

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

(DS394 / DS395 / DS398)

**EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT
OF THE CO-COMPLAINANTS AT THE FIRST SUBSTANTIVE MEETING
OF THE PANEL WITH THE PARTIES**

September 13, 2010

I. Introduction

1. On behalf of the complainants, we would like to begin by thanking the Panel and the Secretariat staff for taking on this task. Our delegations look forward to working with you, and with the delegation of China, as you carry out your work. The complainants have attempted to consolidate their views in a joint statement, to be read by the three complaining parties. This statement will be supplemented by statements by individual complaining parties.

2. The measures at issue in this dispute restrain the exportation of nine types of industrial raw materials from China. These raw materials are important inputs for the manufacture of steel, aluminum, and chemicals – and their downstream products. China's export restraints are barriers to trade that severely distort the conditions of competition in the global marketplace.

II. China's Export Restraints

3. **Export Duties.** In contravention of its obligations in paragraph 11.3 of its Accession Protocol, China imposes export duties on the exportation of various forms of bauxite, coke, fluorspar, magnesium, manganese, silicon metal, and zinc, even though China did not reserve the right to impose export duties on any of these products. For yellow phosphorus, China did reserve the right to impose export duties up to 20%. However, as of the date of filing of the consultations request in this dispute, China's frequently changing export duties on yellow phosphorus stood at 70%.

4. **Export Quotas.** The second form of export restraint we have asked you to examine is an export quota. Article XI:1 of the GATT 1994 prohibits such export quotas. Yet China subjects the exportation of bauxite, coke, fluorspar, silicon carbide, and zinc to quotas. China has made these quotas more and more restrictive over time.

5. **Non-Automatic Export Licensing.** Contrary to Article XI:1 of the GATT 1994, China subjects the exportation of bauxite, coke, fluorspar, manganese, silicon carbide, and zinc – to export licensing that is not automatic.

6. **Minimum Export Prices.** China subjects the exportation of bauxite, coke, fluorspar, manganese, magnesium, silicon carbide, yellow phosphorus, and zinc to a minimum export pricing system that constitutes an impermissible export restriction under Article XI:1. Specifically, exportation of these raw materials is subject to a system that prevents exportation unless the seller meets or exceeds the minimum export price.

7. **Administration of the Export Restraints.** The complainants have also asked the Panel to examine a number of requirements China imposes in the administration of its export restraints in light of China's obligations under the trading rights commitments in China's Accession Protocol and Working Party Report, and with China's obligations under Article X of the GATT 1994. These administration-related claims address China's imposition of eligibility criteria on enterprises seeking to export products subject to export quota, impartial or unreasonable administration of the minimum export pricing and of the application process for products subject

to export quota, and failure to publish measures related to minimum export pricing.

III. The Measures within the Panel's Terms of Reference Are Those Set Out in the Panel Requests, Which Frame the "Matter" Referred to the Panel by the DSB

8. Next, we would like to address the issue of the "identity of the measures at issue" in this dispute. Contrary to China's arguments, all of the 2009 measures were very much at issue when consultations were requested and when the Panel was established, on December 21, 2009. The matter that the DSB referred to the Panel, and thus the Panel's terms of reference, is the consistency of those 2009 export restraint measures with China's WTO obligations. The complainants are therefore entitled to findings and recommendations on these measures. In addition, failure to examine and make findings regarding the 2009 measures would effectively create a "moving target" for both the complainants and the Panel in this dispute.

IV. China's Proffered Justifications for Its Imposition of Export Duties and Export Quotas on the Raw Materials

9. *Export Duties.* China does not contest that the export duties being challenged are imposed inconsistently with its obligations in paragraph 11.3 of the Accession Protocol, or that these export duties fall outside of the exceptions explicitly provided in paragraph 11.3. Instead, China invokes the exceptions in Article XX of the GATT 1994 as justifications. However, Article XX is not available as a justification for a breach of China's obligations in paragraph 11.3 of the Accession Protocol.

10. By its terms, Article XX applies strictly to the GATT 1994. The referenced "Agreement" in the *chapeau* of Article XX is the GATT 1994. In *China – Audiovisual Products*, the issue was whether the Article XX exceptions applied to China's trading rights commitment in paragraph 5.1 of the Accession Protocol. The Appellate Body's finding that Members agreed to apply the Article XX exceptions to paragraph 5.1 was based on the specific language of paragraph 5.1. This language is not found in and is in sharp contrast to paragraph 11.3. Additional relevant context also supports the conclusion that Article XX is not available as a defense for a breach of the export duty commitment.

11. *Export Quotas.* China does not deny that the export quotas being challenged contravene the obligation in Article XI:1 of the GATT 1994. Instead, China claims that the export quotas on coke and silicon carbide are justified under Article XX(b) of the GATT 1994 and that the export quota on refractory grade bauxite is justified pursuant to Article XI:2(a) or, failing that, Article XX(g) of the GATT 1994.

