

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

(DS394/ DS395 / DS398)

**CLOSING STATEMENT OF THE UNITED STATES OF AMERICA
AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL
WITH THE PARTIES**

November 23, 2010

1. Mr. Chairman, members of the Panel, we would like to thank you and the Secretariat staff assisting you for your efforts during this panel meeting and throughout this proceeding. As this is our last opportunity to address you in person, we would like to take a few moments to touch on some of the issues raised in this dispute.

Article VIII:1 of GATT 1994

2. To begin, we would like to address a few arguments presented by China regarding the U.S. claim that China's total award price requirement maintained as part of China's administration of the export quotas on bauxite, fluorspar, and silicon carbide is inconsistent with China's obligations in Article VIII:1 of the GATT 1994, because it constitutes a fee or charge imposed in connection with exportation and is not limited to the approximate cost of services rendered. We would like to make four points in response to the arguments China has raised in its submissions.

3. First, China's oral statement yesterday confirms that nothing remains of China's contention that the total award price falls outside the scope of Article VIII. As the United States has set forth, the total award price is a fee or charge imposed in connection with exportation that is not limited to the cost of services rendered. And, China has no response to this. Therefore, we urge the Panel to find that the total award price is inconsistent with Article VIII:1(a). Having no valid textual argument, China proceeds to offer distractions in the form of example mischaracterizations of the measures of other Members, and statements about the supposed implications of the Panel's finding.

4. Second, China contends without proper basis that the United States is a keen supporter of the use of auctions to allocate quotas. Even beyond the fact that U.S. measures are not at issue here, none of the supposed examples presented by China in paragraphs 388-95 of its second

written submission involve the use of auctions to allocate a quota – import or export.

Accordingly, these “examples” – even if they were relevant to the Panel’s assessment of China’s measures – bear no relationship to the use of auctions to allocate a quota.

5. Third, China contends that the GATT 1994 does not prescribe a specific means of allocating a quota. But, this is beside the point. Even if China were correct that the GATT does not prescribe a particular means of allocating a quota, GATT 1994 Article VIII:1(a) prohibits a fee or charge imposed in connection with exportation that is not limited to the cost of services rendered. As the total award price requirement imposed by China is such a fee or charge, it is prohibited by the GATT 1994.

6. Fourth, while China had asserted in its second written submission that the WTO covered agreements neither prescribe nor condone any specific means of quota allocation, China contended in yesterday’s oral statement that WTO Members have agreed on rules that discipline how quotas must be allocated, presumably in order to establish a basis for invoking Article XIII:2 of the GATT 1994 as context. China’s reliance on Article XIII:2 is, in any event, misplaced. Not only is Article XIII:2 limited to import restrictions, it is silent on the question of fees. Furthermore, Article XIII:2 does not work even by analogy since it does not – to use China’s terms – prescribe or condone any specific means of quota allocation.

Article XX(b) of GATT 1994

7. Turning to China’s defense under Article XX(b), China wants to rewrite Article XX(b) to allow GATT-inconsistent measures that are necessary for economic growth. But, that is not what Article XX(b) provides. Article XX(b) permits a GATT-inconsistent measure that is “necessary to protect human, animal or plant life or health.” And, to respond to the point that China has

both economic and environmental goals, we agree with China and the passage from the European Union document that China cites that these goals are not necessarily competing goals. However, that tells us nothing about whether China is acting in conformity with its WTO obligations. As we stated in our second written submission, the WTO rules provide a firm foundation for international trade and development; contrary to China's argumentation, China's pursuit of its economic objectives neither justifies China's breach of those rules nor provides a basis for reading the WTO Agreement so as to weaken or nullify those rules.

8. To briefly summarize another point in relation to the Article XX(b) defense, China's failure to analyze the downstream effects highlights our main point that a measure restricting only foreign users of raw materials is not in fact an environmental measure at all. Rather, it is a measure intended to benefit its domestic industry that uses the raw materials.

9. If China were concerned about the environmental effects of raw material production, it would adopt measures – such as production controls or pollution controls – that directly affect environmental effects of raw material production.

10. China's assertions of a comprehensive regulatory framework for environmental protection are not supported by the evidence. The export restraints are not part of any such framework. Furthermore, the existence of domestic environmental regulations – the effects and effectiveness of which China was not able to tell us today – is not sufficient to establish that such measures are not available as alternatives for purposes of Article XX(b). And, China's arguments to the contrary reflect a mis-reading of the Appellate Body report in *Brazil – Tyres*.

Article XX(g) of GATT 1994

11. Our sessions yesterday and today were helpful in crystallizing important issues on Article XX(g).

12. China has conceded that its restrictions on fluorspar and bauxite prior to the introduction of the 2010 fluorspar and high alumina clay measures (2010 Measures) was not justified under Article XX(g). Accordingly, we heard China say that:

- The quota on fluorspar and the duties on bauxite were “withdrawn” in recognition of their WTO-inconsistency; and
- The duties on fluorspar and the quota on bauxite – as it is applied to high alumina clay – were WTO-inconsistent until the 2010 Measures took effect.

