

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

**(DS394 / DS395 / DS398)**

**ANSWERS OF THE UNITED STATES OF AMERICA  
TO THE FIRST SET OF QUESTIONS BY THE PANEL TO THE PARTIES**

**September 13, 2010**

**TABLE OF REPORTS**

<b>Short Form</b>	<b>Full Citation</b>
<i>Argentina – Bovine Hides (Panel)</i>	Panel Report, <i>Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather</i> , WT/DS155/R, adopted 16 February 2001
<i>Audiovisual Products (AB)</i>	Appellate Body Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Products</i> , WT/DS363/AB/R, adopted 19 January 2010
<i>Audiovisual Products (Panel)</i>	Panel Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Products</i> , WT/DS363/R, adopted January 19 2010, as modified by the Appellate Body Report, WT/DS363/AB/R
<i>Brazil – Tyres (AB)</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007
<i>Brazil – Tyres (Panel)</i>	Panel Report, <i>Brazil – Measures Affecting Imports of Tyres</i> , WT/DS332/R, adopted 17 December 2007, as modified by the Appellate Body Report, WT/DS332/AB/R
<i>China – Auto Parts (Panel)</i>	Panel Report, <i>China – Measures Affecting Imports of Automobile Parts</i> , WT/DS339/340/342/R, adopted July 18, 2008, as modified by the Appellate Body Report, WT/DS339/340/342/AB/R
<i>US – Customs User Fees</i>	GATT Panel Report, <i>United States – Customs User Fee</i> , L/6264, BISD 35S/245, adopted 2 February 1988
<i>US – Gambling (AB)</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/R, adopted 20 April 2005
<i>US – Gasoline (AB)</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996

**TABLE OF EXHIBITS**

<b>Exhibit No.</b>	<b>Description</b>
JE-135	<i>2006 Export Products Temporary Duty Rate List</i>
JE-136	<i>2007 Export Products Temporary Duty Rate List</i>
JE-137	<i>2008 Export Products Duty Rate List</i>
JE-138	Guangzhou CCM Chemical Co., Ltd., The Survey of Yellow Phosphorus in China – Sustainability, Pricing and Trend till 2011 (August 2007) (excerpts)
JE-139	<i>2003 Export Quota Amounts</i>
JE-140	<i>2004 Export Quota Amounts</i>
JE-141	<i>2005 Export Quota Amounts</i>
JE-142	<i>2006 Export Quota Amounts</i>
JE-143	<i>2006 Export Quota Amounts for Important Industrial Products</i>
JE-144	<i>2007 Export Quota Amounts</i>
JE-145	<i>2008 Export Quota Amounts</i>
JE-146	Resource-Net, Updated World Coke Market Overview, Presentation to the 6th China International Coking Technology & Coke Market Congress, Tianjin (September 2008)
JE-147	Resource-Net, Review of Worldwide Coke Production & Capacity, Presentation to the ITA Conference, Krakow, Poland (June 2010)
JE-148	Chinese Domestic and Export Prices for Coke
JE-149	Resource-Net, Updated View on the Global Coke & Anthracite Markets, Coaltrans World Coke & Anthracite Summit, Krakow, Poland (March 2009)
JE-150	Resource-Net, Coke Market Report (Aug. 23, 2010)
JE-151	Yellow Phosphorus: Chinese Export and Domestic Prices Monthly, 2008 - May 2009

**Q1. (All Parties) China alleges that only two of the measures listed by the complainants in the context of their claims concerning minimum export prices were properly included in the complaining parties' consultation and/or Panel requests (see China's first written submission, paragraph 48). China further asserts that most of the challenged measures relating to minimum export prices have been repealed.**

- (a) Could the complainants comment in detail on the table in paragraph 39 of China's first written submission and inform the Panel whether any challenged measure is, in their view, included in the requests for consultation and/or in the panel requests.**
- (b) In addition, could the parties indicate which measures, if any, constitute amendments, extensions, replacement measures, renewal measures or implementing measures to those measures included in the complainants' Panel requests.**
- (c) If a particular measure was repealed, could China indicate in detail when such repeal occurred and was made effective, how it was done, and where the notice of repeal was made public.**
- (d) In order to ensure the Panel's full understanding, could China explain the legal process and the role of the relevant authorities (including their interrelationship) involved in the enactment, administration, and repeal of instruments in China affecting trade in the raw materials at issue in this dispute.**

1. See attached Chart A.

**Q2. Could the complainants list clearly all measures relevant to this dispute for which they are seeking "recommendations" from the Panel within the meaning of Article 19.1 of the DSU. In addition, list which specific WTO provisions each of these measures would violate.**

2. See attached Chart B.

**Q3. (All Parties) Could the parties provide the Panel with a table indicating any change over time in the level of export duties on the products concerned in this dispute before 2009.**

3. The table below provides the most complete information the United States has been able to obtain, to date, on the export duties China imposed on the raw materials at issue prior to 2009,

based on China's 2006 Export Products Temporary Duty Rate List,<sup>1</sup> 2007 Export Products Temporary Duty Rate List,<sup>2</sup> 2008 Export Products Duty Rate List,<sup>3</sup> May 2008 Tariff Commission Special Export Duty Notice,<sup>4</sup> November 2008 Tariff Commission Export Duties Notice,<sup>5</sup> and China's Exhibit CHN-289.

4. As the information in the table demonstrates, over the years, China's use of export duties has increased both in terms of the number of products on which these export duties are imposed and in terms of the rates of the export duties imposed.

Raw Material	Chin. HS No.	2005	2006	2007	2008
<b>Bauxite</b>	2508.3000				15%
	2606.0000			10%	15%
	2620.4000			10%	10%
<b>Coke</b>	2704.0010		5% (starting November)	5% (raised in June to 15%)	25% (adjusted in August to 40%)
<b>Fluorspar</b>	2529.2100		10% (starting November)	10%	15%
	2529.2200		10% (starting November)	10%	15%
<b>Magnesium</b>	8104.1100				10%
	8104.1900				10%
	8104.2000			10% (starting June)	10%

<sup>1</sup> 2006 Export Products Temporary Duty Rate List (Exhibit JE-135).

<sup>2</sup> 2007 Export Products Temporary Duty Rate List (Exhibit JE-136).

<sup>3</sup> 2008 Export Products Duty Rate List (Exhibit JE-137).

<sup>4</sup> May 2008 Tariff Commission Special Export Duties Notice (Exhibit JE-69).

<sup>5</sup> December 2008 Export Duties Notice (Exhibit JE-71).

Raw Material	Chin. HS No.	2005	2006	2007	2008
Manganese	2602.0000			10%	15%
	8111.0010		15% (starting November)	15%	20%
Silicon Metal	2804.6900				10%
Yellow Phosphorus	2804.7010	10% (raised in June to 20%) <sup>6</sup>	20%	20%	20% (raised in May to 120%; adjusted in December to 95%)
Zinc	7902.0000			10% (starting June)	10%
	2620.1100		10% (starting November)	10%	10%
	2620.1900			10%	10%

**Q5. (All Parties) Could the parties provide the Panel with a table indicating any change over time in the level of export quotas on the products concerned in this dispute before 2009.**

5. The table below provides the most complete information the United States has been able to obtain, to date, on the export quotas China imposed on the raw materials at issue prior to 2009, based on China’s *2003 Export Quota Amounts*<sup>7</sup>, *2004 Export Quota Amounts*<sup>8</sup>, *2005 Export*

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<sup>6</sup> Guangzhou CCM Chemical Co., Ltd., *The Survey of Yellow Phosphorus in China – Sustainability, Pricing and Trend till 2001*, at 5 (August 2007) (Exhibit JE-138); “Ups and Downs of the Yellow Phosphorus Market in 2007,” *China Chemical Reporter*, Dec. 6, 2007

<sup>7</sup> Exhibit JE-139.

<sup>8</sup> Exhibit JE-140

*Quota Amounts*<sup>9</sup>, *2006 Export Quota Amounts*<sup>10</sup>, *2006 Export Quota Amounts for Important Industrial Products*<sup>11</sup>, *2007 Export Quota Amounts*<sup>12</sup>, *2008 Export Quota Amounts*<sup>13</sup>, and China's Exhibit CHN-289. Although the United States has been able to obtain copies of China's annual *Export Quota Amounts* measures only to 2003, it appears that quotas have been imposed on several of these products since as early as the mid-1990s.<sup>14</sup> In addition, it is the understanding of the United States that, despite the fact that the export quota amounts for coke were published in the *2005 Export Quota Amounts*<sup>15</sup> and *2006 Export Quota Amounts for Important Industrial Products*<sup>16</sup> measures, the amounts were not published in the *2003 Export Quota Amounts*<sup>17</sup>, *2004 Export Quota Amounts*<sup>18</sup>, *2007 Export Quota Amounts*<sup>19</sup>, or *2008 Export Quota Amounts*<sup>20</sup> measures. The amounts for the coke quota in 2003, 2004, 2007, and 2008 indicated in the table below are taken from China's Exhibit CHN-289. Exhibit CHN-289 does not provide information on whether the amounts indicated are those that were announced or those that were actually allocated or used.

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<sup>9</sup> Exhibit JE-141.

<sup>10</sup> Exhibit JE-142.

<sup>11</sup> Exhibit JE-143.

<sup>12</sup> Exhibit JE-144.

<sup>13</sup> Exhibit JE-145.

<sup>14</sup> See Exhibit CHN-289 at 19, indicating export quota amounts for silicon carbide beginning in 1999; and Exhibit CHN-289 at 20, indicating export quota amounts for coke beginning in 2002, although it is the United States' understanding that export quotas have been imposed on coke since the mid-1990s.

<sup>15</sup> Exhibit JE-141.

<sup>16</sup> Exhibit JE-143.

<sup>17</sup> Exhibit JE-139.

<sup>18</sup> Exhibit JE-140.

<sup>19</sup> Exhibit JE-144.

<sup>20</sup> Exhibit JE-145.

6. As the information in the table demonstrates, over the years, China’s use of export quotas has increased both in terms of the number of products on which these export duties are imposed and in terms of the restrictiveness of the export quotas.

Raw Material	2003	2004	2005	2006	2007	2008
Bauxite				970,000	950,000	940,000
Coke	7,208,500 (CHN-289)	12,866,000 (CHN-289)	14,000,000	14,000,000	13,679,500 (CHN-289)	13,677,200 (CHN-289)
Fluorspar	850,000	750,000	750,000	710,000	685,000	550,000
Silicon carbide	230,000	230,000	230,000	223,000	218,000	216,000
Zinc	600,000	588,000	520,000	<i>not announced</i>	<i>not announced</i>	<i>not announced</i>

**Q6. (United States, Mexico) Could the United States and Mexico comment on China's assertion that a bid winning price is not a fee or charge connected with exportation, and thus is not covered by Article VIII (see paragraph 579 of China's first written submission).**

7. China’s arguments that the total award price (or “bid-winning price”) is not a fee or charge connected with exportation subject to Article VIII of the GATT 1994 ignore the actual text of Article VIII and are thus fundamentally flawed.

8. As actually drafted, Article VIII:1(a) applies to “All fees and charges of whatever character . . . imposed by contracting parties on or in connection with importation or



exportation.”<sup>21</sup> China ignores the plain language of Article VIII stating that the article applies to fees and charges “of whatever character” imposed “on or in connection with” exportation. Instead, China would redraft Article VIII:1(a) so as to apply only to “fees and formalities *in connection with the processing of customs entries*,”<sup>22</sup> Nothing in the text of Article VIII supports China’s proposed limitation.

