CHINA – MEASURES RELATED TO THE EXPORTATION OF VARIOUS RAW MATERIALS

(DS394/ DS395 / DS398)

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

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1. Good morning, Mr. Chairman and members of the Panel. On behalf of the United States, we would like to begin by thanking the Panel and the Secretariat staff for your time and hard work on this dispute. Our delegations look forward to continuing to work with you, and with the delegation of China, as you complete your efforts.

I. Introduction

2. The United States, along with the European Union and Mexico, have brought this case to the WTO, because 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 products subject to the export restraints are various forms of bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus, and zinc.

3. The export duties and export quotas 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. Even beyond that, these export restraints provide users these raw materials with a competitive cost advantage vis-a-vis users of these raw materials in other countries, by driving down prices for these raw materials in the Chinese market, and driving up export prices.

4. ***Export Duties*** In paragraph 11.3 of China's Accession Protocol, China broadly committed to eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of the Accession Protocol. However, China maintains export duties on various forms of bauxite, coke, fluorspar, magnesium, manganese, silicon metal, and zinc. China did not reserve the right to impose export duties on any of these products in Annex 6. China also maintained an export duty of 70% on yellow phosphorus on the date of filing of the request for consultations in this dispute, well in excess of the 20% duty rate that Annex 6 permits.

5. China has not contested that these export duties are inconsistent with China's obligations under paragraph 11.3. China also has not asserted a defense in relation to the export duties imposed on silicon metal, yellow phosphorus, or manganese ores and concentrates.

6. ***Export Quotas*** Article XI:1 of the GATT 1994 prohibits export prohibitions and restrictions including export quotas. Nevertheless, China subjects the exportation of various forms of bauxite, coke, fluorspar, and silicon carbide to quotas. China also maintains a prohibition on the exportation of zinc ores and concentrates.

7. China has asserted no defense with respect to the export quotas imposed on certain forms of bauxite and the export prohibition on zinc ores and concentrates.

8. China does invoke exceptions under Article XX of the GATT 1994 in relation to certain of the export duties and quotas. With respect to the export duties, Article XX is not available as a defense to a breach of China's export duty commitments in the Accession Protocol. Even leaving that aside, none of China's defenses under Article XX withstands scrutiny.

9. First, Article XX(b) permits WTO Members to maintain a GATT-inconsistent measure if the measure is "necessary to protect human, animal or plant life or health." A review of the relevant evidence and China's own statements reveals that China's export duties and quotas for which China invokes this exception are not making a material contribution – let alone necessary to – accomplish China's purported environmental objectives. The evidence also confirms that the objective underlying these export restraints is the furtherance of China's economic advancement, not protection of health.

10. Second, China's defense under Article XX(g) as it relates to certain of the export restraints at issue is similarly without merit. China's export quotas and export duties on fluorspar and

bauxite are not conservation measures. Nor are they made effective in conjunction with restrictions on domestic production or consumption, both because no meaningful restrictions on domestic production or consumption exist and because China's measures are not even-handed.

11. Third China also invokes the exception in Article XI:2(a) of the GATT 1994 in relation to the export quota on one subset of one form of bauxite *i.e.*, "high alumina clay." But, this defense too fails. China's defense suffers from a number of factual inaccuracies and a mis-reading of the terms in that provision.

12. The United States is submitting today, as Exhibit JE-176, an updated chart reflecting those restraints for which China has or has not proffered justifications.[1]

13. Finally, even beyond these export restraints, China maintains a number of additional measures that further restrict the exportation of the raw materials. These measures include maintaining non-automatic export licensing, imposing eligibility criteria to be able to export certain products subject to quota, establishing a minimum export price, requiring exporters of certain products subject to quota to pay a fee to be able to export, and permitting China's Chambers of Commerce to administer aspects of its export quotas.

14. These additional measures are inconsistent with China's obligations in Articles VIII, X, and XI of the GATT 1994 and China's trading rights commitments in paragraph 5.1 of China's Accession Protocol and paragraphs 83 and 84 of the Working Party Report.

15. We will begin by addressing China's defense under Article XX(b), followed by Article XX(g), and then Article XI:2(a). We will then address issues related to terms of reference.

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[1] Exhibit JE-176: Updated Chart of China's Proffered Justifications for the Export Duties and Export Quotas Imposed on the Products at Issue.

Finally, we will address the claims related to China's further restrictions on exportation in the following order: quota administration, export licensing, and minimum export price.

II. Article XX Exceptions of the GATT 1994 Are Not Applicable to China's Commitments in Paragraph 11.3 of the Accession Protocol

16. As we have set forth in our previous submissions, 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. We will focus today on responding to four arguments presented in China's second written submission regarding this issue.

17. *First*, contrary to China's suggestion, China's right to pursue non-trade interests is not at issue in this dispute. In agreeing to paragraph 11.3, China undertook specific obligations regarding export duties. China reserved the right to invoke Annex 6 of the Accession Protocol, and to impose taxes or charges in conformity with GATT Article VIII. China reserved no other rights. If China were to comply with its paragraph 11.3 obligation, China would only be foreclosed from exceeding certain levels of export duties, and China would not – as China's argument implies – be prevented from adopting any other type of measure to achieve its non-trade purposes.

18. For example, if China were in fact concerned about exhaustible natural resources, compliance with paragraph 11.3 would not prevent China from adopting measures restricting the extraction of these resources. Or, if China were in fact concerned about addressing environmental impacts of production processes for these resources, compliance with paragraph 11.3 would not

prevent China from either limiting the amount of the production, or from adopting measures reducing the environmental impact associated with a given level of production. In sum, if China were to comply with its obligations under paragraph 11.3, China would remain entirely free to address any legitimate non-trade interests through measures other than export duties.

19. *Second*, China argues that Article XX imposes an obligation on China, and that because China complies with that obligation, China is then free to breach its paragraph 11.3 commitments. China's argument is fundamentally inconsistent with the legal framework of the GATT 1994 and the WTO Agreement as a whole. To begin with, Article XX of the GATT 1994 does not impose obligations on WTO Members. Rather, Article XX may be used to justify a measure that would otherwise amount to a breach of a Member's commitments under the GATT 1994. Article XX is not an independent source of obligation.

20. Moreover, based on the plain text of Article XX, it may only be used to justify a breach of an obligation under the GATT 1994. As the United States has explained, the only circumstance in which Article XX may be used to justify a breach of an obligation found elsewhere in the WTO Agreement is if there is a specific textual basis for doing so. And, with respect to paragraph 11.3, there is no textual basis for invoking Article XX of the GATT 1994 in an attempt to justify a breach of paragraph 11.3.

21. *Third*, China's second written submission repeats China's argument that the Note in Annex 6 of the Accession Protocol permits China to exceed the maximum export duty rates set out in Annex 6 in "exceptional circumstances."[2] However, based on its plain text, Annex 6 does not

[2] China's Second Written Submission, para. 164.

provide that right. The Note to Annex 6 states that: "China confirmed that the tariff levels in this Annex are maximum levels which will not be exceeded. China confirmed furthermore that it would not increase presently applied rates except under exceptional circumstances."[3] The two sentences address different topics. The first affirms that China will not exceed the maximum level of the tariff in the Annex. There are no conditions or exceptions. The second sentence deals with the rates applied at that time, and it is only in this connection that there is provision made for "exceptional circumstances." China conflates the two sentences and tries to apply the "exceptional circumstances" language to the commitment in the first sentence. But nothing in this language states, or even implies, that China may exceed the "maximum levels" set out in Annex 6. To the contrary, in this note, China has confirmed that it will not exceed the maximum levels.

22. *Fourth*, in its second written submission, China reiterates its contention that panel and Appellate Body reports addressing obligations in the *Agreement on Textiles and Clothing* and the *Agreement on Safeguards* support China's argument regarding the applicability of Article XX to the Accession Protocol Commitments in this dispute. As the United States set forth in its comment on China's answer to Question 36, the reports relied upon by China do not support China's position in this dispute. In each of the cited reports, the provision of the non-GATT Agreement that was at issue in the dispute made explicit reference to a specific GATT obligation, thereby establishing an explicit textual basis for considering that GATT obligation.[4]

23. China's second written submission also wrongly contends that the complainants have changed their position on the applicability of GATT Article XX 1994 to WTO obligations found

[3] Exhibit JE-2 (emphasis added).

[4] U.S. Comments on china's Answers to the First Set of Panel Questions, para. 52.

outside of the GATT 1994.[5] To the contrary, complainants have been clear on this issue, and we have not changed our position. Indeed, in our joint oral statement at the first panel meeting, the complainants stated: "if Article XX is to apply to an obligation in an accession protocol, the language and context of that particular obligation must provide a basis for the applicability of Article XX."[6] And, in this dispute, the text of paragraph 11.3 of the Accession Protocol does not provide a basis for the applicability of Article XX.

24. For these and other reasons discussed in the U.S. submissions, the exceptions in Article XX of the GATT 1994 do not apply to China's commitments in paragraph 11.3 of the Accession Protocol. Nonetheless, as the United States has done in prior submissions, we will next address the fact that China could not meet the requirements set out in Article XX.

