

318. Relying on certain other instruments that took effect on January 1, 2010, China argues that findings on these measures would “serve no purpose” and asserts that the Panel lacks the authority to make recommendations on these measures, notwithstanding the fact that they are properly within the Panel’s terms of reference. Rather, it urges the Panel to use its discretion instead to make findings and recommendations only on the legal instruments that took effect on January 1, 2010, and which imposed export duties on coke, fluorspar, magnesium, manganese, silicon metal, silicon carbide, yellow phosphorus (at the Annex 6 designated maximum), and zinc (but not on bauxite); and export quotas on bauxite, coke, silicon carbide, and zinc (but not on fluorspar).

319. Both with regard to its theory that measures within the Panel’s terms of reference may be disregarded, and in its reliance on the 2010 measures to defend the measures within the Panel’s terms of reference, China’s arguments and assertions are misguided or simply incorrect. China’s claim that the Panel should exercise its “discretion” not to make findings on the measures within its terms of reference is without merit, unsupported by the provisions of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU).

#### **A. Measures Introduced During the Pendency of This Proceeding**

320. On January 1, 2010, legal instruments took effect that changed the scope of the duties and quotas imposed on the raw materials at issue. These legal instruments, together with the other legal instruments listed in the U.S. consultations and panel requests, subject the exportation of various forms of bauxite, coke, silicon carbide, and zinc – but not fluorspar – to export quotas; and subject the exportation of various forms of coke, fluorspar, magnesium, manganese, silicon metal, silicon carbide, yellow phosphorus, and zinc – but not bauxite – to export duties. They do

not subject the exportation of yellow phosphorus to special export duties in excess of the maximum limit designated in Annex 6 of the Accession Protocol.<sup>388</sup>

321. The export restraints applicable to bauxite and fluorspar that are within the Panel’s terms of reference include both export quotas and export duties. Under these 2010 legal instruments, bauxite exportation is subject only to export quotas and fluorspar exportation is subject only to export duties. Yellow phosphorus exportation is subject only to “ordinary” export duties of 20 percent – the maximum level permitted under Annex 6 of the Accession Protocol.

322. On January 2, 2010, China brought into effect the *Circular of the General Office of the State Council on Taking Comprehensive Measures to Control the Extraction and Production of High Alumina Clay and Fluorspar*.<sup>389</sup> On March 1, 2010, China brought into effect the *Public Notice on Fluorspar Industry Entrance Standards*<sup>390</sup> and the *Public Notice on Refractory-Grade Bauxite (High Alumina Bauxite) Industry Entrance Standards*.<sup>391</sup> On April 20, 2010, China brought into effect *Circular on Passing Down the 2010 Controlling Quota of Total Extraction Quantity of High Alumina Clay and Fluorspar*.<sup>392</sup> On May 19, 2010, China brought into effect *Circular of the Ministry of Land and Resources on Passing Down the Controlling Quota of the 2010 Total Production Quantity of High-alumina Refractory-Grade Bauxite and Fluorspar*.<sup>393</sup> These four measures were introduced and brought into effect for the first time in 2010. On June 1, 2010, China brought into effect the *Notice Adjusting the Applicable Tax Rates of Resource*

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<sup>388</sup> The special export duty of 50 percent imposed on yellow phosphorus was in effect at the time the United States filed its request for consultations on June 23, 2009. China ceased applying the special export duty as of July 1, 2010. Nevertheless, the distortive effects from the imposition of the special export duty have continued to impact the international market. See Keith Bradsher, “Business in China Never Easy Gets Harder: Foreign firms complain of protectionism in trade, manufacturing rules,” *International Herald Tribune* (May 17, 2010) at 4 (“China has gradually lowered the export duty since [it first imposed the special export duty]. But Italmatch and other chemical companies are still responding by rushing to expand production in China. ‘We don’t know if and when this can happen again,’ Mr. Iorio said.”) (Exhibit JE-175). As recently as the summer of 2010, rumors were being reported that China would reimpose the yellow phosphorus special export duty. See “China to adjust export tax for some steel, nonferrous metals products,” *Xinhua News Agency* (June 7, 2010) at 1 (“For example, yellow phosphorus . . . is likely to return to its highest [export duty] rate of 185 percent that it carried before the financial crisis,” the official said.”) (Exhibit JE-174).

<sup>389</sup> *Circular of the State Council’s General Office on the Adoption of Comprehensive Measures to Control the Mining and Production of Fireclay and Fluorspar* (State Council [2010] No. 1, January 2, 2010) (Exhibit JE-167). See Exhibit CHN-87.

<sup>390</sup> Exhibit CHN-96.

<sup>391</sup> Exhibit CHN-275.

<sup>392</sup> *Circular on the Allocation of the 2010 Mining Control Targets Applicable to High-Alumina Clay Ore and Fluorspar Ore* (Ministry of Land and Resources (2010) No. 187, April 20, 2010) (Exhibit JE-168). See Exhibit CHN-97.

<sup>393</sup> *Circular on the Allocation of Production Quantity Control Targets Applicable to High-Alumina Clay and Fluorspar for the Year 2010* (MIIT (2010) no. 244, May 19, 2010) (Exhibit JE-169). See Exhibit CHN-98.

*Taxes of Refractory Grade Clay and Fluorspar*<sup>394</sup> (2010 Fluorspar and High Alumina Clay Measures).

323. China argues that these new legal instruments are within the Panel’s terms of reference as “replacement” measures.<sup>395</sup> According to China, the use of the phrase “as well as any amendments or extensions; related measures; replacement measures; renewal measures; and implementing measures” in the U.S. panel request brings into the Panel’s terms of reference the legal instruments that did not take effect until January 1, 2010 – after the Panel’s establishment.<sup>396</sup>

324. Relying on its theory that the Panel may decline to address the measures that are within its terms of reference, in favor of the 2010 measures, China has not even attempted to defend the export duty on bauxite, the export quota on fluorspar, the imposition of both export duties and export quotas on bauxite and fluorspar, or the special export duty on yellow phosphorus, all of which are within the Panel’s terms of reference.<sup>397</sup>

325. China does not contest that the (1) export duties on various forms of bauxite, coke, fluorspar, magnesium, manganese, silicon metal, yellow phosphorus, and zinc, and (2) export quotas on various forms of bauxite, coke, fluorspar, silicon carbide, and zinc, set forth in the U.S. consultations request and panel request are within the Panel’s terms of reference. Instead, China argues that these export restraints “expired” by virtue of the new legal instruments that took effect on January 1, 2010.

326. With respect to the export duty on fluorspar and part of the export quota on bauxite,<sup>398</sup> China attempts to defend the measures at issue by relying on a number of measures that have come into effect, nearly all of them for the first time, during the pendency of this proceeding.<sup>399</sup>

**B. Examination of the Consistency of the Export Quotas and Export Duties within Its Terms of Reference and Findings and Recommendations on Those Measures Secures a Positive Resolution to This Dispute**

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<sup>394</sup> *Notice Adjusting the Applicable Tax Rates of Resource Taxes of Refractory Grade Clay and Fluorspar* Cai Shui [2010] No. 20 (Ministry of Finance and the General Administration of Taxation, effective June 1, 2010) (Exhibit CHN-90).

<sup>395</sup> China’s First Written Submission, para. 70.

<sup>396</sup> China’s First Written Submission, para. 70.

<sup>397</sup> As noted below and in Exhibit JE-134, there are other export quotas and export duties that China does not attempt to defend.

<sup>398</sup> As discussed in more detail below, China defends its export quota on bauxite only as it is imposed on “high alumina clay,” a product that forms a subset of one HS line/commodity code (2508.3000/2508300000) of the materials category “bauxite” subject to export quota and export duty.

<sup>399</sup> As noted above, in January, March, April, May, and June 2010.

327. Pursuant to Article 7 of the DSU, the terms of reference of the Panel are:

To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the United States in document WT/DS394/7, the European Communities in document WT/DS395/7 and Mexico in document WT/DS398/6, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.<sup>400</sup>

The matter referred to the DSB by the United States in document WT/DS394/7 is the matter set forth in the U.S. Panel Request.

328. Both the U.S. panel request as well as the U.S. consultations request set forth and describe export restraints China imposes on industrial raw materials, including: (1) export duties on bauxite, coke, fluorspar, magnesium, manganese, silicon metal, yellow phosphorus, and zinc,<sup>401</sup> and (2) export quotas on bauxite, coke, fluorspar, silicon carbide, and zinc.<sup>402</sup> The U.S. consultations and panel requests set forth non-exhaustive lists of the legal instruments in which the United States understood these measures were reflected. The lists included the following legal instruments:

*Customs Law of the People's Republic of China* (adopted at the 19<sup>th</sup> Meeting of the Standing Committee of the Sixth National People's Congress on January 22, 1987, amended July 8, 2000)

*Regulations of the People's Republic of China on Import and Export Duties* (Order of the State Council (2003) No. 392, adopted at the 26<sup>th</sup> executive meeting of the State Council on October 29, 2003, January 1, 2004)

*Notice Regarding the 2009 Tariff Implementation Program* (State Council Tariff Policy Commission, shuiweihui (2008) No. 40, January 1, 2009)

*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)

*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)

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<sup>400</sup> WT/DS394/8.

<sup>401</sup> WT/DS394/1, p. 2; WT/DS394/7, p. 4-6.

<sup>402</sup> WT/DS394/1, p. 1; WT/DS394/7, p. 2-4.

*Measures for the Administration of License for the Export of Goods* (Order of the Ministry of Commerce (2008) No. 11, July 1, 2008)

*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)

*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)

*Implementation Rules of Export Quota Bidding for Industrial Products* (Ministry of Foreign Trade and Economic Cooperation, November 8, 2001)

*2009 Coke Export Quota Declaration Conditions and Declaration Procedures* (Ministry of Commerce, Notice (2008) No. 76, October 13, 2008)

*Notice “2009 Export Licensing Management Commodities List”* (Ministry of Commerce and General Administration of Customs, Notice (2008) No.

*Notice Regarding 2009 Export Quota Amounts for Agricultural and Industrial Products* (Ministry of Commerce, Notice (2008) No. 83, January 1, 2009)

329. Accordingly, the DSB has charged the Panel with: (1) examining, inter alia, the export duties and export quotas in light of paragraph 11.3 of the Accession Protocol and Article XI:1 of the GATT 1994 as set out in the U.S. panel request and (2) making findings that will assist the DSB in making recommendations or giving rulings pursuant to the Accession Protocol and the GATT 1994. Making findings on these measures is the way to secure a “positive solution to the dispute” in the sense of Article 3.7 of the DSU.

330. Article 11 of the DSU further elaborates the task of the Panel. Article 11 provides that:

The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. . . . <sup>403</sup>

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<sup>403</sup> DSU, Art. 11 (emphasis added).

Pursuant to Article 11 of the DSU, the Panel is to make an objective assessment of the quotas and duties the raw materials at issue, including the applicability of and conformity with Article XI:1 of the GATT 1994, paragraphs 162 and 165 of China’s Working Party Report, and paragraphs 1.2 and 11.3 of the Accession Protocol, and to make any other findings in order to assist the DSB in making the appropriate recommendations and rulings. What China appears to overlook, then, is that making findings and recommendations on these export quotas and export duties are not a matter of the Panel’s “discretion.”

331. Beyond the flaws in China’s understanding of the Panel’s obligations under the DSU, China’s theory depends upon a logical fallacy that bears note. According to China, findings on the export quotas and export duties that China applied when the Panel was established would not be “of use” because the legal instruments imposing those export quotas and duties “no longer exist” today and findings on the legal instruments challenged in the panel request would be moot. Yet, by China’s logic, findings on the legal instruments that took effect on January 1, 2010, after panel establishment, would still fail to serve a purpose or be useful to complainants. The adoption of this Panel’s report and any Appellate Body report will not take place before 2011. At that point, different legal instruments will have taken effect and the legal instruments that took effect on January 1, 2010 will also have “ceased to exist.” In effect, accepting China’s theory would render it impossible to obtain meaningful relief from dispute settlement proceedings.

**C. The Panel Has the Authority and the Mandate to Make Recommendations on the Export Quota and Export Duty Legal Instruments Challenged in the Panel Request and Such Recommendations Are Critical to Securing a Positive Solution to This Dispute**

332. Contrary to China’s suggestion, the Panel has the authority and the obligation to make a recommendation on the legal instruments imposing the export quotas and export duties in effect on various forms of bauxite, coke, fluorspar, silicon carbide, and zinc and various forms of bauxite, coke, fluorspar, manganese, magnesium, silicon metal, yellow phosphorus, and zinc respectively when the Panel was established. As discussed above, Article 19.1 of the DSU requires a panel to make recommendations where it makes a finding of inconsistency. As Article 19.1 states, in relevant part: “Where a panel . . . concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement.”<sup>404</sup> Accordingly, the Panel is authorized and charged by the DSU to make recommendations on the measures in its terms of reference – which includes the export quotas and export duties applied through the legal instruments that are listed in the panel request.

