

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

**(DS394/ DS395 / DS398)**

**EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT  
OF THE UNITED STATES OF AMERICA  
AT THE SECOND MEETING OF THE PANEL WITH THE PARTIES**

**December 3, 2010**

1. China maintains a number of restraints on the exportation of important raw materials for which China is one of the world's leading producers. The export restraints that China maintains on these raw materials are inconsistent with paragraph 11.3 of China's Accession Protocol and Article XI:1 of the GATT 1994 respectively. Although China has asserted no defense with respect to several of the export restraints, China does invoke exceptions under Article XX of the GATT 1994 in relation to certain of the restraints. None of China's defenses withstands scrutiny.

2. ***Article XX Exceptions of the GATT 1994 Are Not Applicable to China's Commitments in Paragraph 11.3 of the Accession Protocol:*** The exceptions in Article XX of the GATT 1994 are not available as a defense to a breach of the commitments in paragraph 11.3 of the Accession Protocol. The non-applicability of Article XX is plain from the text of paragraph 11.3, read in its context. The application of the Appellate Body's reasoning in *China – Audiovisual Products* further shows that Article XX cannot be used in an attempt to justify a breach of paragraph 11.3.

3. ***China's Export Duties on Coke, Magnesium, Manganese, and Zinc and Its Export Quotas on Coke and Silicon Carbide Do Not Satisfy the Criteria Set Out in Article XX(b):*** The evidence is abundant that China's export restraints are not environmental measures, but instead were adopted to support China's industries that use the raw materials covered in this dispute. Even China's statements prepared for presentation to this Panel betray that the export restraints at issue are in place to promote China's economic advancement. China relies heavily on high-level government policy documents that express a goal of "controlling" or "restricting" the export of high-energy-consumption, highly polluting, or resource-intensive products. But, other high-level Chinese government documents place the intention to control the export of highly-polluting products in the context of China's economic policies. The structure of China's measures also shows that their objectives are the promotion of the export of higher value-added downstream products, not environmental protection. China's measures are restraints on exports of raw materials, but the export of the materials at issue is unrelated to environmental pollution. Thus, there is no environmental justification for discriminating against users of the raw materials outside China vis-a-vis users inside China. At best, the export restraints at issue may have indirect, incidental environmental benefits. China's argument that an indirect relationship between the measure and the stated objective is irrelevant is illogical and unpersuasive. Each claimed Article XX defense must be examined on its own merits, in light of the facts and circumstances of the particular dispute. The fact that a measure could, at best, make an indirect contribution to the stated objective, is quite relevant to the question of whether the measure at issue satisfies the requirements of Article XX(b).

4. The *post hoc* environmental justification presented by the consultants that China has retained for the purposes of this dispute provides further confirms that China's defense under Article XX(b) is without merit. An examination of those arguments shows that China has presented no evidence that the export restraints are making a material contribution to China's stated environmental objective. The economic model by Dr. Olarreaga is flawed and unreliable. China also fails to submit evidence that the export duties on scrap products have resulted in increased levels of secondary production of magnesium metal, manganese metal and zinc. China's consultant, Dr. Humphreys, has also made a number of additional assertions that are unsupported by any evidence or are highly speculative. China also has no legitimate response to

the fact that if China is concerned with the environmental impacts of raw material production, China has reasonably available alternatives that would directly address China's supposed environmental concerns. As a result, China cannot meet its burden of establishing that its measures are "necessary" for the protection of human life or health. China has also not met its burden of establishing that environmental controls on production would likewise not meet China's goals. China's reliance on *Brazil – Tyres* in this regard is also misplaced. With respect to the *chapeau* of Article XX, China has not even made a serious attempt to show that its measures meet the *chapeau's* requirements, despite the fact that China has the burden to do so.

5. Finally, the Panel might consider the serious negative systemic implications of a contrary finding. As it relates to the export restraints on the metals, coke, and silicon carbide, China's defense would permit a WTO-inconsistent export restriction on any product whose production causes pollution, simply because the export restriction could lead to reduced production of the product at issue. With respect to scrap products, China's defense suggests that a WTO-inconsistent export restraint may be imposed on any industrial input on the grounds that it is more environmentally friendly than other industrial inputs.

6. ***China Has Not Established that Its Export Duties and Export Quotas on Fluorspar and Bauxite Satisfy the Requirements of Article XX(g)***: China's Article XX(g) arguments only apply to export duties on fluorspar and that portion of its export quota on bauxite covering high alumina clay – which is only one of the several forms of bauxite covered by China's bauxite quota. These export restraints are not conservation measures under the Article XX(g) exception. China has attempted to bolster its Article XX(g) arguments by taking actions over the course of 2010 – indeed, while this matter is under the Panel's consideration – to reduce the number of export restraints imposed on fluorspar and bauxite and to introduce a number of measures directed at the production of fluorspar and high alumina clay (the 2010 Fluorspar and High Alumina Clay Measures). China's efforts to make these export restraints appear more like conservation measures in 2010 are also unavailing.

7. The focus of "conservation" is protective oversight exercised to benefit the state, use, or amount of the natural resource. The export restraints on fluorspar and high alumina clay benefit China's domestic users of fluorspar and high alumina clay by providing them with an important advantage over their foreign competitors. China strains to incorporate into the term "conservation" the concept of self-interested economic and social gain. China's interpretation of the term "conservation" must be rejected because it would subvert the GATT 1994's disciplines on export restraints and non-discrimination.

