

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

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

**JOINT APPELLEE SUBMISSION OF  
THE UNITED STATES OF AMERICA AND MEXICO**

**September 22, 2011**

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<b>Short Form</b>	<b>Full Citation</b>
<i>Argentina – Footwear (AB)</i>	Appellate Body Report, <i>Argentina – Measures Affecting Imports of Footwear, Textiles Apparel and Other Items</i> , WT/DS56/AB/R, adopted 22 April 1998
<i>Australia – Apples</i>	Panel Report, <i>Australia – Measures Affecting the Importation of Apples from New Zealand</i> , WT/DS367/R, adopted 17 December 2010 as modified by the Appellate Body Report, WT/DS367/AB/R
<i>Brazil – Tyres (AB)</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007
<i>Canada – Herring and Salmon</i>	GATT Panel Report, <i>Canada – Measures Affecting Exports of Unprocessed Herring and Salmon</i> , L/6268, adopted 22 March 1988, BISD 35S/98
<i>Chile – Price Band System (AB)</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/AB/R, adopted 23 October 2002
<i>China – Audiovisual Products</i>	Panel Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/R, adopted 19 January 2010 as modified by the Appellate Body Report, WT/DS363/AB/R
<i>China – Audiovisual Products (AB)</i>	Appellate Body Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/AB/R, adopted 19 January 2010
<i>Colombia – Ports of Entry</i>	Panel Report, <i>Colombia – Indicative Prices and Restrictions on Ports of Entry</i> , WT/DS366/R, adopted 20 May 2009
<i>EEC – Bananas</i>	GATT Panel Report, <i>EEC – Member States’ Import Regimes for Bananas</i> , DS32/R, 3 June 1993, unadopted
<i>EC – Asbestos (AB)</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Products Containing Asbestos</i> , WT/DS135/AB/R, adopted 5 April 2001
<i>EC – Bananas 21.5 (AB)</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/RW, adopted 11 December 2008

<i>EC – Bananas III (AB)</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997
<i>EC – Biotech</i>	Panel Report, <i>European Communities – Measures Affecting the Approval and Marketing of Biotech Products</i> , WT/DS291/R, WT/DS292/R, WT/DS293/R, adopted 21 November 2006
<i>EC – Customs Matters (AB)</i>	Appellate Body Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/AB/R, adopted 11 December 2006
<i>EC – Fasteners (AB)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/AB/R, adopted 28 July 2011
<i>India – Patents (AB)</i>	Appellate Body Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , WT/DS50/AB/R, adopted 28 April 1999
<i>India – Quantitative Restrictions</i>	Panel Report, <i>India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products</i> , WT/DS90/R, adopted 22 September 1999, as modified by the Appellate Body Report, WT/DS90/AB/R
<i>Japan – Alcohol (AB)</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996
<i>Korea – Bovine Meat</i>	Preliminary Ruling of the Panel, <i>Korea – Measures Affecting the Importation of Bovine Meat and Meat Products from Canada</i> , WT/DS391
<i>Korea – Dairy (AB)</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000
<i>Thailand – H-Beams (AB)</i>	Appellate Body Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H Beams from Poland</i> , WT/DS122/AB/R, adopted 5 April 2001
<i>Turkey – Textiles (AB)</i>	Appellate Body Report, <i>Turkey – Restrictions on Imports of Textile and Clothing Products</i> , WT/DS34/AB/R, adopted 19 November 1999
<i>US – Carbon Steel (AB)</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R, adopted 19 December 2002

<i>US – Certain EC Products (AB)</i>	Appellate Body Report, <i>United States – Import Measures on Certain Products from the European Communities</i> , WT/DS165/AB/R, adopted 10 January 2001
<i>US – Gasoline (AB)</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996
<i>US – Line Pipe (AB)</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea</i> , WT/DS202/AB/R, adopted 8 March 2002
<i>US – OCTG Sunset Reviews (AB)</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004
<i>US – Shrimp (AB)</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998



## **I. Introduction**

1. The heart of this dispute refers to the maintenance of WTO-inconsistent restraints on exports of various raw materials by China. This appeal will not only raise critical interpretative issues relating to the applicability and scope of some of the exceptions of the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”), and China’s obligations under its Accession Protocol, but also will define whether China will be able to continue basing its economic and industrial policies on WTO-inconsistent measures, or will have to abide by the WTO rules.
2. Before discussing the specific issues raised in this appeal, it is important to remember why the three Co-Complainants initiated this dispute. China imposes WTO-inconsistent restraints on the exports of various raw materials that are critical inputs for the manufacture of steel, aluminum and a variety of chemicals, products necessary for the most basic industries of modern economies. China is a leading producer of each of those raw materials. As such, the restraints have the effect, on the one hand, of increasing the prices that foreign downstream producers must pay for these raw materials on the world market, and, on the other hand, securing access to, and lowering prices for, these same raw materials for downstream producers in China.
3. The effects created by China’s WTO-inconsistent export restraints are not random. Rather, they are the objectives of the policies adopted by China in order to propel its economic and industrial development. Thus, China’s strategy to promote its own economic and industrial advancement comes at the expense of other WTO members.
4. In sum, the three Co-Complainants initiated this dispute in an attempt to preserve their rights under the WTO rules and ultimately level the playing field for all non-Chinese consumers of the raw materials – consistent with what China agreed to do in entering the WTO.

5. During the panel stage, China did not deny that it maintained export restraints, or argue that those restraints were consistent with the WTO rules. Instead, China tried to narrow the scope of the dispute through an unfounded preliminary objection relating to Article 6.2 of the Dispute Settlement Understanding (“DSU”). China’s strategy was for the most part unsuccessful. China subsequently tried again to narrow the scope of the dispute by requesting the Panel to make recommendations only on the various measures that were created during the proceedings, and not the measures that existed at the time of the establishment of the panel. Finally, China tried to justify its WTO-inconsistent export restraints through nonexistent or inapplicable exceptions, or *post hoc* argumentation that had nothing to do with the reasons why the export restraints had been imposed. Again, China’s strategy failed, and ultimately, the Panel ruled in favor of the three Co-Complainants on most of their claims.

6. What has become evident throughout this dispute is China’s apparent disregard for or disavowal of the commitments that China made as a part of its accession to the WTO, and China’s attempt to avoid scrutiny of its WTO-inconsistent export restraints, regardless of the impact on the WTO trading system.

7. Specifically, China committed, under Paragraph 11.3 of Part I of its Accession Protocol, not to impose export duties on products not listed in Annex 6 of the Protocol. Yet, despite this clear commitment, China imposes export duties on the raw materials at issue in this dispute.

8. Further, China committed, under both Article XI:1 of the GATT 1994 and the Accession Protocol, through its incorporation of paragraphs 162 and 165 of the Working Party Report, not to maintain prohibitions or restrictions on exportation. Despite those commitments, China

imposes prohibitive or restrictive export quotas, export licensing requirements, and minimum export price requirements on the raw materials at issue in this dispute.

9. China also committed, under Paragraphs 5.1 and 5.2 of Part I of the Accession Protocol and Paragraphs 83 and 84 of the Working Party Report, to eliminate certain eligibility criteria for obtaining the right to export. Without any regard for these international commitments, in administering its WTO-inconsistent export quotas, China requires exporters to satisfy precisely the eligibility criteria that China was bound to eliminate.

10. Finally, China committed, under Article X of the GATT 1994, to publish promptly its laws, regulations, and rulings relating to restrictions or prohibitions on exports, and to administer them in a uniform, impartial, and reasonable manner. But again, China failed to comply with these obligations.

11. In light of the Panel's well-reasoned decision, which largely, and correctly, found in favor of the three Co-Complainants, China is following the same litigation strategy that it followed during the panel proceedings. First, China is trying to narrow the scope of the dispute, persisting in the arguments put forth during its preliminary objection. Second, China is attempting to prevent the three Co-Complainants from obtaining meaningful recommendations, which would permit China to avoid compliance obligations in this dispute. Third, China is trying to create new exceptions to its commitments and to broaden the scope and applicability of the existing exceptions contained in the GATT 1994 in such a way that its export restraints can be shoehorned into those exceptions.

12. In these proceedings, the Appellate Body will decide whether the three Co-Complainants are able to secure meaningful recommendations, such that a prompt and positive solution to this

dispute will be reached, or whether China will be able to evade its obligations and avoid compliance in this dispute. The Appellate Body will also decide whether through a litigation strategy based on an unfounded standard for sufficiency under Article 6.2, China is able to narrow the scope of this dispute, or whether a prompt and positive solution to the complete dispute will be secured. Finally, the Appellate Body will decide the applicability and scope of the defenses available for China's violations of obligations contained in its Accession Protocol and the GATT 1994.

13. Ultimately, the Appellate Body will decide whether China is able to exempt itself from the WTO rules in order to follow its economic and industrial advancement policies, or whether China's policies will have to abide by the WTO rules. As discussed in detail in this Joint Appellee Submission of the United States and Mexico (collectively referred to as "Complainants" for the purposes of this 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**

14. In Section II of its Appellant Submission, China appeals "the Panel's finding in paragraph 77 of its Second Preliminary Ruling of 1 October 2010 and paragraph 7.3(b) of the Panel Report that Section III of the Co-Complainants'<sup>1</sup> Panel Request complies with the requirement in Article 6.2 of the DSU."<sup>2</sup> China requests that the Appellate Body reverse this finding and, as a consequence, also "reverse" the Panel's findings of inconsistency pursuant to

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<sup>1</sup> For the purposes of this section of the submission, "Co-Complainants" refers to the United States, Mexico, and the European Union.

<sup>2</sup> China's Appellant Submission, para. 4.

all claims identified in Section III of the Panel Requests, *i.e.*, those relating to export quota administration and allocation, export licensing requirements, and minimum export price requirements.<sup>3</sup>

15. For the reasons set out in detail below, the Appellate Body should reject China’s requests. China’s arguments boil down to a complaint, on the part of China, that Section III of the Panel Requests was not structured in the way that China would have preferred. However, Article 6.2 of the DSU provides that a panel request must “provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.”<sup>4</sup> Article 6.2 does not provide that a panel request be structured in the form that a respondent prefers.<sup>5</sup> Here, the Panel correctly concluded that Section III of the Co-Complainants’ Panel Requests satisfied the requirements of DSU Article 6.2.

16. As in the other sections of China’s Appellant Submission, China’s arguments and presentation on this issue are based on critical omissions and inaccurate characterizations of relevant facts, the Panel’s reasoning and analysis, and the Co-Complainants’ arguments before the Panel. In order to provide context for understanding the Panel’s approach, before addressing China’s legal arguments the Complainants will first summarize the relevant facts, developments,

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<sup>3</sup> See China’s Appellant Submission, para. 5.

<sup>4</sup> DSU, Art. 6.2; *see also EC – Bananas (AB)*, para. 142 (finding that Article 6.2 of the DSU provides that a panel request must be sufficiently precise to inform a respondent of the legal basis of the complaint).

