CHINA –MEASURES RELATED TO THE EXPORTATION OF VARIOUS RAW MATERIALS

(DS394 / DS395 / DS398)

COMMENTS OF THE UNITED STATES OF AMERICA
ON CHINA'S ANSWERS TO THE SECOND SET OF QUESTIONS
BY THE PANEL TO THE PARTIES

December 15, 2010

TABLE OF EXHIBITS

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1. The United States provides below comments on certain of China's answers to the second set of Panel questions. The absence of a U.S. comment on any particular answer by China does not indicate that the United States agrees with China's answer.

Q2. (China) Please comment on Exhibit JE-176.

2. As an initial matter, the United States notes that, contrary to China's assertions, the co-complainants have not "misrepresented" China's arguments nor attempted "to create confusion" through Exhibits JE-176 and the earlier version, Exhibit JE-134. To the contrary, China has introduced confusion into this proceeding by raising ill-defined defenses, seemingly at random, address to various products or subcategories of products. The co-complainants believe that the exhibits summarizing China's various defenses introduce some needed clarity on the matters at issue.

3. Indeed, it was in response to Exhibit JE-134 that China clarified: (1) that it was asserting Article XX(b) of the GATT 1994 as a justification for its export duties on hard zinc spelter (2620.1100) and other zinc ash and residues (2620.1900),[1] and (2) that its justification under Article XX(g) and Article XI:2(a) for the export quota imposed on "bauxite" applied only to that portion of refractory clay (2508.3000.00) that includes refractory bauxite/high alumina clay, – but not to the quota as it covers other refractory clays or aluminum ores and concentrates (2606.0000.00).[2] As a result of these clarifications, the co-complainants prepared Exhibit JE-176 as an updated version of Exhibit JE-134.

4. In response to Question 2, China also makes two objections to specific characterizations of certain of China's defenses. Both of these objections are without merit.

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[1] China's second written submission, para. 227.
[2] China's answers to first Panel questions, Question 8, paras. 31-36.

5. First, China argues that Exhibit JE-176 indicates that China "makes no 'defense' of the export duties on forms of unwrought zinc (7901.1110, 7901.1190, 7901.1200, and 7901.2000)."[3] However, Exhibit JE-176 makes no such indication for these products. This is in contrast to the indications of no defense contained in Exhibit JE-176 with respect to the export duties for the bauxite products; the export quota on fluorspar; the export duty for manganese ores and concentrates; the export duty for silicon metal; the export duty for yellow phosphorus; and the export quota for zinc ores and concentrates. The United States notes that China *does not* dispute the absence of defenses for these measures; so, again, the exhibit is helpful in clarifying the issues in dispute.

6. Second, China objects to the update made in Exhibit JE-176 reflecting China's clarification regarding the justification it asserts for the export quota that it imposes on bauxite. Contrary to China's accusation that the co-complainants attempt to "confuse the product scope," it is China's peculiar defense for the export quota on bauxite that is confusing. China imposes one single export quota on "bauxite." That single quota is defined to cover products falling under Chinese Commodity Code (CCC) Nos. 2508.3000.00 (refractory clays) and 2606.0000.00 (aluminum ores and concentrates). China's defense for this export quota extends only to high alumina clay – which constitutes a subset of refractory clays (2508.3000.00). Refractory clays is itself a subset of the products on which the export quota is imposed. Accordingly, even though China's single export quota on bauxite applies to a number of different bauxitic products, China attempts to parse that export quota into different theoretical portions – and attempts to justify the

[3] China's answers to second panel questions, para. 13.

export quota only to the extent that it applies to one subset of one subset of the products that are covered by the quota.

7. In essence, China is trying to rewrite its measures for the purpose of this proceeding. This type of argumentation does not in fact change the underlying measures, and should be rejected. In particular, China explains that its proffered justifications for the Article XI-inconsistent export quota "apply to refractory bauxite" (not all bauxite).[4] Based on the table China has provided in its answer to Question 2, it appears that China is trying to carve out a separate export quota for high alumina clay within the existing bauxite export quota, and to defend the quota only as it applies to high alumina clay. The table at page 5 of China's answers to the Panel's second set of questions shows China attempting to break out the single quota for bauxite into two separate quotas – one for refractory clays (2508.3000.00) and a separate one for aluminum ores and concentrates (2606.0000.00).[5] Nothing in China's measures supports such an attempt to subdivide the bauxite export quota.

8. In contrast to China's argumentation, the actual measure adopted by China is a single export quota on bauxite, as defined in the *2009 Export Licensing List*. That export quota applies to more than just high alumina clay.[6] Furthermore, the entire export quota appears to be allocated and administered as a single quota[7] – just as, e.g., the silicon carbide export quota,

[4] China then makes the point that refractory bauxite/high alumina clay exports comprised 75 percent of the total refractory clay products exported under 2508.3000.00 from November 2009 through 2010, as though this proportion of export volumes somehow validates its approach to its partial defense of the bauxite export quota. It does not. Regardless of the proportion of the export volume represented by high alumina clay exports under this quota, the quota covers a number of different products, of which high alumina clay forms only a subpart.

[5] Compare this to the quota represented in the same table for fluorspar, silicon carbide, and zinc ores and concentrates – each one of which applies to products falling under more than one Chinese Commodity Code number.

[6] *See 2009 Export Licensing List Notice* (Exhibit JE-22), Appendix 1; *see also 2009 First Round Bauxite Bidding Procedures* (Exhibit JE-94), Section I; and Exhibits CHN-441 and CHN-513, showing export volumes of the various different products subject to the bauxite export quota.

[7] *See 2009 First Round Bauxite Bidding Procedures* (Exhibit JE-94).

which covers products falling under two different CCC numbers, is administered and allocated as a single quota.

9. In short, China's justification for the bauxite export quota – but only to the extent that it applies to high alumina clay – is an attempt to defend a fictional measure. For this reason alone, China's attempts to defend its bauxite export quota should fail.[8]

10. Finally, in addition to commenting on the contents of Exhibit JE-176, China's response to Question 2 recapitulates China's arguments on the 2009/2010 time frame for the Panel's review.[9] The United States has already responded to those arguments, at length, in prior submissions.[10]

11. Related to the bauxite export quota, the United States notes a mistake in Exhibit JE-176. The table should indicate "no defense" for the export quota on bauxite, as it covers aluminum ores and concentrates. The corrected portion of the Exhibit JE-176 chart for the bauxite export restraints should appear as set forth in Exhibit JE-181.

Q4. (China) The Panel would like to understand the chain of China's legislative authority. Is there a general instrument in the Chinese legal system establishing export tariff rates on products? If so, provide a copy and its corresponding translation. What is the relationship between this instrument and Article 3 of the *Regulations of the People's Republic of China* (Exhibit JE-67)?

12. China has confirmed, in its answer to Question 4 of the second set of Panel Questions, that in the legal framework for China's export duties, there exists no general instrument beyond

[8] *See* U.S. second written submission, section III.B.1, paras. 188-200.

[9] This includes China's arguments in Section A of its answer (relating to export restraints in effect in 2009 but not in 2010), paras. 6-9; Section C (relating to the export duty on aluminum ash and residues (2620.4000), which was in effect in 2009 but not in 2010), para. 12, (relating to the yellow phosphorus export duty, which exceeded Annex 6 levels in 2009 but not 2010), para. 14; and Section D (relating to the export restraints in effect in 2009 that continued to be in effect in 2010), para. 15 and table.

[10] *See* Joint Oral Statement of the Co-Complainants at the First Panel Meeting, paras. 38-52; U.S. second written submission, paras. 317-343; U.S. second oral statement, paras. 106-115; and U.S. second closing statement, para. 13.

the *Regulations of the People's Republic of China on Import and Export Duties* (Exhibit JE-67) and the legal instruments implementing specific export duties on products (*e.g.*, the *2009 Tariff Implementation Plan* (Exhibit JE-21), *Circular of the State Council Tariff Commission on the Adjustment of Export Tariffs on Certain Commodities* (Exhibit CHN-1), etc.). This reveals the absence of an important evidentiary basis for China's justifications for its various export duties as environmental measures under Article XX(b) of the GATT 1994 or as conservation measures under Article XX(g).

13. The United States notes that another answer provided by China further shows the absence of a legal framework for the selection of products subject to export duties, or for the rate of such duties. In particular, in China's answer to Question 18 of the second set of Panel Questions regarding the criteria China applied to setting export duties on fluorspar,[11] China describes various criteria without reference or citation to any legal measures or any other evidence or supporting material.

14. In such, China's answers to Questions 4 and 18 demonstrate that China's laws provide for no specific criteria or parameters in China's decisions on: (a) whether to impose export duties on particular products or (b) what level of export duties to apply to products that China has decided to subject to export duties.

15. Although there is no need for the Panel to reach the *chapeau* of Article XX because Article XX(b) and Article XX(g) do not apply to China's export duty commitments, the absence of any framework articulating criteria for imposing export duties and setting export duty levels shows that China would not be able to meet its burden of showing that its measures do not result

[11] *See* China's second answers to questions, paras. 53-57.

in "arbitrary" discrimination. Indeed, in the absence of criteria, China's imposition of export duties on various products and at various rates appears to be completely arbitrary.

Q5. (China) The Panel would like to understand who or what body in the Chinese system enacts the various legal instruments relevant in this dispute. For instance, for export duties, who enacted the *Customs Law of the People's Republic of China* (Exhibit JE-68)? What body enacted the *Regulations of the People's Republic of China on Import and Export Duties* (Exhibit JE-67) What body enacted the notice referred to in (Exhibit JE-21)? In the case of export quotas, Exhibit US-1 lists some 22 measures for which the United States is requesting findings and recommendations. Could China indicate what legislative body enacted the *Foreign Trade Law* (Exhibit JE-72), and the *Regulation of the People's Republic of China on the Administration of the Import and Export of Goods* (Exhibit JE-73)? What legislative body enacted all the other measures thereafter listed in Exhibit US-1 for export quotas?

16. China provides Exhibit CHN-537 in response to this question. The United States notes that China has provided information for some of its minimum export pricing measures, but does not cover several of the legal instruments listed in the minimum export pricing section of Exhibit US-1.

Q7. (China) China argues that since 1 July 2009, it no longer assesses export duties on yellow phosphorus. Did China publish the *Circular of the State Council Tariff Commission on the Adjustment of Export Tariffs on Certain Commodities* (Exhibit CHN-1), and, if so, when and how was it published?

17. In its answer, China states that it first published the *Circular of the State Council Tariff Commission on the Adjustment of Export Tariffs on Certain Commodities* on June 22, 2009. The United States notes that this was over 13 months after China first increased the export duties on yellow phosphorus to 120 percent, on the eve of the U.S. filing of the request for consultations in this dispute. This circular was preceded by a number of other circulars, each announcing a significant change to the yellow phosphorus export duties to take effect within a matter of days:

- China's initial imposition of 120 percent combined export duties on yellow phosphorus in May 2008, which took effect within a week of its announcement, caused a substantial shock to the international market – quadrupling yellow phosphorus prices overnight.[12]

- Although the May 2008 notice indicated that the 120 percent export duties would remain in effect until December 31, 2008,[13] China announced on November 13, 2008 that it would lower the combined export duty rate to 95 percent, effective December 1, 2008 through December 31, 2008.[14]

- Again, just a month later on December 15, 2008, China issued yet another measure announcing that the export duties on yellow phosphorus would be further modified to 70 percent, effective January 1, 2009.[15]

As the United States noted in its answer to Question 9 of the Panel's second set of questions and in earlier submissions,[16] China's actions modifying the yellow phosphorus export duties demonstrate how easily and quickly these export duties are – and have been – imposed and reimposed.

Q11. (China) What happens if a quota exporter decides not to export up to the full amount of its quota allocation? Must that exporter still pay the full amount of the total award (bid-winning) price? If a total quota is not filled, is the total award price in connection with the unused portion reimbursed?

18. In response to Question 11, China contends that if an exporter returns any unused quota allocated to it by October 31, the part of the total award price corresponding to the allocated quota amount "is refunded."[17] However, a review of the relevant measures reveals that China is not obligated to refund <u>any</u> portion of the total award price in case the exporter decides not to use all of the quota allocated to it. Article 23 of the Quota Bidding Implementation Rules provides

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[12] *See* Exhibit JE-175 at 3.

[13] The *May 2008 Tariff Commission Special Export Duty Notice* (Exhibit JE-69) and the *May 2008 Customs Special Export Duty Notice* (Exhibit JE-70).

[14] The *November 2008 Tariff Commission Export Duties Notice* (Exhibit JE-71).

[15] *2009 Tariff Implementation Program* (Exhibit JE-21).

[16] *See* U.S. answers to second panel questions, note 11; *see also* U.S. second written submission, para. 340.

[17] China's Answers to the Second Set of Panel Questions, para. 33.

that: "[F]or the quotas returned to a bidding office before October 31, the bidding office may refund the corresponding award price that has been paid . . ."[18] In other words, an enterprise that does not export quota amounts allocated to it, may forfeit the total award price. In a case where some or all of the allocated quota is transferred or assigned to another enterprise, the successful bidding enterprise still bears the responsibility of paying the total award price.[19]

19. In addition, it is relevant that an enterprise that fails to use the quota may be subject to certain penalties. Quotas that have not been returned or assigned by successful bidding enterprises, quotas for which export licenses have not been received within the validity period of the quotas, and quotas that have received export licenses but have not been used are deemed "wasted quotas."[20] A successful bidding enterprise that wastes more than 5 percent and less than 30 percent of the quota awarded to it shall be disqualified from bidding for the same commodity for two years. A successful bidding enterprise that wastes more than 30 percent of the quota awarded to it is disqualified from bidding for the same commodity for three years.[21] With respect to assigned quotas, an enterprise that assigns more than 20 percent of the quota awarded to it in public bidding will have the excess quantity deducted from its bid quantity in the next year.[22]

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[18] Exhibit JE-78 (emphasis added); *see also* the version of this same measure submitted by China (Exhibit CHN-305).

[19] Quota Bidding Implementation Rules, Article 20 ("the total award price shall not be paid by another enterprise on behalf of the successful bidding enterprise) (Exhibit JE-78); *see also* Quota Bidding Measures, Article 24 (Exhibit JE-77).

[20] Quota Bidding Implementation Rules, Article 35 (Exhibit JE-78).

[21] Quota Bidding Implementation Rules, Article 35 (Exhibit JE-78). *See also* EU Answers to the Second Set of Panel Questions, para. 12.

[22] Quota Bidding Implementation Rules, Article 36(I) (Exhibit JE-78). *See also* EU Answers to the Second Set of Panel Questions, para. 11.

20. The adverse consequences and, in some cases penalties, faced by an enterprise that fails to use the quota allocated to it undermines the credibility of certain of China's arguments regarding the total award price. In its second closing statement, China asserts that the total award price does not constitute a "fee[] or charge[] of whatever character . . . imposed on or in connection with . . . exportation" within the meaning of Article VIII:1(a), because it does not have a "sufficiently proximate connection to exportation." According to China, this is because at the time of payment of the total award price "the bidder has not entered into a contract to export or even decided to export. . . exportation may never occur."[23] As we will discuss below, this interpretation of Article VIII:1(a) finds no support in the text of that provision. Even beyond that, China's argument lacks credibility since enterprises face penalties if they fail to export quotas amounts allocated to them in bidding. In other words, even if it were legally relevant that "exportation may not occur" in spite of payment of the total award price, China's rules governing export quota bidding create a strong disincentive for successful bidding enterprises to fail to export quota quantities allocated to them. In this light, it seems unlikely that enterprises reach the point of payment of the total award price without having an intention to export.