333. China refers to a statement made by the Appellate Body in *US – Certain EC Products* as support for the proposition that the Panel accordingly has no authority to make recommendations

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<sup>404</sup> DSU, Art. 19.1 (emphasis added, footnote reference omitted).

on measures where the legal instrument imposing that measure is no longer in effect, yet the Appellate Body’s statement in that report does not support China’s position. In *US – Certain EC Products*, the measure at issue had ceased to exist prior to the establishment of the panel’s terms of reference.<sup>405</sup> Here, the legal instruments imposing the export duties and export quotas challenged in the U.S. panel request were in effect when the Panel was established.<sup>406</sup> Furthermore, various panels and the Appellate Body have, in accordance with Article 19.1 of the DSU, made recommendations on measures when they have found a measure to be inconsistent even though that measure may have been modified or ceased to have effect during the course of panel proceedings.<sup>407</sup>

334. Accordingly, China’s argument and assertion are incorrect. The Panel has the authority and obligation to make recommendations on the legal instruments imposing the export quotas on the various forms of bauxite, coke, fluorspar, silicon carbide, and zinc and export duties on the various forms of bauxite, coke, fluorspar, manganese, magnesium, silicon metal, yellow phosphorus, and zinc that are challenged in the U.S. panel request.

**D. The Panel Should Not — and Cannot — Make Findings or Recommendations on the Legal Instruments Taking Effect on January 1, 2010 Imposing Export Quotas and Export Duties on Certain of the Raw Materials at Issue**

335. The legal instruments that took effect on January 1, 2010, *i.e.*, after panel establishment, are outside the Panel’s terms of reference. As discussed above, the U.S. panel request forms the basis of this Panel’s terms of reference. The U.S. panel request includes the following legal instruments which, together with other listed legal instruments, imposed export quotas on various forms of bauxite, coke, fluorspar, silicon carbide, and zinc and export duties on various forms of bauxite, coke, fluorspar, manganese, magnesium, silicon metal, yellow phosphorus, and zinc:

*Notice Regarding the 2009 Tariff Implementation Program* (State Council Tariff Policy Commission, shuiweihui (2008) No. 40, January 1, 2009)

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<sup>405</sup> Appellate Body Report, *US – Certain EC Products*, paras. 60-82.

<sup>406</sup> See footnote *supra* regarding yellow phosphorus.

<sup>407</sup> See, *e.g.*, Panel Report, *EC – Information Technology Products*, para. 7.167 (“any repeal [of the measure at issue] would have taken place after the panel was established and its terms of reference set. Therefore, the Panel considers that it may make recommendations with respect to these measures”) and fn. 265 (“The Appellate Body has explained that it would be inappropriate for a panel to make recommendations with respect to measures that were repealed or expired prior to the establishment of the panel.” Citing Appellate Body Report, *US – Certain EC Products*, para. 81; Appellate Body Report, *US – Upland Cotton*, para. 272; and Appellate Body Report, *EC – Bananas III (Article 21.5 – Ecuador II)*, para. 271); Panel Report, *EC – Biotech*, paras. 8.16 and 8.36; Appellate Body Report, *EC – Customs*, para. 310; Appellate Body Report, *Dominican Republic – Cigarettes*, para. 129.



*Notice “2009 Export Licensing Management Commodities List”* (Ministry of Commerce and General Administration of Customs, Notice (2008) No.

*Notice Regarding 2009 Export Quota Amounts for Agricultural and Industrial Products* (Ministry of Commerce, Notice (2008) No. 83, January 1, 2009)

The measures that took effect on January 1, 2010 are, according to China:

*2010 Catalogue of Goods Subject to Export Licensing Administration*

*2010 Tariff Implementation Plan*

*Notice on Announcement of the 2010 Export Quota Amounts for Agricultural and Industrial Products*

The U.S. panel request did not include these measures because none of these measures existed at the time the U.S. panel request was filed.

336. China argues that, because the legal instruments listed in the U.S. panel request include the phrase “as well as any amendments or extensions; related measures; replacement measures; renewal measures; and implementing measures,” the legal instruments that took effect on January 1, 2010, constitute “replacement measures” or “renewal measures” that bring them within the Panel’s terms of reference.<sup>408</sup> However, China misreads the U.S. panel request.

337. As the panel in *India – Additional Duties* cautioned, “. . . as a panel, we must be careful not to rule upon a measure that the complaining party never intended to be included within our terms of reference and is not requesting to be included.”<sup>409</sup> Contrary to China’s assertion, these legal instruments do not constitute “replacement measures” or “renewal measures” as the United States meant such measures in its panel request. The reference in the U.S. panel request to “replacement measures” and “renewal measures” is a reference to legal instruments in existence at the time of the U.S. panel request but of which the United States may not have been aware, that formally “replaced” or “renewed” a legal instrument listed in the U.S. panel request but did not change its content or effect. The Panel’s terms of reference are therefore not broad enough to include these legal instruments that took effect on January 1, 2010 (the January 1, 2010 Measures).

338. Furthermore, the January 1, 2010 Measures “changed the essence” of the legal instruments that were in effect at the time of panel establishment, and thus are not sufficiently similar to the measures that are within the Panel’s terms of reference to be considered in this

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<sup>408</sup> China’s First Written Submission, para. 70.

<sup>409</sup> Panel Report, *India – Additional Duties*, para. 7.59.

dispute. As discussed above, the January 1, 2010 Measures changed the scope of applicability of the instruments in effect at the time of the panel’s establishment in 2009. The January 1, 2010 Measures imposed export quotas and export duties on fewer of the raw materials at issue, subjecting both fluorspar and bauxite to only one type of export restraint instead of both types.

339. WTO panels and the Appellate Body have declined to make findings on legal instruments that change the essence of the measures properly included in the panels’ terms of reference and challenged in the panel request.<sup>410</sup> In doing so, prior panels have considered that when a responding Member modifies or repeals a measure that is within the panel’s terms of reference and that measure could be easily re-imposed, it is appropriate under Article 3.7 of the DSU for the panel to rule on the measure challenged in the panel request without regard to the later changes, in order to secure a positive solution to the dispute.<sup>411</sup>

340. The same reasoning applies here: China has the ability to bring into effect new export duties and new quotas at any point in the year, within days of announcing them. For example, China announced its intention to impose a special export duty of 100 percent on yellow phosphorus on May 14, 2008. Six days later, on May 20, 2008, the 100 percent special export duties went into effect.<sup>412</sup> In another example, China announced on June 11, 2007 that it would subject the exportation of molybdenum and indium to export quota licensing for the first time, effective June 18, 2007.<sup>413</sup> In both instances, China was able to introduce substantial and significant export duties and export quotas on new products within a week’s time. In fact, earlier this summer, media reports in China were forecasting the reintroduction of special export duties on yellow phosphorus. Furthermore, as demonstrated in the January 1, 2010 Measures, China is able to release products from the imposition of export duties and export quotas just as nimbly. Thus, consistent with the approach of previous panels and the Appellate Body, it would be inappropriate for the Panel to make findings and recommendations on the January 1, 2010 Measures.

#### **E. Examining the January 1, 2010 Measures Creates a “Moving Target” and Permits China to Shield Its Measures from Review**

341. Were the Panel to consider the January 1, 2010 Measures and the 2010 Fluorspar and High Alumina Clay Measures adopted in January, March, April, May, and June of 2010, this

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<sup>410</sup> Appellate Body Report, *Chile – Price Band System*, paras. 135-139; Panel Report, *EC – Information Technology Products*, para. 7.139; Panel Report, *India – Additional Duties*, paras. 7.61-7.63.

<sup>411</sup> Panel Report, *EC – Information Technology Products*, para. 7.165; Panel Report, *India – Duties*, paras. 7.65-7.70.

<sup>412</sup> See U.S. First Written Submission para. 85 (referencing the *May 2008 Tariff Commission Special Export Duty Notice* and the *May 2008 Customs Special Export Duty Notice* (Exhibits JE-69 and JE-70).

<sup>413</sup> See *Announcement No. 54, 2007 Releasing the Catalogue of Indium and Molybdenum Products Subject to Export Quotas Licensing Administration* (Ministry of Commerce and General Administration of Customs, June 11, 2007) (Exhibit JE-170).

would permit China, by changing the parameters of the Panel’s review, to shield aspects of its measures from proper review. As the Appellate Body stated in *Chile – Price Band System*:

We emphasize that we do not condone a practice of amending measures during dispute settlement proceedings if such changes are made with a view to shield a measure from scrutiny by a panel or by us. . . . [G]enerally speaking, the demands of due process are such that a complaining party should not have to adjust its pleadings throughout the dispute settlement proceedings in order to deal with a disputed measure as a ‘moving target’.<sup>414</sup>

342. The 2010 Fluorspar and High Alumina Clay Measures (as well as any it will put into effect in 2011 and the future) may be relevant to the resolution of the present dispute. However, their relevance would properly be considered in any compliance phase of this dispute. In further support of this point, the United States notes that despite their potential relevance to an examination of the January 1, 2010 Measures, by virtue of the fact that these measures were not introduced until well into these panel proceedings, the January 1, 2010 Measures were not “consulted on” in the sense of DSU Article 4.2 and therefore do not form part of the “measures at issue” under Article 6.2 of the DSU.

343. Accordingly, in the preceding discussion, the United States did not address the quotas and duties imposed by the January 1, 2010 Measures or the 2010 Fluorspar and High Alumina Clay Measures, except in an *arguendo* context, since they are not relevant to the quotas and duties in the Panel’s terms of reference.

**V. CHINA’S ADMINISTRATION AND ALLOCATION OF ITS EXPORT QUOTAS ARE INCONSISTENT WITH CHINA’S OBLIGATIONS UNDER THE ACCESSION PROTOCOL, THE WORKING PARTY REPORT, AND THE GATT 1994**

344. As the United States explained in its First Written Submission, China’s administration and allocation of its export quotas are inconsistent with China’s obligations under the Accession Protocol, the Working Party Report, and the GATT 1994. In this Part of the U.S. Second Written Submission, the United States will show that China has failed to rebut the U.S. showing that China’s measures involving the administration and allocation of export quotas are inconsistent with China’s WTO obligations

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

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<sup>414</sup> Appellate Body Report, *Chile – Price Band System*, para. 144.

345. As the United States explained in its First Written Submission, China's measures restricting access to its export quotas are inconsistent with China's trading rights obligations under China's Protocol of Accession and Working Party Report.

346. With regard to coke exports, China restricts enterprises' right to export by requiring enterprises to satisfy certain criteria in order to be eligible to export under the quota. China subjects enterprises seeking to export coke under the quota to an application procedure that includes an examination of the applicant enterprises' "export scale."<sup>415</sup> In addition, China requires enterprises seeking to export coke to satisfy certain prior export experience and minimum registered capital requirements.<sup>416</sup> The measures establishing this application procedure and eligibility criteria are inconsistent with China's trading rights commitments in paragraph 5.1 of the Accession Protocol, as well as paragraphs 83 and 84 of the Working Party Report.<sup>417</sup>

347. With regard to exports of bauxite, fluorspar, and silicon carbide, China administers its export quotas through a quota bidding system. China subjects enterprises seeking to participate in the bidding system to an application procedure and imposes conditions for qualification to bid. These conditions include registered capital and prior export experience requirements.<sup>418</sup> These measures are also inconsistent with China's trading rights commitments in paragraph 5.1 of the Accession Protocol, as well as paragraphs 83 and 84 of the Working Party Report.<sup>419</sup>

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<sup>415</sup> U.S. First Written Submission, para. 281.

<sup>416</sup> U.S. First Written Submission, paras. 279-282.

<sup>417</sup> Paragraph 84(a) of the Working Party Report confirms China's commitment to eliminate its "examination and approval" system of trading rights within three years of accession. In addition, 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 export. Finally, paragraph 83(b) confirms China's commitment to eliminate its "examination and approval" system for enterprises to be granted trading rights including by eliminating any minimum registered capital requirements. These same commitments are reaffirmed with respect to foreign enterprises in China in paragraph 84(b).

As a threshold matter, we note that paragraphs 83 and 84 of the Working Party Report are explicitly included in paragraph 342 of the Working Party Report. As a result, these paragraphs of the Working Party Report are also an integral part of the WTO Agreement by virtue of paragraph 1.2 of the Accession Protocol. China's assertion, therefore, that the obligations assumed under paragraphs 83 and 84 of the Working Party Report are "particular applications of the general obligation, assumed under Paragraph 5.1 of the Accession Protocol, to grant the right to trade" is unclear. China's First Written Submission, paras. 624-25. However, to the extent that such an assertion is intended to suggest that paragraphs 83 and 84 of the Working Party Report do not themselves contain enforceable commitments, such a suggestion is contradicted by the explicit text of paragraph 1.2 of the Accession Protocol and prior panel and Appellate Body reports.

<sup>418</sup> U.S. First Written Submission, paras. 285-86.