<sup>5</sup> See Co-Complainants’ Comments on China’s Responses to the Panel’s Questions on China’s Preliminary Ruling Request, para. 18 (“[C]ontrary to China’s implications, the Appellate Body’s reasoning in *U.S. – OCTG Sunset Reviews* does not prescribe any particular form in which a complaining party must provide a plain connection between the measures and legal obligations in a panel request, let alone the form that China suggests.”) (referencing *U.S. – OCTG Sunset Reviews (AB)*, paras. 170-171).

and arguments from the panel proceedings related to the Panel’s findings on the sufficiency of Section III of the Panel Requests.

**A. Background**

**1. China’s Use of DSU Article 6.2 Objections to Section III of the Panel Requests**

17. China’s defense in this dispute has relied heavily on procedural objections, in particular with respect to Section III of the Co-Complainants’ Panel Requests. At the panel stage, China first advanced its arguments on the sufficiency of Section III of the Panel Requests under DSU Article 6.2. by filing a preliminary ruling request on the day after the Panel was composed.<sup>6</sup>

18. The Panel responded to China’s concerns by taking the unusual step of establishing an entirely separate schedule for submissions, hearing, and question-and-answer procedure in the first 30 days following the Panel’s composition to address the issues raised in China’s preliminary ruling request.<sup>7</sup> The Panel addressed China’s arguments on Section III of the Panel Requests in the first phase of its preliminary ruling issued on May 7, 2010, and again in the second phase of its preliminary ruling issued on October 1, 2010.<sup>8</sup>

19. Thereafter, China continued to make objections to claims that the EU brought pursuant to Section III of the Panel Requests and the Panel addressed those in its final Report.<sup>9</sup>

20. Having its arguments rejected numerous times, China has seized upon Section III of the Panel Requests again at the appellate stage of this dispute.

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<sup>6</sup> China’s Preliminary Ruling Request.

<sup>7</sup> See Panel Report, paras. 1.11-1.13.

<sup>8</sup> See Panel Report, paras. 7.1-7.4; and Annex F.

<sup>9</sup> Panel Report, paras. 7.34-7.51.

## 2. Co-Complainants' Arguments

21. During the proceedings on China's request for a preliminary ruling, China misrepresented the Co-Complainants' response by asserting that the Co-Complainants considered "there is no need for plain connections between the narrative paragraphs, the 37 listed measures, and the 13 listed treaty provisions" in Section III.<sup>10</sup> China continues this misrepresentation – repeatedly – on appeal.<sup>11</sup>

22. To set the record straight, therefore, the Complainants would refer the Appellate Body to the actual statements of the Co-Complainants on this issue.<sup>12</sup> For example, the Co-Complainants stated unequivocally that:

co-complainants have advanced no such argument; indeed, China does not cite to any statement by the co-complainants to support this erroneous assertion [that co-complainants "argue that there is no need for plain connections"]. To the contrary, as the co-complainants have explained, the Panel Requests in fact do provide a plain connection between the measures and the legal obligations consistent with the requirements of Article 6.2 of the DSU. In arguing that the co-complainants have failed to do so – particularly in the face of the overwhelming number of panel and Appellate Body reports rejecting China's line of reasoning – it is China that misunderstands Article 6.2.<sup>13</sup>

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<sup>10</sup> See China's Response to the Panel's Written Questions on the Preliminary Ruling Request, paras. 7, 11; see also Complainants' Comments on China's Response to the Panel's Written Questions on the Preliminary Ruling Request, para. 17.

<sup>11</sup> China's Appellant Submission, paras. 13, 54, 56, 68, 78.

<sup>12</sup> See, e.g., Complainants' Joint Response to the Request for a Preliminary Ruling, Section V.A; Complainants' Joint Oral Statement at the Hearing on China's Preliminary Ruling Request, Section III; Complainants' Joint Answers to the Panel's Questions on China's Preliminary Ruling Request, paras. 21-24.

<sup>13</sup> Complainants' Joint Comments on China's Responses to the Panel's Questions on China's Preliminary Ruling Request, para. 17 (internal references omitted).

China's resort to continued mis-characterization of the Co-Complainants' arguments does not advance the resolution of this dispute, and instead only serves to highlight the weakness of China's position.

23. The Co-Complainants have consistently maintained that Section III of the Panel Requests satisfy the requirements of Article 6.2 of the DSU by: identifying the claims through a narrative description of the restraints being challenged and identifying the legal obligations that the Co-Complainants consider China's measures breach through identification of specific provisions of the GATT 1994 and China's Accession Protocol. In addition, the Panel Requests identified the relevant specific instruments and in that context also enumerated the particular legal obligations at issue.<sup>14</sup>

24. To assist in showing that Section III of the Panel Requests contained all the elements needed to connect the relevant measures with the legal basis for the claims, Co-Complainants called the Panel's attention to a number of adopted panel reports (*EC – Biotech*, *Korea – Bovine Meat*, *Australia – Apples*), as well as the Appellate Body's findings in *U.S. – OCTG Sunset Reviews*.<sup>15</sup> Co-Complainants also presented examples of over 35 panel requests over the past 12

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<sup>14</sup> Complainants' Joint Response to China's Preliminary Ruling Request, paras. 23-25, 29-30.

<sup>15</sup> Complainants' Joint Response to China's Preliminary Ruling Request, paras. 27-32; Complainants' Joint Oral Statement at the Hearing on China's Preliminary Ruling Request, paras. 32-48; Complainants' Joint Answers to the Panel's Questions on China's Preliminary Ruling Request, paras. 21-24; Complainants' Joint Comments on China's Responses to the Panel's Questions on China's Preliminary Ruling Request, paras. 18-20.



years that follow the structure of Section III of the Panel Requests, none of which, to the Co-Complainants’ knowledge, has been found not to adequately connect the measures and claims.<sup>16</sup>

25. Although China continues to argue its position on appeal, China has never distinguished the numerous prior panel findings contradicting China’s line of reasoning – either during the panel proceedings, or now in its appeal.<sup>17</sup>

### **3. The Panel’s Analysis and Findings**

26. Having addressed misleading deficiencies in China’s characterization of the Co-Complainants’ arguments at the Panel stage, the Complainants note that many of China’s representations and characterizations in Section II.C.2-5 of its Appellant Submission relating to supposed facts and developments at the Panel proceedings, which form the basis for China’s legal arguments, are inaccurate or unfounded and need to be corrected, clarified, and placed in their proper context.

#### **a. The Panel Did Not Observe Defects in Section III of the Panel Requests**

27. In Section II.C.2, China attempts to create a factual basis for its assertion that the Panel “observed defects in Section III of the Panel Requests.”<sup>18</sup> China asserts that the “Panel rejected the Complainants’ assertion that they were making *all* claims with respect to *all* measures,”<sup>19</sup> referencing paragraph 35 of the First Phase of the Panel’s Preliminary Ruling, and that the Panel

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<sup>16</sup> Complainants’ Joint Comments on China’s Responses to the Panel’s Questions on China’s Preliminary Ruling Request, para. 20 and fn. 28.

<sup>17</sup> See, e.g., China’s Comments on Complainants’ Answers to the Panel’s Questions on China’s Preliminary Ruling Request, paras. 32-35.

<sup>18</sup> See China’s argument in China’s Appellant Submission, Section II.E.2.b.

<sup>19</sup> China’s Appellant Submission, para. 14.

“took the view that the Panel Requests *themselves* did not identify which of the 37 listed measures was alleged to violate which of the 13 listed treaty provisions,”<sup>20</sup> referencing paragraph 46 of the First Phase of the Panel’s Preliminary Ruling.

28. However, contrary to China’s assertion, a review of paragraph 35 of the First Phase of the Panel’s Preliminary Ruling, taken together with paragraph 34, reveals that the Panel was provisionally accepting – and certainly not rejecting – that Section III of the Panel Requests was sufficient for purposes of Article 6.2 of the DSU. In paragraph 34, the Panel noted “in particular” that in *EC – Selected Customs Matters*, the Appellate Body stated that the requirement under DSU Article 6.2 of a brief summary of the legal basis of the complaint “aims to explain succinctly *how* or *why* the measure at issue is considered by the complaining Member to be violating the WTO obligation in questions.”<sup>21</sup> The Panel then, in paragraph 35, found that:

... Section III of the panel requests, entitled “Additional Restraints Imposed on Exportation”, comprises three sub-parts: first, it contains narrative paragraphs, then a list of measures and, finally, the WTO provisions that the Complainants consider are infringed by the listed measures. The narrative paragraphs describe generally the types of measures that the Complainants are challenging and points to some of their WTO inconsistency. In the panel’s view, these narrative paragraphs aim at explaining sufficiently how and why some of the challenged measures at issue are inconsistent with some of the WTO principles. Then the listed legislative instruments identified by bullet points appear to be the more specific measures alluded to in the narrative paragraphs; the final part provides a list of all WTO obligations that would be violated by one or all of the listed measure [sic].

(Emphasis added.)

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<sup>20</sup> China’s Appellant Submission, para. 16.

<sup>21</sup> First Phase of the Panel’s Preliminary Ruling (Annex F), para. 34 (quoting *EC – Selected Customs Matters* (AB), para. 130).

29. Similarly, a review of paragraph 46 of the First Phase of the Panel’s Preliminary Ruling, together with paragraph 39, shows that contrary to China’s suggestion, the Panel’s provisional conclusion was that the Panel Requests were not deficient. Instead, the Panel stated in paragraph 46 that it “reserves its decisions” on China’s objections under Article 6.2 of the DSU to Section III of the Panel Requests and would make its ruling after reviewing the Co-Complainants’ first written submissions in order to assure itself “that China is able to defend itself appropriately.”<sup>22</sup> This is consistent with the Panel’s reasoning in paragraphs 36-39 and the conclusion it reached in paragraph 39. After indicating its preliminary view in paragraph 35 that Section III of the Panel Requests met the standard articulated by the Appellate Body in *EC – Selected Customs Matters* to “explain succinctly how and why” measures at issue are inconsistent, the Panel stated in paragraph 39 that it “decides to reserve its decision on this part of China’s request and to rule on it at later stage, once it has examined the Parties’ first written submissions and is more able to take fully into account China’s ability to defend itself.”<sup>23</sup> The Panel added that its review of the parties’ first written submissions was not for the purpose of determining whether flaws in a panel request could be cured by those first written submissions, “but rather after the parties’ first written submission, the Panel will be in a better position to determine whether China has suffered any prejudice[] by the Complainants’ panel requests . . . .”<sup>24</sup>

30. These paragraphs demonstrate that, at the time it issued the First Phase of the Panel’s Preliminary Ruling, the Panel provisionally considered Section III of the Panel Requests to be

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<sup>22</sup> First Phase of the Panel’s Preliminary Ruling (Annex F), para. 46.

<sup>23</sup> First Phase of the Panel’s Preliminary Ruling (Annex F), para. 39 (emphasis added).