21. In addition, the text of Article VIII does not support China's argument. Article VIII does not state that the fee or charge at issue must be "proximate" to exportation such that exportation is a certainty at the time of payment of the fee or charge. And, indeed, China does not – and cannot – point to anything in the text of Article VIII to support China's reading of Article VIII:1(a). Article VIII:1(a) provides that the fee or charge must be imposed "in connection with exportation." Article VIII:4 makes clear that Article VIII:1(a) applies to fees and charges

[23] China's Second Closing Statement, para. 7.

relating to *inter alia* quantitative restrictions, licensing, and documents, documentation and certification. This broad list of activities is not in any way limited in the way China suggests. With respect to licensing, a Member may maintain an export licensing system whereby an entity can apply for an export license in spite of the fact that exportation may never occur. Yet, the text of Article VIII:4 is clear that fees or charges relating to licensing come within the scope of Article VIII including Article VIII:1(a). Thus, China's argument regarding the supposed limitations on the scope of Article VIII do not withstand scrutiny.[24]

22. Furthermore, China is also incorrect in asserting that this conclusion is "confirmed" by the "evidence, which shows that the bid-winning fee does not reduce the volume, or increase the price, of exports."[25] To be clear, China has submitted no such "evidence." China relies on an economic theory prepared by its economic consultant which contends that quota bidding is the most economically efficient means to allocate a quota.[26] This is not "evidence" of the price or quantity effects of China's quota bidding policies. Furthermore, even if China's economic

[24] *See also* U.S. Answers to the First Set of Panel Questions, paras. 7-13. China's assertion that the total award price is not "imposed" by the government and therefore not covered by Article VIII:1(a) is also without merit. According to China, this is because the total award price reflects "the price that a bidder has chosen to attach to the right to export." *See* China's Second Closing Statement, para. 8. As set forth in the U.S. Second Written Submission, the measures at issue explicitly require successful bidding enterprises to pay the total award price in order to export. *See* U.S. Second Written Submission, paras. 373. The fact that the amount of the total award price is determined by the terms of a private transaction does not make the total award price something other than a fee or charge outside the scope of Article VIII:1 where the government imposes the requirement to pay that fee or charge in order to export. For example, a Member could require payment of an export licensing fee that is based on the price of the export transaction at issue. Such a fee is imposed by the government, regardless of the fact that the amount of the fee depends on the price agreed upon by the parties to the export transaction.

[25] China's Second Closing Statement, para. 8.

[26] Exhibit CHN-306. China's reliance on a U.S. document regarding tariff-rate quotas is also inapposite. *See* China's Second Closing Statement, para. 8 citing Exhibit CHN-463. This document addresses tariff-rate quotas, which are distinct from quotas.

theory has merit, it in no way "confirms" China's misreading of the text of Article VIII:1(a), because it bears no relationship to the text of Article VIII:1(a).[27]

Q12. (China) Why does China seek to justify export restrictions on unwrought manganese waste and scrap and unwrought manganese powder, but not on manganese ores and concentrates? Why does China seek to justify export restrictions on refractory-grade bauxite or high alumina clay, but not on aluminium ores and concentrates or on aluminium ash and residues? Why does China seek to justify export restrictions on zinc waste and scrap, hard zinc spelter and other zinc ash and residues, but not on other forms of zinc at issue in this dispute?

23. In response to Question 12, China fails to provide a coherent rationale for why it claims justifications for some export restraints and not others. China's arbitrary invocation of defenses for certain of its WTO-inconsistent export restrictions reveals the illogic inherent in the defenses China has invoked. China's approach also reveals the *post hoc* nature of China's defenses in this dispute.[28] A review of the specific examples addressed in Question 12 makes this more clear.

24. For example, China states that it defends the export restraints on manganese metal and manganese scrap, but not manganese ore, because China considers that the export duty on manganese ore does not currently satisfy the requirements of Article XX of the GATT 1994. Yet, China provides no explanation for why this is the case. According to China, the export duty on manganese metal satisfies the requirements of Article XX(b), because the export duty will lead to a reduction in production of manganese metal, which will result in less associated pollution. As the United States has explained, China's assessment of the supposed pollution effects on each product in isolation without an assessment of the impact of the export restraints imposed on products in various stages of the production chain renders China's analysis under Article XX(b) without merit.

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[27] U.S. Second Closing Statement, para.

[28] *See* U.S. Second Closing Statement, paras. 18-21.

25. It is noteworthy, however, that the export duty on manganese ore runs directly contrary to the export restraint on manganese scrap. China contends that restricting the export of manganese scrap will lead to increased secondary production (*i.e.*, increased consumption of scrap), and less primary production of manganese metal *i.e.*, production from crude ores. However, as we have discussed, export restraints on ores similarly stimulate additional consumption of ores, thereby undercutting China's supposed environmental rationale for the export restraints on scrap for which China does assert a defense.[29] China even goes so far as to use the fact that it asserts no defense for the export duty on manganese ores to support the contention that the Panel should not even consider the relationship between the export restraints on manganese ore and manganese scrap.[30] Such an argument is illogical as the legal defense invoked for the export restraint on ores is not determinative of the effect of that export restraint on the market. In short, China's invocation of an environmental defense for the export duties on manganese metal and manganese scrap combined with China's choice not to defend the export restraint on manganese ores reveals an inherent contradiction in the theory of China's defense. It also reveals the *post hoc* nature of the environmental defense that China has asserted for manganese metal and manganese scrap.

26. Similarly, China's statement that it chooses not to defend the export prohibition on zinc ores and concentrates reveals the illogic and *post hoc* nature of China's defense of the export duties on zinc scrap, hard zinc spelter, and other zinc ash and residues. An export restraint on zinc ores stimulates additional consumption of the ores *i.e.*, additional primary production,

[29] U.S. Second Written Submission, para. 64.
[30] *See e.g.* Exhibit CHN-519, paras. 67-68.

undercutting the theory of China's defense that the export duties on zinc scrap will necessarily lead to increased secondary production.

27. We also note that China tries to explain the fact that it invokes a defense for the export quota on bauxite only as it relates to high alumina clay (which China refers to as refractory-grade bauxite), to the exclusion of other forms of bauxite. As an initial matter, we take this opportunity to clarify confusion that may result from the Panel's question. China imposes a single export quota on bauxite (not separate quotas on high alumina clay (which China refers to as refractory-grade bauxite) and aluminum ores and concentrates as the question perhaps implies). The bauxite quota encompasses two products: refractory clay (2508.3000) and aluminum ores and concentrates (2606.000). However, China's defenses under Article XI:2(a) and XX(g) do not apply to the same products on which the export quota is applied. Instead, China only defends its export quota as it is applied to high alumina clay, which is a subset of refractory clay. In other words, China does not defend the export quota on aluminum ores and concentrates or refractory clay other than high alumina clay. This disconnect between the measure that China imposes and the defense that China invokes also reinforces the U.S. explanation that China's defenses in this dispute are *post hoc* justifications developed for purposes of this litigation, but do not fit with the measures that China has chosen to impose.

28. With respect to export duties, China imposes an export duty on bauxite including refractory clay, aluminum ores and concentrates, and aluminum ash and residues. China asserts no defense with respect to the export duties on bauxite.[31] We will now turn to address China's response to Question 12 as it relates to the export quota on bauxite.

[31] *See* Exhibit JE-176; *see also* U.S. Comments on China's Answer to Question 2 above.

29. While China addresses its choice not to defend the export quota as it is applied to aluminum ores and concentrates, China does not even address the lack of a defense for the export quota applied to refractory clay other than high alumina clay.

30. China's discussion of its choice not to defend the export quota as it is applied to aluminum ores and concentrates also undercuts the defenses China has invoked for high alumina clay. China's explanation is based on two factors. First, presumably in an effort to claim that its export quota does not satisfy Article XX(g), China states that it does not restrict the extraction and processing of aluminum ores and concentrates. Second, China asserts that there is no critical shortage of aluminum ores and concentrates.

31. This latter assertion is of particular importance in exposing the flaws of China's defense under Article XI:2(a) as it relates to high alumina clay.[32] As set forth in the U.S. second written submission, China's defense under Article XI:2(a) of the GATT 1994 places great weight on two factors: (1) the supposed lack of substitutes for high alumina clay in the production of refractories for steel production; and (2) the supposed limited amount of reserves of high alumina clay. Both of these assertions are without merit.[33] Metallurgical grade bauxite and non-metallurgical grade bauxite, both classified as aluminum ores and concentrates (26060000), can be used to produce refractories for steel production, and China's assertion of a lack of substitutes for high alumina clay is therefore without merit. In addition, the "wide[] availab[ility]" of aluminum ores and concentrates – which, like high alumina clay, can also be used to produce refractories for steel production – renders China's assertions regarding the supposed limited amount of reserves of high alumina clay irrelevant and discredits China's contention that it faces

[32] China's Answers to the Second Set of Panel Questions, para. 38.
[33] U.S. Second Written Submission, paras. 221-28.

a "critical shortage" within the meaning of Article XI:2(a).[34] China's choice not to defend the export quota as it relates to aluminum ores and concentrates again exposes the illogic of the defense under Article XI:2(a) that China does invoke for high alumina clay.

32. With respect to China's defense under Article XX(g) for the export quota as applied to high alumina clay, China has maintained the export quota on bauxite since 2006.[35] However, China contends that in 2010, when China imposes domestic measures that supposedly affect production of high alumina clay, the export restraint is a conservation measure that can be justified under Article XX(b). This *post hoc* assertion of a conservation objective is unpersuasive.

Q13. (China) Does China impose any export restrictions on the downstream sectors that demand EPRs, such as the steel or aluminium industries?

33. Contrary to China's suggestion, China's response to Question 13 in fact confirms the U.S. position that the objective of China's export restraints is not environmental protection, but rather the promotion of production and exports of higher value-added products.[36]

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[34] U.S. Second Written Submission, paras. 233-37.

[35] *See* U.S. Answer to the First Set of Panel Questions, para. 6.

[36] China also misrepresents the complainants' position by suggesting that our "entire argumentation" is premised on the fact that China imposes its export restraints for economic reasons. *See* China's Answers to the Second Set of Panel Questions, para. 44. As the United States has explained in detail, China's defense under Article XX(b) in fact fails for a number of reasons. One of those reasons is that the evidence confirms that China imposes its export restraints with the objective of promoting its downstream industries, not reducing environmental pollution There are a number of additional reasons that China's defense fails. First, since the export of the products bears no relationship to the environmental pollution associated with their production, China cannot show that the export restraints at issue are necessary to accomplish China's stated environmental objectives. Indeed, China has failed to provide any evidence that its export restraints are making a material contribution to its purported environmental objective. Second, there are a number of WTO-consistent, reasonably available alternatives – including production controls and pollution controls – that would more directly address China's stated objective and would not present the same issues of WTO inconsistency as the export restraints at issue. China does not have any legitimate response to these proposed alternatives, except to point to the existence of vague environmental measures that make no mention of the products at issue in this dispute. The evidence does not support China's assertions of the existence of environmental controls and, China's argumentation regarding these alternatives reflects a mis-reading of *Brazil – Tyres*. Accordingly, China has not – and cannot – show that its measures satisfy the requirements of Article XX(b). On this basis, we urge the Panel to reject China's defense under Article XX(b) as it relates to the export duties on

(continued...)

34. As the United States has explained, this is confirmed by statements in high-level documents of the Chinese government. Such documents express an intention to:

> At the same time that we continue to strictly control the export of 'highly energy-consuming, highly polluting and resource-intensive products,' we will put into force suitably flexible policies for export tariffs and support the export of deeply processed products with high technology content and high value added . . . We will accelerate the transformation of export methods and encourage the export of . . . end products, thereby spurring the indirect export of non-ferrous products.[37]

35. Similarly, China states that it will "put the top priority on meeting domestic demand, optimize direct exports, expand indirect exports."[38] As further context, the Blueprint for the Adjustment and Revitalization of the Steel Industry issued by the State Council in 2009 further states:

> Guided by continued adherence to the policy of controlling the export of 'highly-polluting, highly energy-consuming and resource-intensive' products with low value-added, we shall earnestly implement measures for raising the export rebate rate for some steel products, and likewise . . . increase the export rebate rate for steel-containing products with high technical content and high value-added.[39]

36. At the outset, we note that China's stated intention to "expand indirect exports" directly contradicts China's defense under Article XX(b). Even beyond the flaws in China's assertion of an environmental defense, China does not even seek to reduce exports – let alone production – of the products at issue. China simply seeks to export the products at issue in this dispute in the form of higher value-added products. In addition, in response to Question 13, China suggests that the existence of export restraints on crude steel and steel scrap products as well as

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[36] (...continued)
magnesium metal, manganese metal, coke, and silicon carbide. Finally, China's defense, if accepted, would have serious negative systemic implications. U.S. First Oral Statement, paras. 115-21; U.S. Second Written Submission, paras. 81-108; U.S. Second Oral Statement, paras. 25-53.

[37] Exhibit JE-13 (emphasis added).

[38] Exhibit JE-9 (emphasis added).

[39] Exhibit JE-9.

unwrought aluminum and aluminum waste and scrap contradicts the U.S. position supported by China's own high-level government documents cited above. However, a careful review of China's response and Exhibit CHN-549 exposes the fallacy of China's contention.

37. ***Steel***. In Exhibit CHN-549, China indicates that it imposes export duties[40] on 32 "steel" products, all classified in Chapter 72 of the Harmonized Schedule. However, a review of this list of products reveals that most of the products are either properly classified as raw materials used in the further processing of steel or are semi-finished steel products. Ten of the 34 iron and steel products on which China imposes export duties are raw materials for steel making. Ten of the products are semi-finished steel products, which are also further processed into higher value-added products. Significantly, as shown in Exhibit JE-182, these products reflect a small portion of the more than 205 8-digit steel products in Chapter 72 of China's tariff schedule, and none of the more than 160 steel products in Chapter 73 of China's tariff schedule.[41]

38. The raw materials on which China imposes export duties include granules and powders of pig iron classified in Customs Commodity Code 7205 and Ingots and other primary[42] forms of iron and steel, classified in Customs Commodity Code 7206. In addition, China wrongly includes steel scrap among its "downstream" products. The only use of steel scrap is as a raw material in the production of steel and iron. Scrap has no other independent uses, and therefore is more properly considered a raw material for steel production. Six of the 34 steel products identified in Exhibit CHN-549, classified in Customs Commodity Code 7204, are scrap products.

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[40] Although China imposes export duties on products identified by their HS tariff number (*See* Exhibit JE-21), China identifies the products in Exhibit CHN-549 by their customs commodity code.

[41] Chapters 72, 73, and 76 of China's tariff schedule (Exhibit JE-182).

[42] "Primary" aluminum and steel products refer to products that have been processed only once. The term has a distinct meaning from "primary" used in other contexts of this dispute to refer to metals produced from ores, rather than from scrap.

39. China also imposes export duties on 10 semi-finished steel products in Customs Commodity Code 7207, 7218, and 7224. This includes steel billets, slabs, and other semi-finished products. These products have no final uses in and of themselves; rather, they are then rolled or otherwise processed to make finished steel products such as sheets, strip, bars, beams, wire etc.

40. ***Aluminum***. With respect to aluminum, China misrepresents the information in Exhibit CHN-549. China states that it imposes export duties on 21 aluminum products. However, for 16 of the tariff lines identified in Exhibit CHN-549, the interim tariff rate is 0 percent. Since the interim tariff rate trumps the export tariff rate,[43] China in fact does not impose export duties on 16 of the products identified in Exhibit CHN-549. There remain 6 aluminum products on which China imposes export duties. However, these include scrap (classified in Customs Commodity Code 7602) and a number of primary forms of aluminum (classified in Customs Commodity Code 7601), which are further processed. As discussed in the context of steel, scrap products are inputs used in the production of aluminum, and are therefore more properly characterized as raw materials. Finally, as demonstrated in Exhibit JE-182, China applies export duties on only a small fraction of the aluminum products listed in Chapter 76 of its tariff schedule.

41. Based on these clarifications, neither China's response to Question 13 nor Exhibit CHN-549 support China's position. China's export policies do not reflect an environmental objective. China's response to Question 13 implies that the export duties on the steel and aluminum products listed in Exhibit CHN-549 are consistent with China's environmental justification asserted for the export restraints imposed on the raw materials at issue in the dispute, but Exhibit

[43] U.S. First Written Submission, para. 78.