V. China Has Failed to Establish that Its Measures Fulfill the Criteria Set Out in Article XX of the GATT 1994

12. *China's Export Quota on Fluorspar and Refractory-Grade Bauxite Is Not Justified by*

Article XX(g) of the GATT 1994. China's duties on fluorspar exports and China's quota on refractory grade bauxite exports fail to satisfy the requirements of Article XX(g). First, China provides no argument or support for the assertion that these export restraints "relate to" the conservation of these raw materials, which has been interpreted as meaning "primarily aimed at" the conservation of a natural resource and having a "close and substantial relationship of means and ends" between the means presented by the measure at issue and the ends of conservation.

13. Rather than directly address the question of whether the measures at issue are made effective in conjunction with restrictions on domestic production or consumption of fluorspar and refractory grade bauxite, China merely asserts that it has "adopted a comprehensive set of measures relating to the conservation" of fluorspar and refractory grade bauxite. Many of these measures came into effect in 2010. Of the remaining measures, China fails to address how these measures constitute "restrictions" on domestic production or consumption of fluorspar or refractory grade bauxite. China also characterizes its purported right to adopt these export restraints as an issue of "sovereignty" over its natural resources, and also purports to find support in the principles of "conservation" and "sustainable development." The sovereignty of a WTO Member over its natural resources is not at issue under Article XX(g). Regarding the requirements of the *chapeau* of Article XX, China has made no serious attempt in its first submission to satisfy its burden. Accordingly, China has failed to meet its burden under the *chapeau*.

14. **China's Export Duties on Magnesium, Manganese, and Zinc, and Export Quotas on Bauxite and Silicon Carbide Are Not Justified by Article XX(b).** China contends that certain of its export duties and export quotas are justified pursuant to Article XX(b), because the export restraints result in less production of the products, and therefore, less environmental pollution. However, the measures do not satisfy the elements of Article XX(b). As the Appellate Body has stated, "a 'necessary measure is...located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'." The exportation of the products at issue is entirely unrelated to environmental pollution. As China itself argues, it is the production of these products, not their export, that causes pollution. Thus, restraints on the export of the products at issue bear no direct relationship to China's environmental goals. The restraints, however, do have a direct economic effect in terms of providing a competitive advantage to China's industrial users of raw materials. China's arguments under Article XX(b) also raise serious systemic concerns, because under China's approach, Article XX(b) would justify a WTO-inconsistent export restriction on any product whose production causes pollution, or on any economically advantageous or energy efficient product.

15. With respect to scrap, China has failed to establish that the export duties are contributing to, let alone necessary to, accomplishing increased secondary production. China's model is instead based on unsubstantiated assumptions regarding supposed increases in secondary production. In addition, China's estimates of increased secondary production that supposedly could result from the export duties is decidedly modest. Much of the production and trade data presented by China's own economist also contradicts China's reasoning. Finally, there are a

number of reasonably available, WTO-consistent measures that China could take to more directly address its stated health objectives. China also fails to satisfy its burden to demonstrate that these measures satisfy the elements of the *chapeau* of Article XX.

16. With respect to the metals, coke, and silicon carbide, China also significantly downplays the effects of China’s policies downstream and the environmental damage that results from increased downstream production using the raw materials as inputs. In addition, primary production of the metals at issue has increased in recent years. Finally, there are a number of reasonably-available, WTO-consistent measures that China could take to more directly address its health objectives. China also fails to satisfy its burden to demonstrate that these measures satisfy the elements of the *chapeau* of Article XX.

VI. China’s Export Quota on Bauxite Is Not Justified Under Article XI:2(a) of the GATT 1994

17. As a threshold matter, as the party invoking the defense under Article XI:2(a), China bears the burden of establishing that its export quota on refractory-grade bauxite satisfies all of the elements of the exception. China has failed to do so. China’s interpretation of the terms in Article XI:2(a) is also flawed, and relies heavily on the measures of other Members, which are not in the Panel’s terms of reference and are irrelevant to this dispute.

18. China’s arguments also depend heavily on the supposed methodology employed by “criticality” assessments developed by the United States and the European Union. These studies do not purport to address the requirements of Article XI:2(a) of the GATT 1994 and in fact are not relevant – let alone authoritative – as to the question of whether China’s measures satisfy the requirements of Article XI:2(a). This fact renders much of China’s discussion of the export quota on refractory-grade bauxite beside the point as it relates to Article XI:2(a).

19. China’s assertion that refractory-grade bauxite is essential to China appears to be based in large part on the assertion that refractory-grade bauxite is indispensable for the production of iron and steel, as well as other products such as glass, ceramics, and cement. This line of reasoning is untenable as it would suggest that any input into large-scale industrial operations would qualify as an essential product under Article XI:2(a). With respect to “critical shortage,” China neglects to meaningfully analyze that term, and instead merely collapses the “essential products” and “critical shortage” inquiries in Article XI:2(a). China also relies heavily on assertions that refractory-grade bauxite is “finite” or “limited” in its availability. This is not sufficient to establish a “critical shortage.” Finally, China’s export quota is not “temporarily applied.”

VII. Conclusion

20. Having taken on obligations as part of its negotiated accession to the WTO, China now, for reasons that do not appear to be anything other than industrial policy, appears to want to forego those obligations. We ask the Panel to help ensure that China abides by its commitments.