<sup>24</sup> First Phase of the Panel’s Preliminary Ruling (Annex F), para. 39 (emphasis added).

sufficient under DSU Article 6.2 – and that the only additional information the Panel needed in order to make a definitive finding was to determine, from the Parties’ first written submissions, whether China had suffered any prejudice in its ability to defend itself. As the Panel noted in paragraph 33 of the First Phase of the Panel’s Preliminary Ruling, determining whether a panel request complies with the requirements of DSU Article 6.2 is to be done “on a case-by-case basis.” In making its findings, the Panel cited to, and followed, the Appellate Body’s mode of analysis in *Korea – Dairy*: “In resolving [an issue of the sufficiency of the panel request], we take into account whether the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings . . . .”<sup>25</sup> In short, the fact that the Panel made a provisional finding in favor of the sufficiency of the Panel Requests in no way indicates that the Panel’s reasoning was in any way unsound; rather, the Panel was following a prudent approach used in past disputes.

**b. The Panel Did Not Use Co-Complainants’ Later Submissions to Cure Defects in Section III of the Panel Requests**

31. In Sections II.C.3-5, China attempts to create a factual basis for its assertion that the Panel used the Co-Complainants’ later submissions to cure defects in Section III of the Panel Requests. China asserts that the Panel posed written Question 2 (of the Panel’s questions after the first panel meeting) “in an attempt to overcome these deficiencies” that China avers the Panel believed existed in Section III of the Panel Requests.<sup>26</sup> China also characterizes the submission by the United States of Exhibit US-1 at the time it delivered its Second Oral Statement as an

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<sup>25</sup> *Korea – Dairy (AB)*, para 127.

<sup>26</sup> China’s Appellant Submission, para. 19.

attempt to “redefine[] the scope of the ‘matter’ on which [Co-Complainants] desired a ruling”<sup>27</sup> and Question 1 posed by the Panel following the second Panel meeting, as an additional instance of the Co-Complainants and the Panel attempting to define the “matter” presented in Section III of the Panel Requests.<sup>28</sup>

32. As noted above, China’s assertion that the Panel considered Section III of the Panel Requests to be defective pursuant to DSU Article 6.2 is a mischaracterization of the Panel’s statements in the First Phase of the Panel’s Preliminary Ruling and factually incorrect.

33. Furthermore, contrary to China’s assertion, a review of Question 2 demonstrates that the Panel did not pose Question 2 with any specific intentions regarding Section III of the Panel Requests.<sup>29</sup> Instead, the subject of Question 2 is the recommendations that Co-Complainants seek from all the claims at issue in the dispute. Thus, China’s contention that Question 2 was somehow intended to “overcome” alleged deficiencies in Section III of the Panel Requests is unsupported.

34. Additionally, the Complainants note that Exhibit US-1 was submitted at the second panel meeting in order to correct typographical and orthographical errors made in the U.S. answer to Question 2.<sup>30</sup> With respect to the “third table” that the Complainants submitted, the Complainants observe that this table was responsive to Question 1 of the Panel’s second set of

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<sup>27</sup> China’s Appellant Submission, para. 29.

<sup>28</sup> China’s Appellant Submission, paras. 30-31.

<sup>29</sup> Question 2 states, in relevant part: “Could the complainants list clearly all measures relevant to this dispute for which they are seeking ‘recommendations’ from the Panel within the meaning of Article 19.1 of the DSU. In addition, list which specific WTO provisions each of these measures would violate.”

<sup>30</sup> See Panel Report, para. 7.877; see also U.S. Second Oral Statement, para. 128.

questions, in which the Panel specifically asked for the confirmation of “specific articles or provisions of each of the measures at issue [for which] they are seeking recommendations and rulings, and where in their submissions this was indicated.”<sup>31</sup> The Panel explicitly explained that the purpose of this question was to “guide the Panel in drafting the relevant section of the Descriptive Part”<sup>32</sup> – not to address China’s objections to Section III of the Panel Requests.

**c. The Panel Looked to the Parties’ Later Submissions for Confirmation that China Had Not Been Prejudiced in the Preparation of Its Defense**

35. The Second Phase of the Panel’s Preliminary Ruling makes clear that the Panel’s review of the Parties’ first written submissions and the Co-Complainants’ responses to Question 2 served only to confirm that China had not been prejudiced in the preparation of its defense.<sup>33</sup>

36. In paragraph 63 of the Second Phase of the Panel’s Preliminary Ruling, the Panel again recalls the Appellate Body’s statement in *Korea – Dairy* that sufficiency of a panel request under DSU Article 6.2 must be made on a “case-by-case basis.”<sup>34</sup> As noted above, the Appellate Body’s statement in *Korea Dairy* provides that “[i]n resolving that question [of sufficiency], we take into account whether the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings.”

37. In paragraphs 64 through 70 of the Second Phase of the Panel’s Preliminary Ruling, the Panel identifies examples that demonstrate that claims that the Co-Complainants advanced in the

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<sup>31</sup> Panel’s Second Set of Questions, Question 1.

<sup>32</sup> Panel’s Second Set of Questions, Question 1.

<sup>33</sup> See Second Phase of the Panel’s Preliminary Ruling (Annex F-2), paras. 63-70.

<sup>34</sup> Second Phase of the Panel’s Preliminary Ruling (Annex F-2), para. 63 and fn. 75, referencing First Phase of the Panel’s Preliminary Ruling (Annex F-1), para. 33 referring to *Korea – Dairy (AB)*, para. 127.

dispute were all claims that had been identified as possible claims in Section III of the Panel Requests. Accordingly, the Panel confirmed that China had not suffered prejudice from any alleged lack of notice regarding the nature of the claims brought against it. As confirmation that this was the Panel’s approach, the Complainants note that in paragraphs 71 through 77 of the Second Phase of the Panel’s Preliminary Ruling, the Panel excluded from its terms of reference one claim for which it considered that Section III did not provide sufficient notice per DSU Article 6.2: the EU’s claim regarding a failure to publish quota amounts for coke. Consistent with this approach, the Panel also excluded from its terms of reference the EU’s claims under Article X:1 and Article X:3(a) of the GATT 1994 regarding China’s administration of its export licensing system because they were not sufficiently identified in Section III of the EU’s Panel Request.<sup>35</sup>

38. Having made its determination that China had not suffered prejudice with respect to the other claims identified and advanced by the Co-Complainants relating to “additional restraints on exportation,” the Panel definitively found what it had found provisionally earlier,<sup>36</sup> *i.e.*, that Section III of the Panel Requests “provided sufficient connections between the listed claims and violations” for those claims.<sup>37</sup>

**B. The Panel Correctly Found that Section III of the Panel Requests Satisfy the Requirements of Article 6.2 of the DSU**

**1. China’s Arguments on Appeal**

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<sup>35</sup> Panel Report, paras. 7.34-7.51.

<sup>36</sup> *See* First Phase of the Panel’s Preliminary Ruling (Annex F-1), para. 35.

<sup>37</sup> Second Phase of the Panel’s Preliminary Ruling (Annex F-2), para. 77.

39. In its appeal, China argues that the Panel observed defects in Section III of the Panel Requests<sup>38</sup> and that the Panel found that the Co-Complainants' responses to Question 2 corrected the defects in the Panel Requests.<sup>39</sup> In the preceding section, the Complainants have already responded to those largely factual arguments on the basis of the Panel's statements and reasoning in the First Phase of the Preliminary Ruling and the Second Phase of the Preliminary Ruling.

40. China's legal argument, which is built on these factual arguments, is that the Panel erred in concluding that the Panel Requests comply with Article 6.2 of the DSU on the grounds that relevant connections are made in the Co-Complainants' responses to questions because later submissions cannot be used to cure defects in a panel request.<sup>40</sup> China also argues that the Panel erred by frustrating China's due process rights under Article 6.2 of the DSU.<sup>41</sup>

41. The Complainants will address the reasons that the Appellate Body should reject these arguments below.

**2. The Panel Found that Section III of the Panel Requests Was Sufficient to Present the Problem Clearly and Consulted Later Submissions to Confirm that China's Ability to Defend Itself Was Not Prejudiced**

42. Contrary to China's argument, the Panel's finding that Section III of the Panel Requests satisfied the requirements of DSU Article 6.2 was not made in error. As noted above, China's factual assertions that the Panel "observed defects" in Section III of the Panel Requests for purposes of DSU Article 6.2 and used later submissions by the Parties to "cure" those defects are incorrect. Moreover, the Panel's reasoning and analysis demonstrates that its finding is

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<sup>38</sup> China's Appellant Submission, Section II.E.2.b.

<sup>39</sup> China's Appellant Submission, Section II.E.2.c.

<sup>40</sup> China's Appellant Submission, Section II.E.2.d.

<sup>41</sup> China's Appellant Submission, Section II.E.2.e.



supported by and consistent with the text of Article 6.2 of the DSU and the interpretations of the Appellate Body and other panels regarding the requirements of DSU Article 6.2.

43. The Panel’s finding (in paragraph 77 of Phase 2 of the Panel’s Preliminary Ruling) that Section III of the Panel Requests satisfied the requirements of DSU Article 6.2 was based on two main elements: (1) the Panel’s assessment, in the First Phase of the Panel’s Preliminary Ruling, that Section III of the Panel Requests provided the brief summary of the legal basis of the complaint required by DSU Article 6.2, and (2) the Panel’s assessment, in the Second Phase of the Panel’s Preliminary Ruling, that China’s ability to defend it was not prejudiced.

44. Article 6.2 of the DSU requires, in relevant part, that a request for the establishment of a panel:

... provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

In *EC – Selected Customs Matters*, the Appellate Body interpreted this element of Article 6.2 of the DSU to require that the “brief summary” provided in a panel request be sufficient to: (1) define the scope of a dispute and (2) to meet due process requirements of providing notice to, *inter alia*, the responding party:

A brief summary of the legal basis of the complaint required by Article 6.2 of the DSU aims to explain succinctly *how* or *why* the measure at issue is considered by the complaining Member to be violating the WTO obligation in question. This brief summary must be sufficient to present the problem clearly. Taken together, these different aspects of a panel request serve not only to define the scope of a dispute, but also to meet the due process requirements.<sup>42</sup>

45. In the First Phase of the Panel’s Preliminary Ruling, after taking into account the Parties’ arguments set forth in the various submissions and statements related to the preliminary ruling

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<sup>42</sup> *EC – Selected Customs Matters (AB)*, para. 130.

process, the Panel recalled this particular statement of the Appellate Body in *EC – Selected Customs Matters*, and provided its assessment that Section III of the Panel Requests was sufficient to present the problem clearly in defining the scope of the dispute. Using language echoing the Appellate Body’s in *EC – Selected Customs Matters*, the Panel stated:

The Panel recalls that Section III of the panel requests, entitled “Additional Restraints Imposed on Exportation”, comprises three sub-parts: first, it contains narrative paragraphs, then a list of measures and, finally, the WTO provisions that the Complainants consider are infringed by the listed measures. The narrative paragraphs describe generally the types of measures that the Complainants are challenging and points to some of their WTO inconsistency. In the Panel’s view, these narrative paragraphs aim at explaining succinctly how and why some of the challenged measures at issue are inconsistent with some of the WTO principles. Then, the listed legislative instruments identified by bullet points appear to be the more specific measures alluded to in the narrative paragraphs; the final part provides a list of all WTO obligations that would be violated by one or all of the listed measure[s].<sup>43</sup>

46. However, at that time, the Panel expressly reserved its judgment on whether Section III of the Panel Requests definitively satisfied the requirements of DSU Article 6.2 because it intended to assess whether Section III of the Panel Requests met the due process requirements of Article 6.2. Referencing the Appellate Body’s statement in *U.S. – Carbon Steel*:

Nevertheless, in considering the sufficiency of a panel request, submissions and statements made during the course of the panel proceedings, in particular the first written submission of the complaining party, may be consulted in order to confirm the meaning of the words used in the panel request and as part of the assessment of whether the ability of the respondent to defend itself was prejudiced,<sup>44</sup>

the Panel stated, again echoing the Appellate Body’s language, that it intended to “tak[e] into account the Parties’ first written submissions in order to assess fully whether the ability of the

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<sup>43</sup> First Phase of the Panel’s Preliminary Ruling, para. 35 (emphasis added).