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

A. China Has Not Demonstrated that Its Export Duties on Coke, Magnesium, Manganese, and Zinc and Its Export Quotas on Coke and Silicon Carbide Satisfy the Criteria Set Out in Article XX(b)

25. China does not deny that it maintains export duties that are inconsistent with paragraph 11.3 of the Accession Protocol on magnesium scrap, manganese scrap, and zinc scrap, and coke, magnesium metal, and manganese metal. Nor does China deny that its export quotas on coke and silicon carbide are inconsistent with Article XI:1 of the GATT 1994. Instead, China contends that these export duties and export quotas are justified by the exception in Article XX(b).

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[5] China's Second Written Submission, paras. 177-78.

[6] Complainants' Joint Oral Statement, para. 58.

26. Thus, in order to avoid a finding that China's measures are inconsistent with China's obligations under the WTO Agreement, China has the burden of showing that its measures meet each of the elements of Article XX(b). China has failed to meet this burden. Today we will summarize the reasons that China fails to satisfy the requirements of Article XX(b) as it relates to these export restraints and respond to certain of the points made by China in its second written submission.

1. Introduction

27. The record in this dispute shows that China has adopted its export restraints, in order to pursue its economic goals, and in particular to advantage its domestic industries using the raw materials covered in this dispute. China's defense regarding environmental goals is a justification invented in this dispute settlement proceeding for the purpose of defending its economically-motivated measures. Indeed, the reports upon which China relies were not prepared for the purpose of constructing China's measures. Instead, these reports are litigation documents prepared after those measures were adopted, and solely for the purpose of presentation to this Panel. The structure of China's measures also shows that they are adopted for economic purposes, not for environmental protection. In particular, if China's measures were in fact motivated by environmental concerns, the measures could directly have addressed the environmental impacts associated with the extraction and processing of the raw materials. Instead, the measures only impact foreign producers. As such, China's measures have, at most, only an incidental impact on the levels of environmental effects associated with these raw materials.

28. Moreover, the availability of measures that would directly address environmental impacts, without discriminating against foreign producers, further undermines China's defense. In these

circumstances, China's export restraints cannot meet the requirements of Article XX as being "necessary" for protecting human life or health. Finally, if economic measures having only incidental effects on environmental protection could be justified under Article XX, such findings would have severe and harmful systemic implications. In particular, if Members could justify economically discriminatory measures based only on incidental environmental effects, then the results would be to destroy the balance between the trade obligations in the GATT 1994 and the exceptions provided in Article XX.

29. As a last point, the United States will address China's *post hoc* justification, provided by China's experts, regarding incidental effects of China's measures on environmental protection. Even if such incidental effects could be proven, they would not suffice to justify China's measures under Article XX(b). As we have shown, however, even the incidental environmental effects claimed by China are not supported by the reports.

2. China's Own Statements Show That its Objectives Are the Promotion of Export of Higher Value-Added Downstream Products, Not Environmental Protection

30. In this dispute, 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. Indeed, 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. For example, China's economist states:

> The imposition of export restrictions will allow China to develop its economy in the future . . . The reason for this is that export restraints encourage the domestic consumption of these basic materials in the domestic economy. Consumption of the basic materials at issue by downstream industries (such as the steel, aluminum, and chemical industries, and those industries further processing steel, aluminum and

> chemicals), and the consequent additional production and export of higher value-added products, will help the entire Chinese economy grow faster and, in the longer run, move towards a more sophisticated bundle, away from heavy reliance on natural resource, labor-intensive, highly polluting manufacturing. This move towards higher-tech, low-polluting, high value-added industries, in turn, will increase growth opportunities for the Chinese economy, generating positive spillovers beyond those to firms directly participating in these markets.[7]

31. Similarly, in the context of export restraints on the scrap products, China states:

> The export duties guarantee a steady and guaranteed supply of scrap, which is essential to the development and use of a strong and sustainable secondary industry. In the longer term, the promotion of secondary facilities encourages additional recycling of exhausted consumer and industrial products. In sum, China imposes export duties to ensure the necessary supply of non-ferrous metal scrap products to Chinese domestic non-ferrous metal producers.[8]

32. In other words, the export restraints have as their objective China's economic advancement, not an environmental objective.

33. Perhaps in recognition of this, China's submissions devote considerable efforts to trying to stitch together a connection between the export restraints on the one hand and China's environmental goals on the other. However, all that China has shown is that the purported connection between China's export restraints and environmental goals is an important component of China's litigation strategy; the evidence does not reveal any such connection between any environmental concerns and China's purpose in adopting the export restraints at issue in this dispute.

34. China's submissions rely heavily on high-level government policy documents – other than those providing for the export restraints – that express a goal of "controlling" or "restricting" the

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[7] Exhibit CHN-442, p. 7.

[8] China's First Written Submission, paras. 258-59.

export of high-energy-consumption, highly polluting, or resource-intensive products. But, the existence of such policy documents does not establish a pollution-reduction objective for China's export restraints.

35. To the contrary, 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. For example, in the Adjustment and Revitalization Plan for Non-Ferrous Industry issued by the State Council in 2009, China states:

> At the same time that we continue to strictly control the export of 'highly energy-consuming, highly polluting and resource-intensive products,' we will put into force suitably flexible policies for export tariffs and support the export of deeply processed products with high technology content and high value added . . . We will accelerate the transformation of export methods and encourage the export of . . . end products, thereby spurring the indirect export of non-ferrous products.[9]

36. Similarly, in the Blueprint for the Adjustment and Revitalization of the Steel Industry issued by the State Council in 2009, China states that it will "put the top priority on meeting domestic demand, optimize direct exports, expand indirect exports."[10] This document provides further context for China's policies, stating:

> Guided by continued adherence to the policy of controlling the export of 'highly-polluting, highly energy-consuming and resource-intensive' products with low value-added, we shall earnestly implement measures for raising the export rebate rate for some steel products, and likewise . . . increase the export rebate rate for steel-containing products with high technical content and high value-added.[11]

37. For the purpose of this litigation, China urges the Panel to believe that China seeks to achieve a contraction in the production of magnesium metal, manganese metal, coke, silicon

[9] Exhibit JE-13 (emphasis added).
[10] Exhibit JE-9 (Emphasis added).
[11] Exhibit JE-9.

carbide, and zinc. To the contrary, these high-level government documents expose China's clear intention to promote the continued growth of those industries and leverage the production of the products to expand the exports of higher value-added downstream products, including aluminum and steel. This approach is not consistent with a goal of pollution-reduction. It is in this context that we urge the Panel to view the documents adduced by China expressing an intention to "control the export" of products whose production causes pollution.[12]

3. The Structure of China's Measures Undermines China's Argument that They are Necessary for Environmental Protection

38. 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, and thus undermines China's arguments that the measures are necessary for environmental protection. In particular, China's measures are restraints on exports of raw materials, but the export of the materials at issue is unrelated to environmental pollution. Indeed, China's own arguments acknowledge that the production of these products, not their export, causes environmental pollution.[13] Indeed, the environmental pollution associated with producing one unit of the raw materials is the same regardless of whether that product is exported or used within China. 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.

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[12] *See* Annex A to China's Comments on Answers to the First Set of Panel Questions; *See also* China's Second Written Submission, paras. 233-53.

[13] *See* China's First Written Submission, paras. 224, 286, 528.

39. China considers that an indirect relationship between the measure and the stated objective is irrelevant, because Article XX makes no distinction between direct and indirect contribution.[14] China's response is illogical and unpersuasive. The United States is not asserting that "direct" versus "indirect" is some sort of formal legal test, or that any such distinction is determinative of the analysis under Article XX(b). Rather, 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, in this dispute, China can show, at most, that its measures have an indirect and incidental environmental impact is relevant to the Panel's objective assessment of whether China's export restraints are "necessary to protect human, animal or plant life or health." For example, the fact that exports of raw materials do not themselves cause pollution is relevant to whether export restraints are making a material contribution to the stated objective China has claimed for purposes of this litigation.[15] Furthermore, the fact that any effect on pollution is indirect and incidental is relevant to whether there are other measures that China might adopt that would directly achieve environmental goals, without requiring a breach of China's commitments. Thus, 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. WTO-Consistent Reasonably Available Alternatives Are Available to China

40. A consideration of the WTO-consistent, reasonably available alternatives is another element of an analysis of whether a measure is "necessary" under Article XX(b). In this dispute,

[14] China's Second Written Submission, paras. 290-92.

[15] Appellate Body Report, *China – Audiovisual Products*, para. 240.

China has no legitimate response to the fact that if China is concerned with the environmental impacts of raw material production, China has direct, reasonably available alternatives that would directly address China's supposed environmental concerns. And, because China has no legitimate response, the issue is outcome-determinative: China cannot meet its burden of establishing that its measures are "necessary" for the protection of human life or health.

41. As the United States has explained, since it is the production of the products at issue, rather than their export, that causes the environmental pollution at issue, China has a number of WTO-consistent alternatives that are reasonably available to address its pollution concerns. The simplest alternative would be to limit the level of the production of the products. Such a measure would not, on its face, discriminate between domestic consumption and exports to foreign producers. Moreover, the record in this dispute shows that production restraints are available to the Government of China. For purposes of its Article XX(g) defense, China claims that it has adopted production restraints. China has not, however, met its burden that limits on the level of production are not a reasonably available alternative in the context of its Article XX(b) defense.