9. The context provided by other GATT provisions, as well as prior DSB findings, supports that China’s proposed limitation is incorrect. First, Article VIII:4 explains that the “fees and charges” in Article VIII:1(a) include those relating to “quantitative restrictions” and “licensing”. Fees and charges imposed as part of an export licensing regime, for example, are not necessarily imposed at the border or as part of customs processing. Such fees and charges may instead be imposed as a “precursor to exportation.”<sup>23</sup> This confirms that the “fees and charges” in Article VIII:1(a) are not limited to those charges imposed as part of customs processing or at the border.

10. Second, the panel in *China – Auto Parts* examined the phrase “in connection with” – used both in Article II and Article VIII of the GATT 1994 – and found that the language was intended to have broad scope. Article II:1(b) – like Article VIII – provides disciplines on, *inter alia*, “all other duties or charges of any kind imposed on or in connection with importation . . .” In interpreting this phrase from Article II:1(b), the panel contrasted the phrase “on importation” with “in connection with importation. The panel stated:

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<sup>21</sup> GATT 1994, Article VIII:1(a) (emphasis added).

<sup>22</sup> China’s First Written Submission, para. 579 (emphasis original).

<sup>23</sup> See China’s First Written Submission, para. 591 (China argues that the total award price is a “precursor to exportation” and is not “connected with the exportation itself.”)

We find further useful context for our understanding in this regard in Articles I:1 and VIII:1(a) of the GATT 1994. We first note that these provisions, which also deal with fiscal matters, use the expression ‘on or in connection with importation,’ not ‘on importation’ alone. This seems to indicate the intended broad scope of these provisions and hence the choice of a broader language.<sup>24</sup>

In contrast to the broader phrase “in connection with importation,” the panel found that the phrase “on importation,” “*had a strict and precise temporal element,*” and, therefore, “the [relevant] obligation . . . is linked to the product at the moment it enters the territory of another Member.”<sup>25</sup> China’s proposed interpretation is contrary to this reasoning in that China would limit the phrase “in connection with” as applying only to those fees and charges imposed at the time the products were subject to Customs procedures.

11. Third, China’s invocation of the GATT 1947 panel report in *US – Customs User Fees* does not support China’s proposed limitation of the scope of Article VIII.<sup>26</sup> China relies on the panel’s statement in that case that Article VIII:(1) “states a rule applicable to all charges levied at the border, except tariffs and charges which serve to equalize internal taxes.”<sup>27</sup> While this statement makes clear that all charges levied at the border come within the scope of Article VIII:1(a), this statement does not suggest – contrary to China’s arguments – that Article VIII is limited to such charges. In other words, the report makes no findings that fees or charges administered in some other way *i.e.*, not at the border, are outside the scope of Article VIII:1(a).

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<sup>24</sup> Panel Report, *China – Auto Parts*, para. 7.177.

<sup>25</sup> Panel Report, *China – Auto Parts*, para. 7.184 (emphasis original).

<sup>26</sup> China’s First Written Submission, para. 585.

<sup>27</sup> Panel Report, *US – Customs User Fee*, para. 69; *See* China’s First Written Submission, para. 585.

Accordingly, the panel’s statement in *US – Customs User Fees* on which China relies does not support China’s argument.

12. Similarly, China’s interpretation does not find support in the discussion of Article VIII:4 in the *US – Customs User Fees* report. China quotes the panel’s statement that Members have interpreted the “illustrative list” of government activities in Article VIII:4 “as a list of those customs-related government activities which the draft meant when they referred to ‘services rendered’.”<sup>28</sup> China’s invocation of this statement is misplaced for two reasons. First, the statement appears to relate to the meaning of “services rendered” rather than to the question of whether the fees and formalities in Article VIII:1(a) are limited to those administered at the border. Second, China omits relevant portions of the panel’s statement in *US – Customs User Fees* explaining that the illustrative list in Article VIII:4 was expanded beyond just custom-related activities. The panel states that while the list of items in Article VIII:4 was understood as an illustrative list of “services rendered,” “[t]he text of Article VIII was later changed to enlarge the scope of that provision” and “the enlarged scope gave a different meaning to the illustrative list in paragraph 4.”<sup>29</sup>

13. For the foregoing reasons, China’s contentions that the bid winning price is not a fee or charge within the scope of Article VIII:1(a) is without merit. Furthermore, for the reasons set forth in the U.S. and Mexico first written submissions, the bid winning price is inconsistent with Article VIII:1(a) of the GATT 1994.<sup>30</sup>

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<sup>28</sup> *US – Customs User Fees*, para. 76; *See* China’s First Written Submission, para. 584.

<sup>29</sup> Panel Report, *US – Customs User Fees*, para. 76.

<sup>30</sup> U.S. First Written Submission, paras. 315-30. We note that China, supported by their  
(continued...)

**Q9. (Complainants) Are the complainants aware of specific instances where exporters sought to apply for a quota-license to export zinc fluorspar, bauxite, coke or silicon carbide and were refused one in 2009? In 2010? Finally, could the complainants provide similar details for applicants of manganese licences.**

14. China's export licensing regime is non-transparent; China does not appear to publish information regarding applicants that seek to apply for export licenses. In addition, because the licenses are granted to entities within China, the United States has only limited access to information regarding what licenses those entities have sought. The United States, does, however have information regarding Chinese exporters of bauxite. In particular, bauxite exporters have represented in U.S. court that "[e]xporters seeking licenses to export were subject to the direct output restrictions represented by the [export] quotas, and required to join the Bauxite Branch of CCCMC, and submit to the coordination of the Branch, as a condition of obtaining an export license. Exporting bauxite without a license is illegal."<sup>31</sup>

**Q10. (All Parties) In discussing coordinated export prices, the complainants refer to coordination rules and measures of the "Bauxite Branch". Could China and the complainants provide coordination rules and measures for coke, fluorspar, magnesium, silicon carbide, yellow phosphorus and zinc.**

15. As detailed in the U.S. first written submission,<sup>32</sup> the United States was able to obtain a copy of the *CCCMC Coordination Measures* only from the public record of a U.S. court

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<sup>30</sup> (...continued)

economist, offers an extended discussion of the economic theory that bidding is the most economically efficient way to allocate a quota. See China's First Written Submission, paras. 597-601. Regardless of the merits of this theory, we note that this theory bears no relationship to the text of Article VIII:1(a) or to the Panel's question. Accordingly, we consider that the economist's statements in this regard are beside the point.

<sup>31</sup> Memorandum in Support of Defendants' Joint Motion to Dismiss First Amended Complaint in *Resco Products, Inc. v. Bosai Minerals Group and CMP Tianjin Co.* (Oct. 7, 2008) at 28 (Exhibit JE-105)

<sup>32</sup> See U.S. First Written Submission, para. 212.

proceeding involving allegations by private litigants of price fixing and other anti-competitive behavior by Chinese exporters of magnesite (also known as magnesium carbonate),<sup>33</sup> in which defendant Chinese exporters submitted a copy of the *CCCMC Export Coordination Measures*.<sup>34</sup> Similarly, the United States was only able to obtain a copy of the *Bauxite Branch Coordination Measures* from the public record in a U.S. court proceeding involving private allegations of price fixing and anti-competitive behavior by Chinese exporters of bauxite.<sup>35</sup> The many efforts the United States has made to obtain coordination rules and measures for coke, fluorspar, magnesium, silicon carbide, yellow phosphorus and zinc, have been frustrated by the lack of transparency in this area of China's export regulation. Accordingly, the United States has explained that China has acted inconsistently with Article X:1 of the GATT 1994 by failing to publish the specific coordination programs and Branch coordination measures prescribed under the *CCCMC Export Coordination Measures*.<sup>36</sup>

**Q11. (Complainants) The complainants state that China's customs authorities enforce coordinated export prices "for at least yellow phosphorus" (see, e.g., United States' first written submission, paragraph 356). Could the complainants clarify their positions with respect to whether coordinated export prices are enforced for coke, fluorspar, magnesium, silicon carbide and zinc.**

16. China's customs authorities have the authority to enforce coordinated export prices for coke, fluorspar, magnesium, silicon carbide and zinc as shown by the continuing effectiveness of three measures: *Notice of the Rules on Price Review of Export Products by the Customs*, the

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<sup>33</sup> *Animal Science Products, Inc. v. China National Metals and Minerals Import and Export Corp.* (D. NJ).

<sup>34</sup> Exhibit JE-107. See also *supra* note 283.

<sup>35</sup> *Resco Products, Inc. v. Bosai Minerals Group and CMP Tianjin Co.* See also U.S. First Written Submission, para. 214.

<sup>36</sup> See U.S. First Written Submission, para. 378.

*Rules for Coordination with Respect to Customs Price Review of Export Products*, and the *Provisional Rules on Export Price Verification and Chop for Key Products Subject to Price Review*. Based on the evidence provided by the *2002 PVC Notice* and the *2004 PVC Notice* (both of which were issued pursuant to these measures), these measures authorize review by customs of export prices in the clearance process as a method of enforcing industry coordinated export prices as minimum export prices for the raw materials at issue.<sup>37</sup> The United States also notes that these three measures (the *Notice of the Rules on Price Review of Export Products by the Customs*, the *Rules for Coordination with Respect to Customs Price Review of Export Products*, and the *Provisional Rules on Export Price Verification and Chop for Key Products Subject to Price Review*) do not appear to be published and the United States has, accordingly, explained that this forms the basis of a breach by China of its obligations under Article X:1 of the GATT 1994.

**Q12. (Complainants) China argues in paragraph 847 of its first written submission that the Normal Export Price Provisions do not involve price coordination, but rather, through its Article 5, concerns export prices charged by individual exporters. Could the complainants comment on China's argument.**

17. The measure at issue does in fact involve export price coordination. Through its Article 4, this measure requires that individual exporters “follow the coordination by various chambers of commerce for import and export trade, and set export prices which are suitable in countries to which the goods are exported.”<sup>38</sup> In addition, Article 7 of this measure provides that an enterprise’s unlawful trading activity can be reported through the relevant chamber of commerce. Finally, Article 6 of this measure provides for the same MOFCOM-imposed penalties to which

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<sup>37</sup> See U.S. First Written Submission, paras. 357-358 and 361.

<sup>38</sup> *Export Price Penalties Regulations*, Article 4 (Exhibit JE-113).

exporters may be subject for failing to abide by the export prices coordinated by the CCCMC, as provided in Article 21 of the *CCCMC Export Coordination Measures* and Article 8 of the *Bauxite Branch Coordination Measures*.<sup>39</sup> In fact, in their filing in U.S. court in a proceeding involving private allegations of price-fixing and other anti-competitive behavior by Chinese exporters of bauxite, Chinese bauxite exporters stated that, “[a]s provided in the 1996 [*Normal Export Price Provisions/Export Price Penalties Regulations*], and other regulations cited above, the [Bauxite] Branch’s coordination measures provide for punishment of members who violate the coordination by competing “willfully with low price.”<sup>40</sup>

**Q13. (Complainants) In paragraph 851 of its first written submission, China cites certain evidence in claiming that exports of yellow phosphorus and bauxite were actually exported at prices below coordinated prices alleged by the complainants. China goes on to argue that this provides evidence, in part, to show that no coordinated export prices existed at the time. Could the complainants substantiate their allegation that, where exports occurred below alleged minimum export prices, the exporter was subject to penalties. Please respond for exports of all relevant products, including yellow phosphorus and bauxite.**

18. The ability of the United States to obtain information on China’s minimum export price system is limited by the lack of transparency of the system. Nevertheless, the statements made by Chinese exporters of bauxite in U.S. court are illuminating.