<sup>44</sup> *U.S. – Carbon Steel (AB)*, para. 127 (citing *Korea – Dairy (AB)*, para. 127 and *Thailand – H-Beams (AB)*, para. 95)).

respondent to defend itself was prejudiced.<sup>45</sup> The Panel repeated this intention in paragraph 39 of the First Phase of the Panel’s Preliminary Ruling.

47. Accordingly, in the Second Phase of the Panel’s Preliminary Ruling, the Panel having reviewed the Parties’ first written submissions, made its assessment regarding whether China’s ability to defend claims brought pursuant to Section III of the Panel Requests had been prejudiced. In paragraph 64, the Panel observed that claims that had been advanced and argued by the Co-Complainants in their first written submissions (China’s administration of its quota system, China’s export licensing system, China’s coordination of minimum export prices and failure to publish such prices, and China’s failure to publish certain quota amounts) had been sufficiently identified in Section III of the Panel Requests. The Panel then examined various other indicia to confirm that China’s ability to defend itself had not been prejudiced, including: the Co-Complainants’ responses to Question 2 posed by the Panel<sup>46</sup> and the defenses that China raised in its first written submission in response to claims brought pursuant to Section III of the Panel Requests.<sup>47</sup> The Panel then definitively found in paragraphs 65 and 77 of the Second Phase of the Panel’s Preliminary Ruling, that Section III of the Panel Requests provided sufficient notice to China of the claims brought by the Co-Complainants, which the Panel identified in paragraph 64 of the Second Phase of the Panel’s Preliminary Ruling.

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<sup>45</sup> First Phase of the Panel’s Preliminary Ruling, para. 37 (citing *U.S. – Carbon Steel (AB)*, para. 127) (emphasis added).

<sup>46</sup> Second Phase of the Panel’s Preliminary Ruling, paras. 67-69.

<sup>47</sup> Second Phase of the Panel’s Preliminary Ruling, para. 70.

48. Both on appeal and at the panel stage, China mistakenly relies upon a single phrase in *U.S. – OCTG Sunset Reviews*<sup>48</sup>: namely, that “in order for a panel request to ‘present the problem clearly’, the complainant must plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed.”<sup>49</sup> A full examination of the facts and Appellate Body findings in *U.S. – OCTG Sunset Reviews*, however, supports the sufficiency of the Panel Requests in the present dispute. .

49. In *U.S. – OCTG Sunset Reviews* the Appellate Body found that Argentina’s panel request satisfied the requirements of Article 6.2 of the DSU. The link between the measures and WTO obligations at issue was far less clear than in the Panel Requests in the current dispute. In *OCTG*, Argentina alleged that the United States acted inconsistently with certain enumerated WTO obligations through *inter alia* an “irrefutable presumption under U.S. law,” and that this presumption was evidenced by a “practice based on U.S. law.” In an entirely separate section of the panel request, Argentina identified certain U.S. measures without any mention of the claim relating to the “irrefutable presumption under U.S. law.” During the course of the proceeding, Argentina argued that these measures contained the “irrefutable presumption under U.S. law” that were allegedly inconsistent with the WTO obligations identified in an earlier section of the panel request.

50. The Appellate Body found that Argentina had satisfied the requirement to connect the relevant measures with the relevant legal obligations in asserting this claim. In so finding, the Appellate Body stated: “a review of [the WTO Agreement provisions identified in a later section

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<sup>48</sup> See China’s Appellant Submission, paras. 45-47; China’s Request for a Preliminary Ruling, Section III.C; China’s First Written Submission, para. 16.

<sup>49</sup> *U.S. – OCTG Sunset Reviews (AB)*, para. 162.

of the panel request] reveals that they form the basis of Argentina’s challenge with respect to the alleged ‘irrefutable presumption’. . . . the United States could reasonably have been expected to understand that these provisions were the focus of Argentina’s challenge with respect to the ‘irrefutable presumption’.”<sup>50</sup> The Appellate Body made this finding in spite of its recognition that “[n]ot all of the [enumerated WTO obligations] relate[d] to” the irrefutable presumption that was being challenged.

51. In the current dispute, the connection in Section III the Panel Requests between the measures at issue and relevant legal obligations is set out far more clearly than in the *OCTG* Panel request. In particular, Section III of the Panel Requests contains narrative paragraphs, lists China’s legal instruments, and sets forth the WTO provisions Co-Complainants considered to be infringed.<sup>51</sup> Thus, China reliance on the Appellate Body report in *OCTG* only serves to confirm that the Panel Requests in the current dispute met the standard of DSU Article 6.2 to “provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.”

52. The Panel’s finding is also consistent with and supported by the Appellate Body’s statements and interpretations in *EC – Selected Customs Matters* and *U.S. – Carbon Steel* (as discussed above), as well as in several other reports. For example:

- *EC – Bananas III*, where the Appellate Body stated that a panel request needs simply to set forth claims, *i.e.*, allegations that identified measures violate, or nullify or impair the benefits arising from, the identified legal obligations<sup>52</sup> and made clear that a panel request may adequately state a

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<sup>50</sup> *U.S. – OCTG Sunset Reviews (AB)*, paras. 170-71.

<sup>51</sup> See First Phase of the Panel’s Preliminary Ruling, para. 35; Second Phase of the Panel’s Preliminary Ruling, paras. 63-65, 77.

<sup>52</sup> *EC – Bananas III (AB)*, para. 141 (“In our view, there is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the

claim if the request simply cites the pertinent provision of the WTO agreement;<sup>53</sup>

- *EC – Biotech*, where the panel request enumerated a list of measures and stated that those measures were inconsistent with a list of specific WTO Agreement obligations. The panel found that the panel request in that dispute satisfied the requirements of Article 6.2 of the DSU, even though there was a large number of claims, stating that the existence of a large number of claims does not “mean[] that the legal standard of clarity against which the panel requests must be measured is higher than it would have been had the panel requests identified fewer claims;”<sup>54</sup> and
- *Korea – Bovine Meat*, where Canada’s panel request identified a number of relevant Korean measures being challenged and alleged that each of the measures was inconsistent with the listed legal obligations. In its preliminary ruling request, Korea adduced many of the same arguments as those advanced by China in its preliminary ruling request, and the panel rejected Korea’s request. With respect to the supposedly large number of claims at issue, the panel found that there is no requirement that a panel request with a large number of claims be set forth any differently from a panel request with a smaller number of claim.<sup>55</sup>

53. In fact, as the Co-Complainants pointed out during the panel proceeding, of the more than 35 panel requests (over the past 12 years) identified by the Co-Complainants that follow the structure of Section III of the Panel Requests – *i.e.*, a narrative description of the measures at issue, a list of legal instruments through which such measures are maintained, and a list of provisions of the WTO Agreements with which such measures are alleged to be inconsistent –

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panel’s terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties.”) (emphasis in original).

<sup>53</sup> *EC – Bananas III (AB)*, para. 141 (“We accept the Panel’s view that it was sufficient for the Complaining Parties to list the provisions of the specific agreements alleged to have been violated without setting out detailed arguments as to which specific aspects of the measures at issue relate to which specific provisions of those agreements.”).

<sup>54</sup> Panel Report, *EC – Biotech*, para. 7.47 (para. 101 of panel’s preliminary ruling).

<sup>55</sup> Preliminary Ruling of the Panel, *Korea – Bovine Meat*, para. 24.

the Co-Complainants are not aware of a single case where a panel request was found not to satisfy the requirements of Article 6.2 of the DSU.<sup>56</sup> To the contrary, in seven disputes in which such panel requests were challenged on this basis, the panel requests were found to satisfy Article 6.2.<sup>57</sup> Neither on appeal nor at the panel stage has China identified a single DSB ruling to support its argument that Section III of the Panel Requests does not satisfy the standard of Article 6.2 of the DSU.

54. China pretends that it is making a simple and straightforward argument that they needed the Panel Requests to set forth “plain connections” between measures and legal obligations. But, in addition to the fact that the Panel Requests provide the requisite information pursuant to Article 6.2, China’s preliminary ruling request was not a simple and straightforward request. China asked the Panel and is now asking the Appellate Body to take a dramatically new approach to the interpretation of Article 6.2, an approach for which China is unable to cite a single panel or Appellate Body report for support, and for which the Co-Complainants cited overwhelming evidence contradicting China’s line of reasoning. Even the dispute where the Appellate Body articulates the “plainly connect” formulation, on which China relies so heavily, does not support China’s position once the facts and legal reasoning in that report are examined.

### **3. The Panel’s Finding Respected Due Process Requirements under Article 6.2 of the DSU**

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<sup>56</sup> See Co-Complainants’ Comments on China’s Responses to the Panel’s Questions on China’s Preliminary Ruling Request, para. 20 and fn. 28.

<sup>57</sup> See Co-Complainants’ Comments on China’s Responses to the Panel’s Questions on China’s Preliminary Ruling Request, para. 20 and fn. 29.

55. Contrary to China’s arguments, as discussed in detail above, the Panel took pains to assess whether the argumentation advanced by Co-Complainants resulted in any prejudice to China’s ability to defend itself. The Panel reserved its decision on China’s DSU Article 6.2 objection to Section III of the Panel Requests in order to make this determination and made that determination the focus of its analysis in the Second Phase of the Preliminary Ruling.

56. As the Appellate Body stated in *U.S. – Carbon Steel*, the due process objective of a panel request is to notify parties and potential third parties of the nature of the complainant’s case<sup>58</sup> and the Panel took the position that whether or not a panel request has fulfilled that objective may be assessed with reference to the parties’ first written submissions, to determine whether the ability of the respondent to defend itself has been prejudiced.<sup>59</sup> The operative question in this determination is whether a respondent and other Members have had adequate notice of the claims. As the Appellate Body articulated in *U.S. – OCTG Sunset Reviews*, one must look to see if, on the basis of the panel request, a respondent “could reasonably have been expected to understand” that a challenged measure was the focus of the challenge.<sup>60</sup>

57. In arguing that it considered that the Co-Complainants intended to advance “subsets of claims regarding subsets of measures” and arguing that the total combination of measures and legal provisions resulted in a large number of possible claims, China’s own arguments – both on appeal and at the panel stage – demonstrate that China was more than “adequately notified” by Section III of the Panel Requests – in fact, China was well aware – of the claims that the Co-

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<sup>58</sup> *U.S. – Carbon Steel (AB)*, para. 126.