42. China has also not met its burden of establishing that environmental controls on production – that is, regulations requiring producers to adopt more environmentally-friendly production processes – would likewise not meet China's goals. China's only response is that it already has in place domestic environmental regulations that represented an effort to control environmental pollution. However, as the United States set forth in its second written submission, China has not established that these domestic measures are operating to limit production of the products or the

environmentally harmful impacts of the production processes.[16] The proffered environmental regulations on their face only express an intention or goal to address environmental harms, but do not actually set forth any specific standards or rules. Many of these same environmental regulations do not even mention any specific products – let alone those at issue in this dispute.[17]

43. In addition, China's second written submission misstates the standard for an evaluation of alternatives. In particular, China invokes *Brazil – Tyres* as support, but China misrepresents the Appellate Body's reasoning. In *Brazil – Tyres*, the complaining party proposed domestic regulations on the collection and disposal of waste tyres to minimize the environmental risks associated with the accumulation of waste tyres. This argument did not succeed, but for reasons that China describes incorrectly. The reason was not – as China asserts – that Brazil already had such regulations in place. Rather, the reason was based on Brazil presenting evidence that Brazil's existing domestic regulations on the collection and disposal of waste tyres had limited capacity to address used tires and could not cope with the additional quantities that would result from unlimited imports. Brazil did not – as China does here – simply assert that the reasonable alternative was unavailable. Instead, Brazil, as the party invoking the defense, proved this point through introduction of specific evidence. As the Appellate Body stated, "[a]s regards landfilling, stockpiling, co-incineration of waste tyres, and material recycling, these remedial methods carry

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[16] U.S. Second Written Submission, paras. 102-07.

[17] *See e.g.*, Mineral Resources Law (Exhibit CHN-78); Environmental Protection Law (Exhibit CHN-88); Law of the People's Republic of China on the Prevention and Control of Atmospheric Pollution (Exhibit CHN-268); Law on Promoting Clean Production (Exhibit CHN-271); Law of the People's Republic of China on the Prevention and Control of Environmental Pollution by Solid Wastes; Law of the People's Republic of China on the Prevention and Control of Water Pollution (Exhibit CHN-269); Energy Conservation Law of the People's Republic of China (Exhibit CHN-272); The 2007 General Work Plan for Energy Conservation and Pollutant Discharge Reduction (Exhibit CHN-145); 2008 and 2009 Work Arrangements for Energy Conservation and Pollutant Discharge Reduction (Exhibits CHN-287; CHN-288); U.S. Second Written Submission, paras. 105-06.

their own risks or, because of the costs involved, are capable of disposing of only a limited number of waste tyres."[18] It was on this basis that the Appellate Body upheld the panel's finding that domestic regulations on the collection and disposal of waste tyres could not constitute an alternative *i.e.*, "substitute" for the import ban. In contrast, China has simply asserted that the existence of environmental regulations makes the imposition of additional or stronger environmental regulations not "available", without any factual support or analysis of the existing environmental regulations in relation to the products at issue.[19] Thus, China's reliance on *Brazil – Tyres* is misplaced.

44. In addition, China attempts to rely on the Appellate Body's reasoning in *Brazil – Tyres* that the import ban and Brazil's domestic regulations were "complementary elements of an overall framework." For similar reasons, China's reliance on this element of *Brazil – Tyres* is unavailing. Although China attempts to depict its own WTO-inconsistent export duties and quotas as part of a comprehensive environmental regulatory framework, China presents no evidence of such a relationship. The only indicator of such a complementary relationship is China's mention – in its submissions in this dispute – of the export duties along with China's other environmental regulations in its submissions in this dispute. China has not explained how the export duties interact with or support the other environmental regulations. Indeed, as we have discussed, the environmentally harmful impact of production of the materials at issue is the same regardless of how much of the materials are exported. In that light, it is difficult to see how limits on the export of the materials interact with China's domestic environmental regulations.

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[18] Appellate Body Report, *Brazil – Tyres*, para. 211.

[19] China's Second Written Submission, paras. 309-16.

45. Finally, China also contends now that it maintains energy consumption caps on the production of magnesium metal, manganese metal, and coke.[20] The measures setting forth such caps were apparently promulgated in 2008. However, China submitted those measures for the first time in this dispute with its second written submission on October 8, 2010, despite specific questions from the Panel directly inquiring about China's pollution and energy controls.[21] The existence of environmental controls on the production of the products at issue in this dispute in no way supports China's position that the export duties at issue are "necessary" under Article XX(b), and the reasoning in *Brazil – Tyres* does not change that fact for the reasons we have discussed. The existence of such measures and the other environmental regulations that China contends are in existence do, however, highlight the fact that China considers it feasible to undertake such domestic regulations.

5. China Has Presented No Evidence that the Export Restraints Are Making a Material Contribution to the Stated Objective

46. The *post hoc* environmental justification presented by the experts that China has retained for the purposes of this dispute provides further confirmation that China's defense under Article XX(b) is without merit. An examination of those arguments shows that contrary to China's contentions, China has presented no evidence that the export duties and export quotas at issue are making a material contribution to China's stated environmental objective. China submits an economic model – prepared for purposes of this dispute by Dr. Olarreaga – with estimates of decreases in production of magnesium metal, manganese metal, coke, and silicon carbide that

[20] China's Second Written Submission, para. 310 citing Exhibits CHN-470, CHN-471, CHN-472, and CHN-473.

[21] *See* China's Answers to the first Set of Panel Questions, paras. 192-216; 217-22

supposedly result from the imposition of export duties and export quotas on those products. This analysis is flawed and unreliable for the reasons set forth in the U.S. second written submission and the analysis prepared by Dr. Gene Grossman and Dr. Mark Watson ("Grossman-Watson Report").

47. Similarly, China 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, while the export duties have been in place. In response to this point, China states in its second written submission that it has shown that secondary production occurs in China.[22] The "evidence" on which China relies consists of news reports and a statement regarding the existence of a secondary production facility.[23] In contrast, China provides extensive data showing levels of primary production in China in recent years.[24] Even beyond that, the question is not simply whether secondary production is occurring in China, but rather whether the export duties on scrap products are resulting in a shift away from primary production toward increased levels of secondary production. It is this connection between China's export duties and secondary production that China has failed to establish.

48. Not only do the estimates in Dr. Olarreaga's model not establish that the export restraints are making a contribution to China's stated environmental objectives, the data in fact reveal the opposite. Not only has production of magnesium metal, manganese metal, coke, and silicon carbide increased even with the existence of export duties, but also the export of these products has expanded significantly in the form of downstream products such as aluminum and steel.

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[22] China's Second Written Submission, para. 341; Exhibit CHN-481.
[23] Exhibit CHN-481.
[24] Exhibit CHN-289.

49. China argues in its second written submission that absolute increases in production are not relevant to assessing the contribution made by the measures to China's environmental objective. According to China, the relevant question is what the level of production would be in the absence of export restraints, and China invokes as support its own economic analysis conducted by Dr. Olarreaga.[25] For the reasons discussed at length in the U.S. second written submission, the analysis conducted by Dr. Olarreaga is fundamentally flawed and unreliable. Moreover, it is China's defense that the export restraints are in place to bring about a decrease in production. The increases in production combined with the expansion of downstream production and exports, and China's stated intention to expand "indirect exports" contradicts those assertions.

50. We will address China's arguments as they relate to the export duties on magnesium metal, manganese metal, and export quotas on coke, and silicon carbide. We will then turn to address China's arguments as they relate to the export duties on the scrap products.

6. The reports on magnesium metal, manganese metal, and coke, and export quotas on coke and silicon carbide

51. China places great weight on the economic analysis prepared by Dr. Olarreaga, which sets forth projected decreases in production of magnesium metal, manganese metal, coke, and silicon carbide that supposedly result from imposition of the export duties. However, as set forth in the U.S. second written submission and detailed in the Grossman-Watson Report,[26] one of the flaws with China's economic analysis is that China ignores the linkages between the products in various stages of the production process. For example, China's economic model fails to address the

[25] China's Second Written Submission, paras. 286-88; 337.
[26] U.S. Second Written Submission, paras. 97-101; Exhibit JE-158.

increased downstream consumption of magnesium metal, manganese metal, coke, and silicon carbide that will be stimulated by the imposition of export restraints on those products, and the pollution associated with such production. In fact, China has repeatedly failed to meaningfully address the implications for China's defense under Article XX(b) of increased downstream production activity that is stimulated by China's export restraints. In response to a question from the Panel regarding this issue, China responded that the pollution associated with downstream production "is not particularly relevant or important relative to the pollution savings generated by the decreased production of EPR products resulting from the export restraints in the first place."[27] To the contrary, the stimulation of increased production of downstream products is directly relevant to China's defense. Specifically, the stimulation of increased production activity downstream belies China's contention that its export restraints are furthering a pollution-reduction objective.

