CHINA – MEASURES RELATED TO THE EXPORTATION OF VARIOUS RAW MATERIALS

(AB-2011-5 / DS394, DS395, DS398)

EXECUTIVE SUMMARY OF
JOINT APPELLEE SUBMISSION OF
THE UNITED STATES OF AMERICA AND MEXICO

September 22, 2011

Service List

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I. Introduction

1. The heart of this dispute is China's maintenance of WTO-inconsistent restraints on exports of various raw materials that are critical inputs for the manufacture of steel, aluminum and a variety of chemicals. These WTO-inconsistent export restraints are part of the policies adopted by China in order to propel its economic and industrial development and create an advantage for Chinese downstream producers, to the disadvantage of their competitors throughout the world. The restraints at issue take the form of export duties, export quotas, and various additional restraints, including prior export performance, minimum registered capital, and minimum export performance requirements.

2. In these proceedings, the Appellate Body will decide whether China is able to exempt itself from applicable WTO rules in order to follow its economic and industrial advancement policies, or whether China's policies must confirm with WTO rules. As discussed in detail in this Appellee Submission, all of the Panel findings challenged by China – which confirm that China must comply with its WTO obligations – should be upheld.

II. The Panel Correctly Found That Section III of the Panel Requests Complies With Article 6.2 of the DSU

3. In its appeal, China first challenges the Panel's finding that Section III of the Complainants' panel requests satisfies the requirements of Article 6.2 of the DSU. China further requests that the Appellate Body reverse all of the Panel's findings of inconsistency pursuant to the claims identified in Section III, that is, the findings that China's imposition of prior export performance requirements, minimum registered capital requirements, export licensing requirements, and minimum export price requirements.

4. In particular, China argues that the Panel erred in concluding that the panel requests comply with Article 6.2 because, according to China, in so doing the Panel impermissibly

allowed later submissions to cure defects in a panel request. China also argues that the Panel erred by frustrating China's due process rights under the DSU. China continues to insist on appeal that Section III of the panel requests failed to "plainly connect" the challenged measures with the listed legal obligations. As discussed in detail in our submission, these arguments should be rejected.

5. As a factual matter, China's apparent belief that the Panel considered the panel requests defective and allowed subsequent submissions to cure the defects – which forms the basis of its appeal – is incorrect. Furthermore, the Panel's finding that the panel requests complied with Article 6.2 of the DSU is supported by and consistent with both the text of Article 6.2 and the interpretations of the Appellate Body and panels in multiple past disputes.

III. The Panel Correctly Made Recommendations on the Series of Measures Through Which China Imposes Its Export Quotas and Export Duties

6. In section III of its appeal, China appeals the Panel's "recommendation in paragraphs 8.8; 8.15 and 8.22 of the Panel Report that China must bring its export duty and export quota measures into conformity with its WTO obligations to the extent that its recommendations apply to annual replacement measures." Complainants ask the Appellate Body to reject China's arguments.

7. During the panel proceeding, China changed the export restraints it applies to bauxite and fluorspar and introduced a number of new measures that it attempted to proffer as evidence in support of its defense of those export restraints. Complainants note that the DSU provides for findings and recommendations on the basis of the matter referred to the Panel by the DSB – measures in effect at least on the date of panel establishment. Accordingly, Complainants have

maintained that the Panel makes findings and recommendations on the measures identified in the Panel Requests as they were in force on the date of panel establishment. The Panel made findings and recommendations based on the series of measures resulting in the imposition of China's export quotas and export duties as of the date of panel establishment.

8. Complainants note that China's appeal is narrow in scope – China only appeals the Panel's recommendation to the extent that it applies to "future annual replacement measures," which China argues are outside of the Panel's terms of reference.

9. China has not understood the Panel's recommendations correctly; they are made on the measures imposing China's export quotas and export duties as of the date of panel establishment. Those measures are within the Panel's terms of reference. Accordingly, China's appeal must fail. Furthermore, China is confused and has not understood that the Panel's recommendations extend to and have consequences fo future annual measures. Finally, contrary to China's assertion, Complainants did not "abandon" their right to obtain meaningful recommendations from this dispute settlement proceeding.