<sup>59</sup> First Phase of the Panel’s Preliminary Ruling, para. 37 (referencing *U.S. – Carbon Steel (AB)*, para. 127).

<sup>60</sup> *U.S. – OCTG Sunset Reviews (AB)*, para. 171.



Complainants could advance. In fact, in its reply to the Co-Complainants' joint response to the Preliminary Ruling Request, China stated: "As China shows below, Section III of the panel requests makes different claims, under different treaty provisions, with respect to differing groups of measures affecting different product categories. Thus, instead of making all claims with respect to all measures, as the Co-Complainants' incorrectly assert, the panel requests show that the Complainants have made several subsets of claims with respect to several subsets of measures affecting several subsets of product categories."<sup>61</sup> This statement shows that China perceived both the possible and likely claims that Co-Complainants could advance against it. Consequently, China's own arguments evidence that Section III of the Panel Requests satisfy the notice requirements of DSU Article 6.2.

58. It is also important to place China's arguments regarding the "subset of claims" in proper context. China placed great weight before the Panel on its understanding that Section III of the Panel Requests advanced a subset of claims with respect to a subset of measures. In so arguing, China purported to be responding to an explicit argument by Co-Complainants that in Section III of the Panel Requests, the Complainants intended to advance claims with respect to all the listed measures as inconsistent with all the listed legal provisions.<sup>62</sup> In fact, the Co-Complainants never made such a claim and China is unable to provide a reference to such a claim by Co-Complainants. Instead, the Co-Complainants have repeatedly explained that Section III of the Panel Requests more than satisfies Article 6.2 of the DSU, because it identifies the measures and

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<sup>61</sup> China's Comments on Complainants' Joint Reply to the Preliminary Ruling Request, para. 49.

<sup>62</sup> See China's Comments on Complainants' Joint Reply to the Preliminary Ruling Request, para. 49.

the legal provisions with which they are considered to be inconsistent, and a narrative describing the nature of the legal complaint. China’s ensuing rebuttal *i.e.*, that Co-Complainants are advancing a “subset of claims” in response to an argument that Co-Complainants never made is therefore beside the point and irrelevant. In fact, as noted above, China has made clear that based on an examination of Section III of the Panel Requests, China knew the case it would have to answer. The Complainants also note that Article 6.2 of the DSU does not require that every claim identified in a panel request be advanced.

### **C. Conclusion**

59. For all of the foregoing reasons, the Complainants request that the Appellate Body reject China’s request and uphold the Panel’s finding that Section III of the Panel Requests satisfied the requirements of DSU Article 6.2 as set forth in paragraph 77 of the Second Phase of the Panel’s Preliminary Ruling and paragraph 7.3(b) of the Panel Report and consequently uphold the Panel’s findings of inconsistency in paragraphs 7.669, 7.670, 7.678, 7.756, 7.807, 7.958, 7.1082, 7.1102, 7.1103, 8.4(a)-(b), 8.5(b), 8.6(a)-(b), 8.11 (a), (c), (e) and (f), 8.12(b), 8.13(a)-(b), 8.18(a)-(b), 8.19(b) and 8.20(a)-(b) of the Panel Report.

### **III. The Panel Correctly Made Recommendations on the Series of Measures through which China Imposes Its Export Quotas and Export Duties**

60. In Section III of its Appellant Submission, 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.”<sup>63</sup> The Panel’s recommendations, however, were correctly made in accordance with DSU Articles 7.1, 11, and 19.

61. As in the other sections of China’s Appellant Submission, China’s arguments and presentation on this issue are based on critical omissions and inaccurate characterizations of relevant facts, the Panel’s reasoning and analysis, and the Complainants’ arguments before the Panel. In order to provide context for understanding the Panel’s approach, before addressing China’s legal arguments the Complainants will first summarize the relevant facts, developments, and arguments from the panel proceedings related to the recommendations that the Panel made on China’s export quota and export duty measures.

**A. Background from the Panel Proceeding**

**1. Operative Date of the Complainants’ Challenge and the Temporal Reference Point for the Panel’s Review**

62. In the years leading up to the initiation of formal dispute settlement proceedings in this dispute, the Co-Complainants had, individually or in combination, made repeated efforts to raise their concerns with China in a number of different fora<sup>64</sup> regarding China’s imposition of export restraints on industrial raw materials for which China is a leading producer.<sup>65</sup> All of those efforts proved to be of no avail: not only did the situation not improve but, over time, the number of restraints proliferated and their degree of restrictiveness increased.<sup>66</sup> Accordingly, in the summer

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<sup>63</sup> China’s Appellant Submission, para. 99.

<sup>64</sup> See U.S. First Written Submission, para. 18; Mexico’s First Written Submission, para. 18; U.S. Closing Oral Statement at the Second Panel Meeting, para. 18.

<sup>65</sup> See U.S. First Written Submission, para. 4 and Section III.B; Mexico’s First Written Submission, para. 4 and Section III.B.

<sup>66</sup> See U.S. First Written Submission, paras. 1-3, 69, 90; Mexico’s First Written Submission, paras. 1-3, 72, 93.

of 2009, the Co-Complainants filed requests for consultations with China regarding China's maintenance of various export restraints on nine categories of industrial raw materials.<sup>67</sup> Those consultations also failed to provide a resolution regarding these export restraints. As a result, the Co-Complainants requested the establishment of panels, moving forward with dispute settlement proceedings in which the parties continue to engage today, in order to seek resolution to the dispute and relief from the trade distorting effects of the export restraints at issue.<sup>68</sup>

63. When the Co-Complainants filed their Panel Requests on November 4, 2009, and when the Panel was established on December 21, 2009, the Co-Complainants alleged that China was breaching its WTO obligations through, among others, the export quotas China was imposing on various forms of bauxite, coke, fluorspar, silicon carbide, and zinc and the export duties China was imposing on various forms of bauxite, coke, fluorspar, magnesium, manganese, silicon metal, and zinc.<sup>69</sup>

64. The Complainants have maintained throughout the panel proceeding that they seek, through these dispute settlement proceedings, findings and recommendations with respect to the export restraints that they challenged – *i.e.*, those on which they consulted with China and were

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<sup>67</sup> WT/DS394/1, WT/DS395/1, and WT/DS398/1.

<sup>68</sup> See U.S. First Written Submission, paras. 27-31; Mexico's First Written Submission, paras. 27-34.

<sup>69</sup> See WT/DS394/7, WT/DS395/7, and WT/DS398/6. See also Panel Report, paras. 3.2-3.3, 7.17 and fns. 55 and 56 (referencing paras. 7.59-7.63 (export duties) and 7.172-7.201 (export quotas)). The Complainants note that these Panel Requests also listed an export duty on yellow phosphorus alleged to exceed the maximum level permitted under Annex 6 of China's Accession Protocol. That export duty was effectively lowered to the Annex 6 maximum level of 20 percent as of July 1, 2009, prior to the dates of panel request and panel establishment. The Panel did not make findings or recommendations on the yellow phosphorus duty and the Co-Complainants do not appeal the Panel's approach to making findings and recommendations on the yellow phosphorus export duty.

in place at least as of the date of the Panel’s establishment.<sup>70</sup> Accordingly, the Complainants have maintained, in response to China’s arguments that the Panel should permit China to “move the target” and therefore could only make findings and recommendations in respect of the export restraints as China modified and amended them over the course of the panel proceeding, that the temporal point of reference for the Panel’s review and for the Panel’s findings and recommendations is the date of panel establishment. In so arguing, the Complainants have relied on the clear text of the DSU and found support in relevant past panel and Appellate Body reports.

## **2. Developments during the Panel Proceeding**

65. Despite the lack of any amelioration or indication of any desire to address Co-Complainants’ concerns regarding these export restraints in the years leading up to the initiation of consultations, and in the months between the request for consultations and the establishment of the panel, once the panel was established, China began making numerous changes to its laws and policies in areas related to the Co-Complainants’ challenges. As the Panel noted, a very large number of legal instruments relevant to the matters challenged in this dispute – newly adopted – were introduced into evidence by China over the course of the panel proceeding.<sup>71</sup>

66. Based on these instruments presented by China, China claimed to have changed the scope of application of its export quotas and export duties. As of December 21, 2009 – and since

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<sup>70</sup> Complainants’ Joint Oral Statement at the First Panel Meeting, paras. 41-42; U.S. Second Written Submission, paras. 332-334; Mexico’s Second Written Submission, paras. 337-339; U.S. Second Oral Statement, paras. 106-108.

<sup>71</sup> Panel Report, paras. 7.5. *See also* U.S. Second Written Submission, Section IV.A; Mexico’s Second Written Submission, Section IV.A.

2006<sup>72</sup> – China subjected the exportation of bauxite and fluorspar to both export quotas and export duties. But China claimed that as of January 1, 2010, China (without explanation or any apparent rationale) decreased the export restraint burdens on bauxite and fluorspar, subjecting each raw material to only one type of restraint (and keeping in place one of each type of restraint) – by imposing only an export quota on bauxite and only an export duty on fluorspar.

67. Over the course of 2010, after the panel proceeding began and while it continued, China introduced a number of legal instruments. Specifically, as detailed in the Complainants’ Second Written Submissions:<sup>73</sup>

- China claimed that on January 2, 2010, China brought into effect the *Circular of the General Office of the State Council on Taking Comprehensive Measures to Control the Extraction and Production of High Alumina Clay and Fluorspar*;<sup>74</sup>
- China claimed that On March 1, 2010, China brought into effect the *Public Notice on Fluorspar Industry Entrance Standards*<sup>75</sup> and the *Public Notice on Refractory-Grade Bauxite (High Alumina Bauxite) Industry Entrance Standards*;<sup>76</sup>
- China claimed that On April 20, 2010, China brought into effect *Circular on Passing Down the 2010 Controlling Quota of Total Extraction Quantity of High Alumina Clay and Fluorspar*;<sup>77</sup>
- China claimed that On May 19, 2010, China brought into effect *Circular of the Ministry of Land and Resources on Passing Down the Controlling Quota of the*

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<sup>72</sup> See Exhibits CHN-439 and CHN-440.

<sup>73</sup> U.S. Second Written Submission, para. 322; Mexico’s Second Written Submission, para. 327.

<sup>74</sup> *Circular of the State Council’s General Office on the Adoption of Comprehensive Measures to Control the Mining and Production of Fireclay and Fluorspar* (State Council [2010] No. 1, January 2, 2010) (Exhibit JE-167). See Exhibit CHN-87.

<sup>75</sup> Exhibit CHN-96.