CHN-549 supports no such thing. China's export duties are not imposed on the products at issue in this dispute or the downstream products in any consistent fashion. Instead, China has imposed, removed and reimposed multiple times by China. But, there is no evidence that such changes reflect changes in China's environmental policy or in environmental conditions, as opposed to China's perception of changing market conditions and its own economic interest. For example, China provides no explanation for why China imposes export duties on the selection of products listed in Exhibit CHN-549 while other steel and aluminum products not listed are free from export restraints, or how such a discrepancy fits with China's supposed environmental objectives.[44]

42. With respect to steel, China began imposing export duties on certain steel products in 2006. Since that time, China's crude steel production increased from 419 million metric tons in 2006 to 620 million metric tons in 2010[45], even while export duties on these products varied considerably over this time.[46] Moreover, during the 2006-2010 period, China also combined the use of export duties on certain steel products with differential VAT rebates on exports to restrict or accelerate the export of certain steel products.[47] Such an approach is not consistent with China's stated environmental rationale.

43. As set forth above, a review of the products listed in Exhibit CHN-549 is consistent with the U.S. position that China's export policies promote China's economic, rather than

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[44] We also note that China provides its export duties on steel and aluminum products for 2010, but not for 2009.

[45] World Steel Association Steel Statistical Yearbook, 2009; http://www.worldsteel.org/pictures/programfiles/SSY2009.pdf.

[46] *See e.g.* CCCMC Presentation at the Fourth China-US Steel Dialogue Meeting (excerpts) (Exhibit JE-183).

[47] *See* Blueprint for the Adjustment and Revitalization of the Steel Industry issued by the State Council in 2009, IV.1 (Exhibit JE-9).

environmental, goals of developing the production and export of higher value-added products, by subjecting inputs and lower value-added products to export restraints.

Q14. (China) What are the environmental measures that China has adopted in connection with the downstream industry, for example, in connection with the steel or aluminium industries?

44. In response to Question 14, China submits a chart (Annex 14-1) that purportedly shows measures it has in place to address the environmental impacts of producing steel and aluminum. In Exhibit JE-184, the United States submits a chart annotating China's chart.[48] As Exhibit JE-184 demonstrates, none of these measures sets forth any standards to control the environmentally polluting impacts of steel or aluminum. Instead, where they even address the pollution associated with the production of steel or aluminum, they merely identify certain goals, rather than specific standards, with respect to environmental protection. Moreover, many of the measures identified in Annex 14-1 do not even mention steel or aluminum, but China asks the Panel to take China's word that they apply to steel and aluminum producers. In any event, as with the environmental measures that China contends control the polluting effects of production of coke, magnesium, manganese, and silicon carbide, China provides no explanation of how these measures address the environmental impacts of the production of steel and aluminum. And, the mere listing of a large number of measures in Annex 14-1 does nothing to change this fact.

[48] Exhibit JE-184 annotates China's list to indicate (1) whether the measure addresses pollution associated with the production of aluminum and steel; and (2) whether the measure sets forth specific standards that producers of aluminum and steel must follow. Where the measure does not set forth such standards, we have provided an illustrative example of the type of provision that the measure does include and an explanation of why the measure does not support China's position.

45. China adduced many of the same measures in response to Question 39 and in the U.S. comment on China's answer to Question 39, we provide a few illustrative examples of the measures that set forth vague statements related to environmental protection goals without any specific requirements imposed on producers in any specific industry or any indication of how such statements would impact the behavior of specific producers. Accordingly, the Panel has no evidence of pollution controls imposed on steel or aluminum production in China.

46. In addition, some of the measures listed in Annex 14-1 are not environmental measures at all, but rather are measures announcing China's export policies. These are measures which China asks the Panel to view as environmental measures, but the inclusion of such measures in the list in Annex 14-1 does not make them environmental measures.

47. Finally, it is important to put the Panel's question in the broader context of the dispute. The Panel asks about China's environmental controls on steel and aluminum production. This is relevant, because as the United States has discussed in detail, China's export restraints subject to this dispute promote the expansion of China's downstream industries, including steel and aluminum industries. China's repeated failure to address the polluting impacts of downstream production processes reinforces our point that China's export restraints on coke, magnesium, manganese, and silicon carbide, are not environmental measures at all. Instead, they are economic policies designed to promote the development of higher value-added industries. China's lack of pollution controls on downstream production further reinforces this fact.

Q15. (China) Does China agree with the view that the application of an export restriction on a raw material may induce an increase of exports of the downstream sector?

48. The United States refers the Panel to Exhibit JE-185[49] wherein Drs. Gene Grossman and Mark Watson provide comments on China's answers to certain of the Panel's Questions.

Q17. (China) What impact will a 15 per cent export duty have on the lifespan of fluorspar reserves and how does the extended lifespan address China's sustainable development concerns?

A. China Does Not Answer the Panel's Question

49. In its answer to Question 17, China once again sidesteps the Panel's question. In Question 17, the Panel:

(1) Asks China what impact a 15 percent export duty will have on fluorspar reserves; and

(2) if China believes that the export duty extends the lifespan of reserves, asks China how that supposed extended lifespan addresses China's sustainable development concerns.

In its response,[50] China does not show that the export duties in themselves will have <u>any</u> effect on fluorspar reserves – much less attempt to argue that the export duties will extend the lifespan of fluorspar reserves. If China's 15 percent export duties on fluorspar had been set with the intention of extending the lifespan of China's fluorspar reserves, China's answer to this question should have been straightforward. Instead, China argues that its export duty on fluorspar is a conservation-related measure because "it manages and controls the use and supply of this commercially exploited by exhaustible natural resource."[51] It appears that China chooses to answer the question "how do the export duties of 15 percent on fluorspar relate to conservation?" and not Question 17.

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[49] Grossman-Watson Comments on Certain of China's Answers to the Second Set of Panel Questions (Exhibit JE-185).

[50] China's answers to second panel questions, paras. 47-52.

[51] China's answers to second panel questions, para. 47.

B. China's 15 Percent Export Duties on Fluorspar Do Not Relate to Conservation

50. In answering a different question from the one the Panel actually poses, China argues that: (1) it is the "caps" on mining and production that restrict the supply of fluorspar[52] while (2) the role of the 15 percent export duties on fluorspar is only to "manage" the supply of fluorspar that is allegedly restricted by the mining and production "caps."[53] China does not make the argument that the 15 percent export duties have the effect of extending the lifespan of fluorspar reserves. Accordingly, based on China's own argumentation, the 15 percent export duties on fluorspar do not extend the lifespan of fluorspar reserves and, therefore, the export duties do not in themselves relate to conservation.

51. In fact, the export duties do not relate to conservation whether considered by themselves or considered in combination with other measures proffered by China. As the United States has shown in prior submissions, instead of benefitting the lifespan of fluorspar reserves, the export duties only benefit Chinese users of fluorspar to the detriment of foreign users.[54]

52. Furthermore, China's 2010 mining and production targets do not restrict fluorspar supply. As the United States has demonstrated in prior submissions, those mining and production targets are set at levels exceeding actual levels of mining and production and

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[52] China's answers to second panel questions, para. 48 ("As a result of the caps, the total available supply of fluorspar is restricted.").

[53] China's answers to second panel questions, para. 48 ("The export duty manages the limited supply of fluorspar . . .").

[54] *See, e.g.*, U.S. answers to second panel questions, paras. 69-70; U.S. second oral statement, paras. 65-67; U.S. second written submission, paras. 138-145 and 249-257; Joint Oral Statement of the Co-Complainants at the First Panel Meeting, para. 74.

therefore do not operate as restrictions.[55] As a result, the export duties also do not manage a supply of fluorspar that is limited or restricted.

53. China has therefore failed to meet its burden of showing, as required by Article XX(g) of the GATT 1994, that its 15 percent export duties on fluorspar: (1) relate to conservation or (2) are made effective in conjunction with restrictions on domestic production or consumption.

C. China Introduced the 2010 Fluorspar and High Alumina Clay Measures for the Purpose of the Present Dispute Settlement Proceedings

54. Finally, in its response to this question, China also attempts to defend the fact that its mining and production targets for fluorspar were not introduced until 2010.[56] While acknowledging that its attempts to put in place measures concerning fluorspar production are recent, China argues that these measures were foreseen as early as 2008 in the *National Mineral Resources Plan (2008-2015)*.[57] The United States notes that China has imposed export restraints on fluorspar since well before the introduction of the 2010 measures or the *National Mineral Resources Plan (2008-2015)*; export quotas were first imposed on fluorspar as early as the mid-1990s and export duties were first imposed in 2006.

55. Additionally, a review of the actual text in the *National Mineral Resources Plan (2008-2015)* reveals that any exhortation to restrict the mining of fluorspar articulated in that plan is premised on preserving the value that fluorspar commands in the export market:

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[55] *See, e.g.*, U.S. answers to Questions 20 and 31 of the second panel questions, paras. 14-44 and 60-91; U.S. second oral statement, paras. 75-84; U.S. second written submission, paras. 147-158, 165-173, 259-270, and 278-286; Joint Oral Statement of the Co-Complainants at the First Panel Meeting, paras. 77-83.

[56] China incorrectly states that the co-complainants' "only objection to [the argument that the restraints manage the use of the limited supplies of the resources made available under extraction and production caps] is that the relationship between the export restraints and the caps is recent." (China's answers to second panel questions, para. 51) (emphasis added). U.S. objections on other substantive grounds are set forth in the previous paragraphs and the portions of the U.S. submissions referenced therein.

[57] *See* China's answers to second panel questions, para. 51.

> . . . for minerals with export advantages, restrict the extraction and thus maintain the value thereof, strictly control the establishment of mining rights, strengthen the administration of export quotas and prohibit extraction beyond planning and prohibit excessive export. . . .
>
> Non-metal minerals. Restrict the extraction of such minerals as barite, fluorspar, graphite, magnesite, talc and rich phosphorite.[58]

56. The policy set forth in the *National Mineral Resources Plan (2008-2015)* is therefore a continuation of the economically-driven – rather than conservation-related – policy set forth in the 2001 version of the *National Mineral Resources Plan*, which 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.[59]

57. Finally, one further point worth noting relates to China's assertion, without citation to any support, that its 2010 measures concerning fluorspar production "apply with effect from 1 January 2010."[60] China's State Council issued the *Circular on the Adoption of Comprehensive Measures to Control the Mining and Production of Fireclay and Fluorspar*[61] (*Adoption Circular*) on January 2, 2010. The *Adoption Circular* only announced that mining and production targets would be implemented and tasked various ministries with the responsibility of determining the target levels.[62] Implementing measures were not issued by these various ministries until April 20, 2010 (issued by the Ministry of Land and Resources announcing

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[58] *National Mineral Resources Plan (2008-2015)* (Exhibit CHN-80), Section IV.2 at 8. Note that this section of the *National Mineral Resources Plan (2008-2015)* makes no mention of bauxite or high alumina clay, the latter of which is subject to the same measures China introduced for fluorspar in 2010.

[59] *National Mineral Resources Plan* supplemental excerpt (Exhibit JE-186), section 7(4).

[60] China's answers to second panel questions, para. 51.

[61] Exhibit JE-167 (also Exhibit CHN-87).

[62] *Circular on the Adoption of Comprehensive Measures to Control the Mining and Production of Fireclay and Fluorspar* (Exhibit JE-167), Section I.

mining control target levels)[63] and May 19, 2010 (issued by the Ministry of Industry and Information Technology announcing production control target levels).[64] These April and May 2010 dates cannot be reconciled with China's representation that the mining and production targets applied with effect starting January 1, 2010.

Q18. (China) What criteria are applied in setting export duties on fluorspar?

58. In its answer to this question, China states that the Tariff Commission of the State Council "assessed several factors" in deciding the level at which to set the fluorspar export duties and that "[t]hese factors are similar to those criteria used by MOFCOM in deciding on the level of the export quota applied to refractory bauxite [*i.e.*, high alumina clay]."[65] China provides citations to a document relating to the bauxite quota and to its own submissions. However, China has provided no reference or citation to any legal measures or any other evidence or material in support of the assertion that it considered similar – or any – factors in setting the export duty for fluorspar.[66] In fact, China confirmed in its answer to Question 4 that no such measures or provisions exist in China's legal framework setting forth criteria or parameters for the imposition of export duties or the determination of export duty rates.

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[63] *Circular on Passing Down the 2010 Controlling Quota of Total Extraction Quantity of High Alumina Clay and Fluorspar* (Exhibit JE-168).

[64] *Circular of the Ministry of Land and Resources on Passing Down the Controlling Quota of the 2010 Total Production Quantity of High-alumina Clay and Fluorspar* (Exhibit JE-169).

[65] China's answers to second panel questions, para. 53.

[66] Whereas China cited to Exhibit CHN-283 in reference to the factors it argues were taken into account in setting the volume for the export quota for bauxite in 2010, issued by MOFCOM's Department of Foreign Trade. The United States notes that, pursuant to Article 8(1) of the *Quota Bidding Measures* (Exhibit JE-77), it is the Bidding Committee that has the authority to determine quota volumes for products subject to export quota bidding. It is not clear what the relationship is between the Department of Foreign Trade and the Bidding Committee and whether the Department of Foreign Trade has the authority to make this determination. The United States also observes that quotas have been imposed on bauxite for many years and Exhibit CHN-283 does not relate to factors taken into account in setting the export quota volume for bauxite in years prior to 2010.

59. China's answer also states: "at the time of setting the export duty of fluorspar, the Tariff Commission was aware that, as of January 1, 2010, the caps on the extraction and processing of fluorspar would limit the total supply available of fluorspar . . ." Once again, China provides no support for this statement. In addition, the United States notes that China has been setting export duties for fluorspar since November 2006.[67] China initially chose to set the export duties for fluorspar at 10 percent, then decided to increase the duty rate to 15 percent effective June 2007.[68] China's assertion does not provide any explanation or information regarding the factors it took into account in applying the 10 percent export duties in 2006 or the 15 percent export duties for fluorspar that have been applied since 2007. Furthermore, at those times, the Tariff Commission would not have been aware of measures on fluorspar mining and production that China would not introduce until 2010.

60. China has therefore failed to provide a responsive answer to the Panel's Question 18 regarding the criteria that China actually applied in setting export duties on fluorspar.

Q19. (China) What is the rationale for using two different policy measures, namely a duty and a quota, to achieve the same objective, that is conservation for fluorspar and refractory bauxite, respectively?

61. China's response to Question 19 once again avoids answering the question posed. The Panel has asked China why it chooses, in 2010, to use two different policy measures (an export quota v. an export duty) for two different raw materials in order to accomplish the same purported objective of conservation.[69]

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[67] *See* Exhibit CHN-439.

[68] Exhibit CHN-439.

[69] The United States notes that through 2009, China imposed both export quotas and export duties on fluorspar and bauxite (which applies to high alumina clay as well as other bauxitic materials), but China does not defend any of the export restraints imposed on these materials prior to 2010 and does not defend the export quota

(continued...)

62. China's response to the Panel's question is essentially that: (1) "an export duty and export quota are functionally equivalent measures" that "can be used to manage supply in equivalent terms";[70] (2) "China is permitted to use either type of measure, or both, as part of its conservation policy;"[71] and(3) "[t]he issue is [] not a question of the merits of one measure relative to that of the other measure."[72] China's response is beside the point.

63. The Panel's question seeks an explanation of China's decision, given the differences between export quotas and export duties and the differences in the application of these measures by China in the past, to impose an export quota for bauxite (which applies to high alumina clay as well as other materials that China concedes it is not trying to conserve) and export duties for fluorspar for conservation purposes. If China's export duties on fluorspar and export quota on high alumina clay (which is effected inexplicably through an export quota covering high alumina clay as well as other bauxitic materials) were in actuality conceived and imposed as measures related to the conservation of these two materials, China's answer to this question should be straightforward and well-supported. It is not and the response provides no explanation regarding China's rationale for imposing, in 2010, the two different types of measures for the two materials in service of the same goal of conservation. Accordingly, as the United States noted in its closing statement at the second meeting with the Panel, China's Article XX(g) defense, which is

[69] (...continued)
applied in 2010 to aluminum ores and concentrates (2606.000.00) or refractory clay (2508.3000.00) other than high alumina clay. *See* China's answers to first panel questions, paras. 31-36; U.S. second written submission, paras. 188-200; U.S. comment on China's answer to Question 2 above.

[70] China's answers to second panel questions, para. 58.

[71] China answers to second panel questions, para. 59.