<sup>419</sup> U.S. First Written Submission, paras. 287-89. China also asserts that the measures challenged by the United States have expired and replaced with new measures in 2010. China's First Written Submission, paras. 620-21. The Panel's terms of reference, however, were set in 2009 at the time of panel establishment, and the 2009 quota administration measures are the measures which are within the Panel's terms of reference. The United States also notes that the 2010 measures – which China presents with its First Written Submission – appear to set forth the same

348. In response, China makes three principal arguments. None of these withstands scrutiny.

349. First, China claims an inherent and abstract “right to regulate,” under which no obligation in the Protocol of Accession or Working Party Report can “impair China’s power to impose WTO-consistent import licensing, TBT, and SPS measures.”<sup>420</sup> This argument is entirely circular, and thus without merit. China’s quota administration measures are in fact not consistent with China’s WTO obligations regarding trading rights, as contained in its Protocol of Accession and Working Party Report. Thus, an inherent “right to regulate” through adoption of “WTO-consistent” measures cannot serve as a basis for defending China’s breach of its trading rights obligations.

350. Second, China presents a similar argument that China is permitted to limit the “right to export” because China maintains an export quota. China argues that the language in paragraph 5.1, “without prejudice to the right to regulate trade in a manner consistent with the WTO Agreement,” permits China to maintain any regulations administering a quota if that quota is consistent with the WTO Agreement.<sup>421</sup> However, this reflects a mis-reading of that provision. Paragraph 5.1 confirms that the trading rights commitments do not prejudice China’s right to regulate trade in a manner consistent with the WTO Agreement. Regulations on trade *e.g.*, TBT or SPS requirements may have the effect of limiting the right to trade, but China is permitted to impose such regulations provided that they are consistent with the WTO Agreement. The measures at issue with respect to trading rights commitments are not regulating trade in any manner other than by limiting who may export. Thus, under China’s interpretation, the trading rights commitment in paragraph 5.1 is without prejudice to China’s right to breach its trading rights commitments. Such an interpretation is, like China’s first argument, entirely circular, and without merit.

351. Third, China relies on Article 3.5(j) of the Import Licensing Agreement as “context” for interpreting its trading right commitments.<sup>422</sup> Article 3.5(j) states that Members, in allocating non-automatic import licenses, “should consider the import performance of the applicant.”<sup>423</sup> This statement – which only applies to non-automatic import licenses, and is not stated as a commitment of a Member – cannot be used as “context” to override China’s explicit obligation in paragraph 83 of the Working Party Report to eliminate export performance requirements.

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restrictions on the right to trade as the 2009 measures. *See* Exhibits CHN-307, 311.

<sup>420</sup> China’s First Written Submission, paras. 623-624 (citing *China-Audiovisual Products*, emphasis added).

<sup>421</sup> China’s First Written Submission, paras. 624-29.

<sup>422</sup> China’s First Written Submission, para. 631.

<sup>423</sup> WTO Agreement on Import Licensing Procedures, Art. 3(5)(j). Note that China is wrong in stating that this provision “specifically requires” a Member to consider import performance. China’s First Written Submission, para. 631. A statement about what a Member “Should” do – as set out in Article 3(5)(j) – does not impose a “requirement.”

352. Accordingly, for the reasons set forth in the U.S. first written submission, China's measures administering the export quota on coke and the export quota bidding procedure for bauxite, fluorspar, and silicon carbide are inconsistent with China's trading rights commitments.

**B. China's Administration of its Export Quotas Is Inconsistent with Article X:3(a) of the GATT 1994**

**1. The United States Has Shown that China's Administration of its Export Quotas is Partial and Unreasonable**

353. In its First Written Submission, the United States established a prima facie case that China's administration of its export quota on coke, bauxite, fluorspar, and silicon carbide is partial and unreasonable in breach of China's obligations under Article X:3(a) of the GATT 1994.<sup>424</sup>

354. The United States demonstrated that the CCCMC is a membership association of private commercial participants in the metals, minerals, and chemicals industries, representing individual exporters of industrial raw materials as well as their competitors and the competitors of their foreign customers. The United States also demonstrated that China assigns the CCCMC a direct role in the administration of the export quota for coke and the export quota bidding regime for bauxite, fluorspar, and silicon carbide.<sup>425</sup>

355. The CCCMC is responsible for reviewing applications for allocations under the export quota for coke. Enterprises applying for a part of the coke export quota are required to submit to the CCCMC confidential and sensitive business information, including their past export invoices.<sup>426</sup>

356. The CCCMC is also responsible for examining the qualifications of bidders seeking allocations under the bauxite, fluorspar, and silicon carbide export quotas, collecting the total award price from successful bidders, accepting and approving applications for assignment of unused quotas, and issuing certificates to enterprises awarded an allocation of the relevant export quota.<sup>427</sup> Enterprises seeking to an allocation under an export quota subject to quota bidding are required to submit confidential and sensitive business information to the CCCMC, including the

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<sup>424</sup> U.S. First Written Submission, paras. 292-313 and 366-374.

<sup>425</sup> U.S. First Written Submission, paras. 205-228.

<sup>426</sup> U.S. First Written Submission, para. 295 (citing *2009 Coke Export Quota Application Procedures* (Exhibit JE-85)).

<sup>427</sup> U.S. First Written Submission, para. 307.

enterprises' balance sheet and income statement, information about their registered capital, sales revenue, net profits, and past import and export data.<sup>428</sup>

357. Based on these facts, the United States established a prima facie case that China's administration of the export quota for coke, bauxite, fluorspar, and silicon carbide is partial and unreasonable, in breach of China's obligations under Article X:3(a).

358. First, with respect to partiality, the United States demonstrated that China's quota administration, which requires exporters to share confidential and sensitive business information with the CCCMC, a membership organization representing those individual exporters as well as their competitors and the competitors of their foreign customers, presents an inherent conflict of interest. The required flow of the confidential and sensitive business information of an exporter to an entity representing interests adverse to that exporter results in partial administration of the quota. This is supported by the panel's reasoning in *Argentina – Leather*. That panel stated that "the inappropriate flow of one private person's confidential information to another as a result of the administration of [trade] laws" leads to "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>429</sup>

359. Second, with respect to unreasonableness, the United States demonstrated that China's quota administration, which requires exporters to share confidential and sensitive business information with the CCCMC is also unreasonable because the information required to be shared has no bearing on the stated objective for sharing this information – *i.e.*, administering allocations of the relevant export quotas. This is also supported by the panel's reasoning in *Argentina – Leather*. That panel concluded that the administration of Argentina's Customs law, which required industry association representatives to see the pricing information of the suppliers to the association's members, including the destination and quantities involved, was unreasonable because it was not relevant to the objective of the administrative task at issue.<sup>430</sup>

## **2. China has not Rebutted the U.S. Showing that China's Administration of Its Export Quotas Are Partial and Unreasonable**

360. In its rebuttal, China presents three sets of arguments in an attempt to rebut the U.S. showing that China's administration of its export quotas are partial and unreasonable. None of these arguments has merit.

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<sup>428</sup> See U.S. First Written Submission, para. 309 (citing *2009 First Round Bidding Invitation* (Exhibit JE-90) and *2009 Second Round Bidding Invitation* (Exhibit JE-91)).

<sup>429</sup> Panel Report, *Argentina Leather*, paras. 11.99-11.100 (emphasis added).

<sup>430</sup> Panel Report, *Argentina Leather*, paras. 11.90-11.94.

**a. Participation by the CCCMC Secretariat Does Not Cure the Inherent Conflict of Interest Presented in the CCCMC’s Involvement in Quota Administration**

361. China argues that the fact that the CCCMC administers the export quotas through its Secretariat means that there is no inherent conflict of interest present in the CCCMC’s intimate involvement in quota administration. As the United States stated in its answer to the Panel’s Question 33,<sup>431</sup> however, the involvement of the CCCMC Secretariat or “Standing Administrative Organ” in quota administration does not somehow immunize the involvement of the CCCMC in the quota administration process from resulting in partiality and unreasonableness.

362. In fact, as the United States explained in its First Written Submission, the conflict of interest presented by the CCCMC’s involvement in quota administration derives from the requirement that an individual exporter applicant must share its confidential and sensitive business information with an entity that represents the interests of its competitors and potential customers.<sup>432</sup> CCCMC Secretariat staff still conduct their work on behalf of an organization – the CCCMC – that represents the interests of the competitors and potential customers of applicant exporters seeking an allotment under one of the export quotas at issue. Accordingly, CCCMC Secretariat staff still represent the interests of the CCCMC’s membership while administering the export quotas. As a result of the access to confidential and sensitive business information of an individual exporter that this administration process provides to the CCCMC Secretariat, the administration of the export quotas still implicates an inherent conflict of interest.

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<sup>431</sup> U.S. Answers to the Panel’s First Set of Questions, Question 33 (“Based on the organizational chart of the CCCMC provided in Exhibit CHN-316 and the CCCMC Charter, it appears that the entity or entities comprising the CCCMC Secretariat or “Standing Administrative Organ” are established by and report to the CCCMC Standing Committee or Standing Governing Board, which in turn reports to the CCCMC Council or Board of Directors. Members of that body in turn are elected by and answer to the Members’ General Meeting – which is comprised of representatives who are elected by and answer to the CCCMC’s membership. Accordingly, based on the chain of reporting, the CCCMC Secretariat or Standing Administrative Organ appears very much to be a body representing and serving the interests of the CCCMC’s membership. Its involvement in the allocation of China’s export quotas (as well as the administration of the minimum export price system) demonstrates partiality and unreasonableness in the administration of China’s export laws, regulations, and rules.”)

<sup>432</sup> See, e.g., U.S. First Written Submission, paras. 298, 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.”).



**b. The Information an Exporter Is Required to Share with the CCCMC in Apply to Export Under a Quota Is Not Relevant to the Stated Objective for the CCCMC's Involvement**

363. China argues that the CCCMC Secretariat only requests (and thus only has access to) information that is needed to perform CCCMC's role in administering the export quotas.<sup>433</sup> China's argument is unpersuasive. There is no reason why confidential and sensitive items such as an exporter's past export invoices, balance sheet and income statement, information about its registered capital, sales revenue, net profits, and past import and export data, must be shared with the CCCMC in order for the CCCMC to process the exporter's application or otherwise complete tasks related to maintaining the functioning of the export quota and export quota bidding regimes.

**c. Effective Safeguards Do Not Exist to Prevent the Inappropriate Flow of Information in China's Administration of the Export Quotas**

364. China argues that confidentiality agreements executed between CCCMC Secretariat staff and the CCCMC serve as a safeguard to prevent the inappropriate flow of confidential and sensitive business information from an exporter to an entity representing interests adverse to that exporter.<sup>434</sup> This confidentiality agreement, however, does not constitute an effective safeguard to prevent the flow of information that renders China's quota administration partial. First, the confidentiality agreement is between the CCCMC Secretariat staff member and the CCCMC. Any "business secrets" of an individual exporter that is obtained by the staff member in the course of his or her work can be shared within the CCCMC and form the basis for decisions or actions taken by the CCCMC in the interests of its membership – which, by virtue of the membership's inclusion of parties with interests adverse to the exporter, may be adverse to the interests of the individual exporter.

365. Second, the terms of the confidentiality agreement contemplate that the "business secrets" of an exporter applicant may be shared with other parties.<sup>435</sup> While the agreement requires the staff member to seek authorization and "adopt appropriate protection measures," this evidences the inherent precariousness of the CCCMC's intimate involvement in the administration of these export quotas and the vulnerability of the applicant exporter's confidential and sensitive information in the process.

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<sup>433</sup> China First Written Submission, para. 692-724.

<sup>434</sup> China First Written Submission, paras. 719-724.

<sup>435</sup> Exhibit CHN-327, para. II.6.

366. Finally, the confidentiality agreement is executed as part of an employment contract.<sup>436</sup> However, not all CCCMC Secretariat staff are “employees” of the CCCMC. The *Regulations for Personnel Management of Chambers of Commerce* provide that the staffing needs of a Chamber of Commerce’s “standing administrative structure,” *i.e.*, Secretariat, must primarily be “covered by selecting people from member companies.”<sup>437</sup> A small part of the staff may be directly seconded from member companies and, if other means of meeting its staffing needs are not sufficient, a chamber of commerce may advertise openly and recruit from the general public.<sup>438</sup> The *Regulations for Personnel Management of Chambers of Commerce* provide that employment contracts should be executed for those staff members recruited from non-member companies or from the general public.<sup>439</sup> Accordingly, not all Secretariat staff are “employees” who execute employment contracts – and confidentiality agreements – with the CCCMC.

367. In fact, most Secretariat staff are required by the *Regulations for Personnel Management of Chambers of Commerce* to be recruited from member companies or directly second from member companies. This further undermines China’s attempts to portray the involvement of the CCCMC’s Secretariat as a mitigation on the inherent conflict of interest present in the CCCMC’s involvement in the administration of the export quotas.

368. Finally, China also argues that the requirement that the CCCMC comply with China’s laws and regulations also serves as a safeguard to prevent the inappropriate flow of an individual exporter’s confidential and sensitive business information. However, China does not identify a law relevant to protecting confidential and sensitive business information of an exporter from being shared inappropriately. Accordingly, this also does not constitute an effective safeguard that would render China’s administration of its export quotas impartial.