<sup>76</sup> Exhibit CHN-275.

<sup>77</sup> *Circular on the Allocation of the 2010 Mining Control Targets Applicable to High-Alumina Clay Ore and Fluorspar Ore* (Ministry of Land and Resources (2010) No. 187, April 20, 2010) (Exhibit JE-168). See Exhibit CHN-97.

*2010 Total Production Quantity of High-alumina Refractory-Grade Bauxite and Fluorspar.*<sup>78</sup>

- China claimed that On June 1, 2010, China brought into effect the *Notice Adjusting the Applicable Tax Rates of Resource Taxes of Refractory Grade Clay and Fluorspar*<sup>79</sup> (2010 Fluorspar and High Alumina Clay Measures).

**3. China’s “Litigation Strategy” and Arguments**

68. China attempted to use such legal instruments introduced during the proceeding over the course of 2010 (particularly relating to the fluorspar and bauxite industries) to create new facts that would bolster its defenses and justifications for the imposition of 2010 export restraints on these products (bauxite and fluorspar) under Article XX(g) of the GATT 1994. And China strongly insisted that the Panel must make its findings and recommendations on the export quotas and export duties as they were changing and evolving during the course of the panel proceedings, and not as those measures existed at the time of panel establishment.

69. On May 7, 2010, in response to China’s preliminary ruling request, the Panel issued the first phase of its preliminary ruling, determining, among other things, that “replacement” measures fell within its terms of reference. After the issuance of this preliminary ruling, China presented its argument that the Panel should make all of its findings and recommendations on export quota and export duty measures on the basis of the legal state of play as it was evolving during the course of the panel proceedings and not those measures as the DSB had referred them to the Panel, *i.e.*, those in effect as of the date of panel establishment. China characterized the

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<sup>78</sup> *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). See Exhibit CHN-98.

<sup>79</sup> *Notice Adjusting the Applicable Tax Rates of Resource Taxes of Refractory Grade Clay and Fluorspar* Cai Shui [2010] No. 20 (Ministry of Finance and the General Administration of Taxation, effective June 1, 2010) (Exhibit CHN-90).

annually recurring legal instruments through which the export quotas and export duties are partially expressed as “replacement measures” and argued that the ones that were in effect on the date of panel establishment (effective during 2009) had “expired” and become “old” measures which were “replaced” by “new” measures on January 1, 2010.

#### **4. The DSU Provides for Findings and Recommendations to Be Made on the Matter Referred to the Panel by the DSB**

70. In response to China’s arguments, the Complainants have consistently maintained that the DSU provides for findings and recommendations on the basis of the matter that was referred to the Panel by the DSB – *i.e.*, those in effect at least on the date of panel establishment.<sup>80</sup> In the Complainants’ view, the DSB tasked the Panel to make findings and recommendations on the measures referred to the Panel in its terms of reference – which were those in effect on the date of the Panel’s establishment – and this is consistent with the purpose<sup>81</sup> of the dispute settlement system to secure a positive solution to this dispute.<sup>82</sup>

71. With respect to the changes and new facts that post-date panel establishment, Complainants considered that they could be relevant to the Panel’s review of the challenged measures – *i.e.*, those in effect on the date of panel establishment. Consistent with the findings of the panel and the Appellate Body in the *EC – Selected Customs Matters* dispute,<sup>83</sup> measures

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<sup>80</sup> Complainants’ Joint Oral Statement at the First Panel Meeting, paras. 41-42; U.S. Second Written Submission, paras. 332-334; Mexico’s Second Written Submission, paras. 337-339; U.S. Second Oral Statement, paras. 106-108.

<sup>81</sup> *See* Complainants’ Joint Oral Statement at the First Panel Meeting, para. 42.

<sup>82</sup> U.S. Second Oral Statement, paras. 106-107.

<sup>83</sup> *EC – Selected Customs Matters (AB)*, para. 188 (“While there are temporal limitations on the measures that may be within a panel’s terms of reference, such limitations do not apply in the same way to evidence. Evidence in support of a claim challenging measures that are within a panel’s terms of reference may pre-date or post-date the establishment of the panel.”)



that post-date panel establishment could be relevant as evidence, but are not themselves the subjects of findings regarding alleged inconsistency with a covered agreement.<sup>84</sup> Complainants also explained that, to the extent China considered these later-in-time changes and facts to be measures taken to bring its challenged measures (*i.e.*, those in effect on the date of panel establishment) into conformity with its WTO obligations, they would be appropriately reviewed by a panel in the context of a possible compliance proceeding under Article 21.5 of the DSU – after findings and recommendations had been made by this Panel on the basis of the measures in effect on the date of panel establishment.<sup>85</sup>

72. As an initial matter, China’s approach is inconsistent with the plain language of Articles 7.1 and 11 of the DSU – a panel is to examine (make an objective assessment) of the “matter” referred to the DSB by the complaining party in the panel request. Furthermore, the Complainants repeatedly identified a fatal flaw in the logic of China’s argument that the Panel was prohibited from making recommendations on the export quota and export duty measures effective on the date of panel establishment because the export quota and export duty circulars in effect on the date of the Panel’s establishment allegedly “expired” when they were superseded by the annually recurring circulars that came into effect on January 1, 2010.<sup>86</sup> As Complainants noted, if no recommendations could be made in relation to an annual circular once it has been superseded, given the time that necessarily passes in the course of panel and Appellate Body

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<sup>84</sup> Complainants’ Joint Oral Statement at the First Panel Meeting, para. 50; U.S. Closing Statement at the Second Panel Meeting, para. 13.

<sup>85</sup> U.S. Second Written Submission, para. 342; Mexico’s Second Written Submission, para. 347; U.S. Second Oral Statement, paras. 112-113.

<sup>86</sup> U.S. First Oral Statement, para. 45; U.S. Second Written Submission, para. 331; Mexico’s Second Written Submission, para. 336; U.S. Second Oral Statement, paras. 114-115.

proceedings, trade measures imposed in part through annually recurring legal instruments could never be successfully challenged through WTO dispute settlement. As Complainants had predicted, by the time the Panel’s interim report was issued to the parties on February 18, 2011, or its final report was issued on April 1, 2011, or its report was circulated on July 5, 2011, the 2010 export duty and export quota circulars had themselves been superseded by yet another set of annual measures (their 2011 successors). Were China’s view of the DSU in this dispute to prevail, then the DSB would be precluded from making any recommendations, because the 2010 circulars would have ceased to exist before the DSB adopted its recommendations and rulings.

73. Complainants also pointed out to the Panel that adopting China’s approach and making findings and recommendations only on most recent measures in effect during the course of the panel proceedings would result in the creation of a “moving target” for the Complainants and for the Panel. That is, both Complainants and the Panel would continually have had to recast their arguments and assessment of the legal state of play as it evolved through the proceedings. Complainants noted that this would permit China to shield from review various aspects of the measures that had been challenged<sup>87</sup> in a manner that the Appellate Body had stated in *Chile – Price Band System* was not consistent with the requirements of due process in the operation of the WTO dispute settlement system:

We emphasize that we do not condone a practice of amending measures during dispute settlement proceedings if such changes are made with a view to shield a measure from scrutiny by a panel or by us. . . . [G]enerally speaking, the demands of due process are such that a complaining party should not have to adjust its

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<sup>87</sup> Complainants’ Joint Oral Statement at the First Panel Meeting, paras. 45, 51; U.S. Second Written Submission paras. 339-341; Mexico’s Second Written Submission, paras. 344-346; U.S. Second Oral Statement, para. 109.

pleadings throughout the dispute settlement proceedings in order to deal with a disputed measure as a ‘moving target’.”<sup>88</sup>

## 5. The Panel’s Approach to Making Findings and Recommendations

74. After considering the parties’ arguments and undertaking its own reasoning and analysis, the Panel concluded that it would make findings on the WTO consistency of all measures listed in the Complainants’ Panel Requests that were in effect on the date of the Panel’s establishment.<sup>89</sup> The Panel’s approach is consistent with the Appellate Body’s statements in *EC – Selected Customs Matters*. There, after considering the temporal limitations of the Panel’s terms of reference, the Appellate Body concluded:

As we explained above, had the Panel properly identified the measures at issue, its task would have been to determine whether the measures at issue had been administered collectively in a uniform manner *at the time the Panel was established*, that is to say, in March 2005. In order to make this determination, the Panel could rely on *evidence* that pre-dated or post-dated the time of the Panel’s establishment to the extent that it was evidence relevant for the assessment of whether the European Communities acted consistently with Article X:3(a) *at the time of the Panel’s establishment*.<sup>90</sup>

75. With respect to the challenged export quotas and export duties, the Panel acknowledged that, because the measures operating to impose those export restraints included measures of an annually recurring nature, its approach would ensure that these measures did not evade review.<sup>91</sup> In order to do so, the Panel’s approach to making recommendations on the export quota and export duty measures took into account the nature of the legislative framework comprising a

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<sup>88</sup> *Chile – Price Band System (AB)*, para. 144.

<sup>89</sup> *See* Panel Report, paras. 7.24, 7.33(a).

<sup>90</sup> *EC – Selected Customs Matters (AB)*, para. 254 (third set of italics added; footnotes omitted).

<sup>91</sup> Panel Report, para. 7.33(c).

combination of legal instruments through which China’s export quotas and export duties are effected (the “series of measures”).<sup>92</sup>

76. Although the Complainants did not coin the phrase “series of measures,” the panel’s terminology comports with the Complainants depiction of China’s export quotas and export duties, as presented by the Complainants in their panel requests, written and oral submissions, and answers to Panel questions.<sup>93</sup> As the Panel noted, the Complainants presented their claims in their Panel Requests by identifying “series of measures” taken by China<sup>94</sup> and set out the Complainants’ requests for findings and recommendations in Section III of the Panel Report in charts that illustrate the combination of measures through which the challenged export restraints are maintained.<sup>95</sup>

77. As a result, the Panel specified that it would make findings relating to the export quotas and export duties on the basis of “the series of measures comprised of the relevant framework legislation, the implementing regulation(s), other applicable laws and the specific measure imposing export duties or export quotas in force at the date of the Panel’s establishment.”<sup>96</sup>

78. In the same vein, the Panel also specified that it would make recommendations relating to the export quotas and export duties on the same basis – *i.e.*, “the series of measures comprised of

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<sup>92</sup> Panel Report, para. 7.17 (internal references omitted); *see* Panel Report, fn. 55 (citing the Co-Complainants’ Panel Requests, paras. 3.2 and 3.3 of the Panel Report, and paragraphs 7.59-7.63 (describing the legislative system for export duties)) and fn. 56 (citing the Co-Complainants’ Panel Requests, paras. 3.2 and 3.3 of the Panel Report, and paragraphs 7.172-7.201 (describing the legislative system for export quotas)).

<sup>93</sup> *See also* U.S. Other Appellant Submission, paras. 40-41; Mexico’s Other Appellant Submission, para. 16.

<sup>94</sup> Panel Report, para. 7.9.