IV. The Panel Correctly Found That Article XX Is Not Available To Justify Violations of the Export Duty Commitments in Paragraph 11.3 of China's Accession Protocol

10. In Section IV of its appeal China challenges the Panel's finding that Article XX is not available to justify violations of the export duty commitments in Paragraph 11.3 of China's Accession Protocol. Paragraph 11.3 of the Accession Protocol provides, "China shall eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 or applied in conformity with the provisions of Article VIII of the GATT 1994." China did not dispute that the export duties at issue in this dispute are inconsistent with Paragraph 11.3. Instead China

attempted to invoke Article XX to defend some, although not all, of the duties at issue.

11. China faults the Panel's finding that Article XX is not applicable to violations of Paragraph 11.3 because, according to China: two specific exceptions incorporated into Paragraph 11.3 – which itself does not refer to Article XX, the GATT 1994, or the WTO Agreement more generally – incorporate Article XX; provisions other than Paragraph 11.3 (namely, Paragraph 170 of the Working Party Report) incorporate Article XX into Paragraph 11.3; and Article XX reflects an "inherent right to regulate" that supersedes China's Paragraph 11.3 commitments and therefore justifies China's reliance on Article XX's exceptions.

12. As described in detail in Section IV of the Appellee Submission, none of these grounds of appeal changes the fact that there is no textual basis for concluding that Article XX is applicable to violations of the specific export duty commitments in Paragraph 11.3 of the Accession Protocol. The Panel correctly interpreted Paragraph 11.3, in a manner consistent with customary principles of treaty interpretation. Its interpretation is based on the text of Paragraph 11.3, which expressly sets forth the exceptions that apply to the export duty commitment therein, as well as Article XX of the GATT 1994. In particular, Paragraph 11.3 includes a specific commitment to eliminate export duties, and two specific exceptions applicable to that commitment. It includes no language incorporating Article XX, the *chapeau* of which refers to "this Agreement," that is, the GATT 1994.

13. The Panel's conclusion is also consistent with the Appellate Body's interpretation of Paragraph 5.1 of the Accession Protocol in *China – Audiovisual Products*. In that dispute, the Appellate Body concluded that Article XX is available for breaches of China's commitments in Paragraph 5.1. The Appellate Body's conclusion was grounded in the introductory clause of

Paragraph 5.1, which provides, "Without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement . . . ." The language in Paragraph 11.3 stands in stark contrast to the language of Paragraph 5.1.

14. The Panel's interpretation is further supported by relevant context, including Paragraphs 155 and 156 of the Working Party Report. In Paragraphs 155 and 156 WTO Members voiced specific concerns about the export duties China imposed. Paragraphs 155 and 156 include the same content as Paragraph 11.3. They confirm that WTO Members did not intend for the Article XX exceptions to apply to violations of China's commitment to eliminate export duties.

15. The Panel's analysis of other provisions, such as Paragraphs 11.1 and 11.2 of the Accession Protocol, and provisions that do specifically incorporate Article XX by reference, further indicates that Members did not intend for Article XX to apply to China's export duty commitments. Such provisions suggest that, where Members intended for Article XX to apply outside of the GATT 1994, they included specific language to that effect.

16. The Panel's analysis also properly takes into account Paragraph 170 of the Working Party Report. China argues that, pursuant to the "in full conformity with its WTO obligations" in Paragraph 170, the Article XX exceptions apply to violations of its export duty commitments in Paragraph 11.3. However, the Panel properly distinguished between Paragraph 170, which affirms China's WTO obligations, and Paragraph 11.3, which sets forth the relevant commitment with respect to export duties and the applicable exceptions. Paragraph 170 does not change the fact that there is no textual basis for concluding that the Article XX exceptions apply to violations of Paragraph 11.3.

17. As there is no textual basis for China's claim that Article XX applies to Paragraph 11.3, it

is not surprising that China argues on appeal, as it did before the Panel, that no such language is necessary. Instead, citing the Preamble to the WTO Agreement in support, China asserts that an "inherent right to regulate" applies throughout the covered agreements. China argues that, by "presuming" that China had abandoned its right to regulate, the Panel failed to regulate China's inherent powers and distorted the rights and obligations of China's Accession Protocol.