### 3. Conclusion

369. For the above reasons, China has failed to rebut the U.S. showing that its administration of its export quotas through the CCCMC is partial and un reasonable.

#### **C. China’s Total Award Price Requirement Under the Export Quota Bidding Regime Is Inconsistent with Article VIII:1(a) of the GATT 1994**

370. As part of China’s export quota bidding procedure for the export quotas imposed on bauxite, fluorspar, and silicon carbide, China requires exporters that are allocated a portion of the quota through the bidding procedure to pay a fee (“total award price”) in order to be able to

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<sup>436</sup> Exhibit CHN-327 at 1 (“Whereas Party B, as an employee of Party A . . .”).

<sup>437</sup> Regulations for Personnel Management for Chambers of Commerce (Exhibit JE-102), Art. 8.

<sup>438</sup> Regulations for Personnel Management for Chambers of Commerce (Exhibit JE-102), Art. 8.

<sup>439</sup> Regulations for Personnel Management for Chambers of Commerce (Exhibit JE-102), Art. 11.

export.<sup>440</sup> As the United States set forth in its first written submission, the total award price requirement is inconsistent with Article VIII:1(a) of the GATT 1994.<sup>441</sup>

371. China’s defense consists of two principal arguments. Neither of these withstands scrutiny. First, China contends that the bid-winning price is not a fee or charge connected with exportation.<sup>442</sup> The United States refers the Panel to the U.S. answer to Question 6 from the Panel demonstrating that China’s assertions in this regard are without merit.<sup>443</sup> The total award price is a “fee or charge of whatever character . . . imposed . . . on or in connection with . . . exportation” as set forth in Article VIII:1(a) and therefore comes within the scope of that provision.

372. Second, China asserts that the total award price is “part and parcel of the administration of the quota.” According to China, because the total award price is part of China’s administration of the quota, it is not subject to Article VIII:1. This assertion is directly contrary to the text of Article VIII. A licensing measure that administers a quota would also need to be consistent with Article VIII:1 since Article VIII:4 confirms that Article VIII:1 applies to measures relating to “quantitative restrictions” and “licensing.” Thus, there is no basis for asserting that a measure administering a quota is not subject to the disciplines of Article VIII:1. China also asserts broadly that “[p]rovided that a Member maintains rules governing quota allocation that are public, do not discriminate between trading partners, or otherwise do not constitute non-uniform, partial, and unreasonable administration, a Member has the freedom to choose how to allocate quotas.” There does not appear to be any relationship between this statement and the text of the GATT 1994. As just discussed, Article VIII:4 makes clear that licensing measures are subject to the disciplines of Article VIII:1. China’s assertions regarding an economically efficient way to allocate a quota<sup>444</sup> are similarly beside the point in the context of the legal question of whether China’s total award price requirement is consistent with Article VIII:1(a). For these reasons as more fully set forth in the U.S. first written submission, the total award price is inconsistent with the obligation in Article VIII:1(a).

373. The United States has also explained that the total award price requirement is inconsistent with Part I, paragraph 11.3 of the Accession Protocol.<sup>445</sup> China contends that the total award price is not a tax or charge “applied to exports” in the meaning of paragraph 11.3 of the Accession Protocol.<sup>446</sup> China’s arguments in this regard are without merit. China relies on the assertion that the total award price is not set by the government, but “instead reflects the bid-

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<sup>440</sup> U.S. First Written Submission, paras. 167-76.

<sup>441</sup> U.S. First Written Submission, paras. 315-30.

<sup>442</sup> China’s First Written Submission, paras. 579-92.

<sup>443</sup> U.S. Answers to the First Set of Questions from the Panel, paras. 7-13.

<sup>444</sup> China’s First Written Submission, paras. 596, 600.

<sup>445</sup> U.S. First Written Submission, para. 330.

<sup>446</sup> China’s First Written Submission, paras. 602-06.

winning exporters’ expectations about the value of exports of a particular quantity of goods.”<sup>447</sup> However, this assertion is directly contradicted by the fact that China maintains a number of measures that impose the requirement on enterprises exporting under the quota to pay the total award price in order to export.<sup>448</sup> Indeed, China concedes that the payment of the total award price “is required to obtain a *Certificate for the Application of an Export License of Commodities Subject to Quota Bidding*.”<sup>449</sup> Thus, it is clear that the Chinese government imposes the total award price requirement as a condition for receiving a license to export. Finally, in asserting that the total award price is not “applied to exports,” China states that the total award price is incurred “prior to exportation,” “not incurred upon the goods crossing the border.”<sup>450</sup> Paragraph 11.3 does not state that the goods must be imposed on goods as they are “crossing the border.” A tax or charge “applied to exports” could be imposed in a number of different ways, and would not need to be applied at the precise moment when goods cross the border. Accordingly, this assertion also has no merit.

374. In sum, the total award price is inconsistent with Article VIII:1(a) of the GATT 1994. In addition, the total award price is also inconsistent with paragraph 11.3 of the Accession Protocol, because it is a tax or charge applied to exports that is not provided for in Annex 6 and is not applied in conformity with Article VIII.

## VI. EXPORT LICENSING

### A. China’s Export Licensing Is Not Automatic and Inconsistent with Article XI:1 of the GATT 1994

375. The United States demonstrated in its First Written Submission that China subjects the exportation of bauxite, coke, fluorspar, manganese, silicon carbide, and zinc<sup>451</sup> to export licensing that is non-automatic, in breach of the requirements of Article XI:1 of the GATT 1994.<sup>452</sup> China uses this export licensing system, maintained pursuant to Article 19 of China’s *Foreign Trade Law*, for products designated for restricted exportation. Exporters seeking to export such products are required to apply for and obtain a license before they are permitted to export. Unlike the automatic export licensing system that China maintains pursuant to Article 15 of the *Foreign Trade Law*, which China employs solely for monitoring purposes, applications for licenses for export-restricted products are not required to be approved in all cases.<sup>453</sup>

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<sup>447</sup> China’s First Written Submission, para. 604.

<sup>448</sup> U.S. First Written Submission, paras. 167-76.

<sup>449</sup> China’s First Written Submission, para. 605 (emphasis added).

<sup>450</sup> China’s First Written Submission, para. 605.

<sup>451</sup> See Exhibit JE-6 for specific products subject to export licensing.

<sup>452</sup> U.S. First Written Submission, sections III.D and F and IV.D.

<sup>453</sup> *Foreign Trade Law*, Art. 15 (Exhibit JE-72).

376. China responds that its export licensing system for products designated for restricted exportation under Article 19 of the *Foreign Trade Law* is “automatic” – in the sense that export licenses are issued in all cases, provided pre-established conditions are met.<sup>454</sup>

377. However, this argument is belied by the measures governing China’s export licensing for products subject to restricted exportation. Regardless of whether China wishes to call such export licensing, *i.e.*, export licensing maintained under Article 19 of the *Foreign Trade Law*, this licensing system provides China with the authority and the ability to control and restrict, *i.e.*, impose limiting conditions, on products designated for export restriction,<sup>455</sup> whether through the imposition of quota qualification and allocation conditions,<sup>456</sup> minimum price conditions,<sup>457</sup> or any other conditions that Chambers of Commerce like the CCCMC may choose to impose.<sup>458</sup> As an example, in June 2007, China was able to implement and impose export quotas for the first time on indium and molybdenum within seven days of announcing its intention to do so, by virtue of the fact that indium and molybdenum were already designated as products subject to restricted exportation and subject to non-automatic licensing.<sup>459</sup>

378. Moreover, even China’s own WTO notifications show that its export licensing system amounts an export restriction under Article XI:1 of the GATT 1994. In 2006 and 2007, China notified its quantitative restrictions to the WTO Committee on Market Access.<sup>460</sup> In its notification in 2007, China listed all of the products designated for restricted exportation that it subjects to export licensing and export quota licensing, including the products at issue in this dispute.<sup>461</sup> Next to each product, China indicated the type of restriction it imposed on the product and the GATT provision pursuant to which it considered the restriction to be justified. For the products at issue in this dispute, China indicated “Article XI, XX of GATT 1994.”<sup>462</sup>

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<sup>454</sup> China’s First Written Submission, paras. 755, 761-779.

<sup>455</sup> *Foreign Trade Law*, Arts. 16, 17 (Exhibit JE-72); *Import and Export Regulations*, Art. 35 (Exhibit JE-73).

<sup>456</sup> *Export License Measures* (Exhibit JE-74), *Export Quota Measures* (JE-76), *Quota Bidding Measures* (Exhibit JE-77), etc.

<sup>457</sup> *Measures for the Administration of Licensing Entities*, Art. 40(3) (Exhibit JE-75); *Bauxite Branch Coordination Measures*, Art. 7 (Exhibit JE-108).

<sup>458</sup> See *CCCMC Coordination Measures*, Art. 21 (“Meanwhile, if more than half of the voting member companies of the coordination organization agree, CCCMC can request the competent authority to reduce [non-compliant companies’] quotas or stop issuing licenses for the commodities or even withdraw part or all of their export rights.” (Emphasis added.)) (Exhibit JE-107).

<sup>459</sup> *Announcement No. 54, 2007 Releasing the Catalogue of Indium and Molybdenum Products Subject to Export Quotas Licensing Administration* (Ministry of Commerce and General Administration of Customs, June 11, 2007) (Exhibit JE-170).

<sup>460</sup> Committee on Market Access, Note by the Secretariat: Notifications of Quantitative Restrictions G/MA/NTM/QR/1Add.11 (April 11, 2008) (Exhibit JE-171).

<sup>461</sup> Catalogue of Products Subject to Export (Quota) License (2007 QRs of China final) (Exhibit JE-172).

<sup>462</sup> Catalogue of Products Subject to Export (Quota) License (2007 QRs of China final) (Exhibit JE-172).

Accordingly, China itself considers its export licensing for products designated for restricted exportation pursuant to Article 19 of the *Foreign Trade Law* to be a restriction on exportation inconsistent with Article XI:1 of the GATT 1994.

379. China has proffered no arguments or facts to justify its export licensing system. Accordingly, China has not demonstrated that its export licensing on the products at issue can be justified under the GATT 1994.

## VII. MINIMUM EXPORT PRICE

### A. China’s Minimum Export Price Is Inconsistent with Article XI:1 of the GATT 1994

380. The United States has demonstrated that China imposes a minimum export price requirement for bauxite, coke, fluorspar, magnesium, silicon carbide, yellow phosphorus and zinc that restricts the exportation of these products in contravention of Article XI:1 of the GATT 1994.<sup>463</sup> The United States showed that the CCCMC coordinates an export price that all of its members consider a “collective contract”<sup>464</sup> and that export price becomes a required minimum through: (1) a system of “self-discipline,” which China asserts constitutes an actual measure, by which exporters abide by the coordinated price as a minimum;<sup>465</sup> (2) penalties that MOFCOM is authorized to impose for exporting at low prices;<sup>466</sup> (3) licensing authorities that issue licenses on the basis of contract prices meeting or exceeding the coordinated export price;<sup>467</sup> and (4) price review by Customs and the Price Verification and Chop (PVC) procedure.<sup>468</sup>

#### 1. China Continues to Coordinate Export Prices and Those Export Prices Continue to Be Imposed as a Minimum

381. China does not contest that it imposed a minimum export price requirement. China contends, however, that it no longer does so.

382. China’s primary argument in support of this contention is that it has “abandoned export price coordination.”<sup>469</sup> Throughout its argumentation, however, China consistently conflates the concepts of “export price coordination” and the PVC Procedure. As delineated in the prima facie showing made by the United States, export price coordination and the PVC Procedure are two

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<sup>463</sup> U.S. First Written Submission, sections III.G and IV.E.

<sup>464</sup> U.S. First Written Submission, para. 217.

<sup>465</sup> U.S. First Written Submission, paras. 352-353.

<sup>466</sup> U.S. First Written Submission, para. 354.

<sup>467</sup> U.S. First Written Submission, para. 355.

<sup>468</sup> U.S. First Written Submission, paras. 356-361.

<sup>469</sup> China’s First Written Submission, paras. 838-853.

separate elements. China coordinates industry export prices for the raw materials at issue through the coordination activities of the CCCMC. This coordinated export price, in turn, becomes a minimum price requirement through a number of means, including but not limited to the PVC Procedure for yellow phosphorus.

383. Whether or not China repealed the PVC Procedure on May 26, 2008 and whether or not China, through the CCCMC, continued to employ the PVC Procedure after May 26, 2008 affects the question of whether China continues to impose a minimum export price requirement for yellow phosphorus through a procedure that requires the close cooperation of the CCCMC and Customs. It does not affect the question of: (1) whether China continues to coordinate export prices through the CCCMC and (2) whether that export price constitutes a required minimum through other means, including the system of “self-discipline,” MOFCOM penalties, and licensing entities.

384. Although the *2004 PVC Notice* appeared to have been repealed in 2008 by the *2008 PVC Notice*, the United States has provided evidence showing that the PVC Procedure continued to be employed by the CCCMC to enforce coordinated export prices for yellow phosphorus as a minimum through at least October 15, 2009. In response, China has adduced evidence to show that by July 10, 2010, the CCCMC website no longer displayed the *CCCMC PVC Rules* and the *CCCMC Online PVC Instructions*. This only demonstrates, however, that the CCCMC’s continued use of the PVC Procedure ceased some time between October 15, 2009 and July 10, 2010. In any case, long after the *2008 PVC Notice* was issued.