<sup>95</sup> Panel Report, paras. 3.2 and 3.3.

<sup>96</sup> Panel Report, para. 7.33(c) (emphasis added).

the relevant framework legislation, the implementing regulation(s), other applicable laws and the specific measure imposing export duties or export quotas in force at the date of the Panel’s establishment.<sup>97</sup>

## **B. China’s Arguments on Appeal**

79. In its appeal, China seeks the Appellate Body’s review of the Panel’s recommendations on the challenged export quotas and export duties “to the extent that its recommendations apply to annual replacement measures.”<sup>98</sup> According to China, the Panel erred under Articles 7.1, 11, and 19 of the DSU if it made a recommendation on the “series of measures” and that “series of measures” includes “annual replacement measures” because such measures had been excluded by the Complainants from the scope of the dispute.<sup>99</sup> China also argues that the Panel’s error undermines the objectives of dispute settlement by failing to respect choices made by the Complainants.<sup>100</sup>

80. As an initial matter, the Complainants note that China articulates its appeal of the Panel’s export quota and export duty recommendations in a qualified manner. China only appeals the Panel’s recommendations “to the extent that [those] recommendations apply to annual replacement measures.”<sup>101</sup> That is, China does not appeal the Panel’s recommendation to bring its export duties and export quotas, imposed through “the series of measures operating

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<sup>97</sup> Panel Report, para. 7.33(e) (emphasis added); *see also* Panel Report, paras. 8.8, 8.15, and 8.22.

<sup>98</sup> China’s Appellant Submission, para. 99.

<sup>99</sup> China’s Appellant Submission, Section III.D.2.

<sup>100</sup> China’s Appellant Submission, Section III.D.3.

<sup>101</sup> China’s Appellant Submission, para. 99.

collectively” into conformity with its WTO obligations.<sup>102</sup> China’s appeal is therefore limited in scope – *i.e.*, China only appeals the Panel’s to the extent that the recommendation applies to future annual replacement measures, which China argues are measures outside of the Panel’s terms of reference.

81. As discussed in more detail below, as a threshold matter, China has not understood the Panel’s recommendations correctly. The Panel did not make recommendations on measures on which it had not made findings and did not make recommendations on the basis of measures outside of its terms of reference. Consequently, China’s appeal of the Panel’s recommendations is not well-founded and can be rejected simply on this basis.

**C. The Panel’s Recommendations on the Export Quotas and Export Duties Are Made on Measures within the Terms of Reference**

82. It is important to recall what the Panel did and what China has not appealed. The Panel determined it would make findings on the series of measures comprised of the relevant framework legislation, the implementing regulation(s), other applicable laws and the specific measures imposing export duties or quotas in force at the date of panel establishment.<sup>103</sup> China has not appealed the Panel’s approach to the series of measures or its decision to make findings on those measures as of the date of panel establishment. The Panel also determined it would make recommendations, in situations where the claim is based on an annual measure, with respect to the series of measures comprised of the relevant framework legislation, the implementing regulation(s), other applicable laws and the specific measures imposing export

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<sup>102</sup> Panel Report, paras. 8.8, 8.22.

<sup>103</sup> Panel Report, para. 7.33(c).

duties or quotas in force at the date of panel establishment.<sup>104</sup> China has not appealed the Panel’s approach to a recommendation on the series of measures as of the date of panel establishment.

83. All China has appealed is the Panel’s recommendation “to the extent that they apply to annual replacement measures.”<sup>105</sup> China clarifies in its Appellant Submission that it challenges the Panel’s recommendations “to the extent that they apply to annual replacement measures adopted after the establishment of the panel on 21 December 2009.”<sup>106</sup> However, on its face, the Panel has not made a recommendation on annual replacement measures adopted after panel establishment. In fact, the Panel is clear that it has made findings on the series of measures “in force at the date of panel establishment.” The Panel has also made clear that it has made recommendations on the series of measures “in force at the date of panel establishment.” Thus, on the face of the Panel Report, there is no basis for China’s claim of error and request to reverse the Panel for making a recommendation that it did not make. China’s appeal may be dismissed on this basis alone.

**D. The Panel’s Recommendations Extend to and Have Consequences for Future Annual Measures**

84. In China’s view, because the Complainants did not seek findings and recommendations on 2010 measures that superseded annually recurring instruments in effect as of panel establishment, no recommendation could extend to any “annual replacement measures that were excluded from the dispute.”<sup>107</sup> That is, China appears to consider that, if the Panel’s

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<sup>104</sup> Panel Report, para. 7.33(e).

<sup>105</sup> China’s Notice of Appeal, paras. 6 and 8.

<sup>106</sup> China’s Appellant Submission, para. 136.

<sup>107</sup> *See, e.g.*, China’s Appellant Submission, para. 133.

recommendations are based on the annually recurring legal instruments in effect on the date of panel establishment, those recommendations cannot extend to and have consequences for future annual measures. China’s argument is without support in the DSU and misunderstands the consequences of a recommendation.

85. First, China confuses the distinction between the basis on which a recommendation is made (*i.e.*, a finding of a measure’s inconsistency at one point in time before the recommendation is made and adopted) and the application or effect of the recommendation once it is made (*i.e.*, an obligation to ensure that the measure for which a recommendation is made and adopted has been brought into conformity). The fact that a recommendation may have a temporal application in the future (in the sense of requiring the Member concerned to ensure that it has complied with the recommendation) does not contradict the fact that it is necessarily made on the basis of a finding whose temporal application is in the past. The Panel’s determination not to make findings or recommendations on “replacement” measures (post-dating panel establishment) is not inconsistent with or contradicted by the nature of the obligation that results from the recommendation that it makes on the basis of an “original” measure (in effect on date of panel establishment).<sup>108</sup>

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<sup>108</sup> For example, the Member concerned may take the position that it has already brought its measure into compliance and needs to do nothing further as a result of the recommendation. If the complaining party disagrees, then Article 21.5 of the DSU provides a means for resolving that disagreement. In an Article 21.5 proceeding, the complaining party could contest either that a measure exists that was taken to comply, or that the measure taken to comply is inconsistent with a covered agreement. In the context of this dispute, were China of the view that the measures found to be inconsistent have expired and China needs do nothing further for compliance, China could so assert. It would then be up to a complaining party to accept that assertion or to contest it using the procedures under the DSU.



86. Second, China appears to consider that the only way for Complainants to pursue a dispute against “the future life of the export duties and quotas at issue [would have been] by challenging China’s replacement measures.”<sup>109</sup> Complainants disagree. It is not necessary for a complaining party to make its prima facie case with respect to challenged measures properly within the panel’s terms of reference under DSU Articles 6.2 and 7.1 and then do so again and again with respect to any replacement measures taken during the course of the proceeding in order to pursue and prevail in a WTO dispute against the “future life” of the challenged measures. Once the challenged measures have been found to be WTO-inconsistent, DSU Article 19.1 mandates that a panel or the Appellate Body “shall recommend” that the measure be brought into conformity with a Member’s WTO obligations. If the complaining party considers that the challenged measure has not been withdrawn or brought into conformity – which the Appellate Body has explained involves fully removing the WTO-inconsistency<sup>110</sup> – and if the responding party disagrees, then that disagreement can be the subject of a compliance proceeding. Thus, there is no need to challenge “replacement measures” and obtain findings and recommendations against them for “future” measures potentially to come within the scope of a Member’s implementation obligation.

87. And as noted above, rather than promoting the prompt and orderly settlement of disputes, the facts of this dispute evidence that China’s approach would frustrate the aims of the dispute settlement system. China’s profusion of post-panel establishment measures, replacement and

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<sup>109</sup> China’s Appellant Submission, para 162.

<sup>110</sup> *EC – Bananas 21.5 (AB)*, para. 323.

otherwise, would have created just the moving target situation the Appellate Body has cautioned against.

**E. Contrary to China’s assertion, Complainants did not “abandon” their right to obtain meaningful recommendations from this dispute settlement proceeding**

88. Other remarks made by China in its Appellant Submission bear mention for purposes of setting the record unequivocally straight. China suggests that the Complainants “abandoned” their rights to obtain recommendations in this dispute. China also argues that by attempting to make recommendations under these circumstances, the Panel has subverted the object and purpose of the WTO dispute settlement system.<sup>111</sup> Both of these arguments is not only wrong, but exactly backwards.

89. With regard to a supposed “abandonment” of rights: as detailed above and in other submissions,<sup>112</sup> Complainants have consistently sought recommendations on the measures found to be inconsistent as of the date of panel establishment. Complainants have also made clear their view that such recommendations are necessary to secure a positive solution to this dispute<sup>113</sup> – which is, as succinctly stated in Article 3.7 of the DSU, the aim of the WTO’s dispute settlement mechanism.

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<sup>111</sup> China’s Appellant Submission, Section III.D.3.

<sup>112</sup> Section III.A.4; *see also*, U.S. Other Appellant Submission, Section IV.E and Mexico’s Other Appellant Submission, para. 16; Complainants’ Joint Oral Statement at the First Panel Meeting, paras. 47-52; U.S. Second Written Submission, Section IV.B-C; Mexico’s Second Written Submission, Section IV.B-C; U.S. Second Oral Statement, paras. 106-108, 115.

<sup>113</sup> Complainants’ Joint Oral Statement at the First Panel Meeting, para. 42; U.S. Second Oral Statement, paras. 106-108.

90. The Complainants did not initiate and undertake this dispute lightly.<sup>114</sup> The Complainants raised their concerns persistently bilaterally and multilaterally. The export restraints at issue in this dispute have caused serious concern for many years, especially as they have proliferated and become more restrictive. Because of China’s position as leading producer of the raw materials at issue and because of China’s active and aggressive use of these export restraints, these policies have significant import in the real world affecting the opportunities and livelihoods of workers, manufacturers, and economies.

91. As noted, Article 3.7 of the DSU provides that “[t]he aim of the dispute settlement mechanism is to secure a positive solution to the dispute.” Furthermore, the “prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.”<sup>115</sup>

92. And with regard to China’s argument that the Panel has subverted the object and purpose of the WTO dispute settlement system: the only “subversion” that could occur would be if China’s were to prevail in its positions on the availability of recommendations in a dispute such as this. Recall that the Panel has found challenged measures to be inconsistent with a Member’s affirmative commitments, and not justified under any of the exceptions provided by the WTO’s rules. Article 19.1 of the DSU provides that a panel “shall” recommend the Member concerned bring those measures into conformity. Such recommendations are an integral part of the

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<sup>114</sup> See U.S. Closing Statement at the Second Panel Meeting, para. 18.

<sup>115</sup> DSU Article 3.3.

mechanism’s capacity to settle the dispute. As the DSU provides in Article 3.5:

“[r]ecommendations . . . made by the DSB shall be aimed at achieving a satisfactory settlement of the matter . . . .”<sup>116</sup>

93. Complainants have consistently maintained that the WTO dispute settlement system is and must be able to provide recommendations with respect to the measure found to be in breach, in particular on the challenged export quotas and export duties – either through the approach that the Panel set out<sup>117</sup> or through an alternate approach should the Appellate Body find that the Panel’s approach is for some reason not tenable.<sup>118</sup> If China’s positions were adopted, resulting in the inability to obtain recommendations on the types of annual measures at issue in this dispute, there would be not only a failure with respect to the serious matters at issue in this dispute, but the result would also represent a more fundamental failure on the part of the WTO dispute settlement mechanism.