18. In its report, the Panel recognized that WTO Members have a sovereign right to regulate trade. The Panel's conclusion that the Article XX exceptions are not available for breaches of the export duty commitments in Paragraph 11.3 in no way impugns that right. Rather, the Panel's conclusion is consistent not only with the relevant text and context, but also with the fact that, in entering the WTO Agreement, Members have agreed to discipline their right to regulate trade, subject to certain specific exceptions. China overlooks the fact that the commitment to eliminate export duties, subject to the specific exceptions in Paragraph 11.3, establishes such a discipline.

19. The Panel's conclusion does not jeopardize the ability of any WTO Member to promote non-trade interests, such as health or conservation interests. WTO Members, including China, may of course pursue such interests and have a range of policy tools available to do so. However, the existence of a right to regulate for health or conservation purposes does not determine whether a particular measure is consistent with a Member's WTO obligations or whether an otherwise inconsistent measure is justified by an applicable exception. Article XX is not an applicable exception for violations of the export duty obligations in Paragraph 11.3 of China's Accession Protocol.

20. Accordingly, as discussed in more detail in Section IV of the Joint U.S. and Mexican

Appellee Submission, the United States and Mexico request that the Appellate Body reject China's request to reverse the Panel's finding that Article XX does not apply to violations of China's export duty commitments in Paragraph 11.3 of the Accession Protocol. The Panel's findings on this issue are firmly grounded in the text of China's WTO commitments and respect the ability of WTO Members to regulate to promote legitimate non-trade objectives.

V. The Panel Correctly Found That China's Export Quota on High Alumina Clay ("Refractory-Grade Bauxite") Is Not Justified Under Article XI:2(a)

21. Among the export restrictions challenged by the Complainants as a violation of GATT Article XI was China's export quota on bauxite. China attempted to justify the quota with respect to a subset of bauxite, which the United States and Mexico refer to as "high alumina clay" but which China refers to as "refractory-grade bauxite," under Article XI:2(a). In Section V of its appeal China challenges the Panel's conclusion that China's export quota on high alumina clay is not "temporarily applied" to prevent or relieve a "critical shortage" and therefore is not justified under Article XI:2(a).

22. Contrary to China's arguments on appeal, the Panel correctly interpreted the terms "temporarily applied" and "critical shortage." In fact, China concedes that the Panel properly concluded that a "critical shortage" means a "deficiency in quantity . . . that must be of 'decisive importance' or 'grave,'" and that an export restriction under Article XI:2(a) must be applied only for a limited period of time. China asserts that the Panel erred in finding that "long-term" restrictions, and restrictions on exhaustible natural resources, may not be justified under Article XI:2(a).

23. However, the Panel did not categorically exclude either "long-term" measures or

measures with respect to exhaustible natural resources from the scope of Article XI:2(a). Rather, the Panel properly interpreted Article XI:2(a) as "justify[ing] measures that are applied for a limited timeframe to address 'critical shortages' of 'foodstuffs or other products essential to the exporting contracting party.'"

24. In conducting its analysis, the Panel was appropriately sensitive to the contextual relationship between the terms "temporarily applied" and "critical shortage." In particular, the Panel reasoned that a measure imposed to address the finite reserves of a natural resource, such as China's export quota on high alumina clay, would be imposed until the resource was depleted. Because the available reserves would, at any given point, be finite, and be continually depleted, the restriction could be imposed permanently. As such, the duration of such a measure is not linked to the time period needed to prevent or relieve a "critical shortage."

25. Moreover, a shortage attributable to the limited reserves of a natural resource does not rise to the level of a "critical" shortage, that is, one rising to the level of a crisis. Such an interpretation would read the word "critical" out of the provision; indeed, the drafters of Article XI:2(a) cautioned against such an interpretation. This does not mean that an export restriction on an exhaustible natural resource may never be justified under Article XI:2(a). However, such a restriction must meet the qualifications of Article XI:2(a), including that the restriction be "temporarily applied" to prevent or relieve a "critical shortage."

26. As discussed in detail below, the Panel correctly concluded that China's export restriction on high alumina clay did not meet either of these criteria. In so doing, the Panel did not, as China suggests, neglect its responsibility to conduct an objective assessment of the matter under Article 11 of the DSU. China faults the Panel's supposed failure to consider properly

evidence related to China's annual review of the export quota, and for "assuming" that China's export quota would remain in place until reserves are depleted, notwithstanding potential technological developments.

