

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

(DS394, DS395, DS398)

**EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION
OF THE UNITED STATES OF AMERICA**

October 15, 2010

I. INTRODUCTION

1. At the heart of the dispute are the export duties and export quotas that China maintains on these products. China fails to rebut the complainants' claims that the export restraints are inconsistent with China's commitments in its Protocol of Accession to the WTO, which incorporates commitments made by China in the Report of the Working Party on China's Accession to the WTO, and its obligations under the GATT 1994. In fact, China largely concedes the inconsistency of the export restraints with the relevant obligations.

2. China invokes Article XX(b) in an attempt to portray certain of the discriminatory export restraints as necessary for protection of health. But, a review of the facts confirms that China's defense does not withstand scrutiny. Similarly, China's invocation of the exception related to conservation in Article XX(g) to justify certain of the export restraints also fails. Finally, China has also failed to demonstrate that one of its export quotas for which it invokes Article XI:2(a) is justified pursuant to that provision. China's statements in the course of this dispute have confirmed that the export restraints have the objective of ensuring China's continued economic growth. As China states: "The imposition of export restrictions will allow China to develop its economy in the future . . ." This, and other statements that we will discuss, belie China's arguments in support of its defenses.

3. Finally, China administers its export restraints in a WTO-inconsistent manner through the use of export licensing, restrictions on the right to export, and minimum export pricing. China has also failed to rebut these claims.

II. CHINA'S EXPORT DUTIES ARE INCONSISTENT WITH CHINA'S OBLIGATIONS UNDER PARAGRAPH 11.3 OF THE ACCESSION PROTOCOL

4. The export duties China imposes on bauxite, coke, fluorspar, magnesium, manganese, silicon metal, yellow phosphorus and zinc are inconsistent with China's obligations under paragraph 11.3 of the Accession Protocol. China does not attempt to defend the duties that it imposes on bauxite, silicon metal, and one form of manganese (ores and concentrates) or the special export duties it imposes on yellow phosphorus. Instead, China attempts only to justify the export duties it imposes on coke and fluorspar (which it imposes in combination with export quotas), magnesium scrap, manganese scrap, and zinc scrap, and magnesium metal, and manganese metal, under exceptions provided in Article XX of the GATT 1994.

5. For the reasons set forth in the complainants' first oral statement, the exceptions in Article XX are not available as a defense to a breach of the export duty commitments in paragraph 11.3 of the Accession Protocol. Therefore, China's reliance on the exceptions contained in Article XX of the GATT 1994 to justify its export duties on coke, fluorspar, magnesium and manganese metal, and magnesium, manganese, and zinc scrap is unavailing. An analysis of the text of paragraph 11.3, the Appellate Body's reasoning in *China – Audiovisual Products*, and the relevant context of China's export duty commitment all support the conclusion that Article XX is not applicable to paragraph 11.3 of the Accession Protocol.

6. Even aside from the fact that Article XX of the GATT 1994 is not available as a justification for breaches of the commitment in paragraph 11.3 of the Accession Protocol, China would not meet the conditions required by Article XX(g) and Article XX(b).

7. In order to justify these inconsistent export restraints, it is China's burden to demonstrate that each measure at issue satisfies the specific conditions set out in sub-paragraph (g) or sub-paragraph (b) of Article XX, and that each measure also satisfies the requirements of Article XX's chapeau.

8. China's export duties on scrap products are not justified under Article XX(b) of the GATT 1994. First, China has presented no evidence that the export duties on scrap products have made any contribution, let alone a material contribution, to increased levels of secondary production. China relies instead on projections of supposed increases in secondary production in the future. Second, Dr. Olarreaga's economic analysis setting forth such projections is fundamentally flawed and therefore unreliable. Third, even if Dr. Olarreaga's analysis were taken on its own terms, the increases in secondary production that would supposedly result from the export duties are modest and belie China's contention that the measures can make a "material contribution" to the stated environmental objective. Fourth, many of China's arguments are premised on factual inaccuracies regarding the products themselves. Fifth, China's assertion of supposed supply constraints – to the extent they are relevant to an analysis under Article XX(b) – fail to support China's defense. Sixth, primary production of magnesium metal, manganese metal, and zinc continue to expand in China further undercutting China's assertion that it seeks to shift to increased secondary production. Seventh, there are a number of WTO-consistent reasonably available alternatives that China could employ to more directly address China's stated environmental objectives.