19. Chinese bauxite exporters, defendants in a U.S. court proceeding involving allegations of price fixing and other anti-competitive behavior, have stated (as recalled above in response to Question 12) that: “[a]s provided in the 1996 [*Normal Export Price Provisions/Export Price*

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<sup>39</sup> *CCCMC Export Coordination Measures*, Article 21 (Exhibit JE-107); *CCCMC Bauxite Branch Coordination Measures*, Article 8 (Exhibit JE-108).

<sup>40</sup> Memorandum in Support of Defendants’ Joint Motion to Dismiss First Amended Complaint in *Resco Products, Inc. v. Bosai Minerals Group and CMP Tianjin Co.* (Oct. 7, 2008) at 18 (Exhibit JE-105) (citing *Bauxite Branch Coordination Measures*, Art. 8).

*Penalties Regulations*], and other regulations cited above, the [Bauxite] Branch’s coordination measures provide for punishment of members who violate the coordination by competing “willfully with low price.”<sup>41</sup> In addition, Chinese bauxite exporters have represented that the *Bauxite Branch Charter* defines the Bauxite Branch’s functions as including “directly taking measures to punish members who violate regulations”<sup>42</sup> and that “[e]xporters who contracted for prices below the coordinated price were subject to punishment.”<sup>43</sup>

**Q14. (United States, European Union) China asserts that the United States and the European Union impose anti-dumping duties on some of the products at issue in this dispute; is this true? and if so is there a contradiction in imposing anti-dumping duties while at the same time challenging export restrictions on those products?**

20. The United States can confirm that it imposes antidumping duties on a small subset of the products within the scope of this dispute. However, there is no contradiction in the imposition of antidumping duties and a challenge to China’s WTO-inconsistent export restrictions.

21. The United States has presented claims that China has breached its obligations under Articles VIII, X, and XI of the GATT 1994 and under China’s Accession Protocol. The existence of some overlap in product coverage between these claims and U.S. antidumping duties does not provide China with a defense to its breach of these (or any other) WTO commitments.

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<sup>41</sup> Memorandum in Support of Defendants’ Joint Motion to Dismiss First Amended Complaint in *Resco Products, Inc. v. Bosai Minerals Group and CMP Tianjin Co.* (Oct. 7, 2008) at 18 (Exhibit JE-105) (citing *Bauxite Branch Coordination Measures*, Art. 8).

<sup>42</sup> Memorandum in Support of Defendants’ Joint Motion to Dismiss First Amended Complaint in *Resco Products, Inc. v. Bosai Minerals Group and CMP Tianjin Co.* (Oct. 7, 2008) at 19 (Exhibit JE-105)

<sup>43</sup> Exhibit JE-105 at 28.



For this reason, the existence of antidumping duties is not relevant to any legal issue in this dispute.<sup>44</sup>

**Q16. (All Parties) Could parties comment on paragraph 9 of Brazil's third party oral statement.**

22. Brazil's statements in paragraph 9 of its oral statement relate to China's defense under Article XI:2(a) of the GATT 1994. As the complainants discussed in the joint oral statement, China has failed to demonstrate that its export quota on refractory-grade bauxite satisfies the requirements of Article XI:2(a). Therefore, the export quota at issue is not justified by that provision.

23. We would like to begin by clarifying that we understand Brazil's analysis, in paragraph 9 of its oral statement, to be that where an export restriction is imposed on a non-renewable product on the basis that there is a limited amount of reserves of that product, the export restriction cannot satisfy Article XI:2(a). We agree with Brazil's statement as we understand it for two principal reasons.

24. First, Article XI:2(a) requires that export restrictions be applied to prevent or relieve a "critical shortage." We recall that "critical" means "in the nature of or constituting a crisis." In addition, a "shortage" refers to a "deficiency in quantity."<sup>45</sup> We further recall the discussion of the drafters in relation to the meaning of "critical shortage," clarifying that export restrictions justified under Article XI:2(a) "could be temporarily applied to cope with the consequences of a natural disaster, or to maintain year to year domestic stocks sufficient to avoid critical shortages

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<sup>44</sup> We note that China's only reference to antidumping duties in the context of this dispute is a single statement in relation to the minimum export price claim. *See* China's First Written Submission, para. 861.

<sup>45</sup> China's First Written Submission, paras. 391-92.

of products . . . which are subject to alternative annual shortages and surpluses.”<sup>46</sup> In contrast, China’s invocation of Article XI:2(a) to justify its export quota on refractory-grade bauxite is based, not on these types of circumstances, but merely on the basis that the availability of refractory-grade bauxite is finite *i.e.*, a limited amount of reserves.

25. Furthermore, the drafters also commented on the importance of the word “critical” in Article XI:2(a) stating, “if you take out the word ‘critical’, almost any product that is essential will be alleged to have a degree of shortage and could be brought within the scope of this paragraph.”<sup>47</sup> This statement, too, exposes the flaws in China’s reasoning. The circumstances surrounding China’s imposition of an export quota on refractory-grade bauxite – *i.e.*, the existence of a limited amount of reserves – constitutes a mere “degree of shortage, but does not constitute a “critical shortage.” The mere fact that the availability of a product is finite is not sufficient to constitute a shortage that is “in the nature of or constituting a crisis,” *i.e.*, a “critical shortage.” Accordingly, China has failed to satisfy the requirements of Article XI:2(a).

26. Second, Article XI:2(a) requires that export restrictions be “temporarily applied.” We recall China’s statement that the “temporarily applied” requirement in Article XI:2(a) means that an export restriction can only be applied as long as necessary to prevent or relieve a critical

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<sup>46</sup> GATT Negotiation Group on Agriculture, *GATT Rules and Disciplines Relating to Agriculture – Note by the Secretariat* MTN.GNT/NG5/W/95 (4 July 1989) (Exhibit CHN-180), para. 19 (In this Note by the Secretariat, the Secretariat confirms that the point above regarding the meaning of “critical shortage” was incorporated into the corresponding provisions of the Havana Charter.)

<sup>47</sup> U.N Economic and Social Council, *Second Session of the Preparatory Committee of the United Nations Conference on Trade and Employment, Verbatim Report, Fortieth Meeting of Commission ‘A’ (1) (Articles 25 & 27, 26, 28 & 29), Held on Friday 15 August 1947 at 10:30 a.m. in the Palais des Nations, Geneva, E/PC/T/A/PV/40(1)(15 August 1947)* (Exhibit CHN-181), p. 6.

shortage.<sup>48</sup> However, under China’s theory, the export restriction on refractory-grade bauxite would be applied as long as there are finite reserves. Since the available reserves would continually be depleted, and the available reserves would, at any given point, be finite the export restriction could be imposed permanently. This is clearly inconsistent with the requirement that the export restriction be “temporarily applied.”<sup>49</sup>

**Q17. (All Parties) Could the parties suggest a methodology or criteria for determining when a product is "essential for the exporting country" within the meaning of Article XI:2(a) of the GATT 1994.**

27. In determining the meaning of the words “essential for the exporting country” in Article XI:2(a) of the GATT 1994, we consider that the Panel should apply the ordinary meaning of the relevant terms in their context. Article 31 of the *Vienna Convention on the Law of Treaties* (“Vienna Convention”) provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

28. We recall that the dictionary definition of “essential” is “affecting the essence of anything; ‘material’, important’,” “constituting, or forming part of, the essence of anything”, and

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<sup>48</sup> China’s First Written Submission, para. 374.

<sup>49</sup> We note that Brazil goes on to suggest in its third party statement, that while Article XI:2(a) disciplines temporarily applied export restrictions in the context of a critical shortage, Article XX(g) applies to long-term conservation policies. *See* Brazil’s Third Party Statement, para. 10. Regardless of the merits of this assertion, the United States notes that any WTO-inconsistent measure, such as China’s export quota on refractory-grade bauxite, can be justified by an applicable exception only by satisfying all of the elements of that exception. Thus, the fact that the export quota on refractory-grade bauxite does not satisfy the requirements of Article XI:2(a) does not, in some way, support the proposition that the export quota on refractory-grade bauxite does satisfy the requirements of Article XX(g). And, for the reasons set forth in the complainants’ joint oral statement, China’s export quota on refractory-grade bauxite is in fact not justified by Article XX(g). Complainants’ First Oral Statement, paras. 70-91.

“absolutely necessary, indispensably requisite.”<sup>50</sup> Thus, products deemed “essential to the exporting Member” should satisfy this definition of “essential.” Making a finding of whether a product is “essential” requires the application of the ordinary meaning of the term to the particular facts and circumstances of the dispute.

29. China’s argument that refractory-grade bauxite is essential to China rests largely on the proposition that it is “indispensable for the production of iron and steel, as well as of other products such as glass, ceramics, and cement.”<sup>51</sup> As we will elaborate further in the second written submission, this assertion, which is largely based on China’s assertion that there are no substitutes for refractory-grade bauxite, is erroneous. This assertion also suggests, however, that contrary to the ordinary meaning of “essential” to which China points, China reads the term “essential” products as meaning any input into production. In fact, China concedes as much by selectively quoting from paragraph 4 of the *Understanding on the Balance-of-Payments Provisions of the General Agreement on Tariffs and Trade 1994* (“BOP Understanding”),<sup>52</sup> as suggesting that “essential products” in the context of balance-of-payments measures includes “inputs needed for production.” In fact, the full provision states that for balance-of-payments purposes,<sup>53</sup> “the term ‘essential products’ shall be understood to mean products which meet basic consumption needs or which contribute to the Member’s effort to improve its balance-of-

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<sup>50</sup> Exhibit CHN-173; China’s First Written Submission, para. 380.

<sup>51</sup> China’s First Written Submission, para. 431.

<sup>52</sup> China’s First Oral Statement, para. 35.

<sup>53</sup> Measures taken to safeguard a Member’s balance-of-payments position are disciplined by Article XII and Section B of Article XVIII of the GATT 1994.

payments situation, such as capital goods or inputs needed for production.”<sup>54</sup> Thus, the “essential products” definition is anchored in the specific needs of a Member faced with a balance-of-payments crisis; not any “input needed for production” will satisfy the definition of “essential products” in the BOP Understanding.

30. The inclusion of “foodstuffs” in Article XI:2(a) also provides helpful context for the meaning of “essential products”. While the inclusion of “other products essential to the exporting Member,” makes clear that the products at issue need not be those necessary for food security, the reference to “foodstuffs” does help to convey the level of importance of the products that are within the scope of Article XI:2(a).

31. Article 32 of the Vienna Convention also provides that “[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31.” China invokes the drafters’ discussion of Australia’s export restriction on merino sheep in an attempt to buttress China’s interpretation of the meaning of “essential products.”<sup>55</sup> As discussed below, however, the drafting history cited by China does not even address the meaning of the term “essential.”

32. The drafters’ entire discussion surrounding the Australian export restriction on merino sheep relates to whether the conditions surrounding the export restriction constituted a “critical

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<sup>54</sup> The BOP Understanding, in conjunction with Articles XII and XVIII of the GATT 1994, permit Members to exclude “essential products” from across the board surcharges or other measures taken for balance-of-payments measures.