385. China also points to a January 2008 measure that it argues evidences the fact that CCCMC had stopped employing the PVC Procedure. However, it is difficult to make sense of the meaning of this measure because in January 2008, the *2004 PVC Notice* requiring use of the PVC Procedure for yellow phosphorus exports was still in effect. It was not until May 26, 2008 that the *2004 PVC Notice* was cancelled. The January 2008 measure suggests that the CCCMC decided to cease employing the PVC Procedure at a time when it was still required to use it. This incongruity seems to indicate that it could be just as possible that the CCCMC could continue to use the PVC Procedure even when the *2004 PVC Notice* was no longer in effect.

386. The only evidence China provides in support of its assertion that it no longer coordinates export prices is the CCCMC Standing Committee resolution, adopted in June 28, 2010.<sup>470</sup> There are several curious aspects to this resolution. First, this resolution appears to provide retrospective confirmation that, as of January 2008, China no longer had the authority to coordinate export prices. The reasoning on which this resolution bases this confirmation is exactly the same, flawed reasoning that China advances paragraphs 838 to 840 in its first written submission, *i.e.*, that the repeal of the *2004 PVC Notice* in 2008 means that China no longer had

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<sup>470</sup> Exhibit CHN-4.

the authority to coordinate export prices as of 2008. For the reasons discussed above, this reasoning is fundamentally flawed and the conclusion is incorrect.

387. Second, this resolution abolishes the precise measures specifically identified by the United States as key legal instruments establishing China's minimum export price system: (1) the *CCCMC Coordination Measures*; (2) the coordination and administration measures of the Branches of the CCCMC, specifically including the *Bauxite Branch Coordination Measures*; and (3) the *1994 CCCMC Charter*. Third, this measure was issued on June 28, 2010, two years after China considers that it lost the authority to coordinate export prices, but only four weeks after the United States submitted its First Written Submission and five weeks before China submitted its First Written Submission in this dispute.

388. This measure appears to be a very useful tool China has created for the purpose of defending against the United States' minimum export price claim. Its probative value should be assigned accordingly.

389. China has provided no persuasive evidence that it stopped coordinating export prices and enforcing those prices as a minimum since 2008.

## **2. The Vast Majority of Exports of Yellow Phosphorus Occurred Above the Minimum Export Price**

390. China also argues that evidence showing that exports of yellow phosphorus occurred below the minimum export price demonstrates that China did not maintain a minimum export price requirement for yellow phosphorus.

391. The United States provided a web page PVC interface dated May 28, 2008, showing that China continued to use the PVC Procedure after May 26, 2008 to enforce a minimum export price for yellow phosphorus. The minimum export price indicated in the screen shot was US\$ 8000 per MT. Export prices for yellow phosphorus uniformly surged beginning soon after the end of May in June 2008 and remained above the US\$ 8000 per MT level until November 2008. At the same time, prices for yellow phosphorus exports from China to the United States were almost identical to prices for yellow phosphorus exports to the EU.<sup>471</sup>

392. China asserts that data in Exhibit CHN-361 shows specific instances of export of yellow phosphorus from China that occurred below the minimum export price in 2007 and 2008 and that this demonstrates that China did not impose a minimum export price requirement for yellow phosphorus.

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<sup>471</sup> See China Yellow Phosphorus Exports Average Monthly Price January 2006-January 2010 (World Trade Atlas) (Exhibit JE-173).



393. The United States understands that, through the screen shot of the PVC interface dated May 28, 2008, the minimum export price for yellow phosphorus was US\$8000 per MT at the end of May 2008. The minimum export price may very well have been lower before May 2008. (The United States notes that around that same time, on May 20, 2008, China first imposed the 100 percent special export duty on yellow phosphorus, which increased the total export duty on yellow phosphorus to 120 percent.) Notably, Exhibit CHN-361 does not show any individual prices cited as “below” the minimum export price of US\$ 8000 per MT after May 2008.

394. Even the few instances of exports during May 2008 taking place below the US\$ 8000 per MT minimum export price amount to only 2.8 percent of the total volume of exports of yellow phosphorus in May 2008.<sup>472</sup> In total, all of the alleged instances of exports occurring below the US\$ 8000 per MT minimum export price amount to 2.5 percent of the total volume of exports of yellow phosphorus from January to December 2008. This means that over 97 percent of exports in 2008 occurred above the minimum export price – a fact that supports a showing that a minimum export price for yellow phosphorus did in fact exist and was in fact being enforced.

### **3. A Minimum Export Price Is a Restriction under Article XI:1 of the GATT 1994**

395. Finally, China argues that a minimum export price does not restrict exports and therefore is not inconsistent with Article XI:1 of the GATT 1994.<sup>473</sup>

396. As the United States established in its First Written Submission, a minimum export price prohibits exportation if the price of the export is lower than the floor established by the minimum export price. As such, it subjects the exportation of a given product to a limiting condition – an export price below which exports cannot take place. A minimum export price therefore constitutes a restriction in the sense of Article XI:1 of the GATT 1994.<sup>474</sup>

### **4. Conclusion**

397. For these reasons, the United States has demonstrated that China imposes a minimum export price requirement that is inconsistent with the requirements of Article XI:1 of the GATT 1994.

## **B. China Failed to Publish Measures Related to Its Minimum Export Price Requirement in Breach of Article X:1 of the GATT 1994**

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<sup>472</sup> Compare Exhibits CHN-361 and CHN-362.

<sup>473</sup> China’s First Written Submission, para. 854-865.

<sup>474</sup> Panel Report, *India – Quantitative Restrictions*, para. 5.128. As the GATT Panel in *EEC – Fruits and Vegetables* reasoned, a minimum import price constituted a restriction inconsistent with GATT Article XI:1. GATT Panel Report, *EEC – Fruits and Vegetables*, para. 4.9.

398. In its First Written Submission, the United States demonstrated that China failed to publish important measures and provisions relating to its minimum export price requirement. These measures include:

Specific coordination programs and Branch coordination measures prescribed under the *CCCMC Export Coordination Measures*; and

the *Notice of the Rules on Price Review of Export Products by the Customs* (and 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*, which China has explained formed annexes to the *Notice of the Rules on Price Review of Export Products by the Customs*).

399. In addition, the United States demonstrated that China failed to publish the *2001 CCCMC Charter* promptly in such a manner as to enable governments and traders to become acquainted with it.

400. China does not contest that these measures existed. China does not argue or provide evidence to demonstrate that the specific coordination programs and Branch coordination measures prescribed under the *CCCMC Export Coordination Measures* or the *Notice of the Rules on Price Review of Export Products by the Customs* were or are published. In fact, when the Panel asked China to provide copies of the specific coordination programs and Branch coordination measures prescribed under the *CCCMC Export Coordination Measures* then in Panel Question 10, China did not do so.

401. China also does not argue or provide evidence to demonstrate that the *2001 CCCMC Charter* was published promptly in a manner that enabled governments and traders to become acquainted with it.

402. China's only response is that these measures are no longer in effect.<sup>475</sup> However, a measure no longer being in effect is not a defense for the failure to publish under GATT Article X:1.

403. Accordingly, the United States has demonstrated that China has breached its obligations under Article X:1 by failing to publish the specific coordination programs and Branch coordination measures prescribed under the *CCCMC Export Coordination Measures* and the *Notice of the Rules on Price Review of Export Products by the Customs* and by failing to publish the *2001 CCCMC Charter* promptly.

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<sup>475</sup> China's First Written Submission, para. 868-872.

**C. China’s Administration of the Minimum Export Price System for Yellow Phosphorus through the Price Verification and Chop Procedure Is Partial and Unreasonable**

404. In its First Written Submission, the United States demonstrated that China’s administration of the minimum export price system through the involvement of the CCCMC in the Price Verification and Chop (PVC) Procedure was partial and unreasonable in breach of China’s obligations under Article X:3(a) of the GATT 1994.

405. China’s only response is that the Panel should refrain from reviewing this claim because the PVC Procedure was formally repealed on May 26, 2008.<sup>476</sup>

406. The United States demonstrated in its First Written Submission that, despite the formal repeal of the *2004 PVC Notice* on May 26, 2008, the PVC Procedure continued to be used by the CCCMC for yellow phosphorus exports.<sup>477</sup> Accordingly, it is the Panel’s task, under Articles 7, 11, and 19.1 of the DSU, to make findings and recommendations on this matter.

407. China has not contested that it employed the PVC Procedure to enforce the minimum export price system for yellow phosphorus. China has not contested the role of the CCCMC in the operation of the PVC Procedure nor has China contested the nature of the confidential and sensitive information the PVC Procedure required yellow phosphorus exporters to provide to the CCCMC. Accordingly, China has breached its obligations under Article X:3(a) in administering the minimum export price system for yellow phosphorus through the PVC Procedure.

**D. The Panel Should Reject China’s Request to Exclude Certain MEP Measures From the Terms of Reference**

**1. The Panel’s Preliminary Findings on China’s MEP Terms of Reference Arguments Cannot Be a Preliminary Ruling under the Working Procedures**

408. On October 1, 2010, the Panel issued the “Second Phase of the Preliminary Ruling” (Second Preliminary Ruling). Part of the ruling addressed the remaining issues from China’s preliminary ruling request, which was filed with the Panel on March 30, 2010. The Second Preliminary Ruling also, however, included findings on issues not subject to any request for a preliminary ruling. In particular, the Panel made findings on arguments of China in its First Written Submission<sup>478</sup> that certain minimum export price (MEP) measures addressed by the

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<sup>476</sup> China’s First Written Submission, para. 867.

<sup>477</sup> The United States addresses China’s argument regarding the continued enforcement by the CCCMC of the PVC procedure below.

<sup>478</sup> China’s First Written Submission, Section II.D paras. 36-48.

United States should be outside the Panel’s terms of reference under Article 6.2 of the DSU. Because these findings in the Second Preliminary Ruling were not made in response to a preliminary ruling request, they cannot be part of a preliminary ruling, and instead must be considered as findings that the Panel will reexamine *de novo* after considering all of the evidence and arguments submitted in the dispute. To adopt any other approach would be inconsistent with the DSU and the Panel’s own Working Procedures.

409. Under the DSU and the Panel’s Working Procedures, “formal rebuttals shall be made at a second substantive meeting of the panel.”<sup>479</sup> And under Article 11 of the DSU, the Panel is to make an objective assessment of the matter before it, which – with one caveat – should include consideration of all of the parties’ submissions including rebuttals.

410. The caveat is that the DSU does allow a panel to adopt “additional procedures specific to the panel.”<sup>480</sup> In its Working Procedures, this panel has adopted procedures for preliminary rulings. However, the findings in the Second Preliminary Ruling on China’s terms of reference arguments concerning MEP measures were not made in response to a preliminary ruling under the Panel’s Working Procedures.

411. First, although a request for a preliminary ruling may be made as late as the respondent’s first written submission,<sup>481</sup> China did not state that its terms of reference arguments on the MEP measures were part of a preliminary ruling request.<sup>482</sup>

412. Second, the Panel’s response to China’s First Written Submission did not treat these arguments as a preliminary ruling. Under the Working Procedures, if the Panel had considered China’s First Written Submission to include a request for a preliminary ruling, the Working Procedures specify certain procedures that must be followed. In particular, under Paragraph 11 of the Working Procedures, “if the respondent requests such a ruling, the complaining party shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request.” In this instance, the Panel did not determine a time prior to the first substantive meeting for complainants to respond to China’s terms-of-reference arguments on MEP measures. Thus, the Panel itself did not consider China’s First Written Submission as including a request for a preliminary ruling.

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<sup>479</sup> DSU, Appendix 3, para. 7; Working Procedures, para. 7.

<sup>480</sup> DSU Appendix 3, para. 11.

<sup>481</sup> Working Procedures, para. 11.

<sup>482</sup> The United States would note that an argument concerning the terms of reference is not equivalent to a request for a preliminary ruling. For example – as in this case – a terms of reference argument may turn on specific and detailed facts regarding the interrelationship between various measures, and may thus not be conducive to resolution in an expedited preliminary ruling procedure.

413. Separately, paragraph 11 of the Working Procedures also provides that “[t]he Panel shall inform the parties promptly of any preliminary rulings it might make in the course of the proceedings. In addition, the Panel may also choose to inform third parties of such preliminary rulings, if appropriate.” The Panel did not inform the parties or third parties that it considered China’s First Written Submission as including a request for a preliminary ruling, or that the Panel otherwise might make a preliminary ruling on China’s MEP terms of reference arguments.

414. If the Panel does not understand paragraph 11 of the Working Procedures as outlining the procedure that should have been used in making its second preliminary ruling, then the second preliminary ruling was not made in accordance with any provision of the Working Procedures. In this case, there would be no basis for departing from the general rule -- which follows from DSU Article 11 and the DSU and Working Procedures provisions on rebuttals - that findings should take into consideration all of the parties' submissions, including rebuttals. More generally, if the panel were to adopt any additional working procedures on preliminary rulings, those procedures (like the existing procedure in paragraph 11) should at a minimum provide notice and an opportunity for the parties to comment.