9. China's export duties on magnesium metal, manganese metal, and coke are also not justified under Article XX(b). First, China has presented no evidence that the export duties on magnesium metal, manganese metal, or coke have made any contribution, let alone a material contribution, to decreased levels of production of those products. China relies instead on projections of supposed increases in secondary production in the future. Second, primary production of the metals has in fact increased, and these products continue to be exported at significant levels in the form of downstream, higher-value added products. Third, Dr. Olarreaga's economic analysis setting forth such projections is fundamentally flawed and therefore unreliable. Fourth, there are a number of WTO-consistent reasonably available alternatives that China could employ to more directly address China's stated environmental objectives. Thus, China's defense under Article XX(b) relating to magnesium metal, manganese metal, and coke should not be sustained.

10. In examining whether China's export duty on fluor spar relates to conservation of fluor spar, the operative question is whether there is a close and genuine relationship of ends and means between the goal of fluor spar conservation and the means presented by the export duty. The answer to this question is no.

11. China also fails to demonstrate that its export duty on fluorspar is “made effective in conjunction with restrictions on domestic production or consumption.” China asserts that it has a “conservation policy” consisting of a number of measures “to manage the supply, production, and use of fluorspar.” As discussed below, these measures do not constitute “restrictions on domestic production or consumption.” The export duty on fluorspar therefore is not “made effective in conjunction with” such restrictions. Even if China had demonstrated the existence of restrictions on domestic production or consumption, China would still not have demonstrated the requisite even-handedness to justify its export duty on fluorspar under Article XX(g).

12. The United States sets forth its arguments regarding the measures within the Panel’s terms of reference and the appropriate measures on which the Panel’s findings and recommendations should be made below. Should the Panel, *arguendo*, review the export restraints as applied by China in 2010, and should the Panel consider the measures China implemented over the course of this proceeding’s pendency through the summer of 2010 relevant to that review *arguendo*, the United States addresses the export duty on fluorspar applied in 2010 in light of those measures below. As the United States demonstrates, the measures China has introduced over the course of 2010 do not alter the fact that China’s export duty on fluorspar is not justified under Article XX(g) of the GATT 1994.

13. The burden of establishing conformity with the relevant subparagraph and the chapeau lie with the party invoking the defense. Even if the export duties at issue were consistent with the particular paragraph of Article XX that China invokes, the export duties also fail to satisfy the *chapeau* of Article XX.

14. In China’s first written submission and its oral statement to the Panel at the first meeting, China made no serious attempt to satisfy its burden of establishing that the export duties satisfy the *chapeau*. China has articulated the incorrect legal standard for “arbitrary or unjustifiable discrimination” under the *chapeau*. This renders China’s statement that the export duties at issue do not discriminate between export destinations insufficient to satisfy its burden. China also asserts that the export duties do not constitute a disguised restriction on international trade because they are “not applied in a manner that constitutes a *concealed* or *unannounced* restriction or discrimination in international trade.” China fails to present any evidence or argumentation to substantiate this assertion. This is insufficient to satisfy China’s burden of demonstrating that its measures satisfy the requirements of the *chapeau*.