<sup>55</sup> China’s First Written Submission, paras. 385-87; China’s First Oral Statement, paras. 57-59.

shortage.” The drafters did not discuss the meaning of “essential products” or whether the product at issue satisfied the “essential products” definition.<sup>56</sup> Furthermore, contrary to China’s suggestion,<sup>57</sup> the drafters did not address whether live merino sheep were essential because of their value to a downstream industry, or whether such circumstances would satisfy the meaning of “essential products” in Article XI:2(a). China’s assertion that the “essentialness” of merino sheep derives from their value to the downstream industry is not based on any statement in the 1947 drafting history. Instead, it is based instead on an industry association document from 2009 – that is, from a document prepared over 60 years after the drafting of Article XI:2(a). In short, the drafting history provided by China provides no information on what the drafters intended by the term “essential products” in Article XI:2(a).

33. For the foregoing reasons, the term “products essential to the exporting Member” should be interpreted consistently with the ordinary meaning of the words as set forth above in their relevant context, and should be applied to the specific facts and circumstances in the dispute. China’s interpretation of the term “essential products” would bring within the scope of Article XI:2(a) export restrictions on any input into production. Such a definition of “essential products” would be inconsistent with the ordinary meaning of the term. In addition, China’s reliance on paragraph 4 of the BOP Understanding and Australia’s export restriction on merino sheep is misplaced for the reasons set forth above, and do not in fact support China’s interpretation of “essential products.”<sup>58</sup>

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<sup>56</sup> Exhibit CHN-181, p. 6.

<sup>57</sup> See China’s First Oral Statement, para. 57.

<sup>58</sup> We also take this opportunity to note that China’s invocation of Article XXXVI:5 of the GATT 1994 and its *Ad Note* in support of its arguments is without merit. China’s First Oral Statement, para. 36. Article XXXVI of the GATT 1994 addresses certain principles of the GATT 1994 in relation to development and the needs of developing countries. First, as the

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**Q18. (All Parties) Could the parties suggest a methodology or criteria relevant to indicating a "critical shortage" within the meaning of Article XI:2(a) of the GATT 1994. In this context, could the parties indicate whether price is a relevant factor.**

34. As with the term “essential products,” the Panel should assess China’s arguments on “critical shortage” by analyzing the specific facts and circumstances present in this dispute in light of the meaning of the term as determined consistent with the customary rules of treaty interpretation reflected in Articles 31 and 32 of the Vienna Convention.

35. The dictionary definition of “critical” is “in the nature of or constituting a crisis.” In addition, a “shortage” refers to a “deficiency in quantity.”<sup>59</sup> Taken together, a “critical shortage” is therefore a deficiency in quantity that is “in the nature of or constituting a crisis.”<sup>60</sup> Furthermore, as the complainants discussed in their joint oral statement, the statements of the drafters reveal their understanding that a mere “degree of shortage” is not sufficient to constitute a “critical

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<sup>58</sup> (...continued)

United States set forth in its closing statement, the Members of the Working Party of China's WTO Accession made certain special provisions for developing countries available to China in certain explicit circumstances. No such special treatment is afforded to China in the context of Article XI of the GATT 1994 – or with respect to any of the WTO obligations at issue in this dispute for that matter. U.S. First Closing Statement, para. 7. Thus, the principles espoused in Article XXXVI are beside the point in the context of China’s WTO-inconsistent measures in this dispute. Second, while China invokes Article XXXVI:5 and its *Ad Note* as supposed relevant context for the meaning of “essential products,” that provision of the GATT 1994 in fact contains no reference to the concept of essential products, let alone support for the proposition that the term “essential products” may have a different meaning for developing country Members than for developed country Members. Third, China invokes that provision to support the proposition that the GATT 1994 expresses an encouragement for developing country WTO Members to adopt measures that “foster the ‘processing of primary products and the development of manufacturing industries.’” Even if the language in Article XXXVI were relevant to China, this statement merely confirms that China’s export restriction on refractory-grade bauxite is not related to conservation or designed to “prevent or relieve a critical shortage,” but rather to “foster” the development of a domestic industry.

<sup>59</sup> China’s First Written Submission, paras. 391-92.

<sup>60</sup> Complainants’ First Oral Statement, para. 140.

shortage.”<sup>61</sup> While the supposed finite or limited availability of refractory-grade bauxite, which is the basis of China’s export quota, may constitute a “degree of shortage”, it should not be construed as sufficient to rise to a “critical shortage.”<sup>62</sup>

36. The drafters also identified certain types of circumstances that would qualify as a “critical shortage,” and stated that export restrictions justified under Article XI:2(a) “could be temporarily applied to cope with the consequences of a natural disaster, or to maintain year to year domestic stocks sufficient to avoid critical shortages of products . . . which are subject to alternative annual shortages and surpluses.”<sup>63</sup> As set forth above, China’s export quota on refractory-grade bauxite is based on the limited availability of the product, not on the types of circumstances discussed by the drafters.

37. Finally, the last sentence of this question from the Panel asks the parties to indicate whether price is a relevant factor. The United States considers that, as a theoretical matter, there may be a situation where price could be a relevant factor in determining whether there is a critical shortage under Article XI:2(a). In this dispute, however, price does not appear to be a relevant factor in China’s defense under Article XI:2(a) as it relates to the export quota on refractory-grade bauxite.

**Q20. (Complainants) According to China, Article X:3(a) of the GATT 1994 sets forth three distinct requirements, and it argues that each requirement is distinct as a matter of law, requiring an independent prima facie demonstration and solid evidence. Do the complainants agree with this assertion? If not, why not?**

38. Article X:3(a) requires a Member to administer its laws of general application pertaining to exports in a uniform, impartial and reasonable manner. The United States agrees that Article

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<sup>61</sup> Exhibit CHN-181, p. 6.

<sup>62</sup> See also Brazil’s Third Party Statement, para. 9; U.S. Answer to Question 16 from the Panel.

<sup>63</sup> Exhibit CHN-180, para. 19.



X:3(a) imposes three separate obligations on China. We also agree that a complainant has the initial burden of proof. However, it is not clear what China means by an “independent” demonstration. Depending on the circumstances, there might well be an overlap in the evidence used to show, for example, that a Member’s administration of its laws is partial and the administration of its laws is unreasonable.

39. In fact, the panel in *Argentina – Bovine Hides* noted that, in that dispute, one common set of facts related to Argentina’s administration of its Customs process implicated both the requirement of reasonableness and the requirement of impartiality in Article X:3(a). As the panel observed, “[a]lthough the requirements of reasonableness and impartiality are distinct in nature, both relate to the question of information flows in this case.”<sup>64</sup> The panel then found that it was “unreasonable” to allow private industry representatives participating in the Customs clearance process to gain access to business confidential information, such as pricing information and the identities of exporters, when the purported purpose for sharing the confidential information was the proper classification of products. The panel then found that the flow of confidential information to private parties participating in the Customs clearance process also constituted “partial” administration because those private parties had no right to that information and had commercial interests that were adverse to those of the exporters.

40. Similar to the approach of the panel in *Argentina – Bovine Hides*, in the U.S. First Written Submission, the United States identified the elements constituting the unreasonableness of China’s

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<sup>64</sup> Panel Report, *Argentina – Bovine Hides*, para. 11.86.

administration, through the CCCMC, of its coke export quota,<sup>65</sup> export quota bidding regime,<sup>66</sup> and minimum export price regime.<sup>67</sup> The United States also identified the elements constituting the partiality of China’s administration, through the CCCMC, of its coke export quota,<sup>68</sup> export quota bidding regime,<sup>69</sup> and minimum export price regime.<sup>70</sup>

**Q25. (All Parties) Does publication following quota allocation meet the requirements set forth in Article X:1? If not, why not? Is it possible to export prior to official publication of a quota?**

41. The United States refers the Panel to the European Union’s answer to this question.

**Q29. (Complainants) Could the complainants comment on China's assertion that it is common practice among WTO Members to delegate the exercise of regulatory authority to private industry (see paragraph 725 of China's first written submission)?**

42. China broadly asserts in paragraph 725 of its First Written Submission that it is common practice among WTO Members to “delegate the exercise of regulatory authority to private industry.” China, however, has not provided evidence to support its broad assertion, nor has China explained how a survey of Members’ regulatory practices might be relevant to any issue in this dispute.

43. If China’s assertion is meant to imply that the WTO and its Members somehow condone the involvement of domestic user of materials in the operation of measures governing the export of those materials, China is incorrect. The dispute *Argentina – Bovine Hides* addressed a measure under which an organization representing producers and processors of a raw material was involved

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<sup>65</sup> U.S. First Written Submission, paras. 298, 300-303.

<sup>66</sup> U.S. First Written Submission, paras. 309, 312.

<sup>67</sup> U.S. First Written Submission, paras. 367-369.

<sup>68</sup> U.S. First Written Submission, paras. 298, 300-303.

<sup>69</sup> U.S. First Written Submission, paras. 309-311.

<sup>70</sup> U.S. First Written Submission, paras. 367-368, 370.

in the regulation of the export of the raw material. The panel found that the organization's involvement amounted to unreasonable and partial administration of Argentina's customs laws, regulations, and rules, in breach of Argentina's obligations under GATT Article X.<sup>71</sup>

**Q33. (United States, Mexico) Do the United States and Mexico agree that "the involvement of CCCMC Secretariat staff from the CCCMC Bidding Department and the Minerals & Metals Department in the administrative process leading to the allocation of quotas does not implicate CCCMC members in quota administration, and therefore constitutes neither partial nor unreasonable administration" (emphasis original) (see China's first written submission, paragraph 670)? If not, why not?**

44. The United States does not agree that the involvement of the CCCMC Secretariat or "Standing Administrative Organ" in quota administration immunizes the involvement of the CCCMC in the quota administration process from partiality and unreasonableness. Based on the organizational chart of the CCCMC provided in Exhibit CHN-316 and the CCCMC Charter,<sup>72</sup> it appears that the entity or entities comprising the CCCMC Secretariat or "Standing Administrative Organ" are established by and report to the CCCMC Standing Committee or Standing Governing Board, which in turn reports to the CCCMC Council or Board of Directors. Members of that body in turn are elected by and answer to the Members' General Meeting – which is comprised of representatives who are elected by and answer to the CCCMC's membership. Accordingly, based on the chain of reporting, the CCCMC Secretariat or Standing Administrative Organ appears very much to be a body representing and serving the interests of the CCCMC's membership. Its involvement in the allocation of China's export quotas (as well as the administration of the

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<sup>71</sup> Panel Report, *Argentina – Bovine Hides*, paras. 11.86-101.

<sup>72</sup> See Exhibits JE-86 and JE-87. The United States notes that the version of the CCCMC Charter submitted by China in Exhibit CHN-314 is dated 2010 and was therefore brought into effect after the establishment of the Panel in this dispute.

minimum export price system) demonstrates partiality and unreasonableness in the administration of China's export laws, regulations, and rules.

**Q35. (Complainants) Could the complainants comment on China's assertion that its right to regulate is an inherent power that could be invoked against any violation of any commitments of its Accession Protocol? If there is such a right that may be invoked against any violation of any commitments in the Accession Protocol, what are the parameters or boundaries of such right?**

45. The United States disagrees with China's argument that its "inherent right to regulate" can be invoked against any violation of any commitments of its Accession Protocol.

46. First, China's arguments reflect certain overarching problems with China's defenses in this dispute. China invokes the abstract "right to regulate" supposedly in the context of China's contention that the exceptions in Article XX of the GATT 1994 are available to China as a defense of a breach of the commitments in paragraph 11.3 and Annex 6 of the Accession Protocol. The United States would like to emphasize, however, the broad and systemic implications that would result from the adoption of China's positions regarding an abstract "right to regulate." China argues, relying on the Appellate Body's statement in *China – Audiovisual Products*, that Members' right to regulate is "an inherent power enjoyed by a Member's government", not a "right bestowed by international treaties such as the *WTO Agreement*."<sup>73</sup> China goes on to say that "China's right to regulate export trade through conservation-related and public health measures is not bestowed by affirmative language in the *WTO Agreement*, including the *Accession Protocol*."<sup>74</sup> China's sleight of hand here is problematic. China appears to be suggesting that, as a general matter, a Members' right to impose conservation-related or public health measures could somehow trump a Member's

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<sup>73</sup> Appellate Body Report, *China – Audiovisual Products*, para. 222; China's First Oral Statement, para. 67.