415. In the Second Preliminary Ruling, the Panel faults the United States for failing to present in its answers to the first set of panel question its complete response to China’s MEP terms of reference arguments. The Panel states:

. . . no explanation was provided by the complainants as to why these new measures were not included in the requests. All that the Panel has before it is a chart with the descriptor “implementing” for these nine measures.

The Panel notes specially the complainants’ failure to explain how the alleged implementing measures implement measures . . . <sup>483</sup>

416. Under the DSU and Working Procedures, however, formal rebuttals need not be made until the second substantive meeting. And indeed, the United States has always intended to present its arguments in response to China’s First Written Submission in the U.S. Second Written Submission and second oral statement. Furthermore, the Panel’s questions did not state that they were part of a preliminary ruling process. Nor did the Panel’s questions make explicit the Panel’s apparent expectation that the United States would present its full arguments on the MEP terms of reference arguments in response to Panel Questions 1 and 2.<sup>484</sup>

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<sup>483</sup> Second Phase of the Preliminary Ruling, paras. 52-53.

<sup>484</sup> The Panel's Question 1(a) and (b) states only:

(a) Could the complainants comment in detail on the table in paragraph 39 of China's first written submission and inform the Panel whether any challenged measure is, in their view, included in the requests for consultation and/or in the panel requests.

(b) In addition, could the parties indicate which measures, if any constitute amendments, extensions, replacement measures, renewal measures or implementing measures to those measures included in the

417. In these circumstances, for the Panel not to consider U.S. rebuttal arguments on China’s MEP terms-of-reference arguments would be inconsistent with the DSU and the Working Procedures. Accordingly, the United States will proceed in this Second Written Submission to set forth a written response to China’s arguments in its First Written Submission concerning whether certain MEP measures are within the Panel’s terms of reference. The United States respectfully requests that the Panel consider these responses before making findings with regard to China’s MEP terms-of-reference arguments.

**2. Three Measures Related to the Minimum Export Price Claim Are within the Panel’s Terms of Reference Because They Are Listed in the Consultations Request and the Panel Request**

418. As provided in its answers to the Panel’s Question 1(a), the United States notes that in addition to the two measures that China accepts are within the Panel’s terms of reference because they are included in both the consultations and panel requests,<sup>485</sup> there are three additional measures that are within the Panel’s terms of reference by virtue of being included in both the consultations and panel requests. Those are:

*Measures for the Administration over Foreign Trade and Economic Social Organizations* (Ministry of Foreign Trade and Economic Cooperation, February 26, 1991)<sup>486</sup>

*Notice Regarding Printing and Distribution of Several Regulations for Personnel Management of Chambers of Commerce for Importers and Exporters* (Ministry of Foreign Trade and Economic Cooperation, September 23, 1994)<sup>487</sup> and

*Charter of the China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters*<sup>488</sup>

419. China does not contest that the *Export Price Penalties Regulations* and the *Measures for Administration of Licensing Entities* are within the Panel’s terms of reference. Accordingly, these three measures are also within the Panel’s terms of reference.

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complainants’ Panel requests.

<sup>485</sup> The *Export Price Penalties Regulations* (Exhibit JE-113) and the *Measures for Administration of Licensing Entities* (Exhibit JE-75), listed in the chart in China’s First Written Submission, para. 39, as measures 1 and 2.

<sup>486</sup> *Measures for the Administration of Trade Social Organizations* (Exhibit JE-101).

<sup>487</sup> *Regulations for Personnel Management of Chambers of Commerce* (Exhibit JE-102).

<sup>488</sup> *1994 CCCMC Charter* (Exhibit JE-86) and *2001 CCCMC Charter* (Exhibit JE-87).

**3. Four Measures Not Included in the Panel Request Are Nevertheless in the Panel’s Terms of Reference as “Implementing Measures”**

420. The following four measures are in the Panel’s terms of reference even though they were not identified in both the U.S. consultations request and the U.S. panel request:

*CCCMC Export Coordination Measures*<sup>489</sup>

*CCCMC Bauxite Branch Coordination Measures*<sup>490</sup>

*Bauxite Branch Charter*<sup>491</sup>

*“System of self-discipline”*<sup>492</sup>

As the United States will demonstrate below, these measures are within the Panel’s terms of reference because they constitute “implementing measures” as indicated in the phrase “as well as any amendments or extensions; related measures; replacement measures; renewal measures; and implementing measures” in the U.S. panel request.

421. Measures not specifically identified in a panel request can nevertheless be included in a panel’s terms of reference if the panel request references “implementing measures” and those measure can be considered to “implement” measures that are specifically identified in the panel request.<sup>493</sup> As the Appellate Body stated in *Japan – Film*:

To fall within the terms of Article 6.2, it seems clear that a ‘measure’ not explicitly described in a panel request must have a clear relationship to a ‘measure’ that is specifically described therein, so that it can be said to be ‘included’ in the specified ‘measure’. In our view, the requirements of Article 6.2 would be met in the case of a ‘measure’ that is subsidiary or so closely related to a ‘measure’ specifically identified, that the responding party can reasonably be found to have received adequate notice of the scope of the claims asserted by the complaining party. The two key elements – close relationship and notice – are inter-related: only if a ‘measure’ is subsidiary or closely related to a specifically

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<sup>489</sup> *CCCMC Export Commodities Coordination Management Measures* (Exhibit JE-107).

<sup>490</sup> *CCCMC Measures for Coordination Management of the Bauxite Branch* (Exhibit JE-108).

<sup>491</sup> *Charter of the Bauxite Branch of the China Chamber of Commerce of Metals, Minerals and Chemical Importers and Exporters* (Exhibit JE-112).

<sup>492</sup> See MOFCOM June 2008 statement.

<sup>493</sup> See Panel Report, *Japan – Film*, paras. 10.6-10.11; Appellate Body Report, *EC – Bananas III*, para.

identified ‘measure’ will notice be adequate. For example, we consider that where a basic framework law dealing with a narrow subject matter that provides for implementing ‘measures’ is specified in a panel request, implementing ‘measures’ might be considered in appropriate circumstances as effectively included in the panel request as well for purposes of Article 6.2. Such circumstances include the case of a basic framework law that specifies the form and circumscribes the possible content and scope of implementing ‘measures’.

Accordingly, “implementing measures” can be included in a panel’s terms of reference if: (1) the “implementing measures” are based on “a basic framework law” that is specifically identified in the panel request; and (2) the “basic framework law” deals with a narrow subject matter that provides for implementing measures, e.g., where a basic framework law specifies the form and circumscribes the possible content and scope of implementing measures.

422. The four of the measures at issue here were not specifically identified in the panel request. The United States made diligent attempts to locate these measures, but those attempts were consistently frustrated by the general lack of transparency in this area of China’s regulatory framework. As demonstrated in China’s answer to the Panel’s Question 10, it is very difficult to obtain access to or copies of the CCCMC’s measures.

423. Despite the fact that the *1994 CCCMC Charter* and the *2001 CCCMC Charter* indicate the existence of coordination measures and charters for the CCCMC and all of its commodity-specific Branches, the United States was only able to obtain a copy of the *Bauxite Branch Charter*, the *Bauxite Branch Coordination Measures*, and the *CCCMC Export Coordination Measures*, from a search of the record of the pending U.S. court proceedings involving private allegations of price-fixing and other anticompetitive behavior by Chinese exporters of bauxite and Chinese exporters of magnesite.

424. However, the United States included a reference to “implementing measures” in its panel request in order to cover measures of which it was aware, but had immense difficulty finding, in the event its continued efforts to locate and obtain a copy of such measures were rewarded. There is at least one “basic framework law” that is specified in the panel request that each of the four “implementing measures” implements.

425. The *1994 CCCMC Charter* and the *2001 CCCMC Charter* are basic framework laws identified in the panel request. They deal with a narrow subject matter – the functions,<sup>494</sup> responsibilities,<sup>495</sup> and structure<sup>496</sup> of the CCCMC. As discussed below, they also provide for

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<sup>494</sup> *1994 CCCMC Charter*, Chapter 2 (Exhibit JE-86); *2001 CCCMC Charter* Chapter 2 (Exhibit JE-87).

<sup>495</sup> *1994 CCCMC Charter*, Chapter 3 (Exhibit JE-86); *2001 CCCMC Charter* Chapter 3 (Exhibit JE-87).

<sup>496</sup> *1994 CCCMC Charter*, Chapters 4-6 (Exhibit JE-86); *2001 CCCMC Charter* Chapters 4-6 (Exhibit JE-87).



implementing measures, specifying the form and circumscribing the possible content and scope of implementing measures.

426. Both the *1994 CCCMC Charter* and the *2001 CCCMC Charter* provide that one of the CCCMC's primary functions is to coordinate trade in metals, minerals, and chemicals.<sup>497</sup> This coordination mandate set out in Article 6 specifically includes coordination of import and export prices, markets and customers,<sup>498</sup> quota bidding,<sup>499</sup> the import and export trade activities by business within the industries,<sup>500</sup> disputes among members,<sup>501</sup> and promoting the industry's self-discipline.<sup>502</sup> These measures also provide for penalties for CCCMC members that violate the *CCCMC Charter* or otherwise fail to cooperate with the CCCMC's coordination.<sup>503</sup>

427. All four measures at issue implement the coordination mandate of the *1994 CCCMC Charter* and the *2001 CCCMC Charter*.

428. The *CCCMC Export Coordination Measures* set forth detailed provisions governing the CCCMC's coordination functions and activities. Article 4 of the *CCCMC Export Coordination Measures* provides a detailed list of the CCCMC's "coordination content," which includes, *inter alia*, coordinating export prices, sales market and customers, quota bidding, and business disputes among members.<sup>504</sup> Article 21 of the *CCCMC Export Coordination Measures* provides for penalties for CCCMC members that violate the *CCCMC Export Coordination Measures* or otherwise fail to cooperate with the CCCMC's coordination, including on prices.<sup>505</sup>

429. The *Bauxite Branch Coordination Measures* set forth detailed provisions governing the Bauxite Branch's coordination functions and activities. Article 2 provides a detailed list of the Bauxite Branch's coordination content and scope, which includes, *inter alia*, coordination of export prices,<sup>506</sup> sales markets, and customers. Articles 8-10 provide for penalties that violate the Bauxite Branch's coordination rules, including on prices.<sup>507</sup> Notably, the *1994 CCCMC Charter*

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<sup>497</sup> *1994 CCCMC Charter*, Art. 6 (Exhibit JE-86); *2001 CCCMC Charter*, Art. 6 (Exhibit JE-87).

<sup>498</sup> *1994 CCCMC Charter*, Art. 6.2 (Exhibit JE-86).

<sup>499</sup> *1994 CCCMC Charter*, Art. 6.6 (Exhibit JE-86); *2001 CCCMC Charter*, Art. 6.6 (Exhibit JE-87).

<sup>500</sup> *2001 CCCMC Charter*, Art. 6.1 (Exhibit JE-87).

<sup>501</sup> *2001 CCCMC Charter*, Art. 6.9 (Exhibit JE-87).

<sup>502</sup> *2001 CCCMC Charter*, Art. 6.3 (Exhibit JE-87).

<sup>503</sup> *1994 CCCMC Charter*, Art. 14 (Exhibit JE-86); *2001 CCCMC Charter*, Art. 14 (Exhibit JE-87).

<sup>504</sup> *CCCMC Export Coordination Measures*, Art. 4 (Exhibit JE-107).

<sup>505</sup> In this sense, this measure also "implements" the *Export Price Penalties Regulations* (Exhibit JE-113), which require exporting enterprises to abide by the coordination of the Chambers of Commerce (Art. 4) and provide for penalties for enterprises that export at prices that are too low (Art. 6).

<sup>506</sup> See also *Bauxite Branch Coordination Measures*, Art. 4 (Exhibit JE-108).

<sup>507</sup> In this sense, this measure also "implements" the *Export Price Penalties Regulations* (Exhibit JE-113), which require exporting enterprises to abide by the coordination of the Chambers of Commerce (Art. 4) and

specifically provides that, where a commodity-specific Branch is established, the Branch leadership is responsible for formulating or amending the Branch’s specific import and export product coordination regulations.<sup>508</sup>

430. The *Bauxite Branch Charter* sets forth detailed provisions governing the CCCMC Bauxite Branch’s functions, responsibilities, and structure. Article 8 provides that the Bauxite Branch’s function includes coordination of bauxite import and export activities and promotion of the industry’s self-discipline. Article 20 provides for penalties for Branch members that violate the Branch’s charter, fail to implement Branch decisions, fail to implement industry coordination, or violate other laws. Notably, both the *1994 CCCMC Charter* and the *2001 CCCMC Charter* specifically provide that commodity-specific Branches may be established<sup>509</sup> and specify that if Branches are established, the Branch leadership is responsible for formulating a Branch charter.<sup>510</sup>

431. The “*System of self-discipline*” is not a document, but China has represented that it is “an actual specific measure[] taken by China to effect its regulatory policies.”<sup>511</sup> According to China, “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>512</sup> Accordingly, self-discipline is an expression of the CCCMC’s coordination that is explicitly provided for in Article 6.3 of the *2001 CCCMC Charter*, and a measure that also imposes penalties for non-compliance, in particular with price coordination.<sup>513</sup>

432. The *CCCMC Export Coordination Measures* also provide for penalties for CCCMC members that violate the *CCCMC Export Coordination Measures* or otherwise fail to cooperate with the CCCMC’s coordination, including on prices.<sup>514</sup> In this sense, the *CCCMC Export*

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provide for penalties for enterprises that export at prices that are too low (Art. 6).