52. China has also made a number of additional assertions that are unsupported by any evidence or are highly speculative. For example, China asserts that the production of magnesium metal, manganese metal, coke, and silicon carbide are "the most polluting step" in their respective production processes, and that pollution levels decrease as production moves downstream.[28] China provides no evidence to support this assertion. In addition, the implications of this assertion for manganese and zinc bear some consideration. If pollution levels decrease as production moves downstream, then the imposition of export duties on manganese ore and an export prohibition on zinc ores, which would stimulate increased primary production of manganese metal and zinc, runs

[27] Exhibit CHN-442, p. 6.
[28] Exhibit CHN-442, p. 1-2.

contrary to China's stated pollution-reduction goals. In the analysis prepared by Dr. Humphreys for China's second written submission, Dr. Humphreys repeats these assertions and while he purports to "compare pollution levels caused by the initial production of each EPR material with that generated by its downstream consumers," he provides no such comparison. Instead, Dr. Humphreys notes that he is not aware of any publicly available information addressing the pollution associated with downstream production, and simply asserts that the pollution levels should be less than those associated with the production of magnesium metal, manganese metal, and coke.[29]

53. Dr. Humphreys' analysis also inexplicably skips a step in the production chain. For example, he points out that manganese is used primarily to produce iron and steel and that iron and steel are used in construction. He proceeds to opine – without factual support – that construction is a significantly less polluting industry than the production of manganese metal, without addressing the pollution associated with the intermediate step of producing iron and steel.[30] Dr. Humphreys and China's silence on this point combined with the dramatic expansion of production and exports of steel speak volumes.

7. The reports on magnesium scrap, manganese scrap, and zinc scrap

54. With respect to the export duties on the scrap products, the U.S. second written submission identifies a number of flaws that render China's defense without merit. First, China's economic analysis is unreliable for the reasons set forth in the Grossman-Watson Report. Second, China relies on a number of assertions related to recycling of products that are not at issue in this dispute.

[29] Exhibit CHN-481, p. 7-11.
[30] Exhibit CHN-481, p. 8-9

Third, China's assertions regarding the scarcity of scrap fail to address certain factors related to a development of a scrap supply and do not provide a basis for the imposition of export restraints under Article XX(b).[31]

55. Additionally, as we have discussed with respect to manganese scrap, China's defense under Article XX(b) fails for the simple reason that secondary production of manganese metal simply does not occur. In its second written submission, China continues to maintain that secondary production does occur in spite of Dr. Humphreys recognition to the contrary in his initial analysis for this dispute.[32] China contends that manganese scrap exists and is traded as evidenced by the fact that the complainants import manganese scrap.[33] However, the U.S. Geological Survey, which has stated that recovery of scrap for manganese is negligible[34], has addressed the peculiarity of data showing small quantities of imports of manganese scrap in the United States.[35]

56. As a substitute for evidence, Dr. Humphreys asserts that as the world's largest producer of manganese, "China naturally generates this type of scrap."[36] But, this is not evidence that secondary production of manganese metal from scrap is possible, let alone that it is occurring in China. In short, China has failed to establish that secondary production of manganese metal is feasible, let alone that the export restraints on manganese scrap can make a material contribution to China's pollution-reduction objectives.

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[31] U.S. Second Written Submission, paras. 49-75.

[32] Exhibit CHN-11, p. 5 n. 26.

[33] China's Second Written Submission, para. 340.

[34] Exhibit JE-43.

[35] U.S. Second Written Submission, para. 55, n. 54 citing USGS Circular 1196-H, Manganese Recycling in the United States in 1998 (Exhibit JE-155), p. H5.

[36] Exhibit CHN-481, p. 5.

8. China's Export Restraints Fail to Satisfy the Requirements of the *Chapeau* of Article XX

57. Because China's measures are not "necessary" under Article XX(b), the Panel does not need to reach issues under the Article XX *chapeau*. The United States would note, however, that China has not even made a serious attempt to show that its measures meet the *chapeau*'s requirements. China has the burden to establish the consistency of its measures with the *chapeau*. Despite having the burden to do so, China has not presented evidence or argumentation to demonstrate how its measures are applied in a manner consistent with the requirements of the *chapeau*. In large part, China restates the same arguments it presented under Article XX(b). Those arguments are without merit for the reasons we have discussed. More fundamentally, a mere recital of the same arguments presented in the context of the subparagraph of Article XX does not suffice to establish consistency with the *chapeau*.

58. China also makes a number of statements asserting that the discrimination inherent in China's measures is justified in light of China's environmental policy goals.[37] But, such assertions are irrelevant to the specific requirements of the *chapeau*. In addition to the fact that the measures are unrelated to environmental protection, the level of importance of a Member's supposed policy objective does not answer the question of whether the measure at issue is applied in a manner that constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade. China has therefore failed to meet its burden of establishing the consistency of its measures with the requirements of the *chapeau*.

[37] China's Second Written Submission, paras. 367-369.

9. China's Defense Has Serious Negative Systemic Implications

59. For the reasons stated above, China cannot be considered to have met its burden of showing that export restraints on raw materials are "necessary" to reduce environmental impacts associated with the extraction or processing of those raw materials. The United States concludes the discussion of China's Article XX(b) defense by adding that the Panel might consider the serious negative systemic implications of a contrary finding.

60. As it relates to the export restraints on magnesium metal, manganese metal, 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 magnesium scrap, manganese scrap, and zinc scrap, China's defense similarly raises serious systemic concerns, because it 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.

61. Article XX(b) permits a Member to maintain a GATT-inconsistent measure if it is "necessary to protect human, animal or plant life or health." But China seeks to rewrite Article XX(b) to permit a Member to maintain a GATT-inconsistent measure for its own economic advantage so long as the measure can be shown to have indirect, incidental environment effects. If Article XX were construed to provide such a safe harbor for GATT-inconsistent measures, it is difficult to see what remains of the obligations in the GATT 1994. For example, Members would be free to restrict any imports as long as they could show, for example, that the process of transporting the imports was associated with increased environmental pollution at the port of entry.

In short, China's defenses under Article XX(b) represent an untenable approach to Article XX, and should not be approved by the WTO dispute settlement system.

B. China Has Not Established that Its Export Duties and Export Quotas on Fluorspar and Bauxite Satisfy the Requirements of Article XX(g)

62. China argues that its export restraints on fluorspar and bauxite are justified as conservation measures under Article XX(g) of the GATT 1994. As an initial matter, the United States notes that despite China's broad description of its Article XX(g) defense, the specific Article XX(g) arguments presented by China do not apply to most of the measures at issue in this dispute. China does **not** attempt to justify the export quota on fluorspar; the export duties on bauxite; and the export quota on most forms of bauxite. Instead, 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. As the United States has explained, these export restraints do not qualify as conservation measures under the Article XX(g) exception.

63. 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. In this statement, we will refer to these measures as the 2010 Fluorspar and High Alumina Clay Measures.

64. These measures adopted in the midst of the panel proceeding are not in the Panel's terms of reference. Even aside from this fact, China's efforts to make these export restraints appear more like conservation measures in 2010 are also unavailing.

1. The Export Quotas and Duties on Fluorspar and Bauxite Are Not Conservation Measures that Can Be Justified under Article XX(g) of the GATT 1994

65. As set forth in the U.S. Second Written Submission, "conservation" of an exhaustible natural resource means keeping that exhaustible natural resource from harm, waste, or loss through protective oversight. The focus of "conservation" is protective oversight exercised to benefit the state, use, or amount of the natural resource. The export duties on fluorspar and the export quota applied to high alumina clay in themselves lack the requisite relationship to the goal of benefitting the state, use, or amount of fluorspar and high alumina clay.

66. These export restraints are fundamentally different from the measures at issue in *U.S. – Gasoline* and *U.S. – Shrimp*, the two prior WTO disputes in which the Article XX(g) exception has been invoked. At issue in *U.S. – Gasoline* was a regulation to control pollution caused by the combustion of gasoline manufactured in – or imported into – the United States.[38] At issue in *U.S. – Shrimp* was an import ban on shrimp harvested with commercial fishing technology which may adversely affect sea turtles.[39] Both measures, in themselves, had a particular relationship to the goal of benefitting the state, use, or amount – of clean air, in *U.S. – Gasoline,* and of sea turtles, in *U.S. – Shrimp* – sufficient to be considered conservation-related under Article XX(g).

67. Here, the export duties on fluorspar restrain foreign users' access to fluorspar by making fluorspar from China more expensive for foreign users to obtain, while the export quota applied to high alumina clay limits the amount of high alumina clay that foreign users can obtain from China (which also increases the prices for those users). These measures serve the goal of benefitting

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[38] *U.S. – Gasoline (AB)* at 1.

[39] *U.S. –Shrimp (AB)*, para. 3.

China's domestic users of fluorspar and high alumina clay by providing them with an important advantage over their foreign competitors.

68. China attempts to justify these export restraints under Article XX(g) through creative re-interpretation of the terms used in Article XX(g). By reaching for words and phrases appearing in other parts of the GATT 1994 and the WTO Agreement and even entire instruments outside of the WTO Agreements, China strains to incorporate into the term "conservation" the concept of self-interested economic and social gain. It is only through this re-definition of "conservation" that China is able to substantiate its argument that these export restraints "relate to" the goal of "conservation." **China's interpretation of the term "conservation" must be rejected; China's contextual argument does not support this meaning "conservation," and instead draws into the word a meaning that was never intended.**

69. China's interpretation must also be rejected because **it would subvert the GATT 1994's disciplines on export restraints and non-discrimination.** In *U.S. - Gasoline*, the Appellate Body observed that the affirmative obligations set forth in Articles I, III, and XI of the GATT 1994 are context for the interpretation of Article XX(g): "the phrase 'relating to the conservation of exhaustible natural resources' may not be read so expansively as seriously to subvert the purpose and object of Article III:4."[40]

70. China's efforts to interpret the term "conservation" to incorporate benefit to one's own social and economic goals rely heavily on the reference to "sustainable development" in the Preamble to the WTO Agreement. The Preamble states:

[40] *U.S. – Gasoline (AB)*, at 18.