<sup>74</sup> China's First Oral Statement, para. 70.

WTO obligations, because of the “inherent right to regulate.” This is, in fact, not what the Appellate Body stated in *China – Audiovisual Products*, as we will discuss below. And, moreover, China’s statement would appear to suggest that a Member could invoke this abstract “right to regulate” to supersede its WTO obligations. WTO Members have not agreed to this. Indeed, under this line of reasoning, the WTO’s rules-based trading system would cease to exist.

47. Members have, however, agreed on provisions such as Article XX of the GATT 1994. While Article XX of the GATT 1994 contemplates the right of Members to maintain measures that are inconsistent with other obligations in the GATT 1994, such measures must satisfy all of the elements of the relevant subparagraph and the *chapeau* of Article XX in order to be justified under one of the exceptions provided for therein. A GATT-inconsistent measure cannot be justified pursuant to Article XX merely based on a Member’s right to regulate in the abstract. There is no question that WTO Members have a right to maintain *e.g.*, conservation-related and public health measures. But, the existence of such a right does not determine whether a particular measure at issue is consistent with the Member’s WTO obligations or whether an otherwise WTO-inconsistent measure is justified under one of the applicable exceptions. Yet, China seeks to invoke this abstract “right to regulate” as a substitute for an analysis of that very question. For these reasons, China’s line of reasoning is without merit.

48. Second, as China’s argument relates to the applicability of Article XX of the GATT 1994 to paragraph 11.3 and Annex 6 of the Accession Protocol, the argument is also based on a mis-characterization of the Appellate Body’s reasoning in *China – Audiovisual Products*. In that case, the Appellate Body concluded that China had recourse to Article XX of the GATT 1994 for breaches of paragraph 5.1 of the Accession Protocol. The Appellate Body based its conclusion on

the “without prejudice to the right to regulate trade in a manner consistent with the WTO Agreement” clause in paragraph 5.1,<sup>75</sup> language that does not appear in paragraph 11.3 or Annex 6. Nevertheless, China contends that the “inclusion of this phrase was not necessary to enable China to regulate through recourse to Article XX.”<sup>76</sup> According to China, this is because “the right to regulate derives from an ‘inherent power’ vested in States, and is not ‘bestowed by international treaties such as the *WTO Agreement*’.”<sup>77</sup> This line of reasoning is directly contradictory to the reasoning of the Appellate Body.

49. The Appellate Body, in discussing the abstract idea of a “right to regulate,” explained that “with respect to *trade*, the WTO Agreement and its Annexes . . . operate to, among other things, discipline the exercise of each Member’s inherent power to regulate by requiring WTO Members to comply with the obligations that they have assumed thereunder.”<sup>78</sup> The Appellate Body concluded that “we read the phrase ‘the right to regulate trade in a manner consistent with the WTO Agreement’ as a reference to ‘Members’ rights to take actions to regulate trade consistent with the WTO disciplines and ‘certain rights to take regulatory action that derogates from obligations under the WTO Agreement – that is, to relevant exceptions’.”<sup>79</sup> Thus, the Appellate Body’s conclusion that China had recourse to the exceptions in Article XX of the GATT 1994 was explicitly grounded in the specific language in paragraph 5.1 of the Accession Protocol, not in some abstract “right to regulate”. China’s argument that such language was not necessary for the

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<sup>75</sup> Appellate Body Report, *China – Audiovisual Products*, paras. 217-23.

<sup>76</sup> China’s First Oral Statement, para. 70.

<sup>77</sup> China’s First Oral Statement, para. 70.

<sup>78</sup> Appellate Body Report, *China – Audiovisual Products*, para. 222.

<sup>79</sup> Appellate Body Report, *China – Audiovisual Products*, para. 223.

Appellate Body’s conclusion is without merit. Moreover, that language from paragraph 5.1 that underlies the Appellate Body’s reasoning does not appear in paragraph 11.3 of the Accession Protocol. Accordingly, China’s reliance on the Appellate Body’s reasoning is ultimately unavailing.

50. Third, China’s analysis of paragraph 11.3 of the Accession Protocol is flawed, and recourse to Article XX is not available to China as a defense to breaches of the export duty commitments in paragraph 11.3 and Annex 6. China points to the Note in Annex 6 of the Accession Protocol, which states that: “China confirmed that the tariff levels included in this Annex are maximum levels which will not be exceeded. China confirmed furthermore that it would not increase the presently applied rates, except under exceptional circumstances. If such circumstances occurred, China would consult with affected Members prior to increasing *applied tariffs* with a view to finding a mutually acceptable solution.”<sup>80</sup> According to China, this Note authorizes China to “depart from the export duty commitments assumed in paragraph 11.3” under exceptional circumstances, because it reflects the “drafters’ recognition that China’s ‘inherent power’ remains.”<sup>81</sup> In fact, nothing in the Note authorizes China to breach its export duty commitments, and members of the Working Party would likely find China’s assertions in this regard surprising. Instead, the Note makes clear that China committed not to impose export duties on products not listed in Annex 6, and not to impose export duties above the “maximum levels” set forth in Annex 6 for the products listed. The members of the Working Party understood that China could increase its “presently applied rates,” up to but not beyond the maximum levels only, under “exceptional

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<sup>80</sup> Accession Protocol, Annex 6 Note (Exhibit JE-2) (emphasis added).

<sup>81</sup> China’s First Oral Statement, para. 71.

circumstances” and after consultation. Even aside from the fact that China’s reading of the Note is inaccurate, however, that reading still would not support China’s argument that the exceptions in Article XX are somehow available as a defense to a breach of China’s export duty commitments also fails. For the reasons we have set forth, Article XX is not applicable to paragraph 11.3 and Annex 6 of China’s Accession Protocol.

51. China then suggests that paragraph 170 of the Working Party Report supports the argument that Article XX is applicable to paragraph 11.3 and Annex 6. Paragraph 170 states: “The representative of China confirmed that upon accession, China would ensure that its laws and regulations relating to all fees, charges or taxes levied on imports and exports would be in full conformity with its WTO obligations, including Articles I, III:2 and 4, and XI:1 of the GATT 1994, and that it would also implement such laws and regulations in full conformity with these obligations.”

52. China’s attempt to draw an analogy between this paragraph of the Working Party Report and paragraph 5.1 of the Accession Protocol<sup>82</sup> fails. Paragraph 5.1 contains a commitment in addition to the introductory phrase that the commitment was “without prejudice to the right to regulate trade in a manner consistent with the WTO Agreement.” In contrast, paragraph 170 simply reaffirms certain of China’s commitments relating to import and export taxes, fees, and charges including certain specific obligations in the GATT 1994, but makes no reference to the specific obligation set forth in paragraph 11.3. Accordingly, paragraph 170 of the Working Party Report does not afford China with a defense under Article XX for its breach of the commitment in paragraph 11.3. It is also noteworthy that paragraphs 155 and 156 of the Working Party Report

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<sup>82</sup> China’s First Oral Statement, para. 73.



relate specifically to China’s commitment in paragraph 11.3. Paragraph 155 of the Working Party Report states, “Some members of the Working Party raised concerns over taxes and charges applied exclusively to exports. In their view, such taxes and charges should be eliminated unless applied in conformity with GATT Article VIII or listed in Annex 6 to the Protocol.”<sup>83</sup> This provision follows the structure of paragraph 11.3, and refers to the same obligation set forth in paragraph 11.3, namely China’s obligation to eliminate export duties except in the limited circumstances referenced. This further confirms that Members did not agree to have the Article XX exceptions apply to China’s commitments in paragraph 11.3 of the Accession Protocol.<sup>84</sup>

53. China’s further reliance on the Appellate Body’s reasoning in *China – Audiovisual Products* that certain WTO Agreements set forth a balance between the “right to regulate trade in goods” and ensuring that such measures “comport with specific objectives recognized as legitimate” is misplaced and misleading.<sup>85</sup> Contrary to China’s suggestion, in making this statement, the Appellate Body does not refer to the “covered agreements” generally, but rather to the SPS, TBT, and Import Licensing Agreements, and the GATT 1994.<sup>86</sup> The Appellate Body’s statement addresses the fact that paragraph 84(b) of the Working Party Report explicitly provides that China’s obligation to grant trading rights does not impair China’s ability to impose WTO-consistent TBT, SPS, and import licensing measures.<sup>87</sup> This statement does not address the

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<sup>83</sup> Exhibit JE-3.

<sup>84</sup> See also Complainants’ First Oral Statement, paras. 56-65.

<sup>85</sup> Appellate Body Report, *China – Audiovisual Products*, para. 224 n. 427; See China’s First Oral Statement, para. 74.

<sup>86</sup> Appellate Body Report, *China – Audiovisual Products*, para. 224 n. 427; See China’s First Oral Statement, para. 74.

<sup>87</sup> Appellate Body Report, *China – Audiovisual Products*, para. 224.

applicability of the exceptions in Article XX to Agreements other than the GATT 1994 generally.

This line of reasoning is therefore unrelated to China’s export duty commitments in paragraph

11.3. Moreover, China’s reliance on this statement out of context would suggest that China considers that a Member’s right to regulate trade would afford that Member recourse to Article XX of the GATT 1994 for a breach of any obligation in any covered agreement.<sup>88</sup> As such, China’s arguments would operate to alter any number of the WTO’s disciplines and should not be sustained.

**Q36. (All Parties) What are the implications of the absence in paragraph 11.3 of China's Accession Protocol of the introductory phrase "Without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement" that appears in paragraph 5.1 of China's Accession Protocol?**

54. As set forth in response to Question 35, China relies on the Appellate Body’s reasoning in *China – Audiovisual Products* to support the proposition that Article XX is available as a defense to a breach of China’s commitments in paragraph 11.3 of the Accession Protocol. However, in doing so, China erroneously asserts that the Appellate Body’s conclusion that Article XX is available as a defense to a breach of China’s trading rights commitments does not depend on the introductory clause of paragraph 5.1 of the Accession Protocol – “without prejudice to the right to regulate trade in a manner consistent with the WTO Agreement.” For the reasons set forth in response to Question 35, China’s arguments in this regard misrepresent the Appellate Body’s

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<sup>88</sup> See Answer of the European Union to Question 35 from the Panel suggesting that under China’s line of reasoning, a Member may have recourse to Article XX for a breach of a commitment in the *TRIPS Agreement*.

reasoning. An analysis of the text of paragraph 11.3 makes clear that Article XX is not available as a defense to a breach of that commitment.<sup>89</sup>

**Q37. (All Parties) Could the parties provide information on whether China is a large export supplier of the products at issue and whether it is capable of influencing world price of these products.**

55. China is one of the world’s leading producers for each of the products at issue. In fact, as shown in the following table, China is ranked first in global share of production for 8 of the 10 product categories at issue, and is the second and third ranking producer for the remaining two products.