<sup>508</sup> *1994 CCCMC Charter*, Art. 26(3) (Exhibit JE-86).

<sup>509</sup> *1994 CCCMC Charter*, Art. 23 (Exhibit JE-86); *2001 CCCMC Charter*, Art. 36 (Exhibit JE-87).

<sup>510</sup> *1994 CCCMC Charter*, Art. 26(2) (Exhibit JE-86); *2001 CCCMC Charter*, Art. 37 (Exhibit JE-87).

<sup>511</sup> MOFCOM statement in *In re Vitamin C Antitrust Litigation*, para. 3 (Exhibit JE-111).

<sup>512</sup> See U.S. First Written Submission, para. 216 (MOFCOM Statement in *In re Vitamin C Antitrust Litigation* (Aug. 31, 2009), para. 3 (Exhibit JE-111)).

<sup>513</sup> In this sense, this measure also “implements” the *Export Price Penalties Regulations* (Exhibit JE-113), which require exporting enterprises to abide by the coordination of the Chambers of Commerce (Art. 4) and provide for penalties for enterprises that export at prices that are too low (Art. 6).

<sup>514</sup> *CCCMC Export Coordination Measures*, Art. 21 (Exhibit JE-107).

*Coordination Measures* implement the *Export Price Penalties Regulations*, which provide for sanctions for enterprises that export at prices that are too low.

433. Accordingly, these four measures all have a subsidiary and close relationship to the *1994 CCCMC Charter*, the *2001 CCCMC Charter*, and three also have a subsidiary and close relationship to the *Export Price Penalties Regulations*. The *1994 CCCMC Charter*, the *2001 CCCMC Charter*, and the *Export Price Penalties Regulations* were all specifically identified in the panel request (as well as the consultations request). Accordingly, China had adequate notice, for the purposes of Article 6.2 of the DSU, that these four measures were within the terms of reference.

#### **4. Three Measures Included in the Panel Request but Not the Consultations Request Are within the Panel’s Terms of Reference**

434. There are three measures that were specifically identified in the panel request but not listed in the consultations request. These measures are:

*Notice of the Rules on Price Reviews of Export Products by the Customs* (Ministry of Foreign Trade and Economic Cooperation guanzonghanzi No. 21, 1997)<sup>515</sup>

*CCCMC PVC Rules*<sup>516</sup>

*Online PVC Instructions*

For the reasons discussed below, these measures are nevertheless included within the Panel’s terms of reference.

435. China argues that measures specifically included in the panel request but not in the consultations request may be excluded from the panel’s terms of reference if those measures were not the subject of consultations.<sup>517</sup> According to China, a complainant must demonstrate

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<sup>515</sup> As China clarified in its First Written Submission, this measure includes, as attachments, both the *Rules for Coordination with Respect to Customs Price Review of Export Products* (Ministry of Foreign Trade and Economic Cooperation guanzonghanzi No. 21, 1997) 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). China’s First Written Submission, para. 849.

<sup>516</sup> *Notice Regarding Rules for Contract Declaration for Chemicals-Related Verification and Stamp Products* (China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters Petroleum and Chemicals Products Department, December 30, 2003) (Exhibit JE-121).

<sup>517</sup> China’s First Written Submission, paras. 42 and 43.

that a measure that appears in the panel request but not the consultations request is “essentially the same” as measures that were included in the consultations request.<sup>518</sup>

436. The United States notes that the panel in *DR – Cigarettes* was examining whether a challenged measure was amended by a another measure during the course of the panel proceedings and which measure was properly within the Panel’s terms of reference. The United States considers that the Appellate Body’s review of the panel’s terms of reference in *US – Continued Zeroing* is more apposite to the question presented here.

437. In *US – Continued Zeroing*, the Appellate Body noted that “Articles 4 and 6 [of the DSU] do not require an ‘exact identity’ between the scope of the consultations request and the panel request.”<sup>519</sup> The Appellate Body stated, “the relevant question, in determining whether, in this case, the 14 additional measures fell within the Panel’s terms of reference, is whether the ‘scope of the dispute’ was expanded as a result of their addition.”<sup>520</sup> The Appellate Body then concluded that 14 additional measures identified in the panel request but not the consultations request were included in the panel’s terms of reference because those additional measures and measures that were explicitly listed in the consultations request “relate[d] to the same duties on the same products from the same countries imposed pursuant to the same authorities . . . .”

438. Here, the United States specifically identified a number of measures related to the imposition of the Price Verification and Chop (PVC) Procedure in the consultations request. These included:

*2004 PVC Notice*<sup>521</sup>

*2002 PVC Notice*<sup>522</sup>

The *2002 PVC Notice* implemented the PVC procedure to enforce observance of the minimum export price for, *inter alia*, yellow phosphorus. The *2003 PVC Notice* expanded the application of the PVC procedure for enforcing observance of the minimum export price for additional commodities. Both measures required the close cooperation of the relevant Chamber of Commerce with jurisdiction over the covered commodity (the CCCMC in the case of yellow

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<sup>518</sup> China’s First Written Submission, para. 43 (citing *DR – Cigarettes*, para. 7.21).

<sup>519</sup> Appellate Body Report, *US - Continued Zeroing*, para. 224.

<sup>520</sup> Appellate Body Report, *US - Continued Zeroing*, para. 224.

<sup>521</sup> *Notice Regarding the Trial Administration of 36 Types of Products such as Citric Acid* (Ministry of Commerce and General Administration of Customs, Notice (2003) No. 36, November 29, 2003) (Exhibit JE-122),

<sup>522</sup> *Notice for the Adjustment of the Catalogue of Export Products Subject to Price Review by Customs* (Ministry of Foreign Trade and Economic Cooperation and the General Administration of Customs, wajingmaomaofa (2002) No. 187, May 1, 2002) (Exhibit JE-121).

phosphorus) and China’s Customs authority.<sup>523</sup> These measures required enterprises exporting yellow phosphorus to submit their export contracts, indicating export prices, to the CCCMC and obtain a stamp from the CCCMC indicating that the export price satisfied the industry coordinated export price, before the enterprise could proceed to Customs to seek clearance for the export.

439. The *CCCMC PVC Rules*<sup>524</sup> and the *Online PVC Instructions* are CCCMC measures, posted on the CCCMC website, providing rules and instructions to exporting enterprises of yellow phosphorus for submitting their export contracts electronically to the CCCMC in order to obtain CCCMC approval under the PVC procedure. Although the United States was not able to obtain a copy of the *Notice of the Rules on Price Reviews of Export Products by the Customs* and believes that this measure was never published, in breach of China’s obligations under Article X:1 of the GATT 1994, references to this measure in the *2002 PVC Notice* indicate that this measure establishes the PVC Procedures and its rules.<sup>525</sup>

440. Accordingly, these three measures are all part of the same PVC procedure of which the *2002 PVC Notice* and the *2004 PVC Notice*, which were consulted on, form a part. The three additional measures related to the same procedure on the same product at issue under the *2002 PVC Notice* and the *2004 PVC Notice*. The inclusion of these three measures in the panel request did not “expand the scope of the dispute.” These measures are therefore also properly within the panel’s terms of reference.

## **5. The Effect of China’s Repeal or Retrospective Confirmation of the Repeal of Certain MEP Measures**

441. In its First Written Submission, China asked the Panel to refrain from making findings on measures within the Panel’s terms of reference relating to the MEP requirement. China asserted that those measures have “expired” and argued that findings would “serve no purpose” because “the measures have ceased to have legal effect and, therefore, can no longer violate WTO obligations or nullify or impair benefits.”<sup>526</sup> China also asserted that the Panel has no authority to make recommendations on these measures.

442. In its First Written Submission, China identified the “expired” or “repealed” measures as including:

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<sup>523</sup> *2002 PVC Notice*, paras. 2-4 (Exhibit JE-121); *2004 PVC Notice*, paras. 3 and 4, Attachment 2 (Exhibit JE-122).

<sup>524</sup> *Notice Regarding Rules for Contract Declaration for Chemicals-Related Verification and Stamp Products* (China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters Petroleum and Chemicals Products Department, December 30, 2003) (Exhibit JE-127).

<sup>525</sup> *2002 PVC Notice*, paras. 2 and 4 (Exhibit JE-121).

<sup>526</sup> China’s First Written Submission, paras. 47, 52, 57-67.

*CCCMC PVC Rules*<sup>527</sup>

*Online PVC Instructions*

*CCCMC Export Coordination Measures*<sup>528</sup>

*CCCMC Bauxite Branch Coordination Measures*<sup>529</sup>

*“System of self-discipline”*<sup>530</sup>

China asserted that these measures had ceased to have effect prior to the Panel’s establishment.

443. Subsequently, at the First Panel Meeting, China identified additional measures that it claimed had expired or whose expiration had been retrospectively confirmed:

*Notice of the Rules on Price Reviews of Export Products by the Customs*<sup>531</sup>

444. In its Answers to the Panel’s Questions, China identified even more measures that it claimed no longer had legal effect. These included:

*Export Price Penalties Regulations* (JE-113)

*Measures for Administration of Licensing Entities* (Exhibit JE-75)

445. Of the measures relating to the MEP requirement that are within the Panel’s terms of reference, the only measures that China has not asserted have been repealed are:

*Measures for the Administration over Foreign Trade and Economic Social Organizations* (Ministry of Foreign Trade and Economic Cooperation, February 26, 1991)<sup>532</sup>

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<sup>527</sup> *Notice Regarding Rules for Contract Declaration for Chemicals-Related Verification and Stamp Products* (China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters Petroleum and Chemicals Products Department, December 30, 2003) (Exhibit JE-121).

<sup>528</sup> *CCCMC Export Commodities Coordination Management Measures* (Exhibit JE-107).

<sup>529</sup> *CCCMC Measures for Coordination Management of the Bauxite Branch* (Exhibit JE-108).

<sup>530</sup> See MOFCOM June 2008 statement.

<sup>531</sup> As China clarified in its First Written Submission, this measure includes, as attachments, both the *Rules for Coordination with Respect to Customs Price Review of Export Products* (Ministry of Foreign Trade and Economic Cooperation guanzonghanzi No. 21, 1997) 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). China’s First Written Submission, para. 849.

<sup>532</sup> *Measures for the Administration of Trade Social Organizations* (Exhibit JE-101).

*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)<sup>533</sup> and

*1994 CCCMC Charter*

*2001 CCCMC Charter*

Given the fact that the Panel confirmed that it considers these measures to be within its terms of reference only on October 1, 2010 when the Panel issued its Preliminary Ruling Part 2, it seems likely that, given China's pattern, by the time of the Second Panel Meeting, China will present the Panel with new evidence that these measures have also been repealed or evidence that retrospectively confirms the repeal of all of these measures.

446. The first question is whether China's assertions regarding these measures' lapse in effectiveness is supported by the facts that China provides as support. The second question is whether, if some or all of these measures are no longer in effect, findings on these measures would secure a positive solution to this dispute. As a third step, the United States will address the authority of the Panel to make recommendations on these measures.

**a. Are the MEP Measures Repealed, When Were They Repealed, How Was Their Repeal Made Known**

*CCCMC PVC Rules*<sup>534</sup> and the *Online PVC Instructions*

447. According to China, the *CCCMC PVC Rules*<sup>535</sup> and the *Online PVC Instructions* ceased to have effect before the Panel was established and the United States has not explained how these measures continued to implement the *2004 PVC Notice* even after the *2004 PVC Notice* ceased to have effect in May 2008. China argues that the *CCCMC PVC Rules*<sup>536</sup> and the *Online PVC Instructions* were repealed when the *2004 PVC Notice* was repealed.

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<sup>533</sup> *Regulations for Personnel Management of Chambers of Commerce* (Exhibit JE-102).

<sup>534</sup> *Notice Regarding Rules for Contract Declaration for Chemicals-Related Verification and Stamp Products* (China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters Petroleum and Chemicals Products Department, December 30, 2003) (Exhibit JE-121).

<sup>535</sup> *Notice Regarding Rules for Contract Declaration for Chemicals-Related Verification and Stamp Products* (China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters Petroleum and Chemicals Products Department, December 30, 2003) (Exhibit JE-121).

<sup>536</sup> *Notice Regarding Rules for Contract Declaration for Chemicals-Related Verification and Stamp Products* (China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters Petroleum and Chemicals Products Department, December 30, 2003) (Exhibit JE-121).