III. CHINA’S EXPORT QUOTAS ARE INCONSISTENT WITH CHINA’S OBLIGATIONS UNDER ARTICLE XI:1 OF THE GATT 1994 AND PARAGRAPHS 162 AND 165 OF THE WORKING PARTY REPORT

15. As the United States set forth in its first written submission, China subjects the exportation of various forms of bauxite, coke, fluorspar, silicon carbide, and zinc to quotas. China has confirmed that it maintains a prohibition on the exportation of zinc. These export quotas and the export prohibition on zinc are inconsistent with Article XI:1 of the GATT 1994

and paragraphs 162 and 165 of the Working Party Report and paragraph 1.2 of China's Accession Protocol. China has failed to establish that its export quota on one subset of one form of bauxite is justified pursuant to Article XI:2(a) or Article XX(g) of the GATT 1994. China has also failed to establish that its export quotas on coke and silicon carbide are justified pursuant to Article XX(b) of the GATT 1994.

16. China has attempted to justify the export quota on bauxite only as it applies to a particular product that China calls "refractory grade bauxite." The product that China calls "refractory grade bauxite," is actually a subset of "refractory clay" (2508.3000) and not a product considered to be within "aluminum ores and concentrates" (2606.0000). Because of the confusion engendered by the fact that a product that falls within "aluminum ores and concentrates" (2606.0000) with high alumina content is also commonly referred to as "refractory grade bauxite," the United States will, for purposes of clarity and precision, refer to the product for which China asserts its defense, as "high alumina clay."

17. China's selective defense of the export quota imposed on "bauxite" only insofar as the quota applies to "high alumina clay" highlights the fact that China's efforts are focused essentially on defending a non-existent or fictional measure. There is no export quota on high alumina clay. Because China does not defend the export quota on "bauxite" as a whole, China has already effectively conceded the inconsistency of that quota. The export statistics China cites raise the possibility and the serious concern that, through China's allocation of the export quota on "bauxite," China may be effecting an export prohibition on "aluminum ores and concentrates."

18. Even if there were a measure imposing an export quota on "high alumina clay," China's defense under Article XI:2(a) as it relates to high alumina clay is without merit. First, China advocates an exceptionally broad meaning of the term "essential" products in Article XI:2(a) that would permit any industrial input to satisfy the meaning of "essential." This is an incorrect reading of the term "essential." Even if China's reading of "essential" were correct, however, China's argument is based on several factual inaccuracies regarding the role of high alumina clay in steel production. These factual inaccuracies confirm that China's defense is unavailing. Second, China fails to properly analyze the meaning of the term "critical shortage," and instead bases its defense under Article XI:2(a) merely on the limited availability of high alumina clay. By doing so, China reads the term "critical" out of Article XI:2(a) altogether. This approach is inconsistent with the text of Article XI:2(a). Third, the export quota is not "temporarily applied" within the meaning of Article XI:2(a). Finally, contrary to China's arguments, Article XI:2(a) is an affirmative defense, for which China bears the burden of adducing evidence and argumentation to establish the defense. Article XI:2(a) sets out an exception to the obligation in Article XI:1, not a separate obligation.

19. In examining whether China's export quota on bauxite, as applied to high alumina clay, relates to the conservation of high alumina clay, the operative question is whether there is a close and genuine relationship of ends and means between the goal of high alumina clay conservation

and the means presented by that part of the export quota that applies to exports of high alumina clay. As above in the case of fluorspar, the answer to this question is also no.

20. China also fails to demonstrate that its export quota for bauxite, as it applies to high alumina clay, is “made effective in conjunction with restrictions on domestic production or consumption.” China asserts that it has a “conservation policy” consisting of a number of measures “to manage the supply, production, and use of [high alumina clay].” As discussed below, these measures do not constitute “restrictions on domestic production or consumption.” The export quota, which applies to the raw material category “bauxite” including both “refractory clay” (2508.3000/2508.300000) and “aluminum ores and concentrates” (2606.0000/2606000000), is not “made effective in conjunction with” such restrictions on “high alumina clay” and therefore is not imposed “even-handedly” as Article XX(g) requires. Even if China had demonstrated the existence of restrictions on domestic production or consumption, China would still not have demonstrated the requisite even-handedness to justify its export quota, as applied to high alumina clay, under Article XX(g).