[72] China answers to second panel questions, para. 59.

applied to exactly one export quota product and one export duty product, appears to be driven by litigation strategy rather than conservation concerns.[73]

64. The Panel's curiosity reflected in this question is well-founded. Export quotas and export duties are distinct policy measures and the two types of policy measures can have different effects on traders and the market. For example, if changes in the market occur once an export quota or export duty is set, product can continue to be exported under an export duty regime whereas an export quota will lock and no more exportation will be permitted to occur after the quota is filled.

65. In addition, export quotas require a framework for administration and allocation that export duties do not require. Based on the way an export quota is administered and allocated – including the timing and frequency of quota distribution, the basis on which a quota is distributed (*e.g.*, first come, first serve; meeting qualification criteria; price and quantity bidding) – an export quota could affect the timing of purchases made by traders as well as create greater price distortions than an export duty would.

66. Furthermore, China began imposing export quotas on fluorspar and bauxite since as early as the mid-1990s. China did not begin also imposing export duties on fluorspar and bauxite (including export duties on aluminum ash and residues, which were not subject to the bauxite export quota) until November 2006 and 2008.[74] China then decided to impose only export duties on fluorspar and only an export quota on bauxite in 2010 – and China defends only these export restraints in 2010 as conservation measures.

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[73] *See* U.S. second closing statement, paras. 18-21.
[74] *See* Exhibit CHN-439.

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

(a) (China) Please clarify how a production reduction is achieved when "target" levels are set much higher than actual production.

67. In its response to this question,[75] China argues only that its production target levels are binding and enforceable numbers that cannot be exceeded. It is China's burden under Article XX(g) of the GATT 1994 to demonstrate that its export restraints on fluorspar and high alumina clay relate to conservation and are made effective in conjunction with restrictions on domestic production or consumption. China does not provide any clarification or explanation regarding how a target number for production – even one that is a binding cap that cannot be exceeded – can be considered to "restrict" production when that number is significantly greater than actual production levels. Accordingly, China has not met its burden under Article XX(g).

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

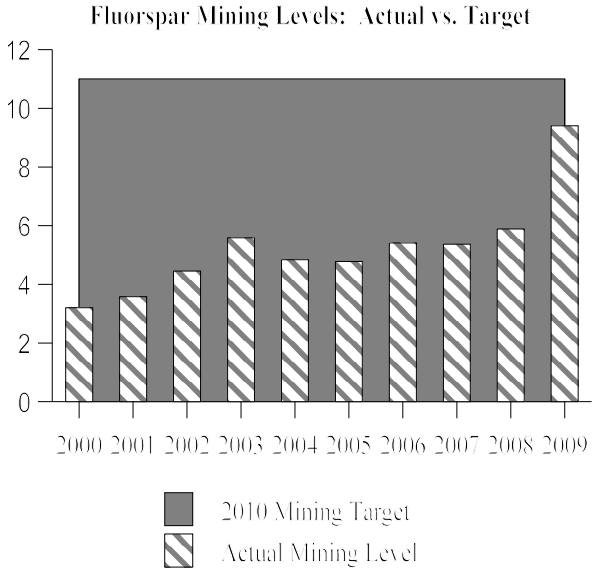
68. In paragraph 71 of China's answers to the second set of Panel questions, China provides 2008 mining data for high alumina clay (2.31 million MT) and fluorspar (5.89 million MT). China calls to the Panel's attention Exhibits CHN-83 and CHN-369 which contain Ministry of Land and Resources data for fluorspar and high alumina clay mining, respectively, for the years 2000 through 2009. These data demonstrate that in every one of the 10 years leading up to China's introduction of mining targets for fluorspar and high alumina clay in 2010, actual mining

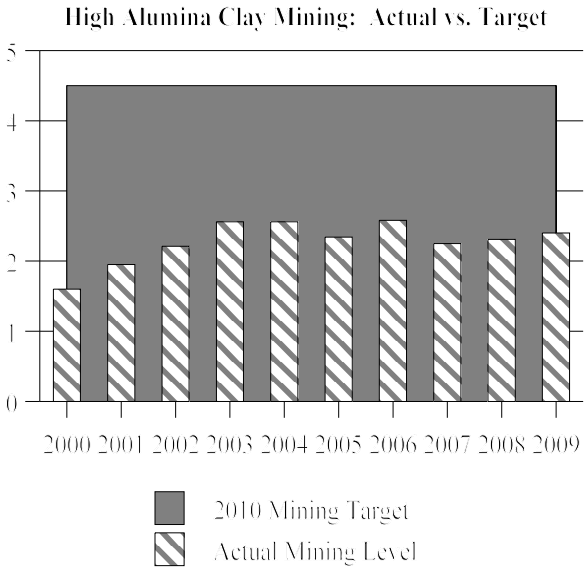
[75] China's answers to second panel questions, paras. 62-70.

levels for fluorspar and high alumina clay were well below the mining target levels of 11 million MT and 4.5 million MT respectively:

69. Accordingly, even taking into account the trend in mining levels for fluorspar and high alumina clay from the past decade, the mining target numbers for both fluorspar and high alumina clay cannot be considered restrictions on production.

70. The United States also notes that the data also show an uncharacteristic and steep spike in the level of fluorspar mined in 2009. From 2000 through 2008, the amount of fluorspar actually mined did not exceed 5.89 million MT. Yet suddenly in 2009, a year in which most of the world was experiencing a substantial economic slowdown or recession, the amount of fluorspar mined





shot up 60 percent to 9.4 million MT. This data demonstrates that there has been no attempt to restrict production or consumption within China during the time that China has imposed export restraints on fluorspar. Furthermore, given the massive growth from 2008 to 2009 in fluorspar

mining levels, it appears that China may have conversely undertaken a major push to expand fluorpsar production.

71. In addition, as discussed in the U.S. answer to Question 20(e) from the Panel's second set of questions, data from other sources show that production of metspar and acidspar from fluorspar ores peaked in 2008 and dipped slightly in 2009.[76] These data anomalies could be explained by the fact that the 2009 fluorspar data are incorrect; the CaF_2 content of fluorspar ores mined in 2009 was uncharacteristically and significantly lower than in other years; and/or not all fluorspar ore mined in 2009 was used to produce metspar and acidspar.

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

72. In its response to this question,[77] China urges the Panel, in evaluating whether the 2010 mining targets are restrictions, to consider not just the 2009 mining data but "all of the historical, contemporaneous, and prospective elements taken into account by the Ministry of Land and Resources in deciding on the level of the cap."[78] The United States recalls that it is China's burden, as the respondent, to establish that it has met every element of the Article XX(g) defense. China has alleged that it introduced production restrictions in 2010 for the purpose of attempting to invoke the Article XX(g) exception for its fluorspar export duties and export quotas on high alumina clay (but not on the other materials covered by the same export quota on bauxite).

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[76] *See* U.S. answers to second panel questions, paras. 41-44. *See also* Market Research on Fluorspar and Selected Fluorochemicals (Exhibit JE-164), Table 7 at 34.

[77] China's answers to second panel questions, paras. 72-79.

[78] China's answers to second panel questions, para. 79.

73. In its answer to this question, China has identified different factors it took into account in setting the level of the 2010 mining targets for fluorspar and high alumina clay, including the size of available reserves, the depletion rate, approved production scale in mining licenses, potential production capacity associated with approved exploration enterprises, and past, current, and projected future international and domestic demand. China's answer does not, however, explain how China's consideration of these factors results in mining target numbers that can be considered actual restrictions on fluorspar or high alumina clay mining.

74. Furthermore, in addressing the mining target levels, China once again[79] states only that the high levels were set to "allow mining enterprises and downstream industries to adjust to restricted supply" and create a "transitional period"[80] during which, it is implied, supply will not actually be restricted but only potentially restricted in the future. What is communicated clearly by China's answer and argumentation is that in China's view, conservation concerns regarding its fluorspar and high alumina clay supply are dire enough in 2010 to call for export restraints on fluorspar and high alumina clay,[81] but not dire enough to require China's domestic producers and consumers to submit to actual supply restrictions. Instead, China's domestic producers and consumers are afforded a "transition period" to adjust to the idea of one day facing supply restrictions, even though foreign consumers have been facing supply restraints for years. This directly contradicts the attempts made by China to justify its export duties on fluorspar and export quota on bauxite applied to high alumina clay as measures that are related to

[79] *See* China's second oral statement, paras. 245-246.

[80] China's answers to second panel questions, para. 78.

[81] Although, as noted above, export restraints have been imposed on fluorspar and high alumina clay for much longer and, through 2009, both export duties and export quotas were imposed on fluorspar and high alumina clay (as well as other bauxitic materials subject to duties and quotas).

conservation. It also undermines any attempt by China to show that it has in place restrictions on fluorspar or high alumina clay production or consumption.

75. The United States notes that its answer to Question 20(c) states that 2009 data are appropriate in evaluating the restrictiveness of 2010 mining targets because, among other reasons, the only relevant mining data of which it was aware is for 2009. The mining data China provides in Exhibits CHN-83 and CHN-369 for the years 2000 through 2008 provide further support for the conclusion that China has failed to demonstrate that the 2010 mining targets are production restrictions.[82] These data also further undermine the credibility of China's argument that the 2010 fluorspar mining target of 11 million MT can be considered a restriction on production when viewed in light of pre-2009 fluorspar mining levels that never exceeded 5.89 million MT.

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

76. The United States refers the Panel to the U.S. response to Question 21. In addition, the United States would like to make the following points in response to China's answer to Question 21.

[82] *See* U.S. comments on China's answers to Question 20(b) above.

77. *First*, in its response to Question 21, China confirms the U.S. position that the export restraints at issue do not satisfy the requirements of Article XX(b). China states that the development of downstream sectors such as steel and aluminum is a "short-term" result of its export restraints, but that it "is merely an intermediate step towards China's long-term environmental goal." This statement exposes that China's entire defense is at odds with the text of Article XX(b). As the United States has explained previously, Article XX(b) permits WTO Members to maintain GATT-inconsistent measures if they are "necessary to protect human, animal or plant life or health." However, China seeks to rewrite Article XX(b) to permit measures that are for the Member's own economic advantage so as long as the measure can be shown to have indirect, incidental environmental effects.[83] Such an approach has serious negative systemic implications. Indeed, if Article XX were construed to provide a safe-harbor for GATT inconsistent measures on the grounds asserted by China, it is difficult to see what remains of the obligations in the GATT 1994.[84]

78. *Second*, China proceeds to attempt to explain why it did not provide an analysis of downstream pollution. As the United States has stated previously, China's failure to analyze the environmental impacts of its export policies as a package considering the interrelationships among the products at different stages of production necessarily means that China has failed to establish that its export restraints are making a material contribution toward China's stated environmental objective, and as the party invoking the defense under Article XX(b), it is China's burden to establish that its measure satisfies the requirements of the defense. Nevertheless, we

[83] This is without prejudice to the U.S. position that China has not even established that its measures will result in indirect, incidental environmental effects. *See* Exhibit JE-22, Response to Question 22 by Dr. Gene Grossman and Dr. Mark Watson (JE-178); *see also* Grossman-Watson Report, p. 6-7 (Exhibit JE-158).

[84] U.S. Second Oral Statement, paras. 59-61.

will address China's proffered reasons and demonstrate that none of these reasons excuses the fatal omission in China's defense.

79. China contends that the "increased supply of [magnesium metal and manganese metal] would merely change the quality of aluminum and steel, but not the quantity that would otherwise have been produced – at largely the same pollution levels."[85] However, China provides no support for this speculative assertion.

80. In addition, China offers this speculation as support for the proposition that an analysis of downstream effects is "not pertinent."[86] This does not follow. If the downstream effects of China's export restraints is, in fact, improved quality in aluminum and steel, rather than increased production of aluminum or steel, then China should demonstrate that as part of its defense. However, China cannot make such a showing, and this is made clear by China's following statement. China states, "[t]o make definite assertions about additional downstream pollution, one would need to know with certainty, how Chinese producers made use of additional supplies of unwrought magnesium and unwrought manganese, and what difference in terms of pollution this made."[87] In other words, China does not know if its statements about the purported improvement in quality of aluminum and steel are true, and on that basis, the United States urges the Panel should reject those statements. Moreover, we recall that China is asking the Panel to draw "definite" conclusions about the impact of the export restraints on magnesium metal and manganese metal, and China's unsupported assertions in response to Question 21 do not support the "definite" conclusions that China asks the Panel to reach.

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[85] China's Answers to the Second Set of Panel Questions, para. 82.
[86] China's Answers to the Second Set of Panel Questions, para. 82.
[87] China's Answers to the Second Set of Panel Questions, para. 82.

81. Similarly, China asserts that "the additional use of the[] products in downstream applications may actually entail pollution reductions during their lifecycle."[88] This statement is not supported by any evidence, and the Panel can reject the statement on that basis. Even if this statement were true, it does not make such an assessment "not pertinent" to the Panel's analysis of China's Article XX(b) defense, for the same reasons discussed above.

82. China then argues that the "any additional downstream pollution must be counterbalanced by pollution savings in upstream industries as a consequence of less EPR production (less mining, refining, and transportation activities)"[89] However, this argument should be rejected for three reasons. First, it is merely a restatement of China's initial defense under Article XX(b) that export restraints lead to decreased production and therefore decreased pollution. As we have stated, China has failed to establish that its export restraints are having the supposed effect. Second, while China considers that the upstream impacts of its export restraints are important, it has failed to provide any analysis of those impacts. This reinforces our initial critique of China's defense that its export restraints have a number of effects and China's analysis failed to take many of those effects into account. China's contention at this stage that the Panel should take upstream impacts into account is therefore irrelevant. If China considers such impacts significant, China should have provided an analysis that takes those effects into account.

83. Third, China's argument ignores the fact that it imposes export restraints on certain upstream inputs in the production of coke, magnesium, manganese, and silicon carbide, which undercuts the premise of China's defense. For example, China asserts that the production of

[88] China's Answers to the Second Set of Panel Questions, para. 82.
[89] China's Answers to the Second Set of Panel Questions, para. 82.

coke will lead to reduced production of coke, and increased consumption of coke in China. China also imposes export restraints on coal, which are used to produce coke and whose production China contends is polluting. Under China's line of reasoning, the export restraint on coal will lead to increased consumption of coal (*i.e.*, production of coke), which is counter to China's stated objective. In short, we agree that an export restraint has multiple effects. However, China's statement of its defense under Article XX(b) does not take many of these effects into account, and therefore China has not shown – and cannot show – that its measures make a material contribution to its stated objective.

84. In addition to imposing an export duty and export quota on coal[90], China subjects the exportation of manganese ores (an input for manganese metal), silicon[91] (an input for silicon carbide) and ferrosilicon[92] (an input for magnesium metal) to export duties. China has failed to analyze the effects of the simultaneous imposition of export restraints on upstream and downstream products, and China's suggestion that the Panel should take account of those effects without relevant evidence from the party invoking the defense should be rejected.

85. China goes on to argue that quantifying the effects of pollution downstream is "an exercise of extreme complexity." Accordingly, "China has decided to quantify only the most polluting stage in the process, namely the production of each of the EPR products at issue, and to limit itself to a *qualitative* description of the offsetting effects of upstream and downstream

[90] *See* Exhibit JE-22; *see also* Exhibit JE-187.

[91] *See* Exhibit JE-21.

[92] *See* Exhibit JE-187. China has stated that it does not subject any inputs for magnesium metal to an export restraint even while acknowledging that magnesium metal is produced by combining dolomite and ferrosilicon, the latter of which is subject to an export duty. *See* China's Answers to the Second Set of Panel Questions, para. 133 n. 135.

pollution and pollution savings."[93] However, contrary to China's suggestion, China has not provided a "qualitative description" of the upstream and downstream pollution effects. As the Appellate Body stated in *Brazil – Tyres*, where a responding Member seeks to show that its measure is "apt to produce a material contribution to the achievement of its objective"[94], the "demonstration could consist of . . . qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence."[95] In contrast to this standard, China has merely made unsupported assertions, as set forth above. The Panel does not therefore have evidence of the pollution effects of upstream or downstream production – qualitative or quantitative. But, the Panel does have China's admission that "the imposition of export restrictions on EPR products gives an incentive to develop respective immediate downstream sectors."[96]

86. *Third*, in response to Question 21, China argues that its economic growth overall will lead to less demand for "basic materials" such as those at issue in this dispute, and therefore less production and consumption of these materials will occur.[97] Apparently, China considers that this will have benefits for the environment. This argument again reinforces that China would rewrite Article XX(b) to allow WTO-inconsistent measures that promote economic growth, as long as there may be some, future, undetermined environmental benefit associated generally with the overall level of a nation's economic development. It is also entirely unclear why a general shift in China's economy away from production of the products at issue in this dispute will

[93] China's Answers to the Second Set of Panel Questions, para. 83.