> The *Parties* to this Agreement,
>
> *Recognizing* that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living . . ., while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development . . .

But nothing in the phrase "sustainable development" indicates that a Member may discriminate against other Members in pursuit of its own economic goals. Indeed, the language in this same section of the Preamble contradicts China's argument. The Preamble describes resources as "the world's" resources – as opposed to a particular Member's resources. The Preamble thus speaks to the shared need of all Members to have access to the trade in those resources.

71. Similarly, the reference to "sustainable development" emphasizes the importance to all WTO Members of the ability to foster and maintain economic and industrial growth in a sustainable manner, and does not, as China argues, pit one Member's interest in sustainable development against another's.

72. Finally, the Preamble of the WTO Agreement also states that the Parties are "desirous of contributing to these objectives by entering into **reciprocal and mutually advantageous** arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international relations." This provides additional context contradicting China's argument that conservation measures under Article XX(g) are measures that permit one Member to leverage its access to natural resources for its own economic benefit to the detriment of other Members' access.

73. Accordingly, China's export duties on fluorspar and export quota on bauxite, as applied to high alumina clay, do not relate to the conservation of fluorspar and high alumina clay respectively, as required by Article XX(g).

2. The Export Duties on Fluorspar Are Not Made Effective in Conjunction with Restrictions on Domestic Production or Consumption of Fluorspar and the Export Quota on Bauxite as Applied to High Alumina Clay Is Not Made Effective in Conjunction with Restrictions on Domestic Production or Consumption of High Alumina Clay

74. 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." Even if a challenged measure bears the requisite relationship to conservation goals, this second requirement ensures that the goal of conservation of exhaustible natural resources does not affect the interests of a Member's trading partners without similarly affecting a Member's domestic interests. In *U.S. – Gasoline*, the Appellate Body called this "a requirement of *even-handedness* in the imposition of restrictions . . . ."[41]

75. Here, even aside from the fact that the fluorspar export duties and high alumina clay export quota do not bear a substantial relationship to the conservation of fluorspar and high alumina clay, they are also not made effective in conjunction with restrictions on domestic production or consumption of fluorspar or high alumina clay. First, China's proffered measures do not establish "restrictions" on domestic production or consumption of fluorspar and high alumina clay. Second, even if they did, the restrictions imposed on foreign and domestic users in the name of conservation would not be even-handed.

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[41] *U.S. – Gasoline (AB)* at 20-21 (original emphasis).

a. No Restrictions Are Imposed on Domestic Production or Consumption of Fluorspar or High Alumina Clay

76. "Restrictions on domestic production or consumption" must be interpreted in the context of the function of the second clause of Article XX(g) as a requirement ensuring that a natural resource conservation measure adversely affecting a Member's trading partners be promulgated or brought into effect together with restrictions on that Member's domestic production or consumption of natural resources. Article XX(g) thus requires that the burdens of conservation do not fall disproportionately on foreign interests. As the Appellate Body stated in *U.S. – Gasoline*, "if *no* restrictions on domestically-produced like products are imposed at all, and all limitations are placed upon imported products *alone*, the measure cannot be accepted as primarily or even substantially designed for implementing conservationist goals."[42] Accordingly, "restrictions on domestic production or consumption" must serve the goal of conservation that the challenged measure serves.

77. As set forth in detail in the U.S. Second Written Submission, the pre-2010 measures China has proffered as constituting components of a conservation program do not constitute restrictions on domestic production or consumption of fluorspar or high alumina clay as required by Article XX(g). In fact, it appears that, even in China's own view, these measures are not sufficient to establish a defense under Article XX(g). In arguing that the Panel should make findings and recommendations on the export restraints on fluorspar and bauxite that were made effective in 2010 as opposed to those in effect at the time the DSB established the Panel, China states that the result of the Panel not making findings on such measures would be "to prevent the Panel from

[42] *U.S. – Gasoline (AB)* at 21.

ruling on China's defenses, including under Article XX(g) of the GATT 1994, which involves extraction and production caps adopted in 2010"[43] and would "deprive China of timely consideration of its defenses."[44]

78. Also as discussed in the U.S. Second Written Submission, and as we will summarize below, the 2010 Fluorspar and High Alumina Clay Measures in fact do not establish the restrictions required by Article XX(g).

(i) Fluorspar

79. According to China itself, in 2009, a year in which no target numbers were set for fluorspar mining, 9.4 million MT of fluorspar was mined in China.[45] Mining quantity control targets for fluorspar were introduced for the first time in 2010.[46] The *2010 Mining Control Targets Measure* set 11 million MT as the target number for fluorspar mining in 2010.[47] That number exceeds the 9.4 million MT amount mined in China in 2009 and demonstrates that it is not set with the intention of restricting the amount of fluorspar produced in 2010. Furthermore, if the target number is understood as a "target" that should be met as opposed to a ceiling that cannot be exceeded, this 11 million MT level may even operate conversely as a tool for fluorspar production growth.

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[43] China's Closing Statement at the First Panel Meeting, para. 17.

[44] China's Closing Statement at the First Panel Meeting, para. 20.

[45] *Analytical Report and Recommendations Regarding the 2010 Mining Quantity Control Targets Applicable to High-Alumina Clay and Fluorspar* (State Council [2010] No. 1, January 2, 2010) (Exhibit JE-166), Section II.1.ii.

[46] *Circular on the Allocation of the 2010 Mining Control Targets Applicable to High Alumina Clay Ore and Fluorspar* (Ministry of Land and Resources (2010) No. 187, April 20, 2010)(Exhibit JE-168), introduction.

[47] *Circular on the Allocation of the 2010 Mining Control Targets Applicable to High Alumina Clay Ore and Fluorspar* (Ministry of Land and Resources (2010) No. 187, April 20, 2010)(Exhibit JE-168), Section I.

2009 Fluorspar Mining Level	2010 Fluorspar Mining Target
9.4 million MT	11 million MT

80. In 2010, China also introduced the *2010 Production Control Targets Measure*,[48] which sets "production" control targets for the amount of "fluorspar blocks" or "fluorspar lump," *i.e.,* metallurgical grade fluorspar,[49] and"fluorspar powder," *i.e.,* acid grad fluorspar,[50] that can be produced from the 11 million MT of fluorspar ore that can be mined in 2010. The *2010 Production Control Targets Measure* set a production control target of 4.71 million MT for metallurgical grade fluorspar and 2.44 million MT for acid grade fluorspar.[51]

81. However, once again, these numbers are set at levels too high to be restrictive. First, data on actual production levels of metallurgical and acid grade fluorspar since 2000 demonstrate that the production control target levels China has set for are not restrictions. Over the years 2000 to 2009, metallurgical grade fluorspar production peaked at 1.35 million MT in 2007 and 2008 and acid grade fluorspar production peaked at 1.9 million MT in 2008[52] – well below the 4.71 million MT and 2.44 million MT levels set as "production control targets" for metallurgical and acid grade fluorspar for 2010. These target numbers are, therefore, not intended to restrict production.

82. Second, calculating the amount of fluorspar ore required to produce these amounts of fluorspar lump and powder, on the basis of reasonable estimates, also demonstrates that these

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[48] *Circular on the Allocation of Production Quantity Control Targets Applicable to High Alumina Clay and Fluorspar for the Year 2010* (MIIT (2010) No. 244, May 19, 2010) (Exhibit JE-169).

[49] Key Facts: Fluorspar Lump and Powder and Chamotte (Exhibit JE-177) at 1-2.

[50] Key Facts: Fluorspar Lump and Powder and Chamotte (Exhibit JE-177) at 2-3.

[51] Exhibit JE-169, Section II.

[52] Market Research on Fluorspar and Selected Fluorochemicals (October 2010) (Exhibit JE-164), Table 7 at 34.

numbers cannot form meaningful restrictions. As shown in Exhibit JE-177, using an estimated conversion ratio of 2.4:1 for fluorspar ores to metallurgical grade fluorspar and a ratio of 2:1 for ore to acid grade fluorspar,[53] the amount of fluorspar ore required to produce 4.71 million MT of fluorspar lump and 2.44 million MT of fluorspar powder would be in the neighborhood of 16 million MT[54] – exceeding the 11 million MT of fluorspar ore that can be mined pursuant to the mining control target, which itself is not a restriction on mining.

	2010 Production Control Target	**2010 Production Control Target**	**Fluorspar Ore Required to Produce 2010 Production Control Target**	**2010 Fluorspar Mining Control Target**
Fluorspar Lump (Metspar)	4.71 million MT	4.71 million MT	11.3 million MT	11 million MT
Fluorspar Powder (Acidspar)	2.44 million MT	2.44 million MT	4.88 million MT	

(ii) High Alumina Clay

83. According to China itself, in 2009, a year in which no target numbers were set for the mining of high alumina clay ore, 2.4 million MT of high alumina clay was mined in China.[55] China introduced mining control targets for high alumina clay for the first time in 2010.[56] The *2010 Mining Control Targets Measure* sets 2010 "mining quantity control targets" of 4.5 million

[53] Key Facts: Fluorspar Lump and Powder and Chamotte (Exhibit JE-177) at 3.

[54] Key Facts: Fluorspar Lump and Powder and Chamotte (Exhibit JE-177) at 3.