21. The United States sets forth its arguments below regarding the measures within the Panel’s terms of reference and the appropriate measures on which the Panel’s findings and recommendations should be made. Should the Panel, *arguendo*, review the export restraints as applied by China in 2010, and should the Panel consider the measures China implemented over the course of this proceeding’s pendency through the summer of 2010 relevant to that review, *arguendo*, the United States addresses the export quota on bauxite, as it is applicable to high alumina clay, applied in 2010 in light of those measures below. As the United States demonstrates, the measures China has introduced over the course of 2010 do not alter the fact that China’s export quota on bauxite, as applied to high alumina clay, is not justified under Article XX(g) of the GATT 1994.

22. China contends that the export quotas on coke and silicon carbide are justified pursuant to Article XX(b) of the GATT 1994. China’s arguments in support of this defense are the same as those advanced in the context of China’s export duties on coke, magnesium metal, and manganese metal. In other words, China argues that the production of coke and silicon carbide result in environmental pollution. The export quotas, according to China, are “necessary” to reduce production of these materials in China, and therefore reduce pollution. China’s defense fails for the same reasons as discussed above in the context of the export duties on magnesium metal, manganese metal, and coke.

23. For the same reasons China fails to demonstrate that the export duties it attempts to justify satisfy the *chapeau* of Article XX, China also fails to demonstrate that the export quotas it attempts to justify satisfy the *chapeau* of Article XX.

IV. TERMS OF REFERENCE ISSUES RELATED TO CHINA’S EXPORT DUTIES AND EXPORT QUOTAS

24. Both with regard to its theory that measures within the Panel’s terms of reference may be disregarded, and in its reliance on the 2010 measures to defend the measures within the Panel’s terms of reference, China’s arguments and assertions are misguided or simply incorrect. China’s claim that the Panel should exercise its “discretion” not to make findings on the measures within its terms of reference is without merit, unsupported by the provisions of the DSU.

25. Contrary to China’s suggestion, the Panel is authorized and charged by the DSU to make findings and recommendations on the measures in its terms of reference – which includes the export quotas and export duties applied through the legal instruments that are listed in the panel request.

26. The legal instruments that took effect on January 1, 2010 (the January 1, 2010 Measures), *i.e.*, after panel establishment, are outside the Panel’s terms of reference. These legal instruments “changed the essence” of the legal instruments that were in effect at the time of panel establishment, and thus are not sufficiently similar to the measures that are within the Panel’s terms of reference to be considered in this dispute. Were the Panel to consider the January 1, 2010 Measures and the 2010 Fluorspar and High Alumina Clay Measures adopted in January, March, April, May, and June of 2010, this would permit China, by changing the parameters of the Panel’s review, to shield aspects of its measures from proper review.

V. CHINA’S ADMINISTRATION AND ALLOCATION OF ITS EXPORT QUOTAS ARE INCONSISTENT WITH CHINA’S OBLIGATIONS UNDER THE ACCESSION PROTOCOL, THE WORKING PARTY REPORT, AND THE GATT 1994

27. As the United States explained in its First Written Submission, China’s administration and allocation of its export quotas are inconsistent with China’s obligations under the Accession Protocol, the Working Party Report, and the GATT 1994. China has failed to rebut the U.S. showing that China’s measures restricting access to the export quotas, China’s administration of its export quotas in a partial and unreasonable manner, and China’s total award price under the export quota bidding regime are inconsistent with China’s WTO obligations

VI. EXPORT LICENSING

28. The United States demonstrated in its First Written Submission that China subjects the exportation of bauxite, coke, fluorspar, manganese, silicon carbide, and zinc to export licensing that is non-automatic, in breach of the requirements of Article XI:1 of the GATT 1994. China itself considers its export licensing for products designated for restricted exportation pursuant to Article 19 of the *Foreign Trade Law* to be a restriction on exportation inconsistent with Article XI:1 of the GATT 1994. China has proffered no arguments or facts to justify its export licensing system. Accordingly, China has not demonstrated that its export licensing on the products at

issue can be justified under the GATT 1994.