[94] In any event, we note that China's arguments in response to Question 21 are proffered in support of its argument that the measures are presently making a material contribution to its stated environmental objective.

[95] Appellate Body Report, *Brazil – Tyres*, para. 151.

[96] China's Answers to the Second Set of Panel Questions, para. 81.

[97] China's Answers to the Second Set of Panel Questions, paras. 88-92.

necessarily lead to overall improvements in environmental protection, and China does not provide support for that leap in its reasoning.[98]

87. For the foregoing reasons, China's assertions in response to Question 21 do not change the fact that China has failed to analyze the effects of its export policies downstream, and that without an assessment of such effects, China cannot show that its measures are making a material contribution to China's purported environmental objective.

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

88. China fails to respond to the Panel's question. The Panel asks whether the Kuznets curve should form part of the Panel's assessment. China responds that the Panel should ignore the WTO-UNEP report, in part because "the views of the authors . . . are not exhaustive of the views to which Members may subscribe with respect to the Kuznets curve for this or other pollutants."[99] Nevertheless, China asks the Panel to accept China's own view of the Kuznets curve in relation to this dispute, which as evidenced by the arguments of the complainants is not "exhaustive of the views to which Members may subscribe with respect to the Kuznets curve." Indeed, China's arguments regarding the Kuznets curve run directly contrary to the complainants' view, and we have explained why the Panel should not take the Kuznets curve into account in assessing China's defense.[100] China's suggestion that the Panel should ignore the WTO-UNEP Report simply because not all Members subscribe to it is beside the point in the

[98] *See also* Exhibit JE-178, Grossman-Watson Response to Question 22.
[99] China's Answers to the Second Set of Panel Questions, para. 95.
[100] *See* Exhibit JE-178.

context of the Panel's question and contradictory to China's position that the Panel should accept China's unique view of the Kuznets curve as it relates to China's defense under Article XX(b).

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

89. In its answer to this question, China argues that, because China has "fixed" available supply of fluorspar and high alumina clay through "extraction and production caps," the export restraints at issue do not provide an incentive to develop the downstream industry.[101] As the United States has demonstrated in prior submissions and in its comments on China's answers above and below,[102] however, China has not met the burden of showing the existence of any restrictions on domestic production that would "fix" the supply of fluorspar or high alumina clay available to China's domestic processers and downstream producers.

Q24. (China) Could China explain why Professor Olarreaga used different methodologies to estimate the impact of export restrictions on coke and those on other materials?

90. The United States refers the Panel to the Grossman-Watson Comments on China's Answers to the Second Set of Panel Questions.[103]

Q25. (China) Estimates of demand and supply elasticity for coke in Exhibit CHN-124 are based on historical data. One well known problem with time series analysis is autocorrelation. Could China explain why it did not take this problem into account and provide the Panel with estimates for the elasticity corrected for autocorrelation?

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[101] China's answers to second panel questions, para. 98.

[102] *See, e.g.*, U.S. second written submission, paras. 146-162, 165-173, 259-275, 278-286; U.S. second oral statement, paras. 76-84; U.S. answers to Questions 20, and 31 of the second set of panel questions; and U.S. comments on China's answers to Questions 20, 32, and 33 of the second set of panel questions.

[103] Exhibit JE-185.

91. The United States refers the Panel to the Grossman-Watson Comments on China's Answers to the Second Set of Panel Questions.[104]

Q26. (China) In paragraph 53 of its second oral statement, the United States claims that Dr. Humphreys' analysis of the levels of pollution associated with different stages of production (Exhibit CHN-481) "skip[s] a step in the production chain"; namely, Dr. Humphrey's analysis does not address the pollution associated with the intermediate step of producing iron and steel. Please provide evidence as to the level of pollution generated by this stage of the production chain.

92. As a threshold matter, the United States take issue with China's framing of the issue presented by this question. China contends that it has "quantitatively demonstrated the extent to which export restrictions imposed on the EPR products at issue (coke, unwrought magnesium, unwrought manganese, and silicon carbide) contribute to the pollution savings in their respective industries."[105] However, China has made no such showing. As the United States has explained in detail, China's quantitative estimates of the reduction in pollution that would supposedly result from imposition of the export restraints is fundamentally flawed.[106] Furthermore, while the production of the materials at issue – just like any industrial process – may have environmental effects, the conclusions China draws regarding the impact of the export restraints on pollution reduction are not supported by evidence. Thus, contrary to China's suggestion, China has made no showing that its export restrictions make a material contribution to China's stated objective.[107] China's statement in response to this question that it has made such a showing also glosses over critical elements of an analysis under Article XX(b).

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[104] Exhibit JE-185.
[105] China's Answers to the Second Set of Panel Questions, para. 102.
[106] U.S. Second Written Submission, paras. 82-101.
[107] *See* China's Answers to the Second Set of Panel Questions, para .102.

93. The United States has explained that China's defense under Article XX(b) as it relates to coke, magnesium metal, manganese metal, and silicon carbide, fails for a number of reasons. First, the export restraints are not environmental measures at all. The statements of the Chinese government make clear that the objective of the export restraints is the development of higher value-added industries in China. This conclusion is further supported by the fact that it is the production of the products at issue – not their export – that causes environmental pollution. The export of the products at issue is entirely unrelated to environmental protection. Finally, there are a number of WTO-consistent, reasonably-available alternatives that China could impose that would more directly address China's objectives and would not present the same WTO-inconsistency as the export restraints. If China were concerned about the harmful environmental impacts associated with the production of the products at issue, then China would impose production controls or pollution controls to address that concern.[108]

94. The complainants have also noted that China's analysis of the supposed impact of its export restraints on pollution addresses the export restraints on the products at issue in isolation and fails to take account of the upstream-downstream linkages between products at various stages in the production chain. Thus, while China's economist reports additional consumption of the products at issue as a result of the export restraints, China does not analyze the environmental impacts of the increased downstream consumption *i.e.*, in the production of steel and aluminum. China's failure to address these downstream impacts further supports the U.S. position that the export restraints are not environmental measures. The failure to analyze downstream effects also highlights the unreliability of China's contention that the export

[108] U.S. Second Written Submission, paras. 81-108; U.S. Second Opening Statement, paras. 27-53.

restraints are making a material contribution to pollution reduction. China's discussion of "material contribution" simply ignores an entire category of environmental pollution that is directly impacted by its export restraints. Thus, there is no basis to accept China's position, and it should be rejected.[109]

95. In Question 26, the Panel asks China to respond to the U.S. point that Dr. Humphreys, in discussing downstream pollution, skips a step in the production chain.[110] In Exhibit CHN-481, Dr. Humphreys purports to "compare" pollution levels associated with production of coke, magnesium, manganese, and silicon carbide. However, Dr. Humphreys does no such thing. He first contends that the production of *e.g.*, manganese, is significantly polluting, then notes that manganese is used in steel, and then identified construction as one of the largest applications for manganese. He goes on to assert that "Construction, while it may utilize some polluting products such as steel and cement, in and by itself is not a conspicuously polluting industry."[111] He then repeats the figure for the amount of electricity used to produce manganese metal without any "comparison". Significantly, his statement also recognizes that steel is polluting, but fails to address the pollution associated with producing steel. Dr. Humphreys statement with respect to coke further highlights the flaws in his analysis. He states: "As for the environmental pollution downstream of the iron and steel-making industries, I have shown above in the context of manganese and magnesium metal that the environmental impacts in downstream industries such

[109] Exhibit CHN-158.

[110] We note that the Panel's question asks about the pollution associated with producing iron and steel. Nevertheless, as China itself notes manganese and magnesium are also used to produce aluminum, and China has never addressed the pollution associated with producing aluminum.

[111] Exhibit CHN-481, pp. 7-8 (emphasis added). We also note that Dr. Humphreys contends in Exhibit CHN-481 at p. 8 that manganese is "overwhelmingly (90%) used in the iron and steel industry. Yet, in response to Question 26, China contradicts itself and claims that "the primary application for unwrought manganese is not the iron and steel sector, but in the aluminum industry."

as construction, light manufacturing or transportation manufacturing are small relative to those generated upstream, namely by the coke-making and iron and steel-making industries."[112] Thus, even China's expert acknowledges the highly-polluting nature of iron and steel making. Moreover, contrary to Dr. Humphreys' assertion, China has not "shown" that the downstream industries listed are less polluting. He has simply asserted it without factual support. In short, China has provided the Panel no reason to conclude either that the downstream pollution is "not pertinent" or that it is "negligible."[113]

96. Nothing in China's response to Question 26 cures the defects in China's argumentation. *First*, with respect to magnesium and manganese metal, China repeats its contention that the increased availability of these products will lead to different – but not necessarily more steel being produced. The United States refers the Panel to the detailed discussion demonstrating that there is no support for these speculative assertions, and they should, therefore, be rejected.[114] We also take this opportunity to reiterate that while the export restraints have been in place, the production and exports of steel and aluminum have increased dramatically.[115] This further undermines the credibility of China's assertion about the supposed effects of its export restraints and China has provided no evidence to explain the discrepancy between the data and Dr. Humphreys' assertions.

[112] Exhibit CHN-481, p. 10.
[113] U.S. Answers to the Second Set of Panel Questions, paras. 45-53.
[114] U.S. Second Written Submission, para. 95.
[115] Magnesium Key Facts (Exhibit JE-152), Tables 16-17 (production data for aluminum and steel) and Tables 20-21 (export data for aluminum and steel).

97. *Second*, China also asserts generally that if the Panel is going to take downstream effects into account, it must also take upstream effects into account.[116] For example, with respect to coke, China argues that the upstream activities including mining and washing of coal, and the transportation of coal cause environmental pollution and that the export restrictions on coke serve to decrease such activities. Contrary to China's suggestion, China has not provided any evidence of supposed upstream pollution savings.[117] Indeed, as the United States has explained, the fundamental flaw in China's analysis is that it failed to address the export restraints as a package, considering that export restraints are imposed on both upstream and downstream products and that the export restraints have impacts both upstream and downstream.[118] With respect to many of the products at issue, China imposes export restraints on upstream products. For example, China maintains an export quota and export duty on coal (an input for coke)[119], and export duties on manganese ores (an input for manganese metal)[120], silicon (an input for silicon carbide)[121], and ferrosilicon[122] (an input for magnesium metal). As China's economic model can attest, these export restraints result in additional consumption of these upstream inputs, in the form of increased production of coke, manganese, and silicon carbide. Yet, China does not address these effects of its export policies.

98. *Third*, China presents a chart with a supposed comparison of pollution levels associated with production of iron and steel and those associated with production of coke, magnesium

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[116] China's Answers to the Second Set of Panel Questions, para. 119.
[117] China's Answers to the Second Set of Panel Questions, para. 119.
[118] Exhibit JE-158.
[119] *See* Exhibit JE-22; *see also* Exhibit JE-187.
[120] *See* Exhibit JE-5.
[121] *See* Exhibit JE-5.
[122] *See* Exhibit JE-187.

metal, manganese metal, and silicon carbide.[123] China does not appear to consider this information persuasive, because according to China, comparison of pollution levels generated by different products is "difficult, if not impossible." This is, however, directly contradicted by Dr. Humphreys' repeated refrain that production of the materials at issue in this dispute is the most polluting step in the production chain.[124]

99. In any event, the United States proceeds to discuss why we agree with China that the information in the chart is not persuasive. The first reason is that the chart presented is in the abstract and not in any way tied to the export restraints at issue. Dr. Olarreaga's initial analysis provides estimates of the supposed changes in domestic production and consumption of coke, magnesium, manganese, and silicon carbide as a result of the export restraints. China applied its own estimates of the pollution associated with producing these materials to the decrease in production that Dr. Olarreaga claimed would result from the export restraints. Dr. Olarreaga's report and China's other submissions also acknowledge that the export restraints will lead to increased consumption of the materials, but China fails to provide the same analysis for the pollution effects of increased downstream consumption. In other words, China's analysis does not estimate the environmental pollution associated with increased consumption of the materials. Thus, even if Dr. Olarreaga's model were reliable, and even if China's information about the pollution associated with steel were reliable, China failed to analyze the downstream pollution effects in light of the increased consumption of the materials in light of China's export restraints. The pollution information in Table 2 of China's submission is therefore irrelevant.

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[123] China's Answers to the Second Set of Panel Questions, para. 121.
[124] *See e.g.* Exhibit CHN-443 at p. 6.

100. China also does not explain why it chose to compare pollution associated with one metric ton of iron and steel with one metric ton of the raw materials. The production of one metric ton of steel requires far less than one metric ton of, for example, coke, magnesium, or manganese. Moreover, the pollution estimates in Table 2 are not tide to any production quantities. In other words, the amount of pollution associated with producing one metric ton of coke compared to one metric ton of steel is irrelevant without an indication of how many metric tons of coke and steel are actually being produced. Accordingly, the "comparison" that China provides is again in the abstract and not in any connected to the question at hand, namely what are the downstream pollution effects of China's export restraints in light of the fact that the export restraints on coke, magnesium, manganese, and silicon carbide lead to increased consumption of those materials downstream?

101. For these reasons, the United States urges the Panel to consider that China's failure to meaningfully analyze the pollution effects of its export restraints downstream reinforces the U.S. position that the export restraints are not making a material contribution to China's stated objective.

102. With respect to China's assertion that the complainants have not provided evidence of the downstream pollution that would result from China's export restraints, we recall that as the party invoking the defense, it is China's burden to establish that it satisfies the requirements of the defense. We also recall, however, that in a 2008 Circular of the Ministry of Environmental Protection on Further Strengthening the Checks on Clean Production of Key Enterprises[125], iron and steel and non-ferrous metals (which includes aluminum) are identified as two of the "key

[125] Exhibit CHN-475.

heavy polluting industries"). China's assertion, for purposes of this litigation, that the pollution associated with increased steel production is "negligible" or "not pertinent" is therefore unpersuasive.

Q27. (China) In light of United States' assertions at paragraph 55 of its second oral statement, please clarify China's position and provide evidence on the extent of recovery of scrap from manganese and the existence of secondary production of manganese.

103. China's repeated response to the U.S. clarification that secondary production of manganese does not occur is to obfuscate by claiming that the issue is whether manganese scrap exists. There is no issue as to whether manganese scrap exists. China's defense under Article XX(b) as it relates to the export duty on manganese scrap is that increased availability of manganese scrap in China will result in increased production of manganese metal from scrap, and a shift away from production of manganese metal from ores. The reason that this defense fails is simple and straightforward. Secondary production of manganese metal simply does not occur. China's repeated assertion that manganese scrap exists is therefore irrelevant and does not change the fact that manganese scrap is not used to produce manganese metal. And significantly, China has failed to present any evidence that secondary production of manganese does occur.

104. In addition to being irrelevant, China's assertions in support of the contention that manganese scrap is traded is also flawed. China glosses over the fact that its export duty is applied to an 8-digit HS category that includes both manganese metal and manganese waste and scrap. Yet, for purposes of this dispute, China asserts two different defenses under Article XX(b) for the export duty as it is applied to two sub-products at the 10-digit level, namely

manganese metal and manganese waste and scrap.[126] In Exhibit CHN-551, China only provides export data for manganese, classified in the 8-digit HS category (8111.0010), which includes both manganese metal and manganese scrap. The data that China provides in Exhibit CHN-289 also contains an oddity in relation to manganese scrap. In the chart, "Import and Export Data for Materials at Issue", China provides import and export data for the products listed from 2006-2009 with the exception of manganese. For manganese, China provides import and export data for the period 2006-2008 for the 8-digit category that encompasses manganese scrap and manganese metal. Then, for 2009, China provides import and export data for the two sub-products – manganese scrap and manganese metal – at the 10-digit level. China does not provide any explanation for this discrepancy between its measure and its asserted justification. But, this discrepancy does reveal that for purposes of the export duty on manganese, the measure at issue does not separate out manganese scrap. It is China's defense, for purposes of this dispute, that makes that distinction.