<b>Production of the Raw Materials at Issue for the Year 2008 (thousands of MT)</b>				
<b>Product</b>	<b>Chinese Production</b>	<b>World Production</b>	<b>China’s Global Share</b>	<b>China’s Global Rank</b>
Bauxite*	35,000	205,000	17%	2
Coke	343,065	560,760	62.2%	1
Fluorspar	3,250	6,040	54%	1
Magnesium**	559	671	83%	1
Manganese Ore	2,200	13,300	17%	3
Manganese Metal	1,140	1,200	95%	1
Silicon Carbide	455,000	1,010,000	45%	1
Silicon Metal	4,000	6,160	65%	1
Yellow Phosphorus	740,000	>1,050,000	70%	1
Zinc Ore***	3,200	11,600	28%	1

<sup>89</sup> Complainants’ First Oral Statement, paras. 56-65.

Sources: USGS data from 2010 Mineral Commodities Summaries for Bauxite, Fluorspar, Magnesium, Manganese Ore, Silicon Carbide, Silicon Metal and Zinc Ore; U.S. Department of Energy, Energy Information Agency, <http://www.eia.doe.gov/cfapps/ipdbproject/IEDIndex3.cfm?tid=1&pid=7&aid=1> for coke; International Manganese Institute 2009 data for Manganese Metal, [http://www.manganese.org/about\\_mn/production](http://www.manganese.org/about_mn/production); Exhibit JE-58 for Yellow Phosphorus.

\* The USGS data for bauxite include all grades of bauxite covered by China’s export restraints. USGS data are not available for refractory-grade bauxite alone. However, China and Guyana are the two primary producers of refractory-grade bauxite in the world.

\*\* The USGS data for magnesium exclude U.S. production for proprietary reasons.

\*\*\* The USGS data for zinc only include zinc ores and concentrates, not unwrought zinc, unwrought zinc alloys or zinc waste and scrap.

56. Due to the export restraints at issue in this dispute, China’s leading rank in global production does not necessarily mean that China will allow itself to serve as a leading world supplier. However, in terms of China’s ability to influence prices, its leading rank in global production provides it with a significant ability to influence global markets.<sup>90</sup>

57. In addition, the impact of China’s export restraints is not limited to the world market, but also will impact China’s domestic market. By diverting supply from the world market, the export restraint causes domestic supply to increase, resulting in lower prices in China’s domestic market.

58. Recent experience with coke and yellow phosphorus illustrate how actions taken by China are influencing world prices, as well as China’s domestic prices.

59. Until 2009, China was a significant export supplier of coke. Indeed, from 2001 through 2008, China dominated the world export market for coke, accounting for approximately one-half of

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<sup>90</sup> See, e.g., Jane Korinek and Jeonghoi Kim, “Export Restrictions on Strategic Raw Materials and Their Impact on Trade,” OECD Trade Policy Working Papers, No. 95 (2010).

total world exports in each year.<sup>91</sup> This market dominance gave China the ability not only to influence the world price for coke, but to set it, and that is essentially what China did. As Exhibit CHN-289 shows, prices of coke in China have been substantially lower than prices in the world market for years.<sup>92</sup> By limiting the supply of coke to the rest of the world for years, and then adding export duties beginning in 2006, China has been able to confer an advantage worth hundreds of dollars per MT to its domestic steel producers.

60. As late as March 2009, world coke market analyst Resource-Net reported that prices for exports of coke from China continued to constitute “the main benchmark for the world market.”<sup>93</sup> This dynamic remained true “despite the 40% export tax levied by the [Chinese] government since August 2008” because of the capacity of other exporters to supply world demand was severely limited.<sup>94</sup> As 2009 progressed, however, Chinese exports of coke dropped precipitously. For the year, Chinese exports of coke totaled only 544,000 MT, well below the previous year’s total of 12,125,000 MT.<sup>95</sup>

61. Yellow phosphorus provides another clear example of China’s ability to affect global markets and to provide a price differential that is beneficial to its domestic users. As the United

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<sup>91</sup> Resource-Net, Updated World Coke Market Overview, Presentation to the 6th China International Coking Technology & Coke Market Congress, Tianjin (September 2008) at 7, 10, and 11 (Exhibit JE-146); Resource-Net, Review of Worldwide Coke Production & Capacity, Presentation to the ITA Conference, Krakow, Poland (June 2010) at 6 (Exhibit JE-147).

<sup>92</sup> Chinese Domestic and Export Prices for Coke (Exhibit JE-148). The source for this data is Exhibit CHN-289.

<sup>93</sup> Resource-Net, Updated View on the Global Coke & Anthracite Markets, Coaltrans World Coke & Anthracite Summit, Krakow, Poland (March 2009) at 1 (Exhibit JE-149).

<sup>94</sup> Exhibit JE-149 at 1.

<sup>95</sup> Resource-Net, Coke Market Report (Aug. 23, 2010) at 6 (Exhibit JE-150).

States explained in a submission to the WTO Committee on Market Access, document

G/MA/W/94 (1 October 2008):

[E]ffective 20 May 2008, China raised its export duties on natural phosphates, including natural calcium phosphates, natural aluminum calcium phosphates and phosphatic chalk, and yellow phosphorus from 10-20 percent to 110-120 percent in 2008, even though it is the world's leading producer of these inputs. In addition, China has imposed minimum prices on export sales of natural phosphates and yellow phosphorus. It appears that these actions not only discourage exports of natural phosphates and yellow phosphorus from China, but also create disadvantages for foreign downstream producers of industrial chemicals by artificially increasing China's export prices for these inputs, which also drives up the world prices. At the same time, China's actions appear to artificially lower China's domestic prices for natural phosphates and yellow phosphorus due to domestic oversupply, enabling China's domestic downstream producers of industrial chemicals to produce lower-priced products from these inputs and thereby creating significant advantages for China's domestic downstream producers of industrial chemicals when competing against their foreign counterparts both in the China market and in export markets. Indeed, since China took these actions, the world price of yellow phosphorus, for example, reportedly has doubled and now totals \$9,000 per metric ton (MT), while China's domestic price ranges between \$3,000 and \$3,500 per MT.

62. In December 2008, China lowered its exports duties on yellow phosphorus from 120% to 95%, and both the world price and China's domestic price decreased. Nevertheless, the difference between the world price and China's domestic price continued to be significant. In the first half of 2009, prior to China's further reduction of the export duties on yellow phosphorus to 20% in July, the price outside China (based on Chinese export prices) ranged between \$3,540 and \$3,870, while China's domestic price ranged between \$1,750 and \$1,975.<sup>96</sup>

**Q38. (All Parties) In its third party oral statement, Canada noted that the panel in Turkey - Textiles provides two economic reasons why import tariffs are preferred over import quotas in the GATT system. Could the rationale apply mutatis mutandis to export**

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<sup>96</sup> Yellow Phosphorus: Chinese Export and Domestic Prices Monthly, 2008-May 2009 (Exhibit JE-151).

**duties and export quotas? How, if at all, would your answer depend on seeking to achieve conservation or environmental goals?**

63. The United States considers that the panel’s discussion in *Turkey – Textiles* regarding the relative preference between tariffs and quotas bears little relevance to the instant dispute.<sup>97</sup> First, the panel in *Turkey – Textiles* was addressing an overarching economic rationale for the GATT’s general preference for import tariffs over quotas, because while the GATT permits Members to maintain import duties, Article XI prohibits the imposition of *inter alia* import quotas.<sup>98</sup> But, *Turkey – Textiles* does not stand for the proposition that Members may breach their commitments regarding duties, simply because duties are preferred over quotas as an economic matter. The panel’s reasoning in *Turkey – Textiles* makes that clear in stating, “Article I, which requires MFN treatment, and Article II, which specifies that tariffs must not exceed bound rates, constitute Part I of GATT.”<sup>99</sup> Thus, any economic preference for tariffs over quotas is not a defense to a breach of a Member’s import or export duty commitments.

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<sup>97</sup> As an initial matter, we note that Canada does not appear to be invoking the panel’s reasoning in *Turkey – Textiles* to support the notion that a tariff is preferable to a quota in relationship to the specific measures at issue in this dispute. Canada notes that Article XI of the GATT expresses a preference for tariffs over quantitative restrictions. Canada goes to reason, based on this preference that: “A prohibited measure under Article XI:1 cannot become permissible by the simple fact that it is implementing a permissible measure. In other words, a prohibited export license remains prohibited even where it implements an export duty.” Thus, Canada’s discussion of *Turkey – Textiles* appears to be directed at making clear that prohibited measures related to the administration of China’s export restraints, such as export licensing, can constitute a breach of the obligations in GATT 1994 Article XI in addition to and independent of the export restraint it administers *e.g.*, an export quota. Thus, Canada’s statement does not appear to express a relative preference between export duties and export quotas in general, or in the context of the specific Chinese measures at issue in this dispute.

<sup>98</sup> Panel Report, *Turkey – Textiles*, para. 9.63.

<sup>99</sup> Panel Report, *Turkey – Textiles*, para. 9.63 (emphasis added).

64. Similarly, China’s WTO obligations include both the export duty commitments in paragraph 11.3 of the Accession Protocol and the provisions of the GATT 1994 including Article XI. China may not breach the export duty commitments in paragraph 11.3 regardless of the supposed preference for tariffs over quotas. Accordingly, the economic reasons for this preference suggested by the panel in *Turkey – Textiles* do not bear any relationship to an analysis of the legal question of whether China’s measures are inconsistent with paragraph 11.3 or Article XI.

65. With respect to the second part of the Panel’s question, the United States considers that the question whether a quantitative restriction may be more or less effective than a tariff in addressing conservation or environmental goals cannot be answered in the abstract and will depend on the particular situation and measures being analyzed. In the context of this dispute, the United States considers that no such relationship exists between the type of measure – quota or tariff – and conservation or health objectives. This is because neither China’s export duties nor its export quotas contribute to the achievement of China’s supposed conservation or environmental goals. As the complainants set forth in our first oral statement, the export duties and quotas for which China invokes Article XX(b) are unrelated to environmental pollution. Even according to China, it is the production of these products, not their export, that causes environmental pollution.<sup>100</sup> Similarly, with respect to the export restraints for which China invokes Article XX(g), China has failed to establish that the export restraints are “related to” conservation.<sup>101</sup> Thus, the question of whether a quota is more or less effective than a duty in addressing conservation or environmental goals does not appear relevant to this dispute.

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<sup>100</sup> Complainants’ First Oral Statement, para. 97.

<sup>101</sup> Complainants’ First Oral Statement, paras. 73-76.



**Q39. (Complainants) Could the complainants elaborate on their claim that the study supplied by China in Exhibit CHN-124 "provides no basis for the assumption underlying the estimates" (paragraph 104 of their joint oral statement); and that the estimated increases in secondary production are "modest" (paragraph 105 of their joint oral statement).**

66. China's economist, Mr. Olarreaga, makes a number of assumptions to arrive at the estimates set forth in Table 1 of his report (Exhibit CHN-124) in asserting that the export duties on scrap would result in a certain increase in secondary production. A number of these underlying assumptions, however, are not substantiated. And, if the assumptions are not valid, the conclusions based on those assumptions are similarly lacking in validity.

67. For example, Mr. Olarreaga states that the estimated increase in secondary production is based in part on "assuming a 10 percent recycling rate." Mr. Olarreaga does not provide any basis for his assumption that China has (or is able to reach) a 10 percent recycling rate. Mr. Olarreaga similarly does not provide any evidence that the export duties on scrap would impact the recycling rate. As the complainants set forth in their oral statement, with respect to manganese, for example, this assumption is wholly without merit as secondary production of manganese does not occur.<sup>102</sup>

68. China's model also assumes that 100 percent of recycled scrap goes into secondary production. However, these assumptions are not based on information relating to the particular scrap products at issue in this dispute, but instead relate to steel or aluminum – and China offers no basis to support the application of the same assumptions to the scrap products at issue.<sup>103</sup> In fact,

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<sup>102</sup> Complainants' First Oral Statement, para. 106 citing *Mineral Commodities Summaries 2010*, U.S. Geological Survey, January 2010 at 98 (Exhibit JE-43).