[55] *Analytical Report and Recommendations Regarding the 2010 Mining Quantity Control Targets Applicable to High-Alumina Clay and Fluorspar* (State Council [2010] No. 1, January 2, 2010) (Exhibit JE-166), Section I.1.ii.

[56] *Analytical Report and Recommendations Regarding the 2010 Mining Quantity Control Targets Applicable to High-Alumina Clay and Fluorspar* (State Council [2010] No. 1, January 2, 2010) (Exhibit JE-166), Section I.2.

MT for high alumina clay ore[57] – almost double the amount mined in 2009. In fact, China states that the mining control target for 2010 is set at the level of authorized production capacity,[58] which greatly exceeds actual production in 2009. This 4.5 million MT number is therefore clearly not set with the intention of restricting or binding in any way the amount of high alumina clay that is mined in China.

2009 High Alumina Clay Mining Level	2010 High Alumina Clay Mining Target
2.4 million MT	4.5 million MT

84. China also introduced production control target for high alumina clay for the first time in 2010. The *2010 Production Control Targets Measure* sets "production" control targets of 4.5 million MT of high alumina clay ore (which appears to be the same target established by the *2010 Mining Control Targets Measure*) and 4 million MT of "chamotte"[59] – which is produced by calcining high alumina clay[60] – from that 4.5 million MT of high alumina clay ore. This number is also set at a level too high to be restrictive. The calcination process uses high temperatures to drive off the water bounded to the clay mineral. As a result, the clay loses about one third of its mass in the firing process.[61] As shown in Exhibit JE-177, this means that approximately 1.5 MT of high alumina clay is required to produce 1 MT of chamotte; therefore, a production target of 4 million

[57] *Circular on the Allocation of the 2010 Mining Control Targets Applicable to High Alumina Clay Ore and Fluorspar* (Ministry of Land and Resources (2010) No. 187, April 20, 2010)(Exhibit JE-168), Section I.

[58] *Analytical Report and Recommendations Regarding the 2010 Mining Quantity Control Targets Applicable to High-Alumina Clay and Fluorspar* (State Council [2010] No. 1, January 2, 2010) (Exhibit JE-166), Section I

[59] *Circular on the Allocation of Production Quantity Control Targets Applicable to High Alumina Clay and Fluorspar for the Year 2010* (MIIT (2010) No. 244, May 19, 2010) (Exhibit JE-169).

[60] Key Facts: Fluorspar Lump and Powder and Chamotte (Exhibit JE-177) at 4.

[61] Key Facts: Fluorspar Lump and Powder and Chamotte (Exhibit JE-177) at 4.

MT of chamotte would require 6 million MT of clay.[62] China's measures provide for only a 4.5 million MT target for the mining of clay, which as already discussed, is not a mining restriction. Accordingly, this production target number does not restrict the production of chamotte in China.

2010 Chamotte Production Target	High Alumina Clay Required to Produce 2010 Chamotte Production Target	2010 High Alumina Clay Mining Target
4 million MT	6 million MT	4.5 million MT

b. The Export Duties on Fluorspar and Export Quota Applied to High Alumina Clay Are Not "Made Effective in Conjunction with" Such Restrictions

85. As noted, even aside from the fact that Article XX of the GATT 1994 is not available as a defense to a breach of China's commitments on export duties, China's export duties on fluorspar and export quota as applied to high alumina clay do not relate to conservation and "restrictions on domestic production or consumption" of fluorspar and high alumina clay do not exist. Additionally, China's measures are not justified under Article XX(g) because the restrictions imposed on foreign users are not "made effective in conjunction with" the restrictions imposed on domestic users of these natural resources – i.e., the restrictions would not be even-handed.

86. China asserts that even-handedness means only that, "provided that the burden of conservation measures is not imposed **exclusively** on export trade, no particular 'distribution' of the burden is required, and the relative burdens need not be identical." China's arguments seek to turn the concept of "even-handed" on its head.

[62] Key Facts: Fluorspar Lump and Powder and Chamotte (Exhibit JE-177) at 4.

87. As set forth in the U.S. Second Written Submission, in addressing the "made effective in conjunction with" requirement in *U.S. – Gasoline*, the Appellate Body did not reach the question of where, in between the two poles of identical or near-identical treatment and complete inequality of treatment, the relative severity of restrictions on foreign and domestic interests shifts from justifiable under Article XX(g) to unjustifiable. But the Appellate Body certainly did not conclude, as China claims, that "no particular 'distribution' of the burden is required."

88. What the Appellate Body did do was observe that, in the GATT 1947 panel report in *Canada – Herring and Salmon*, which involved export restrictions on unprocessed fish and where the parties to the dispute had agreed that conservation-related restrictions on the domestic production of herring and salmon existed, the export restrictions were nonetheless found to be not "made effective in conjunction with" those domestic restrictions because the export restrictions were primarily aimed at protecting domestic processors.[63] As the Appellate Body noted in the footnote to its statement that a measure that amounts to "naked discrimination for protecting locally-produced goods" cannot be justified as even-handed under Article XX(g):

> Some illustration is offered in the *Herring and Salmon* case which involved, *inter alia*, a Canadian prohibition of exports of unprocessed herring and salmon. . . . The prohibitions appeared to be designed to protect domestic processors by giving them exclusive access to fresh fish and at the same time denying such raw material to foreign processors.[64]

89. The facts here, as in *Canada – Herring and Salmon*, present an easy case under Article XX(g). That is, here, as in *Canada – Herring and Salmon*, the export duties of 15 percent for fluorspar and the portion of the 930,000 MT export quota on bauxite that is applicable to high

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[63] GATT Panel Report, *Canada – Herring and Salmon*, para. 4.7.

[64] *U.S. – Gasoline (AB)*, at 21 note 42.

alumina clay, fail the even-handedness test because they are imposed primarily to benefit China's domestic processors – at the expense of foreign processors.

90. As an initial matter, it is difficult to understand how Article XX could justify a quota that applies broadly to a number of products captured in the category of "bauxite," based on measures that are related only to high alumina clay. In other words, China appears to be asking the Panel to impute that some portion of the quota is justified under Article XX while conceding that the other portion is not justified. This raises the question of how a single measure – the quota on bauxite – can be interpreted to have different purposes: conservation when an exporter seeks to export high alumina clay and not conservation when an exporter seeks to export a different bauxite product.

91. Notwithstanding the conceptual peculiarity of China's defense, China also argues that its export restraints work together with production restrictions to create domestic consumption restrictions on fluorspar and high alumina clay, which renders the restrictions even-handed under Article XX(g).[65] China then provides an illustrative example, "inspired by" its high alumina clay measures.[66] China's example has a hypothetical WTO Member restricting production of a natural resource to 100 units per year and adopting an export quota set at 40 units per year. China argues that this scenario results in a "consumption restriction" of 60 units per year for domestic users of the natural resource.

92. China's hypothetical is fundamentally flawed in at least four important ways. First, the hypothetical is based on the fallacy that an export quota of 40 units "reserves 40 out of 100 units

[65] China's Second Written Submission, para. 200.
[66] China's Second Written Submission, paras. 200-202.

for foreign trade."[67] An export quota limits the amount of a product that can be traded. It does not make it unavailable to domestic users or guarantee that amount will be traded to export markets.

93. Second, even if an export quota worked the way China suggests, an actual consumption restriction would result only if domestic demand were greater than the difference between the production restriction and the export quota. Even then, the complex question would arise as to whether the relative amounts made available to the domestic and foreign markets corresponded in an even-handed way to their relative demands.

94. Third, China's example may be "inspired by" but is not based on its actual export quota on bauxite – as applied to high alumina clay – and therefore cannot be applied to the export quota it is trying to defend. China defends only a portion of the export quota – on high alumina clay – that it actually imposes – on a category of bauxite products that covers additional products. It is not clear even what portion of the 940,000 MT export quota in 2009 or the 930,000 MT export quota in 2010 applies to high alumina clay exports, while the mining and production control targets apply only to high alumina clay. Also, as discussed earlier, the mining and production control targets are set at levels so high that they cannot operate to restrict either and are entirely unlikely to result in a consumption restriction when combined with the export quota of unidentified quantity.

95. Finally, China's example is limited to the application of production restrictions with an export quota. It does not address the application of production restrictions with export duties – which are imposed on fluorspar.

[67] China's Second Written Submission, para. 202.

3. Conclusion

96. China's export duties on fluorspar and export quota on bauxite – as it applies to high alumina clay – are not conservation measures. They are applied in the absence of any meaningful restrictions on domestic users and in the absence of any corresponding restraints on the exportation of higher and very high value downstream products processed from fluorspar and high alumina clay. Accordingly, rather than being "primarily or even substantially designed for implementing conservationist goals," they are measures that give domestic processors strong advantages while disadvantaging foreign processors – a goal that is not afforded justification under Article XX(g).

IV. China's Export Quota on Bauxite as Applied to High Alumina Clay Is Not Justified by Article XI:2(a)

97. Article XI:2(a) provides that the provisions of Article XI:1 do not extend to "export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting Member." As the complainants have demonstrated in their second written submissions, 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. Rather than repeat the argumentation that has been submitted to the Panel to date, we will focus today on a few elements of China's defense.