105. Furthermore, as explained in the U.S. second written submission, the U.S. International Trade Commission has also provided an explanation for the small amounts of manganese scrap imported into the United States. China has no rebuttal to this point other than to attempt to belittle this fact as "obscure."[127] However, the "obscurity" of the ITC's discussion is likely attributable to the lack of clarity inherent in the situation. In any event, the "obscurity" of the ITC's discussion does not change the fact that China has failed to grapple with the crux of the issue, namely the fact that secondary production of manganese does not occur. Because of that fact, China's legal defense under Article XX(b) as it relates to manganese scrap must fail.

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[126] U.S. Second Written Submission, para. 55 n. 54.
[127] China's Answers to the Second Set of Panel Questions, para. 132.

Q28. (China) Regardless of whether any export restrictions imposed by China on magnesium, zinc and manganese ore are part of the measures at issue, does China acknowledge that the existence of these measures partially offsets the impact of export restrictions on scraps? In particular, could China elaborate on its statement (answer to question No. 48 of the Panel first set of questions) that "[t] imposition of export tariffs on the ores in question has virtually no impact on the consumption of manganese and zinc scrap in China. This is because China does not export manganese and zinc ores in any meaningful quantities."

106. In response to Question 28, China repeats previous assertions that the low quantity of exports of manganese and zinc ores means that the export restraints on those products do not have an impact on the consumption of scrap. The United States refers the Panel to paragraph 64 of its second written submission, which addresses these arguments.

107. China then asserts that as "a matter of economic theory," the export restraints on ores do not have an effect on the consumption of scrap, because Dr. Olarreaga was trying to isolate the effect of the export duties imposed on scrap products. According to China, the result is "independent of any other factor that may influence the consumption of metal scrap products in China."[128] This tautological reasoning is nonsensical. As the Grossman-Watson Report[129] explained, Olarreaga's failure to take account of the linkages between products renders his analysis flawed and unreliable. The failure to take account of the export restraints on ores was not a "matter of economic theory." It was, instead, a function of the way Dr. Olarreaga designed his model. And, his failure to take account of a relevant factor, namely the export restraints on ores, in designing that model, means that the "result" he reported should not be accepted.

[128] China's Answers to the Second Set of Panel Questions, para. 137.
[129] Exhibit JE-158.

108. Finally, we note that China concedes that the export restraints on ores can have an impact on the consumption of scrap.[130] But, China contends that there are a number of factors that would affect the consumption of scrap, including its own domestic environmental measures, and the Panel should take all of that into account. As we have discussed, China does not provide any analysis of its domestic environmental measures in relation to the products at issue, or demonstrate how they are improving the environmental impact of those production processes.[131] In any event, China's response still elides the Panel's question regarding the effect of the export restraints on ores on the consumption of scrap.

109. China also inexplicably contends that the Panel can only consider the export restraints on ores in relation to an analysis of whether the measures at issue are "apt to make a material contribution" to China's stated objective, and not in the analysis of whether the measures are presently making a material contribution.[132] There is no legitimate basis for such an assertion. China argues that the export restraints on scrap are presently making a material contribution to China's stated objective. China provides no explanation for why the effects of the export restraints on ores, which are also presently in place, cannot be taken into account in this analysis while China's arguments about the supposed effects of the export restraints on scrap can be assessed.

Q30. (China) In Exhibit CHN-519, paragraph 71, Professor Olarreaga claims that: "as the price of the finished metal declines [as a consequence of the imposition of an export restriction], finished metal producers are subject to increased price pressure and more intense competition …. Metal producers become more cost conscious and the incentive to recycle will become stronger [because of the simultaneous

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[130] China's Answers to the Second Set of Panel Questions, para. 138.
[131] U.S. Second Written Submission, para. 78; *see also* Exhibits JE-184 and JE-188.
[132] China's Answers to the Second Set of Panel Questions, para. 141 n. 142.

application of export restrictions on scraps]." Please elaborate on how a reduction in price increases competition in the market.

110. The United States refers the Panel to the Grossman-Watson Comments on China's Answers to the Second Set of Panel Questions.[133]

Q32. (China) Please comment on the United States' claim that the formula used to determine the level of compensation fee "will not directly lead to minimization or reduction of fluorspar output but rather to a maximization of fluorspar output" (United State's second written submission, paragraph 157).

111. In its answer to this question, China confirms that the formula used to set the compensation fee is intended to incentivize the efficient mining of crude ores. Nevertheless, China continues to insist that the compensation fee operates to "restrict[] the consumption and production of available supply" of high alumina clay and fluorspar because it "subjects the extraction of crude ore to an additional cost."[134]

112. In its answer to Question 33, it appears that China continues to argue that certain pre-2010 measures constitute restrictions on domestic production or consumption for purposes of Article XX(g). To the extent that this argument is still relevant to China's attempts to justify its export duties on fluorspar and the portion of its export quota on bauxite that applies to high alumina clay, the United States once again recalls the fact that it would be China's burden as the responding party to demonstrate that the compensation fee is a restriction on domestic production or consumption in conjunction with which these export restraints are made effective.[135]

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[133] Exhibit JE-185.

[134] China's answer to second panel questions, para. 151.

[135] The United States refers to its answer to Panel Question 31 regarding U.S. arguments demonstrating that these measures are not restrictions on domestic production or consumption. *See* U.S. answers to second panel questions, paras. 77-86.

113. China's explanation in its answer to Question 33 indicates that the compensation fee encourages mines to produce more efficiently – *i.e.*, , to produce more useable ores from the amount of available reserves subject to extraction. As a result, any increased efficiency incentivized by operation of the compensation fee could result in an increase in the "available supply" of fluorspar or high alumina clay for China's users, while foreign users continue to face stiff restraints on the exportation of both raw materials. For this reason and for the reasons the United States has already articulated in its second written submission and in its comment on China's answer to Question 31,[136] China has not met the burden of proving its compensation fee is a restriction on domestic production or consumption under Article XX(g).

Q33. (China) Could China comment on the United States' allegation (paragraph 79 of its second oral statement) that target numbers may be "understood as a 'target' that should be met as opposed to a ceiling that cannot be exceeded".

114. In its answer to this question,[137] China argues that: (1) the U.S. use of the term "targets" or "control targets" as the translation for the relevant term used in 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*,[138] the *Circular on Passing Down the 2010 Controlling Quota of Total Extraction Quantity of High Alumina Clay and Fluorspar*,[139] and the *Circular of the Ministry of Land and Resources on Passing Down the Controlling Quota of the 2010 Total Production Quantity of High-alumina Clay and Fluorspar*[140] (together the "2010 Fluorspar and High Alumina Clay Measures") should be disregarded in favor of China's

[136] *See* U.S. second written submission, paras. 155-157 and 268-270; U.S. answers to second panel questions, para. 84.
[137] China's answers to second panel questions, paras. 60-61 and paras. 62-70.
[138] Exhibit JE-167.
[139] Exhibit JE-168.
[140] Exhibit JE-169

translation of "controlling quota" or "quantitative control;"[141] and (2) China's target numbers are binding caps.

115. With respect to the translation issue, China is incorrect to assert that the relevant Chinese term "must be translated as 'controlling quota' or 'quantitative control.'"[142] To the contrary, the better translation is "control target."[143] The United States refers to Exhibit JE-189 for additional detail explaining why this is so.

116. In addition, even if the term used in the 2010 Fluorspar and High Alumina Clay Measures had meant "quotas," the "quotas" would not have restricted actual mining or production of fluorspar or high alumina clay. The United States explained this in its second written submission, second oral statement, and answers to the Panel's second set of questions. China's answer to Question 33 does not show otherwise.

117. China's substantive answer to Question 33 misses the point made by the United States that is referenced by the Panel in this question. The specific point the United States made in its second oral statement is not – as China characterizes it – that the targets are not binding in nature and might be exceeded.[144] Rather, the U.S. point was that these set numbers appeared to be goals that mines and producers are striving to meet. In such a situation, should producers successfully meet these targets, then – because the targets are set at levels much higher than previous levels of actual mining or production – the result would be substantial growth and expansion – rather than a restriction – in domestic mining and production.

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[141] China's answers to second panel questions, para. 61.
[142] China's answers to second panel questions, para. 61 (emphasis added).
[143] *See* Exhibit JE-189.
[144] *See* U.S. second written submission, paras. 169 and 282.

118. However, even if producers did not meet the full amount of the target mining and production numbers set forth in the 2010 Fluorspar and High Alumina Clay Measures, and even if the target numbers were binding ceilings as China argues, the numbers are still set at levels higher than actual mining or production and allow for significant growth and expansion of actual mining and production to take place in 2010.[145] As such, these numbers – whether termed "targets" or "quotas" – cannot be considered restrictions on production.

Q34. (China) China asserts that "in Article XXXVI:5, WTO Members recognize the objective of achieving economic diversification of developing country economies through the development of industries to process primary products". We understand China to argue that the effect of the imposition of export restrictions on fluorspar and refractory-grade bauxite is to support the downstream sectors, such as the steel industry. Could China explain how support to the steel industry would improve its economic diversification?

119. In Question 34, the Panel seeks to understand how the additional support provided to China's steel industry through the export restraints on high alumina clay and fluorspar, can be viewed as improving China's economic diversification. The question is particularly relevant in light of the dominance of China's steel industry.

120. For instance, in the first decade of the 21st century, China's steel industry has been ranked first in the world for crude steel output, with an annual growth rate reaching 21.1 percent. The following chart shows the meteoric rise in China's steel production between 2001 and 2009:[146]

	2001	2002	2003	2004	2005	2006	2007	2008	2009

[145] *See* U.S. comments on China's answer to Question 20 above. *See also* U.S. second written submission, paras. 171-172, 284-285; U.S. second oral statement, paras. 78-84; U.S. answers to Questions 20 and 31 of the Panel's second set of questions.

[146] World Steel Association, Steel Statistical Yearbook 2009 (Exhibit JE-190) at 5; World Steel Association, Crude Steel Statistics Total 2009,available at http://www.worldsteel.org/index.php?action=stats&type=steel&period=latest&month=13&year=2009

Production (Million Metric Tons)	151.6	182.4	222.3	282.9	353.2	419.1	489.3	500.3	567.8

In 2008, four of the world's ten largest steel producers were located in China.[147]

121. China's response acknowledges that it is not support for its already massive steel industry that improves its economic diversification. Instead, China's argument is that the direct result of support to its steel industry is the robust and sustained production of downstream steel products.[148] China then asserts that these downstream steel products are used to produce infrastructure, which in turn "support[s] China's development and industrialization," which in turn"enables diversification of China's economy."[149]

122. The simple answer to the Panel's question is that the policies China has adopted to foster and support the explosive and concentrated growth in China's steel industry are not ones that improve the diversification of China's economy.

123. Furthermore, setting aside the issue of whether China is considered a "less-developed Member" under this provision of the GATT 1994, the second sentence of Article XXXVI:5 urges developed Members to adopt trade-enhancing measures to improve development of less-developed Members:

> There is, therefore, need for increased access in the largest possible measure to markets under favorable conditions for processed and manufactured products currently or potentially of particular export interest to less-developed [Members].

[147] World Steel Association, World Steel in Figures 2009 (Exhibit JE-191) at 8.
[148] China's answers to second panel questions, paras. 158-160.
[149] China's answers to second panel questions, para. 159.

(Emphasis added). Nothing in Article XXXVI:5 implies that less-developed countries are permitted or encouraged to adopt GATT-inconsistent, trade-restricting measures for development purposes.

Q35. (China) With regard to China's specific defences for "Magnesium waste and scrap" (8104.2000), "Zinc waste and scrap" (7902.0000), "Unwrought manganese waste and scrap" (8111.00.10), please identify these products (in their scrap form or subcategory) by their name, short name, tariff line, and product code.

124. The United States makes two points in response to China's answer to Question 35. First, there appears to be a typographical error in the chart. In the second column, "Short Name", the products listed next to tariff line 8111.0010 should be "Manganese metal" and "Manganese scrap."

125. Second, the United States takes this opportunity to reinforce the point raised in the U.S. comment on China's answer to Question 27. China's measure imposes an export duty on tariff line, 8111.0010, which encompasses manganese metal and manganese scrap. For purposes of this dispute, however, China asserts a separate justification for the export duty on manganese metal and manganese scrap. China has not explained this, but it reinforces the fact that with respect to the export duty on manganese scrap, China's defense does not fit with China's measure.

Q36. (China) Exhibit CHN-289 shows that from 2006 to 2009, China exported low quantities of scrap. The United States asserts that "[i]t is not foreign demand for scrap that is preventing the development of a secondary production industry in China". Does China agree? What measures does China have in place to promote its recycling sector?

126. To place the Panel's question in context, the United States recalls that China's defense under Article XX(b) is that the export duties on magnesium scrap, manganese scrap, and zinc scrap are necessary to accomplish China's stated environmental objective, namely to induce a

shift toward increased production of magnesium metal, manganese metal, and zinc from scrap (*i.e.*, secondary production). In other words, China contends that the export restraints on scrap are making a material contribution to reducing foreign demand for scrap, increasing availability of scrap within China, and increasing consumption of scrap in China. A review of the data presented in Exhibit CHN-289, however, reveals that China's exports of scrap products have always been low, or there is no time-series data on exports (*e.g.*, for manganese scrap). This data undermine the credibility of China's assertion that it needs to reduce foreign demand for scrap by imposing an export restraint.

127. In response to Question 36, China fails to rebut the U.S. position. As an initial matter, China contends that its export restraints have led to decreased exports of scrap.[150] With respect to manganese scrap, China's assertion is nonsensical. As we have explained, China imposes an export duty on an 8-digit tariff category (8111.0010) that includes both manganese scrap and manganese metal.[151] However, China invokes a different defense under Article XX(b) for manganese metal on the one hand (8100.0010.90), and manganese scrap (8111.0010.10) on the other hand. These two products are 10-digit sub-products within the 8-digit category. In Exhibit CHN-289, China only provides import and export data for manganese scrap for 2009 (while China provides import and export data for the period 2006-2009 for most other products). Therefore, that data provide no basis for concluding that the export restraints have had any effect on exports. China then submits Exhibit CHN-551 purportedly showing changes in exports over time. However, the data presented therein is for the 8-digit tariff category (8111.0010), so there is no way to differentiate between export levels for manganese scrap and manganese metal. The

[150] China's Answers to the Second Set of Panel Questions, para. 165.
[151] *See* Exhibit CHN-551; *see also* Exhibit JE-5.

Panel, therefore, has no data whatsoever on changes in exports of manganese scrap in the abstract or in relation to the export restraint on scrap.[152]

128. With respect to magnesium scrap and zinc scrap, Exhibit CHN-551 similarly does not provide the data to rebut the U.S. position. We note at the outset that China provides export data in Exhibit CHN-551 in kilograms, while the data in Exhibit CHN-289 is in metric tons. In order to make comparison simpler, we have provided at Exhibit JE-192 the same data as in Exhibit CHN-551 with the export volumes in metric tons. As the United States has explained, China's exports of magnesium scrap and zinc scrap have been low for a number of years. China's exports of magnesium scrap were highest in 2001 at approximately 5,132 metric tons. This represents approximately .026 percent of China's production of magnesium metal in 2001.[153] China's exports of zinc scrap (7902.0000) were highest in 2002 at approximately 2,588 metric tons. This represents approximately .001 percent of zinc production in 2002.[154] The low quantities of scrap exports undermines China's assertions that the export restraints are necessary in order for China to develop its secondary production industry.

129. Furthermore, even according to China's calculation of the year-to-year changes, scrap exports have fluctuated significantly between 2001-2009, although export duties were only in place for part of that period. For example, exports of magnesium scrap dropped significantly in 2001 and 2006 even in spite of the lack of export duties. Similarly, exports of zinc scrap declined significantly in 2004 prior to the imposition of export duties. In other words, the data

[152] As we have discussed, China's defense for manganese scrap fails for the simple reason that secondary production of manganese metal does not occur. There is, therefore, no basis on which to draw the conclusion that an export restraint on manganese scrap is necessary to bring about increased secondary production of manganese metal. China has failed to rebut the U.S. position on this point.

[153] Magnesium metal production numbers based on Exhibit CHN-289.