<sup>103</sup> Metal Scrap, Note Prepared by Dr. Humphries (Exhibit CHN-11), p. 9 n. 48.

as set forth above, there is no secondary production of manganese. With respect to magnesium, China's model significantly overstates the potential for increased secondary production. There are two magnesium products: magnesium metal (HS Number: 8104.1100) (also referred to as "pure magnesium") and other unwrought magnesium (HS number: 8104.1900) (also referred to as "alloy magnesium"). Scrap cannot be recycled to produce pure magnesium, because all or nearly all scrap magnesium is alloyed with other materials. Therefore, there is no secondary production of pure magnesium, which is critical to the production of many products.<sup>104</sup> Magnesium scrap can be used as a raw materials to produce alloy magnesium, but alloy magnesium produced from scrap can only be used for limited purposes. Accordingly, secondary production of this product would be limited regardless of the availability of magnesium scrap.

69. The complainants will elaborate further on the flaws in China's model in our second written submissions.

70. With respect to the "modest" estimated increases in secondary production, as set forth in the complainants' oral statement, China provides estimates for the increase in secondary production for each of the metals that would supposedly result from the export duties. For magnesium, China's estimated increase in secondary production (963 tons) would represent approximately .002% of China's 2009 primary magnesium production. As set forth above, this estimate is already overstated. China also estimates that secondary zinc production would increase by 2,730 tons, approximately 6.2 percent of China's 2009 primary zinc production.<sup>105</sup>

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<sup>104</sup> Mineral Commodities Summaries 2010, U.S. Geological Survey, (January 2010), p. 96 (Exhibit JE-38) ("In 2009, about 22,000 tons of secondary production was recovered from old scrap." Old scrap can only be recycled to produce alloy magnesium, not pure magnesium.)

<sup>105</sup> Complainants' First Oral Statement, para. 105.

71. We recall the Appellate Body’s statements that one of the criteria for determining whether a measure is “necessary” under Article XX(b) is the contribution of the measure to the stated objective.<sup>106</sup> Furthermore, the Appellate Body has also stated that the measure in question should be making a “material contribution” to the protection of life or health,<sup>107</sup> and China contends in this dispute that its export duties on scrap products satisfy that element of Article XX(b). However, China’s small estimated increases in secondary production – which themselves are overstated for the reasons set forth above – belie China’s contentions that the export duties are making a “material contribution” to the protection of life and health.

72. There are also a number of other facts demonstrating that China’s primary production industries and downstream industries continue to grow.<sup>108</sup> These facts, combined with the modest (at best) estimated increases in secondary production further show that China’s environmental justification is *post hoc* litigation position developed for the purpose of defending its discriminatory export restrictions.

**Q40. (Complainants) Could the complainants comment on paragraphs 22 to 25 of China's closing statement at the first substantive meeting.**

73. In paragraphs 22-25 of its closing statement, China reasserts many of its arguments regarding the inherent “right to regulate.” As set forth in response to Question 35, while Members

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<sup>106</sup> Appellate Body Report, *Brazil – Tyres*, para. 156; Appellate Body Report, *China – Audiovisual Products*, para. 240.

<sup>107</sup> Appellate Body Report, *Brazil – Tyres*, para. 151.

<sup>108</sup> See Complainants’ First Oral Statement, paras. 107-08.

have a right to regulate, with respect to trade, Members have agreed to disciplines on their right to regulate in the WTO Agreement and its Annexes.<sup>109</sup>

74. In addition, in paragraphs 22-25 of its closing statement, China appears to turn a proper analysis of WTO inconsistency on its head by suggesting that China must “respect[] the ‘obligations’ that attach to relevant exceptions, such as Article XX of the GATT 1994.”<sup>110</sup> China goes on to state that “the boundaries circumscribing China’s right to regulate trade are the *same* as the boundaries circumscribing other Members’ right to regulate trade. Those boundaries are found in the *obligations* that attach to relevant exceptions.”<sup>111</sup> Finally, China states that in the context of paragraph 11.3, China “bears the burden to establish its adherence to the obligations attached to applicable exceptions, in order to regulate trade through the maintenance of export duties.”<sup>112</sup> By referring repeatedly to the “obligations that attach to exceptions”, China appears to be suggesting that the exceptions are the starting point for an analysis of the consistency of trade measures with WTO obligations. Once an exception has been identified that a Member wishes to invoke, then, according to China, there should be an analysis of whether the measure is consistent with some related obligation. These statements demonstrate that China seeks recourse to the exceptions in Article XX for a breach of paragraph 11.3 without any regard for whether the text of paragraph 11.3 provides such recourse. This line of reasoning is untenable and should not be sustained.

**Q41. (Complainants) In US - Gambling and Brazil - Retreaded Tyres, the Appellate Body stated that, in order to qualify as a reasonably available alternative, an alternative proposed by the complaining party must be not only WTO-consistent but must also**

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<sup>109</sup> Appellate Body Report, *China – Audiovisual Products*, para. 222.

<sup>110</sup> China’s First Closing Statement, para. 23.

<sup>111</sup> China’s First Closing Statement, para. 24 (emphasis original).

<sup>112</sup> China’s First Closing Statement, para. 24.

**preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued in addition to being technically and financially available to the concerned Respondent. Assuming that China were to meet its burden of proof, could the complainants elaborate on how their suggested alternative measures would comply with these requirements.**

75. We would like to begin by clarifying the burdens of proof associated with an analysis of reasonably-available alternatives in the context of a defense under Article XX of the GATT 1994. As the Appellate Body has stated, “[i]f . . . the complaining party raises a WTO-consistent alternative measure that, in its view, the responding party should have taken, the responding party will be required to demonstrate why its challenged measure nevertheless remains ‘necessary’ in the light of that alternative or, in other words, why the proposed alternative is not, in fact, ‘reasonably available’.”<sup>113</sup>

76. In their first oral statement, the complainants identified a number of alternatives that China could have employed that are not only reasonably available to China, but also would more directly address China’s stated health protection objectives.<sup>114</sup> For example, the complainants pointed out that China could impose production controls or pollution controls on primary production of the metals; or could require producers of the raw materials at issue to shift to less polluting production processes. In addition, the complainants noted that China could require recycling to ensure a more steady supply of scrap to facilitate increased secondary production. Finally, China could also

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<sup>113</sup> Appellate Body Report, *US – Gambling*, para. 311; *See also* Appellate Body Report, *Brazil – Tyres*, para. 156; Panel Report, *China – Audiovisual Products*, par. 7.870-71.

<sup>114</sup> Complainants’ First Oral Statement, paras. 112,121.

require domestic producers in China to shift from primary production to secondary production.<sup>115</sup>

Such measures would not present the same WTO issues as China’s export restrictions, and would more directly address China’s stated objectives than China’s discriminatory export restraints. It now rests on China to explain why such measures are not “reasonably available” to China.

77. In that vein, the United States offers the following observations. First, the Panel asks whether the proposed alternatives allow China to achieve its desired level of protection. For the reasons set forth in the complainants’ first oral statement, China’s export restraints are in fact unrelated to environmental pollution, and at most, could have indirect environmental effects.<sup>116</sup> By contrast, the alternatives proposed by the complainants are directly related to the reduction of environmental pollution, which, at least in the context of this dispute, is China’s stated objective for the export restraints. Thus, if anything, the proposed alternatives would be more likely to meet – if not exceed – China’s health objectives than China’s WTO-inconsistent export duties.

78. Second, the Panel asks whether the complainants’ proposed alternatives are technically or financially feasible for China. In addition to the fact that it is China’s burden to explain why the proposed alternatives are not technically or financially feasible, we note that China contends that it maintains environmental regulations<sup>117</sup> in an apparent attempt to control the harmful environmental impact of producing the products subject to this dispute. China’s assertions regarding these regulations illustrate that China itself considers that the alternatives proposed by the complainants are feasible.

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<sup>115</sup> Complainants’ First Oral Statement, para. 112, 121.

<sup>116</sup> Complainants’ First Oral Statement, paras. 97-98.

<sup>117</sup> See e.g., China’s First Written Submission, para. 226.

**Q42. (Complainants) Could the complainants comment on the statement made by China in paragraph 48 of its first oral statement.**

79. As a threshold matter, the United States notes that China’s sovereignty over its natural resources is not at issue in this dispute.<sup>118</sup> What is at issue in this dispute is whether China’s trade measures employed to manage those resources are consistent with China’s WTO obligations. For the reasons the complainants have discussed, the export restraints at issue in this dispute are not consistent with China’s WTO obligations.

80. In addition, China’s argument in paragraph 48 of its first oral statement is entirely circular and without merit. China argues that because its “measures are taken, pursuant to a customary norm of international law, to pursue objectives *explicitly* sanctioned by the covered agreements – either in the Preamble to the *WTO Agreement* or in Article XXXVI:5,” “they cannot constitute a disguised or otherwise illegitimate restriction that would be rendered impermissible under the *chapeau* to Article XX.”<sup>119</sup> China does not specify what the customary rule of international law is that is relevant here or how it affects an analysis under the *chapeau* of Article XX. In addition, the question of whether a measure satisfies the requirements of the *chapeau* of Article XX does not depend on whether the measure pursues an objective reflected in the Preamble to the WTO Agreement or any other WTO provision including Article XXXVI:5.<sup>120</sup> In order to satisfy the requirements of the *chapeau* of Article XX, the measure must not be applied in a manner that constitutes arbitrary or unjustified discrimination or a disguised restriction on international trade.

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<sup>118</sup> See China’s First Oral Statement, para. 48.

<sup>119</sup> China’s First Oral Statement, para. 48 (emphasis original).

<sup>120</sup> Please see U.S. answer to Question 17 from the Panel for our views on China’s invocation of Article XXXVI:5.

It is China that bears the burden of demonstrating that its export restraints meet this requirement.

However, paragraph 48 of China’s oral statement reveals that, rather than adduce argumentation to meet this burden, China contents itself with circular reasoning and vague references to provisions of the WTO Agreement that are legally irrelevant to the claims in this dispute.

81. Moreover, China’s line of reasoning serves to confirm the complainants’ position that China’s measures are designed to grow China’s domestic industry *i.e.*, through “development” and “economic diversification,” and are not designed to address conservation or health objectives.