98. *First*, we begin by reiterating that notwithstanding that the relevant Chinese measure imposes an export quota on two forms of bauxite *i.e.* refractory clay and aluminum ores and concentrates, China's defense only relates to one subset of refractory clay, namely high alumina

clay.[68] Although China refers to this product as "refractory-grade bauxite," we refer to it as high alumina clay in the context of China's defense to distinguish the product for which China asserts a defense under Article XI:2(a) from other forms of bauxite that may also be used to produce refractories. China does not contest the inconsistency of its export quota under Article XI:1 as it is applied to aluminum ores and concentrates and refractory clay other than high alumina clay.

99. *Second*, in its second written submission, China continues to maintain that the burden of establishing a claim under Article XI:1 include establishing that the conditions of Article XI:2 are not met.[69] As the United States noted in its second written submission, China's position on this point is contradicted by the fact that China has conceded the inconsistency of its export quotas on Article XI:1 as they relate to, for example, coke and silicon carbide and has asserted a defense under Article XX(b) for those GATT-inconsistent measures. As set forth in the complainants' first oral statement, 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 for which the responding party bears the burden of establishing that it satisfies the requirements of that provision.[70] Contrary to China's assertions, neither the Appellate Body's conclusions in that dispute, nor the U.S. arguments in this dispute hinge on the notion that all WTO provisions are either obligations or exceptions.[71] And, while China seeks to marginalize the Appellate Body's reasoning as "obsolete" in relation to analyzing burdens of proof in WTO dispute settlement, neither *Brazil – Aircraft* nor *India –*

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[68] U.S. Second Written Submission, para. 201.
[69] China's Second Written Submission, paras. 29-36.
[70] Complainants' First Oral Statement, paras.128-31.
[71] China's Second Written Submission, para. 33.

Additional Duties supports China's argument in this regard.[72] The reasoning in those disputes – addressing the SCM Agreement and Article II:2 of the GATT 1994 – do not extend to Article XI:2(a) for the reasons set forth in the U.S. second written submission.[73] In short, Article XI:2(a) is an affirmative defense for which China bears the burden of establishing that it satisfies all the elements of that defense.

100. *Third*, China's argument that its export quota as applied to high alumina clay satisfies the "essentialness" requirement in Article XI:2(a) places significant weight on the supposed lack of substitutes for high alumina clay in steel production.[74] However, for the reasons set forth in the U.S. second written submission, there are a number of substitutes for high alumina clay in the production of refractories for steel production. Indeed, certain of the other forms of bauxite on which China maintains its export quota can be used to produce refractories for steel production.[75] Even beyond this, China's suggestion throughout this dispute that any input for production can satisfy the "essentialness" requirement in Article XI:2(a) would severely weaken the disciplines in Article XI:1 as it relates to export restrictions and should, therefore, be rejected.

101. *Fourth*, China's arguments regarding the supposed "critical shortage" of high alumina clay reflect an improper reading of the relevant terms. China relies heavily on the limited amount of reserves of high alumina clay. However, as the United States has discussed, the mere limited amount of reserves of a product is not sufficient to amount to a critical shortage. China's arguments to the contrary would operate to read the term "critical" out of Article XI:2(a)

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[72] U.S. Second Written Submission, paras. 207-210.
[73] U.S. Second Written Submission, paras. 205-10.
[74] Exhibit CHN-10, p. 3.
[75] U.S. Second Written Submission, para. 2226.

altogether. China's line of reasoning significantly broadens the scope of the term "critical shortage" to encompass any situation where a product's availability is finite. Such a result is untenable.

102. In its second written submission, China, in fact, confirmed that this is its approach to Article XI:2(a). Specifically, China states: "the Complainants fail to explain why a shortage, even if 'a mere degree of shortage', would fail to satisfy the criticality element of Article XI:2(a)."[76] In addition to the flaws in China's reasoning, China is incorrect. The complainants have explained why this is the case[77], and the reason is simple. If a mere degree of shortage were sufficient to satisfy the "critical shortage" requirement in Article XI:2(a), then the drafters would not have included the word "critical" in that provision. Furthermore, even if limited reserves of a product were sufficient to establish a "critical shortage", China's assertions regarding the available reserves of high alumina clay suffer from a number of factual inaccuracies.[78]

103. Similarly, the existence of supply constraints does not establish a "critical shortage" for purposes of Article XI:2(a). Very few – if any – products are free of any natural or man-made supply constraints whatsoever. But that fact does not mean that all such products face a "critical shortage" within the meaning of Article XI:2(a). A review of the relevant facts reveals that the supposed supply constraints to which China points are, in fact, not limiting China's supply of high alumina clay. China's production of refractory materials and steel and China's exports of those

[76] China's Second Written Submission, para. 143.
[77] U.S. Second Written Submission, paras. 230-32 citing Exhibit CHN-181.
[78] U.S. Second Written Submission, paras. 233-37.

materials have expanded dramatically in recent years. Thus, a review of these factors do not support China's assertion of a "critical shortage."

104. In sum, China has failed to establish that its export quota as applied to high alumina clay satisfies the requirements of Article XI:2(a). China has, however, made clear that the objective of the export quota is the rapid and dramatic growth of China's steel industry. Specifically, China states that it has:

> fostered its own industrial development by using its own natural resources, including refractory-grade bauxite, as a motor to develop processing and value-added industries, resulting in economic diversification, growth, and corresponding social and economic benefits. China's need to 'secure supply of raw material minerals' also requires action to ensure that its own natural resources are used for its own economic and social development. In particular, and as already noted, refractory-grade bauxite has played an essential role in allowing China to develop a steel industry and other downstream industries relying on steel.[79]

105. China goes on to clarify that: "Indeed, the export quota imposed on bauxite ensures that China captures the benefits of the limited supply of its own mineral wealth."[80] Thus, by the terms of China's arguments, the export quota is not in place to address a critical shortage, but rather to fuel the continued expansion of China's steel industry.

V. Findings and Recommendations on China's Quotas and Duties

A. The United States Is Entitled to Findings and Recommendations on the Export Quotas, Duties, and Export Licensing Requirements Effective in 2009

106. In 2009, China subjected the exportation of bauxite, coke, fluorspar, manganese, silicon carbide, and zinc to non-automatic export licensing requirements; the exportation of bauxite, coke, fluorspar, silicon carbide, and zinc to quotas; and the exportation of bauxite, coke, fluorspar,

[79] China's First Written Submission, para. 458.
[80] China's First Written Submission, para. 488.

magnesium, manganese, silicon carbide, silicon metal, and zinc to duties and the exportation of yellow phosphorus to special export duties. This Panel was established in 2009. These export restraints are all set forth in the U.S. panel request. These export restraints all fall within the Panel's terms of reference. Accordingly, the United States is entitled to findings on all of these restraints and, where the Panel finds restraints that are inconsistent with China's WTO obligations, recommendations as well.

107. China argues that the fluorspar export quota, the bauxite export duties, and the yellow phosphorus special export duties were "withdrawn"[81] in 2010 and therefore findings and recommendations on those export restraints would serve no purpose in securing a positive solution to this dispute. The United States has explained in its rebuttal submission that it is entitled to findings on the measures as they existed on the date the DSB established this Panel pursuant to DSU Articles 6.2, 7.1, and 11, and the Panel must make a recommendation on such measures pursuant to Article 19.1. In addition, we note that the United States strongly considers that obtaining findings and recommendations on the 2009 measures is necessary to secure a positive solution to this dispute. As the panel in *EC – Information Technology Products* noted, "past panels have ruled on repealed or expired measures . . . if they thought such a ruling would aid in securing a positive resolution to the dispute as required by Article 3.7 of the DSU. Panels have also decided to make rulings on repealed or expired measures where the respondent member had

[81] China's Second Written Submission, para. 9.

not conceded the WTO inconsistency of the measure and the repealed measure could be easily re-imposed."[82]

108. China has not conceded the WTO inconsistency of the fluorspar export quota, the bauxite export duties, or the yellow phosphorus special export duty. As explained in the U.S. Second Written Submission, these measures 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.

B. China's Argument that the Panel Should Make Findings and Recommendations Only on the Export Restraints Effective in 2010 Must Be Rejected

109. The changes that China made to the scope of its export quotas and export duties in 2010 changed the essence of the measures that are in the Panel's terms of reference – i.e., the export quotas and export duties imposed in 2009. Were the Panel to review the scope of the export restraints only as they were modified and maintained in 2010, it would shield from review aspects of the export restraints properly within the Panel's terms of reference and permit China to create a "moving target" that impinges on the rights under the DSU afforded to the United States as a complaining party in this dispute.[83]

110. Not only did China remove, in 2010, the fluorspar export quota, bauxite export duties, and yellow phosphorus special export duties from the scope of the export restraints challenged in 2009, China also introduced a number of measures over the course of 2010 that address various aspects of fluorspar and high alumina clay mining and production (the "2010 Fluorspar and High Alumina

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[82] *EC – Information Technology Products* (Panel), para. 7.165.

[83] *See Chile – Price Band System (AB)*, para. 144 and U.S. SWS, paras. 341-343.

Clay Measures"). China argues that not reviewing the export restraints only as they were maintained in 2010 would "deprive China of timely consideration of its defenses."[84]

111. First, by describing the 2010 Fluorspar and High Alumina Clay Measures as "its defenses," China once again implies, but does not explicitly acknowledge, that it introduced these measures during the pendency of this dispute because it considered that, without these measures, the export quotas and export duties on fluorspar and high alumina clay were inconsistent with its WTO obligations.