This means that the Panel’s Article XX(g) review is limited now only to an examination of whether the 2010 Measures satisfy the requirements of Article XX(g).

13. This implicates the question of the Panel’s terms of reference and how the 2010 Measures relate to the measures challenged by the complainants in this dispute. We have made our views clear today that the 2010 Measures may be considered as evidence to the extent they are relevant for findings on the challenged measures as they existed on the date the DSB established this Panel.¹ We also made clear our view that the Panel could examine the 2010 Measures for

¹ See *EC – Customs (AB)*, para. 186 (“We agree with the conclusion of the Panel that ‘the steps and acts of administration that pre-date or post-date the establishment of a panel may be relevant to determining *whether or not a violation of Article X:3(a) of the GATT 1994 exists at the time of establishment.*’”) (italics added); para. 187 (“[T]he Panel’s review should therefore have focused on these legal instruments *as they existed and were administered at the time of establishment of the Panel.*”) (italics added); para. 254 (“As we explained above, had the Panel properly identified the measures at issue, its task would have been to determine whether the measures at issue had been administered collectively in a uniform manner *at the time the Panel was established*, that is to say, in March 2005. In order to make this determination, the Panel could rely on *evidence* that pre-dated or post-dated the time of the Panel’s establishment *to the*

purposes of making in-the-alternative or *arguendo* findings that the 2010 Measures do not, in any event, satisfy the requirements of Article XX(g).

14. The United States would like to focus on China’s representation today that its 2010 Measures are the measures addressed to the conservation of resources while its export restraints are addressed at “allocating” those resources, once they have been produced. This underlies an important flaw in China’s Article XX(g) argument: China focuses on presenting the question as one of allocating the shares of the resources. However, the disciplines at issue are addressed to the terms of trade in those resources, which must be non-discriminatory.

15. This also raises the issue of China’s chapeau argument in the context of Article XX(g), which China articulated for the first time in its Second Oral Statement yesterday. We would like to make two points in response.

16. First, China tries to distinguish the Appellate Body’s clear statement in *U.S. – Gasoline* that the non-discrimination in the Article XX chapeau applies on not only an MFN basis but also a national treatment basis. China argues that *U.S. – Gasoline* should be distinguished on the grounds that the measure at issue in *U.S. – Gasoline* was an import restriction while the measures at issue in this dispute are export restraints. This is not a basis for making such a distinction.

17. Second, China argues that any resulting discrimination from the application of its measures is not unjustifiable discrimination because it is uniquely positioned as a “resource-

extent that it was evidence relevant for the assessment of whether the European Communities acted consistently with Article X:3(a) at the time of the Panel's establishment.) (third set of italics added; footnotes omitted); para. 259 (“In any event, although Exhibits EC-167, EC-168, and EC-169 might have arguably supported the view that uniform administration had been achieved by the time the Panel Report was issued, *we fail to see how these exhibits showed uniform administration at the time of the establishment of the Panel.*”) (italics added).

endowed country that enjoys a sovereign right over natural resources found within its territory.²

We would all be in trouble if it were true that China were unique in this way. But it is not true.

And because it is not true, it would be detrimental to the multilateral trading system to endorse

China's arguments on Article XX(g).

Conclusion: China's Litigation Strategy

18. In concluding, the United States notes that, earlier today, China imputed to the United States a particular litigation "strategy." In fact, to the extent that we have a litigation "strategy," it is very straightforward:

- The United States did not bring this case lightly.
- U.S. industries using these resources have struggled under China's export restraints.
- We have raised our serious concerns regarding these export restraints with China many times, over many years.
- We devoted serious time and energy to trying to resolve our differences and concerns and to researching and reviewing China's measures – both the export restraints and any production measures – to try to understand the situation.
- When we could not resolve our concerns, we initiated a formal dispute at the WTO on these export restraints.

19. It is China that has deployed a clever litigation "strategy" here. By manipulating its export measures and introducing new measures, China has arranged a matrix of restraints and defenses to maximize its ability to find the one formula that will provide it with a roadmap to justify *all* of its export restraints – both the ones at issue in this dispute and the myriad export restraints China imposes that are not within the scope of this dispute. China has asserted:

² China's Opening Oral Statement at the Second Panel Meeting, para. 223.

- An Article XI:1 defense for a quota;
- An Article XX(g) defense for a quota;
- An Article XX(g) defense for a duty;
- An Article XX(b) defense for duties;
- An Article XX(b) defense for quotas; and
- An Article XX(b) defense for the combination of both a quota and a duty.

20. This strategy reinforces the *post hoc* nature of China's defenses. These restraints have existed for a long time. These defenses have existed in the GATT 1994 for a long time. And the goals served by these defenses have been present for an even longer time. However, China's efforts to justify these measures and to connect particular measures to particular defenses and goals are new – and presented for the purpose of this litigation. China has expressly acknowledged this today in the context of Article XX(g).

21. The United States asks the Panel to *see China's efforts for what they are* and to find accordingly. We thank you for your attention.