CHINA – MEASURES RELATED TO THE EXPORTATION OF VARIOUS RAW MATERIALS

(DS394 / DS395 / DS398)

CLOSING STATEMENT OF THE UNITED STATES
AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL WITH THE PARTIES

September 2, 2010

1. Mr. Chairman and members of the Panel, on behalf of the United States, we would like to comment on a few matters in our closing statement.

2. We would like to take this opportunity to reiterate that there are two different sets of terms of reference issues raised by China. The first set relates to China's preliminary ruling request submitted on March 30, 2010, and on which the complainants and China have provided submissions to the Panel and participated in an oral hearing. We understand the Panel reserved its decision with respect to two matters raised by that preliminary ruling request and that the Panel seeks to resolve those two issues promptly.

3. With respect to the issues raised in the preliminary ruling request, China's only remaining argument from that request in its first written submission is in Section II.B of China's submission. In that section, and throughout the panel meeting, China simply reasserted its arguments from the preliminary ruling process as it relates to Section III of the complainants' Panel requests. However, those arguments are without merit for the reasons discussed in our submissions to the Panel during the preliminary ruling process. We recall that the Panel stated in its preliminary ruling that the Panel would wait to make its final ruling on certain matters after having a chance to review the parties' first written submissions. This is consistent with the reasoning that under Article 6.2, a responding party's argument that there is an alleged defect in the panel request may be examined in light of the claims advanced in the first submission. China has failed to and indeed cannot show any defect.

4. In this regard, in an attempt to keep its Article 6.2 claims from the preliminary ruling process alive, China continues to argue that the Panel requests at issue fail to satisfy the requirement in Article 6.2 that in stating a claim, a panel request must set forth a plain connection between the measures at issue and the legal obligations that they breach. However,

China misstates the standard as articulated in past disputes. The panel requests satisfy the requisite standards of Article 6.2.

5. The second set relates to China's terms of reference objections under Article 6.2 of the *Understanding on the Rules and Procedures Governing the Settlement of Disputes* ("DSU") raised in China's first written submission, and for which China did not request a preliminary ruling. With respect to this set of issues, we note that China attempted during the panel meeting to blur the lines between the preliminary ruling issues and the new terms of reference issues in China's first written submission. Those terms of reference issues raised in China's first written submission are not within the scope of the preliminary ruling request. While the complainants have coordinated to prepare an oral statement responding to a number of China's arguments in its first written submission, we will respond to China's remaining arguments including those relating to terms of reference in our rebuttal submission and in responding to the Panel's questions.

6. We would also like to respond to a few more points raised by China. We have heard a lot from China about its sovereignty over natural resources and its economic policies. These statements merely confirm that the export restraints at issue are designed to serve China's economic goals and are not related to protection of the environment or conservation. Furthermore, the sovereignty of China is not at issue in this dispute.

7. China repeatedly invokes its supposed status as a developing country. This is an issue that was discussed at the time of China's accession to the WTO as reflected at paragraphs 8 and 9 of the Working Party Report. Members of the Working Party did not agree to give China the benefit of special provisions as a developing country Member in the context of China's export

restraint commitments. Nor are there special provisions for China in relation to Articles XI or XX of the GATT 1994. Indeed, we find China's argument particularly striking in this context, where it is seeking an exemption from its obligations on the basis of its supposed developing country status in relation to raw material inputs, even in spite of the fact that China is now the world's largest steel producer.

8. In a similar vein, China also repeatedly invokes Article XXXVI in yet another attempt to evade its obligations. In addition to the fact that Article XXXVI contains no commitments or obligations, there is no basis to support the notion that this provision weakens China's obligations under Article XI of GATT 1994 or paragraph 11.3 of China's Accession Protocol or, in any way, affects the standard under GATT 1994 Article XX or Article XI:2(a).

9. The "update" that China provided in its opening statement regarding an August 16, 2010, measure repealing three 1997 measures, brings us back to our point on the Panel's terms of reference. China has demonstrated that its measures can appear and disappear with ease. The measures that the complainants challenged in our panel requests are those export restraints in effect in 2009. The Panel should make findings and recommendations on the 2009 export restraints to prevent China from continually moving the target and shielding its measures from review.

10. With respect to China's "right to regulate" arguments, an overarching problem emerges. China is seeking exemptions from obligations without any basis in the text of the WTO Agreement. Just as other WTO Members are not permitted to breach their obligations unless an exception is explicitly provided for in the WTO Agreement and unless the conditions for that exception are met, so too China, as another Member of the WTO, has taken commitments to

which it must adhere. Otherwise, the rules-based trading system would cease to exist.

11. With respect to China's proffered defenses, we offer the following comments. On China's defense under Article XX(g) of the GATT 1994, we note that Article XX(g) requires that a measure must be "related to conservation," and Article XX(g) contains an "even-handedness" requirement. China has not come close to meeting these requirements.

12. With respect to China's defense under Article XX(b) of the GATT 1994, we note that in China's discussion of Article XX(b) in its oral statement, China suggests that a measure may be justified under Article XX(b) if the measure contributes to sustainable development. This assertion is without merit.

13. Finally, regarding China's defense under Article XI:2(a) of the GATT 1994, we observe that China's interpretation of Article XI:2(a) would bring every production input within the coverage of Article XI:2(a). This is inconsistent with the text and purpose of Article XI:2(a). Additionally, China's arguments regarding the requirement of a "critical shortage" in Article XI:2(a) boil down to reading out from that provision the word "critical."

14. These are the issues we addressed in our oral statement and at this first substantive meeting of the Panel with the parties. As we look ahead, we will be addressing all of these issues in greater detail. In particular, we will be responding to China's factual assertions, legal arguments, and economic theories advanced in support of its justifications for imposing its export duties and export quotas. We will also be addressing issues that we did not have the opportunity to touch on at this meeting, including China's arguments regarding the consistency of its non-automatic export licensing, minimum export price regime, quota administration, as well as China's responses to our trading rights and transparency claims under the GATT 1994,

China's Accession Protocol, and Working Party Report.

15. We look forward to re-convening with the Panel and the other parties at the second substantive meeting. Thank you.