8. The second clause of Article XX(g) requires that an otherwise non-conforming measure be "made effective in conjunction with restrictions on domestic production or consumption," which is "a requirement of *even-handedness* in the imposition of restrictions." The pre-2010 measures China has proffered as constituting components of a conservation program are not domestic restrictions and even in China's own view, are not sufficient to establish a defense

under Article XX(g). The 2010 Fluorspar and High Alumina Clay Measures also are not restrictions under Article XX(g) because the mining and production targets are set at levels higher than actual mining and production, showing that they are not intended to restrict the amount of fluorspar produced in 2010. Additionally, China's measures are not even-handed. The facts here, as in *Canada – Herring and Salmon*, present an easy case under Article XX(g): the export restraints on fluorspar high alumina clay are imposed primarily to benefit China's domestic processors – at the expense of foreign processors. Using an example, China argues that its export restraints work together with production restrictions to create domestic consumption restrictions on fluorspar and high alumina clay, making them even-handed. China's hypothetical is fundamentally flawed in at least four important ways. Its measures are not even-handed.

9. ***China's Export Quota on Bauxite as Applied to High Alumina Clay Is Not Justified by Article XI:2(a)***: China's defense under Article XI:2(a) as it relates to a subset of one of the products subject to an export quota on bauxite does not withstand scrutiny. *First*, China's defense only relates to one subset of one of the products on which China imposes its export quota. *Second*, China's assertion that the complaining party bears the burden of establishing that the conditions of Article XI:2 are not met is without merit. The Appellate Body's clear statement in *US – Shirts and Blouses* confirms the U.S. position that Article XI:2(a) is an affirmative defense. And, contrary to China's suggestion, the Appellate Body's reasoning in that dispute is not "obsolete." *Third*, while China's argument regarding "essentialness" requirement places great weight on the supposed lack of substitutes for high alumina clay in steel production, there are a number of substitutes, including certain of the other forms of bauxite on which China maintains its export quota. Moreover, China's reading of "essential" would severely weaken the disciplines in Article XI:1. *Fourth*, China's arguments regarding the supposed "critical shortage" of high alumina clay reflect an improper reading of the relevant terms. The mere limited amount of reserves of a product is not sufficient to amount to a critical shortage. Similarly, the existence of supply constraints does not establish a "critical shortage" for purposes of Article XI:2(a). While China has failed to establish that its export quota as applied to high alumina clay satisfies the requirements of Article XI:2(a), China's statements in this dispute do confirm that the objective of the export quota on bauxite is the rapid and dramatic growth of China's steel industry.

10. ***The United States Is Entitled to Findings and Recommendations on the Export Quotas, Duties, and Export Licensing Requirements Effective in 2009***: The United States is entitled to findings and recommendations on the fluorspar export quota, the bauxite export duties, and the yellow phosphorus special export duties. China has not conceded the WTO inconsistency of these export restraints and they are susceptible to quick and easy re-imposition by China. Accordingly, findings and recommendations on these measures are critical to securing a positive solution to this dispute.

11. ***China's Argument that the Panel Should Make Findings and Recommendations Only on the Export Restraints Effective in 2010 Must Be Rejected***: The changes that China made to the scope of its export quotas and export duties in 2010 changed the essence of the measures in

the Panel’s terms of reference (*i.e.*, the ones imposed in 2009). Reviewing the export restraints only as they were modified and maintained in 2010 would shield from review aspects of the export restraints and permit China to create a “moving target” that impinges on the rights under the DSU afforded to complainants. Furthermore, it is not consideration of China’s defenses that would be untimely if the Panel limited its review to the measures within its terms of reference, what is untimely is China’s belated efforts to introduce measures that it considers helpful in satisfying the requirements of the defenses it has invoked in this dispute. Finally, making findings and recommendations on 2010 measures because 2009 measures have “expired” is clearly not the correct approach – logically or practically – for the settlement of disputes at the WTO, and it is not one that finds support in the text of the DSU.

12. ***China’s Measures Administering and Allocating the Export Quotas Are Inconsistent with China’s Obligations Article X:3(a) of the GATT 1994:*** China argues, citing language from the Appellate Body Report in *U.S. – OCTG Sunset Review* that the United States has not substantiated this claim “through ‘solid evidence.’” The nature of this Article X:3(a) claim is distinct from the one made in *U.S. – OCTG Sunset Review* and is similar to the one made in *Argentina – Leather*. The United States has adduced arguments and evidence that are more than sufficient, in quantity and quality, to substantiate these claims.

13. ***Export Licensing:*** Whether China wishes to call its export licensing requirements “automatic” or “non-automatic,” export licensing maintained under Articles 16 and 19 of the *Foreign Trade Law* provides China with the authority, the ability, and the discretion to control and restrict the exportation of the subject products. China’s invocation of the Import Licensing Agreement is inapposite to this claim regarding its export licensing. Finally, the Article XI:1 prohibition on import and export restrictions extends to more than just limits on the quantity of imports and exports. Article XI:1 has been consistently interpreted by GATT 1947 and WTO panels to cover restrictions on importation and exportation that are not limited to “quantitative” restrictions.

14. ***The Minimum Export Price Requirement Is Inconsistent with Article XI:1 of the GATT 1994:*** With respect to China’s argument that no single MEP-related measure appears to impose a minimum export price requirement, the United States observes that an export restraint, like any other measure, can consist of a number of separate and distinct legal instruments that work together to affect trade. Furthermore, in relation to the terms of reference issues, to the extent that MEP-related legal instruments set forth in the U.S. submissions are considered not to be within the Panel’s terms of reference, those legal instruments are nevertheless evidence of the existence of a minimum export price system that must be considered in the Panel’s review of this claim under Article XI:1.

15. ***Conclusion:*** As a final note, China asserts in its second written submission that the United States has abandoned certain claims. This is not correct. To clarify any confusion, the United States is also providing, as Exhibit US-1, a chart of the U.S. claims in this dispute.