112. Second, it is not consideration of China's defenses that would be untimely if the Panel appropriately limited its review to the measures within its terms of reference. What is untimely is China's belated efforts, during the pendency of the present dispute settlement proceedings, to introduce measures that it considers helpful in satisfying the requirements of the defenses it has invoked in this dispute. China committed, upon its accession to the WTO in 2001, that it would not impose export quotas and non-automatic licensing requirements unless they could be justified under GATT rules.[85] Subsequently, the United States and other WTO Members regularly raised with China their concerns over China's quotas, licensing, and duties imposed on the exportation of industrial raw materials at the WTO and in other fora. Finally, the United States initiated formal WTO consultations with China regarding the matters at issue in this dispute in 2009. Yet China did not introduce measures that it felt would assist in justifying its export restraints on fluorspar and high alumina clay until 2010 – during and throughout the pendency of this dispute.

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[84] China's SWS, para. 17.

[85] Working Party Report, paras. 162 and 165.

113. If China has introduced these 2010 Fluorspar and High Alumina Clay Measures in an attempt to bring the export restraints on fluorspar and high alumina clay into conformity with its WTO obligations, then these measures are properly reviewed in the context of the compliance phase, after findings of inconsistency and recommendations are made with respect to the export restraints that are within the Panel's terms of reference – *i.e.*, the export restraints effective in 2009.

114. The Panel should reject China's argument that the Panel should not make findings and recommendations on the export restraints as they were effective on the date the DSB established this Panel and its terms of reference because those export restraints subsequently expired and findings and recommendations would supposedly be of no use. Accepting the basis of China's argument, making findings and recommendations instead on the export restraints as they were imposed in 2010 – as China urges – would be an equally pointless exercise. The Panel's findings and recommendations will not be issued until after the end of 2010 when the "2010 export restraints" have expired. The Panel would then have to review the export restraints that China will maintain in 2011 and time the issuance of its findings and recommendations within the same calendar year in order to be able to help secure a positive solution to this dispute.

115. Similarly, were there an appeal from the Panel's report, it is possible that the Appellate Body Report would not be circulated until 2012. Thus, China could argue on appeal that the Appellate Body must ensure that no recommendations on the 2011 measures if (as is conceivable) those measures had been replaced or indicated that they were to lapse at the end of 2011. This 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. We therefore respectfully urge

the Panel to make findings and recommendations on the measures within the Panel's terms of reference as established by the DSB.

VI. China's Measures Administering and Allocating the Export Quotas Are Inconsistent with China's Obligations Article X:3(a) of the GATT 1994

116. In response to the claim that the administration of its quotas is partial and unreasonable in contravention of the requirements of 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 the claim "through 'solid evidence.'"[86]

117. The nature of the Article X:3(a) claim at issue in this dispute is, however, distinct from the one made in *U.S. - OCTG Sunset Review*. In *U.S. – OCTG Sunset Reviews*, the Article X:3(a) allegation concerned an allegation of partial and unreasonable conduct of sunset reviews by a government agency. Accordingly, the Appellate Body cautioned that allegations that the conduct of a WTO Member is biased or unreasonable are serious and "must be supported by solid evidence; the nature and scope of the claim, and the evidence adduced by the complainant in support of it, should reflect the gravity of the accusations . . . ."[87]

118. In contrast, the claim at issue here is essentially similar to the one made in *Argentina – Leather*. The claim in this dispute does not concern the conduct of a WTO Member; rather, it concerns the rules and structure for administering China's export quotas provided by China's laws, which require the intimate involvement in the administration of China's export quotas, of representatives of private interests that may be adverse to the entities and individuals seeking

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[86] *See, e.g.,* China's Second Written Submission, para. 441 (citing *U.S. – OCTG Sunset Review (AB)*, para. 217).

[87] *U.S. – OCTG Sunset Reviews (AB)*, para. 217.

access to those export quotas. Specifically, the claim here is that the involvement of the CCCMC, a membership organization representing producers and processors of industrial raw materials, in administering China's export quotas on industrial raw materials, creates an inherent conflict of interest that results in the biased administration of those export quotas. Additionally, the claim is the requirement that individual exporters provide to the CCCMC private, commercially sensitive information in the process of applying and qualifying for the right to export under these quotas, results in the possibility of the inappropriate flow of information of an exporter to adverse interests that results in the unreasonable administration of these export quotas.

119. In its various submissions, the United States has adduced arguments and evidence that are more than sufficient, in quantity and quality, to substantiate these claims.

VII. Export Licensing

120. As reflected in the Working Party Report, in 1999, China subjected 58 categories consisting of 73 products to non-automatic export licensing requirements. China explained that the criteria for subjecting products to non-automatic export licensing was Article 16 of the *Foreign Trade Law* – the provision setting forth the bases for restricting exports.[88] Upon acceding to the WTO, China committed to notify remaining non-automatic restrictions on exports and to eliminate them unless they could be justified under the WTO Agreement or Accession Protocol.[89]

121. In 2009, China subjected over 600 products to export licensing requirements imposed pursuant to Article 16 of the *Foreign Trade Law* – including various forms of bauxite, coke,

[88] Working Party Report, para. 158. *See also Foreign Trade Law*, Art. 16 (Exhibit JE-72).
[89] Working Party Report, para. 165.

fluorspar, manganese, silicon carbide, and zinc at issue in this dispute.[90] Although China notified these export licensing requirements to the WTO pursuant to its commitment under paragraph 165 of the Working Party Report and indicated general justifications for each, it has not asserted any justification for subjecting these products to export licensing requirements in this dispute. Instead, China argues that its export licensing requirement is not a breach of Article XI:1 of the GATT 1994 because: (1) the export licensing is "automatic"; (2) even if it is non-automatic, non-automatic licensing is not prohibited under the Import Licensing Agreement; and (3) the export licensing does not limit the quantity of exports.

122. As the United States explained in detail in its Second Written Submission, regardless of what China wishes to call the export licensing requirements at issue (i.e., "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.[91]

123. With respect to China's argument that non-automatic licensing is not prohibited under the Import Licensing Agreement, the United States observes that the Import Licensing Agreement governs import licensing. The measure at issue in this dispute is export licensing. Additionally, the Import Licensing Agreement provides disciplines on import licensing – it does not "permit" import licensing or speak to when import licensing is permitted as a result of a different covered agreement. In contrast, here, China has an obligation under Article XI:1 of the GATT 1994 and an

[90] *See* products listed by HS and commodity code no. in chart in Exhibit JE-6.
[91] *See* U.S. Second Written Submission, para. 377.

explicit obligation in paragraph 165 of the Working Party Report not to impose non-automatic export licensing unless justified by the GATT 1994.

124. Finally, the Article XI:1 prohibition on import and export restrictions extends to more than just limits on the quantity of imports and exports. The language of Article XI:1 is broad:

> No prohibitions or restrictions, other than duties, taxes, or other charges, whether made effetive through quotas, import or export licenses or other measures, shall be instiuted or maintained by any contracting party on the . . . exportation or sale for export of any product destined for the territory of any other contracting party.

Article XI:1 does not limit its applicability to "quantitative limitations" on exportation. Furthermore, the list of restrictions that are excluded from the scope of Article XI:1's discipline demonstrates that Article XI:1 applies to restrictions that are broader than "quantitative" restrictions. Duties, taxes, or other charges restrict exports in ways other than limiting the quantity of exports that can be made. The fact that Article XI:1 qualifies its ban on restrictions by explicitly excluding from its scope these types of restrictions demonstrates that the restrictions subject to discipline by Article XI:1 include other such types of restrictions imposed on exportation. 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. As the Appellate Body has pointed out, the GATT 1947 panel in *Canada – Provincial Liquor Boards* found that restrictions on points of sale constituted a restriction on importation in breach of Article XI:1 and the panel in *Colombia – Ports of Entry* found that a restriction on the ports through which relevant goods could enter Colombia was a restriction prohibited by Article XI:1.[92]

[92] *China – Audiovisual Products (AB)*, fn. 432.

VIII. The Minimum Export Price Requirement Is Inconsistent with Article XI:1 of the GATT 1994

125. China does not attempt to justify its minimum export price system. Instead, China argues simultaneously that it may have once imposed a minimum export price system but no longer does so; that evidence adduced in this proceeding is not sufficient to establish the existence of a minimum export price system; that measures relating to the minimum export price system it may or may not have imposed have been recently repealed or have had their repeal retrospectively confirmed through recently issued measures; that, repeating the argument deployed in the context of export licensing, a minimum export price system does not constitute a breach of Article XI:1 of the GATT 1994 because Article XI:1 prohibits only a "quantitative limitation on exportation;"[93] and that no single MEP-related measure within the Panel's terms of reference imposes a minimum export price requirement. The United States has set forth rebuttals to these arguments already but will briefly address these last two arguments.

126. As already explained in response to China's export licensing argument, Article XI:1 prohibits more than limits on the quantity of exports. Furthermore, as noted in both the U.S. First and Second Written Submissions, minimum import and minimum export price systems have been explicitly recognized as inconsistent with Article XI:1.[94]

127. 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

[93] *See* China's Second Written Submission, para. 566.
[94] *See* U.S. First Written Submission, para. 363.

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.

IX. Conclusion

128. 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.[95]

129. Mr. Chairman and members of the Panel, this concludes the oral statement of the United States. We thank you for your attention and would be pleased to respond to any questions you may have.

[95] Exhibit US-1: Revised Chart B in Response to Question 2 from the Panel.