27. Contrary to China's claims, the Panel thoroughly considered China's evidence and arguments regarding the annual review of the export quota on high alumina clay, and the record supports the Panel's finding that, notwithstanding this review, the quota is not "temporarily applied." In particular, the Panel's finding is based on evidence that China has imposed an export quota on bauxite since 2000, as well as China's claims that it had a 16-year reserve of refractory-grade bauxite, which it asserted demonstrated a critical shortage. In other words, as the Panel correctly found, notwithstanding the review or any subsequent technological developments, the record showed "no indication of when it [the quota] will be withdrawn and every indication that it will remain in place until the reserves have been depleted."

28. Accordingly, as discussed in detail in Section V of the Joint U.S. and Mexican Appellee Submission, the Panel's conclusion that China's export quota on high alumina clay is not justified under Article XI:2(a) reflects correct legal interpretations as well as the factual evidence, and in reaching that conclusion the Panel satisfied its obligation to conduct an objective assessment of the matter under Article 11 of the DSU. The United States and Mexico request that China's appeal of the Panel's findings in paragraphs 7.257-7.258, 7.297-7.302, 7.305, 7.306, 7.349, 7.351, 7.354, and 7.355 of the Panel Report be rejected.

VI. The Panel Was Correct in Its Interpretation of the Phrase "Made Effective in Conjunction with" in Article XX(g) of the GATT 1994

29. In Section VI of its Appellant Submission, China appeals the Panel's interpretation of the

phrase "made in conjunction with" in Article XX(g) of the GATT 1994, namely that, "restrictions on domestic production or consumption must not only be applied jointly with the challenged export restrictions but, in addition, the purpose of those export restrictions must be to ensure the effectiveness of those export restrictions." Before the Panel, China attempted to justify certain of its export restrictions, namely its export quota on high alumina clay and its export duty on fluorspar, as conservation measures excepted under Article XX(g). According to China, "made effective in conjunction with" means that a challenged measure need only "be applied jointly with" the restrictions on domestic production or consumption required under Article XX(g).

30. Contrary to China's assertions, the Panel's interpretation of the meaning of "in conjunction with" for purposes of Article XX(g) is correct. The Panel's interpretation is made in accordance with the ordinary meaning of the terms of Article XX(g) in their context and in light of the object and purpose of the GATT 1994. The Panel's interpretation is further consistent with and supported by the interpretation of this phrase made by the Appellate Body and WTO and GATT panels, in particular in the *U.S. – Gasoline*, *U.S. – Shrimp*, and *Canada – Herring and Salmon (GATT)* disputes. Furthermore, contrary to China's assertions, the Panel did not interpret "made effective in conjunction with" in Article XX(g) so as to require that challenged measures have "dual" purposes..

31. As discussed in detail in Section VI of the Joint U.S. and Mexican Appellee Submission, the Complainants request that the Appellate Body reject China's arguments and uphold the Panel's interpretation of "made effective in conjunction with" in Article XX(g) to require that the purpose of the challenged export restriction be to ensure the effectiveness of the domestic

restrictions with which they are applied jointly, as set forth in paragraph 7.397 of the Panel Report.

VII. The Panel Correctly Found That China's Prior Export Performance and Minimum Registered Capital Requirements Are Inconsistent With Paragraphs 1.2 and 5.1 of the Accession Protocol and Paragraphs 83 and 84 of the Working Party Report

32. In Section VII of its appeal China appeals the Panel's interpretation and application of China's trading rights commitments in Paragraphs 1.2 and 5.1 of the Accession Protocol, read in combination with Paragraphs 83(a), 83(b), 83(d), 84(a), and 84(b) of the Working Party Report. Although China casts the central issue in its appeal as whether China is entitled to maintain allocation rules for a WTO-consistent quota, none of the export quotas at issue in this dispute are WTO-consistent. The issue before the Panel, and now on appeal, is whether China's imposition of prior export performance and minimum registered capital requirements is consistent with China's trading rights commitments.