VII. MINIMUM EXPORT PRICE

29. The United States has demonstrated that China imposes a minimum export price requirement for bauxite, coke, fluorspar, magnesium, silicon carbide, yellow phosphorus and zinc that restricts the exportation of these products in contravention of Article XI:1 of the GATT 1994. China has failed to rebut that showing. In its First Written Submission, the United States demonstrated that China failed to publish important measures and provisions relating to its minimum export price requirement. China's only response is that these measures are no longer in effect. However, a measure no longer being in effect is not a defense for the failure to publish under GATT Article X:1.

30. In its First Written Submission, the United States also demonstrated that China's administration of the minimum export price system through the involvement of the CCCMC in the Price Verification and Chop (PVC) Procedure was partial and unreasonable in breach of China's obligations under Article X:3(a) of the GATT 1994. China has failed to rebut that showing.

31. On October 1, 2010, the Panel issued the "Second Phase of the Preliminary Ruling" (Second Preliminary Ruling). The Second Preliminary Ruling included findings on issues not subject to any request for a preliminary ruling. In particular, the Panel made findings on arguments of China in its First Written Submission that certain minimum export price (MEP) measures addressed by the United States should be outside the Panel's terms of reference under Article 6.2 of the DSU. Because these findings in the Second Preliminary Ruling were not made in response to a preliminary ruling request, they cannot be part of a preliminary ruling, and instead, pursuant to the DSU and Working Procedures, must be considered as findings that the Panel will reexamine *de novo* after considering all of the evidence and arguments submitted in the dispute. Accordingly, the United States sets forth a written response to China's arguments in its First Written Submission. The United States respectfully requests that the Panel consider these responses before making findings with regard to China's MEP terms-of-reference arguments.

32. There are three additional measures that China fails to identify that are within the Panel's terms of reference by virtue of being included in both the consultations and panel requests: *Measures for the Administration of Trade Social Organizations; Regulations for Personnel Management of Chambers of Commerce; and CCCMC Charter*. In addition, four measures are in the Panel's terms of reference even though they were not identified in both the U.S. consultations request and the U.S. panel request: *CCCMC Export Coordination Measures; Bauxite Branch Coordination Measures; Bauxite Branch Charter; and the "System of self-discipline."* These measures are within the Panel's terms of reference because they implement the coordination mandate of the *1994 CCCMC Charter* and the *2001 CCCMC Charter* in the manner described by the Appellate Body in *Japan – Film*. Three measures that were specifically

identified in the panel request but not listed in the consultations request are nevertheless included within the Panel’s terms of reference: *Notice of the Rules on Price Reviews of Export Products by the Customs*; *CCCMC PVC Rules*; *Online PVC Instructions*. These measures are all part of the same PVC procedure of which the *2002 PVC Notice* and the *2004 PVC Notice*, which were consulted on, form a part. The inclusion of these three measures in the panel request did not, “expand the scope of the dispute” as the Appellate Body described in *US – Continued Zeroing*. These measures are therefore also properly within the panel’s terms of reference.

33. China also asked the Panel to refrain from making findings on measures because those measures have “expired” and findings would “serve no purpose.” China also asserted that the Panel has no authority to make recommendations on these measures. The Panel has the authority and obligation to make findings and recommendations on certain measures which, contrary to China’s arguments and assertions, continue to be in effect. The Panel has the authority and obligation to make findings and recommendations on the other measures in order to secure a positive solution to this dispute.

VIII. CONCLUSION

34. For the reasons set forth in this submission, the United States respectfully requests the Panel to find that China’s measures, as set out above, are inconsistent with China’s obligations under the GATT 1994 and the Accession Protocol. The United States further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that China bring its measures into conformity with the GATT 1994 and the Accession Protocol.