[154] Zinc production numbers based on Exhibit CHN-289.

do not show the connection that the export restraints are in fact having the result China claims. We further note that with respect to zinc, China fails to provide export quantities for hard zinc spelter (2620.1100) and zinc ash and residues (2620.1900) in Exhibit CHN-551. The data in Exhibit CHN-289 show that exports of those products have been low during the 2006-2009 period as well, again calling into question the theory of China's defense.

130. In short, the low quantities of exports of scrap products before and after the imposition of export restraints contradicts China's assertion that its export restraints are making a material contribution – let alone necessary – to China's stated objective. With respect to manganese, there is no data showing changes in exports over time.

131. China then states that it is not just foreign demand, but also foreign supply for scrap, that "frustrate China's long-run objective of substituting, to the maximum amount possible, secondary for primary magnesium metal, manganese metal and zinc."[155] However, as set forth above, China's assertions about foreign demand are not supported by the evidence. With respect to supposed international supply constraints on the supply of scrap, the United States refers to previous submissions where we have responded to China's arguments.[156]

132. Finally, China also devotes considerable attention in response to Question 36 detailing its supposed domestic efforts at developing a recycling industry. As discussed in previous submissions[157], and in the U.S. comment on China's answer to Question 39, China's assertions in this regard are not reliable and should not be accepted.

Q37. (China) Exhibit CHN-114 states that "[t]he price is the key element for scrap recycling in a competitive market economy; the higher the price, the higher the

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[155] China's Answers to the Second Set of Panel Questions, para. 179.
[156] U.S. Second Written Submission, paras. 66-71.
[157] U.S. Second Opening Statement, paras. 40-45; Complainants' First Opening Statement, paras. 112.

collecting rate". The United States claims that the export restraints on scrap would determine a "downward pressure on the price of scrap in China [which] would appear to reduce the incentive to collect scrap and investing in recycling". Would China agree with this interpretation of the export restrictions' effects?

133. In response to Question 37, China does not accept that price is the key element for scrap recycling, or that the higher the price, the higher the collecting rate. In fact, China does not address how the price of scrap may affect the development of a recycling sector.

134. China begins by making the confusing assertion that its objective is not merely that of achieving the highest possible scrap collecting rate, because its primary goal is the "launch and rapid development of secondary production capacity."[158] This is illogical since both scrap collection and the development of secondary production capacity are necessary for increased secondary production. China goes on to state that secondary production leads to pollution reduction, but scrap collection does not. China also states "a high collection rate may achieve *absolutely no* pollution savings, if furnace-ready scrap leaves the country."[159] This assertion is also nonsensical since scrap collection is necessary for secondary production. The development of secondary production and scrap collection infrastructure within China are both elements of inducing increased secondary production. A policy that discourages scrap collection (*i.e.*, reduced prices for scrap) will frustrate this goal even if the export restraints lead to increased availability of scrap. Therefore, the discouragement of scrap collection through the export restraints undermines the credibility of China's assertion that the export restraints are making a material contribution – let alone necessary – to China's stated environmental objective. This is the case regardless of whether China considers scrap collection to be a "secondary goal".

[158] China's Answers to the Second Set of Panel Questions, para. 189.
[159] China's Answers to the Second Set of Panel Questions, para. 189.

135. China also contends that the U.S. argument referenced in the Panel's question ignores China's measures supposedly designed to develop scrap supply channels and recycling networks. According to China, "[t]hese policies countervail any downward pressure on metal scrap prices."[160] As we have discussed, an analysis of these measures does not support China's contentions regarding their supposed effect on the development of a recycling sector. Furthermore, China's bald assertion that the policies "countervail any downward pressure" on prices for scrap is not supported by any evidence, and the Panel should reject that assertion on that basis. In contrast, the U.S. position that the export restraints place downward pressure on the price of scrap is consistent with the economic theory espoused by Dr. Olarreaga in his model simulating the supposed impact of all of the export restraints at issue in this dispute.[161] One of the central themes of China's defense is that the export restraints lead to less production of those materials. Therefore, an export restraint on scrap will lead to less collection (*i.e.*, production) of scrap. This undermines China's entire defense as it relates to the scrap products.

Q38. (China) Does China agree with the estimates reported in Table 1 of Grossman-Watson Report? Does China agree with the United States' view that these figures prove that the effect on exports of China's export restrictions is significant?

136. The United States refers the Panel to the Grossman-Watson Comments on China's Answers to the Second Set of Panel Questions.[162] We also take this opportunity to note that while Dr. Olarreaga endorses the estimates in Table 1, because they show even greater decreases in production than Olarreaga's initial analysis, China continues to ignore the upstream downstream linkages between the products and the export restraints at issue. The figures in

[160] China's Answers to the Second Set of Panel Questions, para. 192.
[161] *See* Exhibits CHN-124 and CHN-147; *see also* Exhibit JE-158, Table 1.
[162] Exhibit JE-185.

Table 1 of the Grossman-Watson Report also show increased consumption of the materials, and as we have discussed, China has failed to address the environmental implications of increased consumption. In addition, all of the materials experience even greater decreases in production in Table 1 of the Grossman-Watson Report including the scrap products even though China supposedly seeks to encourage additional use of scrap in secondary production.

Q39. (China) The complainants point to a number of alternative measures, such as (i) investment in more environmentally friendly technologies; (ii) further encourage and promotion of recycling of consumer goods ; (iii) increasing environmental standards ; (iv) investing in "infrastructure necessary to facilitate recycling scrap" ; (v) stimulating greater local demand for scrap material without discouraging local supply ; and (vi) introducing production restrictions or pollution controls on primary production . Could China clarify what the regulations are that it has in place that introduce these measures and whether they are effective? Could China provide evidence that these measures are binding? How do these measures affect production of the products in question? Please provide evidence in your response.

137. As the United States has explained, the fact that China has WTO-consistent, reasonably-available alternatives that China could use to more directly address its stated environmental objectives demonstrates that China's export restraints are not necessary within the meaning of Article XX(b). China has no legitimate response to this. Therefore, China's defense fails. Nothing China provides in response to Question 39 changes this fact. China provides in Annex 39-1, 39-2, and 39-3 charts of domestic environmental measures that supposedly serve as evidence of existing measures to control environmental pollution. Virtually all of these are measures that China has provided in previous submissions, and the United States has explained that these measures do not support China's position. Most of the measures adduced by China do not even mention any specific products, let alone the products at issue in this dispute.[163] Most of

[163] China's efforts to suggest otherwise in Annex 39-2 are unavailing. With very few exceptions, even China's excerpts of the measures included in Annex 39-1 do not address production of the materials at issue in this (continued...)

the measures also do not set forth any specific environmental standards, but rather express an intention or goal to protect the environment in vague terms. In Exhibit JE-188, we have provided a chart annotating Annex 39-1.[164] Exhibit JE-188 demonstrates the fact that the measures adduced by China do not in fact contain guidelines to the production of the materials at issue.

138. In addition to Exhibit JE-188, we provide below a few illustrative examples of the measures that set forth vague statements related to environmental protection goals without any specific implementation of these goals or evidence of specific requirements imposed on producers or any indication of how such statements would impact the behavior of specific producers.

- The Law of the People's Republic China on the Prevention and Control of Water Pollution provides in Article 9 that "Discharge of water pollutants shall be within the state or local standards for the discharge of water pollutants and indicators for the total discharge control of major water pollutants. In Article 13, it states: "The administrative department of environmental protection under the State Council shall formulate the state standards for the discharge of water pollutants in accordance with the state quality standards of water environment and the national economic and technological conditions. . . Discharge of pollutants to waters under the governance of certain local standards for the discharge of water pollutants must strictly abide by the said local standards."[165] However, China provides no evidence of what those standards are in general, or as they relate to the products i this dispute.

- Article 4 of the Law of the People's Republic of China on the Prevention and Control of Environmental Pollution by Solid Wastes provides that: "The people's

[163] (...continued)
dispute. Where the measures do mention the products (*e.g.*, Exhibits CHN-444, CHN-479), many of them do not articulate any specific environmental standard in relation to that product.

[164] Exhibit JE-188 annotates China's lists in Annexes 39-1, 39-2, and 39-3 to indicate (1) whether the measure addresses pollution associated with the production of coke, magnesium, manganese, silicon carbide, or zinc; and (2) whether the measure sets forth specific standards that producers of these materials must follow. In many instances where the measure does not set forth such standards, we have provided an illustrative example of the type of vague language – as opposed to specific, binding regulatory provision – that the measure does include.

[165] Exhibit CHN-269.

governments at or above the county level shall incorporate the prevention and control of environmental pollution by solid wastes into their environmental protection programs and adopt economic and technical policies and measures to facilitate the prevention and control of environmental pollution by solid wastes." Article 5 provides that, "For the prevention and control of environmental pollution by solid wastes, the State implements the principle that any entity or individual causing the pollution shall be responsible for it in accordance with law. The manufacturers, sellers, importers and users shall be responsible for the prevention and control of solid wastes pollution produced thereby."[166] Again, China provides no evidence of what standards state or local authorities may have developed – if any – in response to this directive, how those standards affect producers of coke, magnesium, manganese, silicon carbide, or zinc, or whether those have been effective in reducing pollution.

- The Law of the People's Republic of China on Promoting Clean Production, Article 7 directs certain governmental components and sub-national authorities to "formulate industrial policies and policies regarding technological development and application that can contribute to the implementation of clean production."[167] Here again, there is no evidence of what such policies have been developed – if any – or how they require producers to change their behavior for the benefit of increased environmental protection.

139. Indeed, China has no response to the Panel's question regarding how these measures affect the production of the products at issue. China merely states without evidence that these measures "necessarily implies higher production costs and lower pollution levels in connection with the production of EPR products."[168] The Panel is left to discern for itself how the measures "necessarily" bring about the effects claimed by China. China's efforts to argue to the contrary in Annex 39-3 are similarly unavailing. While China provides measures promulgated by the Chinese government, in order to show their impact on production, China points to a number of news articles. China lists these news articles next to China's environmental measures, supposedly implying that the measures have had the impact asserted in the articles. But, China

[166] Exhibit CHN-270.
[167] Exhibit CHN-271.
[168] China's Answers to the Second Set of Panel Questions, para. 236.

does not support this with evidence or argumentation. Thus contrary to China's arguments, the listed measures are not "conclusive proof"[169] that China is taking the necessary steps domestically to control the polluting effects of the production processes at issue. Therefore, the Panel should reject China's position.

140. In order to support its position that the alternatives proffered by the complainants are not available, China repeats its flawed reading of *Brazil – Tyres*.[170] As discussed in the U.S. second oral statement, the Appellate Body Report in *Brazil – Tyres* in no way supports China's position.[171] In *Brazil – Tyres*, the complaining party proposed domestic regulations on the collection and disposal of waste tyres to minimize the environmental risks associated with the accumulation of waste tyres. This argument did not succeed, but for reasons that China describes incorrectly. The reason was not – as China asserts – that Brazil already had such regulations in place. Rather, the reason was based on Brazil presenting evidence that Brazil's existing domestic regulations on the collection and disposal of waste tyres had limited capacity to address used tires and could not cope with the additional quantities that would result from unlimited imports. Brazil did not – as China does here – simply assert that the reasonable alternative was unavailable. Instead, Brazil, as the party invoking the defense, proved this point through introduction of specific evidence. As the Appellate Body stated, "[a]s regards landfilling, stockpiling, co-incineration of waste tyres, and material recycling, these remedial methods carry their own risks or, because of the costs involved, are capable of disposing of only

[169] China's Answers to the Second Set of Panel Questions, para. 213.
[170] China's Answers to the Second Set of Panel Questions, paras. 207-08.
[171] U.S. Second Oral Statement, paras. 43-45.

a limited number of waste tyres."[172] It was on this basis that the Appellate Body upheld the panel's finding that domestic regulations on the collection and disposal of waste tyres could not constitute an alternative *i.e.*, "substitute" for the import ban. In contrast, China has simply asserted that the existence of environmental regulations makes the imposition of additional or stronger environmental regulations not "available", without any factual support or analysis of the existing environmental regulations in relation to the products at issue.[173] Thus, China's reliance on *Brazil – Tyres* is misplaced.

141. With respect to China's reliance on *Brazil – Tyres* for the proposition that the alternatives should not prohibitively costly or pose substantial technical difficulties, China has not shown that either of these factors is relevant to China's experience. China merely asserts that at its level of development, its producers cannot make the changes to their production processes necessary to improve environmental protection.[174] The Panel should reject this unsupported assertion.

142. In addition, China attempts to rely on the Appellate Body's reasoning in *Brazil – Tyres* that the import ban and Brazil's domestic regulations were "complementary elements of an overall framework." China's reliance on this element of *Brazil – Tyres* is unavailing. In its response to Question 39, China devotes considerable attention to discussing the supposed complementarity between its export restraints and its environmental regulations. China's arguments are without merit.

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[172] Appellate Body Report, *Brazil – Tyres*, para. 211.
[173] China's Second Written Submission, paras. 309-16.
[174] China's Answers to the Second Set of Panel Questions, para. 208.

143. China begins by asserting that there is short-term complementarity between the export restraints and its supposed domestic environmental regulations.[175] China contends that while the environmental regulations seek to force producers to internalize the environmental cost of producing the product, those regulations are insufficient and the export restraints are needed to close the gap between the costs faced by Chinese producers of the materials and the societal cost. This assertion is fundamentally flawed. First, there is no support – and China provides none – for the proposition that the environmental regulations could not be made more robust to the point that they are effective in forcing producers to internalize the cost of producing the products. And, such environmental controls affect foreign and Chinese consumers of the materials equally, while export restraints impose a cost on foreign consumers alone to the benefit of Chinese consumers. Second, China also ignores the fact that the export restraints drive down the prices for the materials in China, which leads to increased demand for the materials. This provides consumers of the materials with even less incentive to internalize the social cost of producing the materials.

144. China goes on to discuss the supposed medium-term complementarity between its export restraints and domestic environmental regulations.[176] This discussion is similarly unpersuasive. China contends that the export restraints will lead to lower prices and lower profits, thereby encouraging producers to lower their costs.[177] As Professors Grossman and Watson discuss in their comment on China's answer to Question 15 from the Panel, however, this assertion is not supported by the relevant economic literature, since firms will seek to lower costs regardless of

[175] China's Answers to the Second Set of Panel Questions, paras. 246-52.
[176] China's Answers to the Second Set of Panel Questions, paras. 253-60.
[177] China's Answers to the Second Set of Panel Questions, para. 255.

fluctuations in price.[178] Thus, China's assertions that flow from this flawed foundation are similarly flawed. China's claim that more efficient producers will necessarily be larger is also unsupported and unpersuasive.[179] Indeed, it is quite possible that the opposite could be true. Similarly, China's assertion that more efficient firms are less polluting is unpersuasive.[180] Finally, China's statement that larger firms are necessarily less polluting appears to gloss over certain nuances in the literature.[181]

145. With respect to long-term complementarity, China simply reasserts its argument that the export restraints contribute to China's overall economic development, and that such development will result in improved environmental protection.[182] For the reasons we have discussed at length, this argument is without merit.[183]

Q43. (China) Please comment on the statements by the United States and Mexico in their second written submissions that "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.'"

146. In its answer to this question, China argues that the *Regulations for Personnel Management of Chambers of Commerce* apply broadly to all chambers of commerce in China,

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[178] Exhibit JE-185.

[179] China's Answers to the Second Set of Panel Questions, para. 256.

[180] *See* European Union's Answers to the First Set of Panel Questions, paras. 84-86.

[181] For example, in Exhibit CHN-557, China points to a study by Kerr and Newell (2003) to show that larger U.S. refineries over the period 1971-1995 had a significantly higher propensity to adopt cleaner, new technologies. Although the authors did find that larger refineries had significantly higher propensities to adopt new technology, their finding was that for every 10% increase from the mean refinery capacity, the probability that the refinery will adopt new technology increased by 4%. As part of their conclusion, the authors stated the following: "Consistent with previous literature, we also find that larger refineries adopt sooner, which is typically attributed to scale economies, lower investment hurdle rates, management quality, or participation in research and development activities. On the other hand, refineries that are part of larger companies or in regions with many other refineries have lower adoption propensities, likely because the greater flexibility in input and output choice makes adoption less profitable." p. 341.