448. The United States argued, in its First Written Submission, that despite the fact that the *2004 PVC Notice* appeared to have been repealed on May 26, 2008 with immediate effect,<sup>537</sup> evidence demonstrated that the PVC Procedure continued to be implemented by the CCCMC after May 26, 2008.<sup>538</sup> The United States explained that it had obtained a screen shot of the CCCMC's online PVC interface dated May 28, 2008 and submitted a copy of this screenshot as Exhibit JE-124.

449. The United States also explained that the fact that the *Notice of the Rules on Price Reviews of Export Products by the Customs* appeared to still be in effect after May 26, 2008. Although the United States was not able to obtain a copy of this measure and it appears that China has failed to publish this measure in breach of its GATT Article X:1 obligations, references to this measure in the *2002 PVC Notice* demonstrate that this measure established the PVC Procedure and provided rules for the procedure in 1997. This measure is therefore independent from the *2002 PVC Notice* and the *2004 PVC Notice*. By its terms, the *2008 PVC Notice* repeals only the *2004 PVC Notice*. The United States accepts China's explanation that the *2004 PVC Notice* superseded the *2002 PVC Notice*. However, there is no evidence on the face of the *2008 PVC Notice* that the *2008 PVC Notice* had any impact on the effectiveness of the 1997 *Notice of the Rules on Price Reviews of Export Products by the Customs*.

450. In addition, the United States observed that the *CCCMC PVC Rules*<sup>539</sup> and the *Online PVC Instructions* continued to be published on the CCCMC website and appeared to continue to provide a live, password protected link to the CCCMC online PVC interface well past May 26, 2008 and well past the time that the United States requested consultations in this dispute.<sup>540</sup>

451. China has proffered the measure *Notice Regarding Ceasing the Work of Price Verification and Chop for Export Contract of 9 Types of Commodities including Glyphosate* issued on January 9, 2008 to demonstrate that the *CCCMC PVC Rules*<sup>541</sup> and the *Online PVC Instructions* were declared inapplicable by the CCCMC, effective on January 1, 2008. China does not explain how the CCCMC was able or authorized to declare the PVC Procedure inapplicable on January 1, 2008 when the *2004 PVC Notice*, issued by MOFCOM and Customs, was at the time still in effect and was not repealed until May 26, 2008.

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<sup>537</sup> *2008 PVC Notice* (Exhibit JE-128).

<sup>538</sup> See U.S. First Written Submission, paras. 227 and 360.

<sup>539</sup> *Notice Regarding Rules for Contract Declaration for Chemicals-Related Verification and Stamp Products* (China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters Petroleum and Chemicals Products Department, December 30, 2003) (Exhibit JE-121).

<sup>540</sup> See U.S. First Written Submission, para. 227 (referencing website pages captured on October 15, 2009, submitted as Exhibit JE-127).

<sup>541</sup> *Notice Regarding Rules for Contract Declaration for Chemicals-Related Verification and Stamp Products* (China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters Petroleum and Chemicals Products Department, December 30, 2003) (Exhibit JE-121).



452. China also argued that the fact that the United States did not submit a CCCMC website page captured on or after December 21, 2009 (the date of panel establishment) shows that the *CCCMC PVC Rules*<sup>542</sup> and the *Online PVC Instructions* were removed “by October 15, 2009,” the date of the website page that the United States did capture and submit in Exhibit JE-123. In addition to the blatant flaw in China’s logic (a screenshot of a website page dated October 15, 2009 does not demonstrate that the measure displayed on that website page was removed by that date), China’s argument also missed the point. The United States has presented evidence that the PVC procedure continued to be imposed by the CCCMC nearly a year and a half after the PVC procedure was supposedly repealed by MOFCOM, well after the date that the United States requested consultations. The United States has shown that the PVC procedure, even if it was no longer formally in effect or formally being implemented by the CCCMC on the date of panel establishment, continued to affect the operation of a covered agreement.<sup>543</sup>

*CCCMC Export Coordination Measures*,<sup>544</sup> *CCCMC Bauxite Branch Coordination Measures*,<sup>545</sup> and “*System of self-discipline*”<sup>546</sup>

453. In its First Written Submission, China also asserted that the *CCCMC Export Coordination Measures*,<sup>547</sup> *CCCMC Bauxite Branch Coordination Measures*,<sup>548</sup> and “*System of self-discipline*”<sup>549</sup> were no longer in effect. China noted that the Standing Committee of the CCCMC had issued a measure<sup>550</sup> on June 28, 2010 – well into these panel proceedings – that formally repealed the *CCCMC Export Coordination Measures*<sup>551</sup> and *CCCMC Bauxite Branch Coordination Measures*. China also asserted that the self-discipline rule had been repealed, but an examination of the CCCMC’s June 28, 2010 measure does not indicate that the repeal affected this measure.

454. In its answers to the Panel’s Question 1, China submitted a chart as Exhibit CN-438. In that chart, China asserts that these three measures were “declared inapplicable” by *Notice Regarding Ceasing the Work of Price Verification and Chop for Export Contract of 9 Types of*

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<sup>542</sup> *Notice Regarding Rules for Contract Declaration for Chemicals-Related Verification and Stamp Products* (China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters Petroleum and Chemicals Products Department, December 30, 2003) (Exhibit JE-121).

<sup>543</sup> Appellate Body Report, *US – Cotton*, para. 262.

<sup>544</sup> *CCCMC Export Commodities Coordination Management Measures* (Exhibit JE-107).

<sup>545</sup> *CCCMC Measures for Coordination Management of the Bauxite Branch* (Exhibit JE-108).

<sup>546</sup> See MOFCOM June 2008 statement.

<sup>547</sup> *CCCMC Export Commodities Coordination Management Measures* (Exhibit JE-107).

<sup>548</sup> *CCCMC Measures for Coordination Management of the Bauxite Branch* (Exhibit JE-108).

<sup>549</sup> See MOFCOM June 2008 statement.

<sup>550</sup> Exhibit CN-4.

<sup>551</sup> *CCCMC Export Commodities Coordination Management Measures* (Exhibit JE-107).

*Commodities including Glyphosate* issued on January 9, 2008.<sup>552</sup> A review of this measure, however, reveals that this measure addresses only the PVC Procedure. The PVC Procedure is a specific procedure, affecting the enforcement of the coordinated export price as a minimum export price for yellow phosphorus, requiring an export entity to approach and obtain the review and approval of the CCCMC before seeking clearance from Customs for its exports. The *CCCMC Export Coordination Measures* and the *System of Self-Discipline* are much broader measures that govern the coordination work of the CCCMC, including the CCCMC’s responsibility to coordinate export prices for the commodities within its jurisdiction. These measures do not form part of the *PVC Procedure*. In addition, the *Bauxite Branch Coordination Measures* govern the coordination, by the Bauxite Branch, of China’s trade in bauxite. Bauxite is not even subject to the *PVC Procedure*. It appears, therefore, that China’s representation that these three measures have been declared inapplicable as of January 2008 is incorrect.

455. Based on a review of the measures, it appears that the *Self-Discipline Rule* has not in fact been repealed or declared inapplicable. The Panel must therefore make findings on this measure. In addition, the *CCCMC Export Coordination Measures*<sup>553</sup> and the *CCCMC Bauxite Branch Coordination Measures* were not repealed until well into the present panel proceedings. They remain in the Panel’s terms of reference and findings and recommendations on these measures are critical to securing a positive solution to this dispute.<sup>554</sup> Refraining from making findings on these measures would also permit China to create a “moving target” and shield its measures from review, with prejudice to the due process rights of the United States.<sup>555</sup>

*Notice of the Rules on Price Reviews of Export Products by the Customs*

456. At the First Panel Meeting on August 31, 2010, in China’s First Oral Statement, China informed the Panel and the co-complainants that it had issued a measure just two weeks prior, on August 16, 2010, that abolished the *Notice of the Rules on Price Reviews of Export Products by the Customs* (and the *2002 PVC Notice* even though it appeared that the *2002 PVC Notice* had been superseded by the *2004 PVC Notice*).<sup>556</sup>

457. In its Answers to the Panel’s Questions a few weeks later, however, China represented in the chart in Exhibit CHN-438, that the *Notice of the Rules on Price Reviews of Export Products by the Customs* had been “superseded” by the *2004 PVC Notice*. As noted already above, despite the fact that it appears that China has failed to publish the *Notice of the Rules on Price Reviews of Export Products by the Customs*, references to this measure in the *2002 PVC Notice* demonstrate that this measure established the PVC Procedure and provided rules for the

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<sup>552</sup> Exhibit CN-352.

<sup>553</sup> *CCCMC Export Commodities Coordination Management Measures* (Exhibit JE-107).

<sup>554</sup> See discussion above.

<sup>555</sup> Appellate Body Report, *Chile – Price Band System*, para. 144.

<sup>556</sup> China’s First Oral Statement, para. 3; see Exhibit CHN-434.

procedure in 1997. This measure is therefore independent from the *2002 PVC Notice* and the *2004 PVC Notice*. While the *2004 PVC Notice* appears to have superseded the *2002 PVC Notice*, by their terms, neither the *2004 PVC Notice* nor the *2002 PVC Notice* superseded the *Notice of the Rules on Price Reviews of Export Products by the Customs*.

458. Furthermore, for the reasons discussed above, because China’s “repeal” of the *Notice of the Rules on Price Reviews of Export Products by the Customs* did not occur until well into this panel proceeding and as a measure properly within this Panel’s terms of reference, the Panel is required to make findings and recommendations on this measure as part of its duties under Article 11 and Article 19.1 of the DSU, and in order to assist in securing a positive solution to this dispute as set out in Article 3.7 of the DSU.

459. Furthermore, refraining from making findings on these measures would also permit China to create a “moving target” and shield its measures from review, with prejudice to the due process rights of the United States.<sup>557</sup>

*Export Price Penalties Regulations (JE-113) and Measures for Administration of Licensing Entities (Exhibit JE-75)*

460. In its Answers to the Panel’s Questions, submitted on September 13, 2010, China indicated in the chart submitted as Exhibit CHN-438, that the *Export Price Penalties Regulations* had been repealed by a MOFCOM order issued the previous day on Sunday, September 12, 2010.

461. There is no question that this measure is within the Panel’s terms of reference. Its repeal did not occur until well into the current panel proceedings, after the First Panel Meeting. On the basis of the arguments set out above. The repeal fundamentally changes the essence of the measure. China has repealed the measure without explicitly conceding the measure’s inconsistency. China has demonstrated with brazenness how quickly and easily it can promulgate and repeal measures in this dispute. The Panel is, accordingly, required to make findings and recommendations on this measure as part of its duties under Article 11 and Article 19.1 of the DSU, and in order to assist in securing a positive solution to this dispute as set out in Article 3.7 of the DSU. Furthermore, refraining from making findings on the *Export Price Penalties Regulations* would also permit China to create a “moving target” and shield its measures from review, to the detriment of the due process rights of the United States.<sup>558</sup>

462. In its Answers to the Panel’s Questions, submitted on September 13, 2010, China also indicated in the chart submitted as Exhibit CHN-438, that the *Measures for Administration of Licensing Entities* had been “superseded” by the 2001 *Export Licensing Measures*, which were in

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<sup>557</sup> Appellate Body Report, *Chile – Price Band System*, para. 144.

<sup>558</sup> Appellate Body Report, *Chile – Price Band System*, para. 144.

turn repealed by the 2004 *Export Licensing Measures*, which were in turn repealed by the 2008 *Export Licensing Measures*.<sup>559</sup>

463. As the United States explained at the First Panel Meeting, the *Measures for Administration of Licensing Entities* is a different measure that is distinct from the *Export Licensing Measures*. The *Measures for Administration of Licensing Entities* governs the activities and conduct of China’s license issuing entities. The *Export Licensing Measures*, on the other hand, sets out the rules and requirements governing the issuance of export licenses. These measures may be complementary, but are distinct.

464. While it appears that the currently effective *Export Licensing Measures*<sup>560</sup> did supersede the 2004 version of the same measure, which in turn may very well have superseded the 2001 version as China asserts, none of the versions of the *Export Licensing Measures* could have “superseded” the *Measures for Administration of Licensing Entities* in the sense of rendering it ineffective by taking its place. Accordingly, it appears that the *Measures for Administration of Licensing Entities* continue – currently – to be in effect. The Panel is therefore required to make findings and recommendations on this measure.

**b. The Panel Has Authority to Make Recommendations on These Measures and Must Make Recommendations to Secure a Positive Solution to This Dispute**

465. For the measures discussed above that, contrary to China’s arguments and assertions, continue to be in effect, the Panel has the authority and is required to make recommendations on those measures pursuant to Articles 7, 11, and 19.1 of the DSU.

466. For those that appear no longer to be in effect, the Panel, as discussed above, the Panel has the authority and is required to make recommendations pursuant to Article 19.1 of the DSU and in order to secure a position solution to this dispute.

**VIII. CONCLUSION**

467. 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.

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<sup>559</sup> Exhibit JE-74.

<sup>560</sup> Exhibit JE-74.