33. Paragraphs 1.2 and 5.1 of the Accession Protocol, and Paragraphs 83 and 84 of the Working Party Report, provide that China would grant trading rights to all enterprises in China by December 11, 2004, and that, in so doing, China would eliminate prior export performance and minimum registered capital requirements. China does not dispute either that it imposes prior export performance and minimum registered capital requirements on certain of the raw materials at issue or that, at least "in the ordinary course," it must eliminate such requirements. However, on appeal, China claims that its trading rights obligations in Paragraphs 83 and 84 are qualified, in particular by the introductory clause of Paragraph 5.1, such that it is entitled to maintain export quotas and to impose prior export performance and minimum registered capital requirements on companies seeking to export under those quotas. China faults the Panel for

finding to the contrary, and for rejecting China's argument that, so long as China's method for allocating a quota complies with other WTO provisions (namely, GATT Articles X, XI, and XIII), that method is permissible.

34. China's appeal ignores the fact that Paragraphs 83 and 84 include specific commitments – to eliminate its examination and approval process, including the prior export performance and minimum registered capital requirements. The Panel's findings that China's imposition of such requirements is inconsistent with China's trading rights obligations are based on the explicit text of those provisions.

35. The Panel's findings in this regard do not create any inconsistency with Paragraph 5.1, as China alleges. China's argument that the language in Paragraph 5.1 qualifies its obligations to eliminate the prior export performance and minimum registered capital requirements is entirely circular. The introductory language to Paragraph 5.1 confirms that China's trading rights commitments do not prejudice China's ability to regulate trade in a manner consistent with the WTO Agreement. However, the prior export performance and minimum capital requirements at issue in this dispute are not "consistent with the WTO Agreement." They violate the trading rights commitments in the Accession Protocol and the Working Party Report. In effect, then, China argues that, pursuant to Paragraph 5.1, its commitment to eliminate the prior export performance and minimum capital requirements is without prejudice to impose such requirements. This argument is untenable. And, in light of the fact that China's requirements are inconsistent with China's trading rights commitments, contrary to China's suggestion, the Panel did not need to find – and Complainants did not need to allege – that those requirements were inconsistent with some other provision, such as GATT Articles X, XI, or XIII.

36. China also challenges the Panel's interpretation of Paragraph 83(b) of the Accession Protocol in its conclusion that "Paragraph 83(b) directs China to eliminate any 'examination and approval system' within three years of accession, including specifically the elimination of minimum registered capital requirements." According to China, Paragraph 83(b) applies only to the examination and approval system for wholly Chinese-invested enterprises.

37. The suggestion that China is permitted to maintain a minimum capital requirement for foreign-invested, as opposed to wholly Chinese-invested, enterprises is in no way supported by the text of China's trading rights commitments. Indeed, Paragraphs 83 and 84 provide exactly the opposite.

38. As such, as discussed in detail in Section VII of the Joint U.S. and Mexican Appellee Submission, the United States and Mexico request that the Appellate Body reject China's request to reverse the Panel's findings in paragraphs 7.655, 7.665, 7.669, 7.670, 7.678, 8.4(a)-(b), 8.11(a), 8.11(c), and 8.18(a)-(b). The Panel's findings that China's imposition of prior export performance and minimum capital requirements are inconsistent with its trading rights commitments should be upheld.

VIII. The Panel Correctly Found that China's Export Licensing Requirements Are Inconsistent with Article XI:1 of the GATT 1994

39. In Section VIII of its Appellant Submission, China appeals the Panel's finding that China's export licensing requirements are imposed in breach of China's obligations under Article XI:1 of the GATT 1994.

40. On appeal, China argues that the Panel erred in its interpretation of "restriction" under Article XI:1 of the GATT 1994; in its application of that interpretation to China's export

licensing measures; and in its assessment of the matter under DSU Article 11 for lack of a sufficient evidentiary basis for its finding. China maintains that China's licensing authorities are not mandated to require the submission of any undefined or unspecified documents from export license applicants. China claims further that, without specific evidence of individual instances of denials of export licenses, China's export licensing system cannot be considered to "restrict" exports within the meaning of Article XI:1.

41. Contrary to China's claims, the Panel's interpretation of Article XI:1 is consistent with the ordinary meaning of "restriction" in its context and supported by the interpretations undertaken in other disputes. Furthermore, the Panel correctly applied the interpretation of Article XI:1 to the licensing measures at issue in this dispute and made an objective assessment of the matter before consistently with Article 11 of the DSU