[182] China's Answers to the Second Set of Panel Questions, paras. 261-64.

[183] *See* Grossman-Watson Report, p. 6-7 (Exhibit JE-158); Exhibit JE-178, Grossman-Watson Response to Question 22.

and not just the CCCMC. The United States confirms its understanding that this measure covers all of China's chambers of commerce – including the one at issue in this dispute, *i.e.*, the CCCMC.

147. China also represents that the United States and Mexico contend that the *Regulations for Personnel Management of Chambers of Commerce* require "all Secretariat employees of all chambers of commerce be recruited from member companies."[184] The United States has made no such contention in this dispute. To be clear, the relevant U.S. claim is an as such claim that China's administration of its export quotas is in breach of China's obligations under Article X:3(a) of the GATT 1994 because there exist inherent conflicts of interest and dangers of the inappropriate flows of information to parties with interests adverse to individual exporters that render that administration partial and unreasonable. Because China's laws governing the personnel matters of chambers of commerce, which apply to the CCCMC, permit and even encourage the selection or secondment of persons from member companies to serve on the secretariat of the CCCMC[185] (and for whom confidentiality agreements need not be signed), China has failed to establish that it has in place adequate safeguards to prevent the potential inappropriate flows of information.

148. For the United States to prevail on this claim, it does not matter that in practice, at the current moment, the CCCMC's Secretariat staff might be constituted entirely of employees recruited from the general public. It remains the fact that China's laws provide for and even encourage the selection of Secretariat staff that would lead to conflicts of interest and the

[184] China's answers to second panel questions, para. 277.

[185] *See* below for discussion related to the translation of the *Regulations for Personnel Management of Chambers of Commerce* (Exhibit JE-102).

dangers of inappropriate flows of commercially sensitive that would render the export quota administration process partial and unreasonable.[186] The United States refers to its answer to Question 44 of the Panel's second set of questions.

149. China also characterizes the translation of Article 8 of the *Regulations for Personnel Management of Chambers of Commerce* in Exhibit JE-102 as "improper" and asks the Panel to "refer to China's translations of its own measures." In particular, China objects to the phrase "must primarily be covered by selecting people from member companies," which China attributes to the translation of Article 8 in Exhibit JE-102. However, the actual language used in Article 8 of Exhibit JE-102 is:

> As for the general staff needs of the Chamber of Commerce's standing administrative structures, they must <u>essentially</u> be covered by selecting people from member companies . . .[187]

150. China argues that its translation should control. The relevant portion of Article 8 (cited as Article III(8) by China) of Exhibit CHN-315 follows:

> Regular employees needed for the Standing Administrative Organ of the Chambers are are <u>mainly</u> recruited from current employees in the member enterprises, the competent authorities for foreign trade and economic cooperation and public institutions directly administered thereby. Subject to approval by the Members' General Meeting, employees may also be temporarily seconded from the member enterprises. Remaining staff vacancies may be recruited from the general public."[188]

151. It is not clear what the legal significance of China's translation objections is, if any. However, it appears that China attempts to demonstrate that its measure does not express a preference that chambers' secretariat staff be drawn from the ranks of its member companies' employees. Given China's request that the Panel refer to "China's translations of its own

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[186] *See* U.S. comments on China's answer to Question 50 below.
[187] Exhibit JE-102, Art. 8 (emphasis added).
[188] China's answers to second panel questions, para. 279, referencing Exhibit CHN-315 (emphasis added).

measures," the United States notes that China has undertaken a translation of this very measure previously[189] and the United States refers to China's translation of the provision at issue there:

> The general working staff of the permanent administrative offices of chambers shall be chosen primarily from the employees in service of their membership organizations or the competent authorities in charge of foreign trade and economics and the public institutions directly under their leadership. With the approval of the members general meeting, a small group of personnel can also be temporarily transferred from the member companies of the chamber. The insufficient part of personnel may be made up by recruiting from the general public.[190]

Furthermore, China has officially vouched for the authenticity and accuracy of this translation.[191] Accordingly, the version of the translation of Article 8 of the *Regulations for Personnel Management of Chambers of Commerce* that China proffers here contradicts China's own prior translation of this provision. China's attempt to whitewash the language contained in this measures should therefore also be rejected.

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

152. China's answer to this question confirms that the CCCMC, including its Secretariat, is accountable to the CCCMC's members.

153. The inappropriate involvement of the CCCMC – as a membership organization – in the administration of China's export quotas and minimum export pricing is the basis upon which the United States makes it claims under Article X:3(a). On the other hand, the U.S. claims under Article XI:1 and Article X:1 related to minimum export pricing are based on the fact that the CCCMC is also a public entity whose actions and organic statute are attributable to China.

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[189] *See* Exhibit JE-193.
[190] Exhibit JE-193 (emphasis added).
[191] *See* Exhibit JE-193 at 4, 8, 9, and 11.

These claims are based on China's own representations regarding the *sui generis* nature of its chambers of commerce, which "stand in stark contrast" to "similarly-named, but functionally very different" chambers of commerce or trade associations in other parts of the world.[192] According to China, the nature of its chambers of commerce reflect "China's ongoing transition from a state-run command economy to a market-driven economy."[193] As a result, China's chambers of commerce are of a unique, hybrid nature: the chambers are not "mere" trade associations of individual exporters and producers[194] but they are also entities that "regulate[] the export of [] products under the authority and direction of the Ministry [of Commerce] and the General Administration of Customs."[195]

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

154. With respect to China's interpretation of the standard under Article X:3(a), the United States refers to the answer provided by the EU to Question 50 and the EU's comments on China's answer to Question 50.

155. With respect to China's specific argument in paragraphs 309 and 310 of its answers to the Panel's second set of questions, China is incorrect. The United States has established that the intimate involvement of the CCCMC in the administration of China's export quotas breaches China's obligation under Article X:3(a) to administer its export laws in an impartial and reasonable manner. This is so, even under China's own interpretation that, in *Argentina – Leather*, Argentina's administrative rules "necessarily led to" a violation of Article X:3(a).

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[192] *Vitamin-C MOFCOM amicus brief* (Exhibit JE-98) at 5, 7.
[193] *Vitamin-C MOFCOM amicus brief* (Exhibit JE-98) at 3.
[194] *See Vitamin-C MOFCOM amicus brief* (Exhibit JE-98) at 3-5.
[195] *Vitamin-C MOFCOM amicus brief* (Exhibit JE-98) at 7.

According to China, the panel in *Argentina – Leather* found that the access to individual importers' sensitive commercial information granted to representatives of an association representing those importers' competitors through the representatives' involvement in the customs clearance process, constituted a breach of Article X:3(a).[196] The involvement of the CCCMC in the administration of China's export quotas leads to the same situation in which an individual trader's sensitive commercial information is, by the terms of China's laws, made vulnerable to adverse commercial interests.

156. With respect to China's assertion that it has demonstrated that safeguards exist with respect to the flow of the sensitive commercial information, the United States disagrees and refers the Panel to the U.S. answers to Questions 44 and 52 of the Panel's second set of questions and the U.S. comments on China's answer to Question 43 above and Question 51 below.

Q51. (China) When did the staff of the CCCMC Secretariat become entirely composed of persons recruited from the general public? Was there any period when the staff comprised persons recruited from member companies or seconded staff? If so, when and for how long?

157. The United States refers to its comments on China's answer to Question 43 (which was presented by China as a combined answer to Questions 43 and 51) and to the U.S. answers to Questions 44 and 52 of the Panel's second set of questions.

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

[196] *See* China's answers to second panel questions, para. 301.

dispute. What value should the Panel attribute to these statements made in the context of these proceedings?

158. In commenting on China's answer to this question, the United States refers to its answer to Question 61 of the Panel's second set of questions.

Q66. (China) Paragraph 162 of the Working Party Report states 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". Please identify what steps China has taken to comply with this obligation.

159. Contrary to China's erroneous representation in its answer to this question, the U.S. claims under paragraph 162 (as well as paragraph 165) of the Working Party Report extend to both China's export quotas[197] as well as China's export licensing.

160. As an initial matter, the United States notes that the 1994 version of China's *Foreign Trade Law* was in effect at the time of China's accession to the WTO and the subject of Working Party discussions. As set forth in paragraph 158 of the Working Party Report, the representative of China explained that:

> The main criteria used in determining whether a product was subject to export licensing, as set down in the Foreign Trade Law, were: (1) maintenance of national security or public interests; (2) protection against shortage of supply in the domestic market or exhaustion of natural resources; (3) limited market capacity of importing countries or regions; or (4) obligations stipulated in international treaties.

These are the criteria that were set forth in sub-paragraphs (1), (2), (3), and (7) respectively of Article 16 of the 1994 *Foreign Trade Law*.[198]

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[197] *See* U.S. Panel Request, Section I; U.S. first written submission, section IV.B.4; U.S. second written submisions, section III.A, para. 185.

[198] *See Foreign Trade Law (1994) (excerpts)*, Exhibit JE-194.

161. Members of the Working Party expressed concerns regarding the lack of conformity between these provisions in the 1994 *Foreign Trade Law* and provisions of the GATT 1994 – in particular Article XI:2(a) and Article XX(g):

> Certain members of the Working Party noted the conditions in the GATT 1994 in regard to non-automatic licensing and export restrictions. They pointed out that export prohibitions, restrictions and non-automatic licensing could only temporarily be applied under Article XI of the GATT 1994 to prevent or relieve critical shortages of foodstuffs or other products essential to an exporting WTO Member. Article XX of the GATT 1994 also allowed for restrictive export measures, but only if such measures were made effective in conjunction with restrictions on domestic production or consumption. These members noted that some of the criteria of the Foreign Trade Law referred to above did not at present meet the specific conditions laid down in Articles XI and XX of the GATT 1994.[199]

162. China amended the *Foreign Trade Law* in 2004. As a result of the amendment, additional new criteria were included in Article 16, however, the provision on the protection of exhaustible natural resources and the protection of goods in short supply did not change.[200] The 2004 version of the *Foreign Trade Law*, like the 1994 version, does not require that export restrictions imposed: (1) in order to protect exhaustible natural resources be made effective in conjunction with restrictions on domestic production or consumption or (2) in order to protect against short supply be applied temporarily or be applied only to foodstuffs or other goods essential to China.

163. Accordingly, the provisions of the *Foreign Trade Law* specifically identified as not meeting the conditions set forth in Articles XI:2(a) and XX(g) of the GATT 1994 were not brought into conformity with GATT requirements per China's commitment in paragraph 162 of the Working Party Report. Although the United States does not bring a claim against this

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[199] Working Party Report, para. 160 (emphases added).
[200] *See* Exhibit JE-72.

omission by China, the United States does note that the fact is informative in evaluating China's efforts – or lack thereof – in "abid[ing] by WTO rules in respect of non-automatic export licensing and export restrictions" in two ways. First, this demonstrates that China's domestic law permits the imposition of non-automatic export licensing and export quotas in situations where Articles XI:2(a) and Article XX(g) do not. Second, this demonstrates that over the past nine years since China's accession to the WTO, it has taken no steps to comply with commitments set forth in paragraph 162 of the Working Party Report.

164. With respect to export quotas, China committed in paragraph 162 of the Working Party Report specifically to apply them only where justified by GATT provisions. China made this very specific commitment in relation to the export quotas imposed pursuant to Article 16 of the *Foreign Trade Law* – with which the Working Party had concerns. This commitment is separate and distinct from China's commitment to abide by Article XI:1 of the GATT 1994 upon its accession to the WTO. Accordingly, findings on China's export quotas under paragraph 162 (and paragraph 165) of the Working Party Report, as incorporated into paragraph 1.2 of the Accession Protocol through paragraph 342 of the Working Party Report, should be made and do not present an appropriate opportunity for the exercise of judicial economy, as China has argued.[201]

165. Finally, with respect to export licensing, the United States refers to its answers to Questions 61 and 64 of the Panel's second set of questions.

Q69. (China) Does the *2001 CCCMC Charter* replace the *1994 CCCMC Charter*? If so, how and when was this done? Is any element of the *1994 CCCMC Charter* still in effect?

[201] *See* China's first written submission, section VI.G, paras. 560-566.

166. China asserts that the replacement of the *1994 CCCMC Charter* by the *2001 CCCMC Charter* took place "by Resolution of 21 February 2001, and pursuant to the authority of the CCCMC's General Meeting to amend the organization's constitute document."[202] While the *2001 CCCMC Charter* indicates in Article 62 that it was adopted by the General Assembly of the Member Representatives on February 21, 2001, Article 64 of the *2001 CCCMC Charter* also provides that the Charter does not enter into force until it is considered and approved by the Ministry of Civil Affairs. Neither the *2001 CCCMC Charter* nor the statement by the CCCMC provided at Exhibit CHN-541 indicate when the Ministry of Civil Affairs approved the *2001 CCCMC Charter*, bringing it into legal force. Furthermore, the *2001 CCCMC Charter* was not published on the CCCMC website until well into 2009.

167. All substantive provisions of the *1994 CCCMC Charter* continued in effect even after the *2001 CCCMC Charter* took effect, in particular with respect to the CCCMC's mission (Article 3); functions (Chapter II) for coordination (Article 6(2) of the *1994 CCCMC Charter* and Article 6(3) of the *2001 CCCMC Charter*) and for administering export quotas (Article 6(6)); and its membership matters (Chapter III), including its authority to discipline its members for non-compliance with its coordination and MOFCOM's rules (Article 14).[203]

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[202] China's answers to second panel questions, para. 341.

[203] As set out in Exhibit JE-195, which provides a comparison of the substantive provisions of the 1994 and 2001 versions of the *CCCMC Charter*, the *2001 CCCMC Charter* made few changes to the first three chapters of the Charter (Chapter I on general provisions; Chapter II on functions; and Chapter III on membership) of the *1994 CCCMC Charter*. Differences between the *2001 CCCMC Charter* and *1994 CCCMC Charter* are reflected primarily in the sections of the Charter governing the chamber's organizational and leadership structure (Chapter IV) and financial management (Chapter V). Even these differences, however, generally reflect additional detail to the provisions already set out in the *1994 CCCMC Charter*. The *2001 CCCMC Charter* also expands the final chapter of the *1994 CCCMC Charter* labeled "miscellaneous," providing more detail on: (1) procedures addressing amendment of the Charter; (2) termination and liquidation of the Chamber; and (3) interpretation, adoption, and entry into force of the Charter.

168. With respect to China's representation that the *2001 CCCMC Charter* was replaced on January 27, 2010 by the *2010 CCCMC Charter*, the United States notes that Article 59 (erroneously translated as Article 64 in Exhibit CHN-314) of the *2010 CCCMC Charter* provides that the Charter takes effect only after being approved by the Ministry of Civil Affairs and neither Exhibit CHN-314 nor the statement provided in Exhibit CHN-541 indicate whether the Ministry of Civil Affairs has approved the *2010 CCCMC Charter* or, if it has, the date on which the Ministry of Civil Affairs approved it.

169. The United States also notes that, as a legal instrument that did not take effect until – at the earliest – January 27, 2010, its relevance to the claims related to the export restraints at issue in this dispute is limited.[204] Additionally, the key substantive provisions of the *2001 CCCMC Charter* continue in effect in the *2010 CCCMC Charter*. These include the provisions relating to the CCCMC's mandate (Article 2); functions (coordination in Article 6(3) and export quota bidding administration in Article 6(6)/6(7)); and membership matters (including disciplinary sanctions in Article 14).[205]

[204] *See EC – Customs (AB)*, para. 187 ("[T]he Panel's review should therefore have focused on these legal instruments *as they existed and were administered at the time of establishment of the Panel*.") (italics added); para. 254 ("As we explained above, had the Panel properly identified the measures at issue, its task would have been to determine whether the measures at issue had been administered collectively in a uniform manner *at the time the Panel was established*, that is to say, in March 2005. In order to make this determination, the Panel could rely on *evidence* that pre-dated or post-dated the time of the Panel's establishment *to the extent that it was evidence relevant for the assessment* of whether the European Communities acted consistently with Article X:3(a) *at the time of the Panel's establishment*.) (third and fourth sets of italics added; footnotes omitted).

[205] *See* Exhibit JE-196, which summarizes the primary differences between these two versions of the *CCCMC Charter*.