**Q46. (All Parties) Could the parties comment on how the Panel should interpret the requirement of even-handedness as discussed in the jurisprudence concerning Article XX(g) of the GATT 1994. Does the even-handedness requirement of Article XX(g) imply that a reduction in exports has to be accompanied by a restriction in domestic consumption of the restricted product? How has even-handedness been addressed by China in this dispute?**

*Could the parties comment on how the Panel should interpret the requirement of even-handedness as discussed in the jurisprudence concerning Article XX(g) of the GATT 1994.*

82. While the term “even-handedness” does not appear in the text of Article XX(g), the Appellate Body first articulated it in *US – Gasoline* in describing the requirement imposed by the second clause of Article XX(g). The Appellate Body reasoned that the clause “if such measures are made effective in conjunction with domestic restrictions on production or consumption” was appropriately interpreted as “a requirement of *even-handedness* in the imposition of restrictions, in



the name of conservation, upon the production or consumption of exhaustible natural resources”<sup>121</sup> affecting both domestic and foreign interests. There, the Appellate Body noted that this requirement demands something more than limitations imposed on foreign interests alone without any limitations imposed on domestic interests, but does not necessarily require precisely identical treatment of foreign and domestic interests.<sup>122</sup>

83. Two disputes involving Article XX(g) are particularly instructive on the application of Article XX(g)’s requirement that the measures be “made effective in conjunction with domestic restrictions.” In *US – Gasoline*, the challenged U.S. measure created, *inter alia*, “baseline establishment rules” that [established] baselines for determining compliance of [certain gasolines] with U.S. clean air legislation standards. The Appellate Body found that these rules “affected both domestic gasoline and imported gasoline” and concluded that “restrictions on the consumption or depletion of clean air by regulating the domestic production of ‘dirty’ gasoline are established jointly with corresponding restrictions with respect to imported gasoline.”<sup>123</sup>

84. In *US – Shrimp*, the challenged U.S. measure imposed an import ban on shrimp harvested with commercial fishing technology that may adversely affect sea turtles. That measure exempted from the import ban shrimp from harvesting nations certified as not posing a threat to sea turtle populations or certified as having created regulatory programs protecting sea turtles in the harvesting of shrimp that were comparable to the U.S. program. The Appellate Body found that, in addition to the U.S. measure affecting the importation of shrimp, the United States also had in place regulations requiring all U.S. shrimp trawl vessels to use approved turtle exclusion devices,

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<sup>121</sup> AB Report, *US – Gasoline*, p. 21 (emphasis in original).

<sup>122</sup> AB Report, *US – Gasoline*, p. 21.

<sup>123</sup> AB Report, *US – Gasoline*, p. 21.

which were enforceable through monetary sanctions and civil penalties. The Appellate Body concluded, therefore, that the challenged measure was even-handed and satisfied the “made effective in conjunction with restrictions on domestic production or consumption” clause of Article XX(g).<sup>124</sup>

85. The Panel should interpret the even-handedness requirement of Article XX(g) in line with the reasoning of previous panels and the Appellate Body in *US – Gasoline* and *US – Shrimp*. Accordingly, in order for its measures to be justified under Article XX(g), China must meet its burden of proving that its measures were made effective in conjunction with domestic restrictions that operate to affect the access of Chinese users of refractory grade bauxite and fluorspar to these raw materials in a way that can be considered “even-handed” when compared to the way that the export duties and export quotas affect the access of foreign users to these raw materials. In our second written submission, the United States will demonstrate that such domestic restrictions do not exist and that China is not able to satisfy the even-handedness requirement of Article XX(g).

***Does the even-handedness requirement of Article XX(g) imply that a reduction in exports has to be accompanied by a restriction in domestic consumption of the restricted product?***

86. The United States understands this question to be addressed to the relationship between production and consumption restrictions for the purposes of applying Article XX(g). In the abstract, a domestic production restriction on the raw materials at issue would affect both domestic and foreign markets, and depending on the specific facts in the dispute, may affect both markets in an even-handed manner. However, when an export restriction is added on top of domestic

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<sup>124</sup> AB Report, *US – Shrimp*, para. 144-145.

production restrictions – without the concomitant adoption of domestic consumption restrictions – the result would be to impose double restrictions on foreign markets while imposing only a single restriction on the domestic market. This would raise serious issues regarding whether the defending Member’s measures result in even-handed treatment between domestic and foreign users.

87. The United States would emphasize, however, that abstract discussions of the application of Article XX(g) to production and consumption restrictions are of limited utility. In any particular case, the measures that the defending Member puts forward as meeting the “made effective in conjunction with domestic restrictions” clause must be examined carefully to determine whether it results in the even-handedness required by Article XX(g).

***How has even-handedness been addressed by China in this dispute?***

88. China addresses the interpretation of the even-handedness requirement of Article XX(g) in paragraphs 149 to 153 of its first written submission. While acknowledging that the clause “if such measures are made effective in conjunction with restrictions on domestic production or consumption” is meant to “ensure[] that the burden of conservation-related measures is not imposed solely on foreign trade, but applies also to domestic trade,”<sup>125</sup> China’s interpretation is flawed.

89. For instance, China seizes on the Appellate Body’s statement in *US – Gasoline* that there is “no textual basis for requiring identical treatment of domestic and imported products,”<sup>126</sup> ignoring context in which the Appellate Body made the statement. In fact, the Appellate Body’s statement

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<sup>125</sup> China’s First Written Submission, para. 152.

<sup>126</sup> China’s First Written Submission, para. 150, citing AB Report, *US – Gasoline*, p. 21.

was made to clarify that, from a logical standpoint, the even-handedness requirement is not a requirement of “identity of treatment.” As the Appellate Body reasoned, where a measure provides for “real, not merely formal, equality of treatment” between imported and domestic products, it would likely not have given rise to a GATT-inconsistency requiring the invocation of one of the Article XX exceptions.

90. China then attempts to interpret Article XX(g) to permit the severely lopsided treatment of domestic and foreign interests that directly contradicts the requirements set forth in Article XX(g). Through highly misleading invocations of the principles of “State sovereignty over natural resources” and “sustainable development” that are not relevant to this dispute, China proposes a reading of Article XX(g) that places an enormous weight in favor of China on the scale of supposed “even-handedness.” China’s line of reasoning leads it to conclude that Article XX(g) requires Members invoking it only to “manage the supply and use of [] resources through conservation-related measures that foster the sustainable development of their own peoples.”<sup>127</sup>

91. China’s interpretation has no grounding in the text of Article XX(g) and does not align with the core principles of the multilateral trading system. In fact, Article XX(g) requires the Member invoking it to make its non-conforming measure effective “in conjunction with restrictions on domestic production or consumption.” “Restricting domestic production or consumption” is a much more stringent requirement than merely “managing the supply and use” of a resource. In addition, “fostering the sustainable development of their own peoples” are words that do not appear in Article XX(g). And the sentiment underlying these words advanced by China, i.e., that otherwise GATT-inconsistent measures may be maintained in order to advantage a Member’s own

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<sup>127</sup> China’s First Written Submission, para. 153.

interests at the expense of other Members' interests, is plainly contrary to the purpose of the multilateral trading system and the disciplines its Members agreed to assume in becoming a part of that system. Accepting China's interpretation of Article XX(g)'s even-handedness requirement would not only effectively erase the requirement from Article XX(g), it would also render meaningless the core principles of the WTO.

**Q47. (All Parties) The Appellate Body in Brazil - Retreaded Tyres stated that a measure may be justified under Article XX(b) of the GATT 1994 so long as the measure is "apt to produce a material contribution" to the realisation of the desired policy goal. Could the parties comment on what factors are relevant in evaluating whether a measure is apt to contribute materially to a policy goal.**

92. In *Brazil – Tyres*, the Appellate Body applied the text of Article XX(b) – and in particular, the term “necessary” – to the specific facts and circumstances concerning Brazil’s import restrictions on retreaded tires. In that context, the Appellate Body explained that in order for the GATT-inconsistent import restriction to be justified as “necessary to protect human, animal, or plant life or health” under Article XX(b), the measure must make a “material contribution” to the Member’s health protection objective.<sup>128</sup> The Appellate Body further explained that, under the specific circumstances of that dispute, Brazil could meet its burden by demonstrating that the measure at issue “is apt to produce a material contribution to the achievement of its objective.”<sup>129</sup> Such circumstances include that it was “difficult to isolate the contribution to public health or environmental objectives of one specific measure from those attributable to the other measures that are part of the same comprehensive policy” and “the results obtained from certain actions . . . may

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<sup>128</sup> Appellate Body Report, *Brazil – Tyres*, para. 151.

<sup>129</sup> Appellate Body Report, *Brazil – Tyres*, para. 151.

manifest themselves only after a certain period of time . . .”<sup>130</sup> In such circumstances, the Appellate Body noted that “the demonstration [of a material contribution] could consist of quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence.”<sup>131</sup> While China appears to seize on this language to suggest that there need not be any present evidence of the potential for the measure to address China’s stated objective,<sup>132</sup> the United States considers that such an approach reflects a misreading of the Appellate Body’s reasoning in *Brazil – Tyres*. A Member contending that its GATT-inconsistent measure is “necessary” (in the meaning of Article XX(b)) to health protection, cannot rely simply on theoretical pronouncements of the impact that it hopes its measure will have on protection of health. Instead, the Member must be able to demonstrate, based on evidence, a relationship between the policy tool and the objective, even if the actual impact of the measure will not manifest itself until well into the future.

93. Specifically, in the case of *Brazil – Tyres*, the Appellate Body endorsed the panel’s reasoning that the import ban on used tyres was justified under Article XX(b) in part because there was evidence that “at least some domestic used tyres are being retreaded in Brazil” and “that Brazil has taken a series of measures to facilitate the access to domestic retreaders to good-quality used tyres.”<sup>133</sup> In other words, according to the panel and the Appellate Body, Brazil had provided

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<sup>130</sup> Appellate Body Report, *Brazil – Tyres*, para. 151.

<sup>131</sup> Appellate Body Report, *Brazil – Tyres*, para. 151.

<sup>132</sup> China’s First Written Submission, paras. 282, 334-36 (*See e.g.*, “It can thus be expected that manufacturers of magnesium metal and manganese metal will shift increasingly towards combined production processes, allowing for an integration of metal scrap into the primary production process.”)

<sup>133</sup> Appellate Body Report, *Brazil – Tyres*, para. 153.

evidence that the measure could bring about Brazil’s stated objective based in part on certain circumstances surrounding the measure at the time the measure was adopted.

**Q51. (All Parties) Could the parties comment on China's statement in paragraph 334 of its first written submission that "[m]ore efficient producers are also likely to be those producers that employ environmentally-friendlier production methods"?**

94. The United States refers the Panel to the answer provided by the European Union.

**Q53. (All Parties) Under Article XX(g) of the GATT 1994, is there a time threshold for the expected life of a natural resource to justify the imposition of a ban on the production or exportation of a mineral or raw material for conservation purposes? Could each party provide a rationale for the determination of this threshold.**

95. We note as an initial matter that the export restraints challenged in this dispute do not appear to include export bans<sup>134</sup> and that bans on production also do not appear to be implicated in this dispute.

96. That said, the United States respectfully disagrees with the implicit premise of this question, especially as the question is stated in the abstract without any factual context. The premise appears to be that there exists some threshold “expected life” that would justify an export ban. But, without any other factual context, it would seem that regardless of the length of the “expected life” of a natural resource, banning the exportation of a resource, by itself, would not be justified under Article XX(g). Banning exports only prohibits use of the resource by foreign users. An export ban would thus fall afoul of the second requirement of Article XX(g), i.e., that a measure be made effective with domestic restrictions on production or consumption.

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<sup>134</sup> Pending clarification from China on the status of the export quota amount for zinc.

**Q54. (All Parties) China seems to focus on the development needs of its downstream industry to justify export restrictions. Could the parties comment on the relevance of Article XX(i) and Article XX(j) of the GATT 1994 to the circumstances of this dispute?**

97. While China has invoked Articles XX(b) and XX(g) and Article XI:2(a) as defenses to the export duties and export quotas that it imposes on the raw materials at issue in this dispute, China has not invoked Articles XX(i) and XX(j) of the GATT 1994. These provisions therefore do not appear to be directly relevant to the circumstances of this dispute. Nevertheless, Article XX(i) and XX(j) may be relevant context in interpreting Article XX(g) and, in particular, the “even-handedness” requirement discussed in the answer to Question 46 from the Panel.