#### **F. Conclusion**

94. Accordingly, for all of the foregoing reasons, China’s argument should be rejected and the Appellate Body should uphold the Panel’s recommendation in paragraphs 8.8 and 8.22 of the Panel Report that China bring its export duty and export quota measures in force as of the date of panel establishment into conformity with its WTO obligations.

#### **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**

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<sup>116</sup> DSU Article 3.4.

<sup>117</sup> As set forth in the arguments in this Section.

<sup>118</sup> As set forth in U.S. Other Appellant Submission, Section IV; Mexico’s Other Appellant Submission, para. 16.

95. In its appeal China argues that the Panel erred in finding that China may not rely upon the Article XX exceptions to justify a violation of its export duty commitments in Paragraph 11.3 of the Accession Protocol. In effect, China argues that: (1) two specific exceptions incorporated into Paragraph 11.3, which does not itself refer to either Article XX, or the GATT 1994 or WTO Agreement more generally, incorporate Article XX; (2) provisions other than Paragraph 11.3 incorporate Article XX into Paragraph 11.3; and (3) Article XX reflects an inherent “right to regulate” that supersedes WTO obligations and thereby justifies China’s invocation of Article XX to defend a violation of Paragraph 11.3.

96. As discussed below, the Panel correctly interpreted and applied China’s Accession Protocol in this regard, and the Panel’s findings should be upheld. In contrast to the interpretation offered by China, the Panel’s conclusion reflects a key principle of treaty interpretation, namely that, “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>119</sup> The Panel’s interpretation is based on the text of Paragraph 11.3 – which plainly sets forth the exceptions that apply to the export duty commitment therein – and the text of Article XX of the GATT 1994, and is supported by relevant context.

97. The Panel’s conclusion is also consistent with the fact that, through the WTO Agreement, Members agreed to discipline their right to regulate trade, subject to certain specific exceptions. Neither China’s nor any other WTO Member’s “right to regulate” for health or environmental purposes is at issue in this dispute. WTO Members, including China, may pursue such interests “as long as, in so doing, they fulfill their obligations and respect the rights of other Members

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<sup>119</sup> Vienna Convention on the Law of Treaties, Article 31(1).

under the *WTO Agreement*.<sup>120</sup> At issue in this dispute is whether the export duties that China imposes on various raw materials are consistent with the specific textual commitments it made to eliminate such duties in Paragraph 11.3. The Panel properly rejected China’s argument that an “inherent right to regulate” applies above and beyond the exceptions provided for in Paragraph 11.3, as discussed below.

**A. Factual Background**

98. Paragraph 11.3 of China’s Accession Protocol provides,

China shall eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of this Protocol or applied in conformity with the provisions of Article VIII of the GATT 1994.

99. Annex 6 of China’s Accession Protocol provides a list of 84 products and corresponding maximum duty rates. Following the list, Annex 6 includes the following text,

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 the presently applied rates, except under exceptional circumstances. If such circumstances occurred, China would consult with affected members prior to increasing applied tariffs with a view to finding a mutually acceptable solution.

100. The Complainants challenged China’s export duties on bauxite, coke, fluorspar, magnesium, manganese, silicon metal, and zinc as inconsistent with China’s obligations under Paragraph 11.3.

101. China did not dispute that the export duties on the raw materials at issue are inconsistent with Paragraph 11.3.<sup>121</sup> Rather, China argued that certain of the challenged duties were justified

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<sup>120</sup> *U.S. – Shrimp (AB)*, para. 186.

<sup>121</sup> U.S. Second Written Submission, para. 11; Mexico’s Second Written Submission, para. 14.

under Article XX of the GATT. In particular, China argued that the duty on fluorspar was justified under Article XX(g), and that the duties on coke and certain forms of magnesium, manganese, and zinc were justified under Article XX(b). China chose not to defend the export duties on bauxite, silicon metal, or other forms of magnesium, manganese, and zinc.<sup>122</sup>

102. Before the Panel, China argued that, notwithstanding Paragraph 11.3 of its Accession Protocol, it was entitled to impose export duties by virtue of Article XX of the GATT based on its “inherent right to regulate.”<sup>123</sup> China claimed that the Preamble to the *WTO Agreement*,<sup>124</sup> the Appellate Body’s findings in *China – Audiovisual Products*,<sup>125</sup> and the language of Annex 6 to China’s Accession Protocol<sup>126</sup> and Paragraph 170 of the Working Party Report<sup>127</sup> supported its

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<sup>122</sup> China attempted to defend its export *quotas* on coke and silicon carbide under Article XX(b) and its export quota on a subset of bauxite under Articles XI:2(a) and XX(g).

<sup>123</sup> China’s Opening Statement at the First Panel Meeting, paras. 67-78; China’s Response to the First Set of Questions from the Panel, para. 173.

<sup>124</sup> China’s Opening Statement at the First Panel Meeting, para. 67.

<sup>125</sup> China’s Opening Statement at the First Panel Meeting, para. 70; China’s Second Written Submission, para. 162. China also argued, as it does on appeal, that the Appellate Body report in *Turkey – Textiles* and the GATT panel report in *EEC – Bananas*, and the reports in two safeguards cases (*U.S. – Line Pipe* and *Argentina – Footwear*) supported its claims. China’s Response to the First Set of Questions from the Panel, para. 183. Contrary to China’s assertions on appeal, the Complainants refuted these arguments more than once. U.S. Comments on China’s Answers to the First Set of Panel Questions, para. 52; U.S. Opening Statement at the Second Panel Meeting, para. 22. In particular, the Complainants explained that, in the unadopted report in *Bananas*, no provision outside of the GATT 1947 was at issue, and that in each of the other reports cited by China, the provision of the non-GATT Agreement that was at issue in the dispute made explicit reference to a specific GATT obligation, thereby establishing a textual basis for considering that GATT obligation.

<sup>126</sup> China’s Opening Statement at the First Panel Meeting, paras. 71-72; China’s Second Written Submission, para. 164.

<sup>127</sup> China’s Opening Statement at the First Panel Meeting, paras. 73-74; China’s Response to the First Set of Questions from the Panel, paras. 178-179; China’s Second Written Submission, paras. 165-166.

arguments. China further insisted that no specific textual language was actually necessary to secure its “‘inherent power’ to regulate its export trade.”<sup>128</sup>

103. In its report, the Panel examined the ordinary meaning of Paragraph 11.3 of China’s Accession Protocol, including its incorporation of specific exceptions for products listed in Annex 6 and taxes and charges applied in conformity with GATT Article VIII.<sup>129</sup> The Panel noted that, while the Appellate Body in *China – Audiovisual Services* had interpreted the language in the introductory clause of Paragraph 5.1 of China’s Accession Protocol to mean that Article XX exceptions are available to violations of that provision, the language in Paragraph 11.3 is quite different.<sup>130</sup> The Panel also evaluated the context provided by provisions of China’s Working Party Report, including Paragraphs 155, 156, and 170.<sup>131</sup> The Panel further considered the context provided by other provisions of the WTO Agreement, including the text of Article XX itself,<sup>132</sup> as well as the Appellate Body’s analysis of the applicability of Article XX to violations of Paragraph 5.1 of China’s Accession Protocol in *China – Audiovisual Products*.<sup>133</sup> The Panel also addressed China’s argument that its “inherent right to regulate” prevails over its WTO obligations.<sup>134</sup>

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<sup>128</sup> China’s Opening Statement at the First Panel Meeting, para. 72; China’s Response to the First Set of Questions from the Panel, paras. 175, 184-185; China’s Opening Statement at the Second Panel Meeting, para. 196.

<sup>129</sup> Panel Report, para. 7.121-7.129.

<sup>130</sup> Panel Report, paras. 7.117-7.120. *See also* Complainants’ Opening Oral Statement at the First Panel Meeting, paras. 58-61; U.S. Answers to the First Set of Panel Questions, paras. 48-49, 53; U.S. Second Written Submission, paras. 14-20; Mexico’s Second Written Submission, paras. 17-23.

<sup>131</sup> Panel Report, paras. 7.130-7.148.

<sup>132</sup> Panel Report, paras. 7.149-7.157.

<sup>133</sup> Panel Report, paras. 7.117-7.120, 7.155.

<sup>134</sup> Panel Report, paras. 7.155-7.157.



104. In particular, the Panel noted, consistent with the reasoning offered by the Complainants, that the language of Paragraph 11.3 itself suggests that the WTO Members and China did not intend for the Article XX defenses to be available to violations of China's export duty commitments.<sup>135</sup> The Panel found that context provided by other provisions of China's Accession Protocol, Working Party Report, and the GATT 1994, as well as the language of Article XX itself, confirmed that Article XX was not intended to apply, while nothing in the Working Party Report explicitly or implicitly provided for application of the Article XX exceptions to violations of Paragraph 11.3.<sup>136</sup> The Panel reasoned further that this conclusion is not inconsistent with China's right to regulate trade, as such a right cannot prevail over the very obligations intended to discipline the exercise of that right.<sup>137</sup>

105. The Panel ultimately agreed with the Complainants and concluded that China is not entitled to invoke the Article XX exceptions for violations of its commitments with respect to export duties in Paragraph 11.3 of its Accession Protocol.<sup>138</sup> China has appealed the Panel's analysis.

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<sup>135</sup> Panel Report, para. 7.129. *See also* Complainants' Opening Statement at the First Panel Meeting, para. 63.

<sup>136</sup> Panel Report, paras. 7.130-7.154. *See also* Complainants' Opening Statement at the First Panel Meeting, paras. 58-64; U.S. Answers to the First Set of Panel Questions, paras. 50-51; U.S. Second Written Submission, paras. 14-16, 22-25; Mexico's Second Written Submission, paras. 17-19, 25-28.

<sup>137</sup> Panel Report, paras. 7.155-7.157. *See also* U.S. Answers to the First Set of Panel Questions, paras. 46-49, 73; U.S. Comments on China's Answers to the First Set of Panel Questions, para. 51; U.S. Second Written Submission, paras. 17-20; Mexico's Answers to the First Set of Panel Questions, Answer 35; Mexico's Second Written Submission, paras. 20-23.

<sup>138</sup> Panel Report, paras. 7.158-7.160.

106. On appeal, China overlooks the Panel’s textual analysis of the commitments made under Paragraph 11.3. China challenges the Panel’s analysis of the exceptions to those commitments that are specifically provided for in Paragraph 11.3, in part because, according to China, those exceptions encompass the exceptions under Article XX. Moreover, China argues that the Panel erred in declining to find that the specific commitments in Paragraph 11.3 are overridden by Paragraph 170 of the Working Party Report or by China’s inherent “right to regulate.” For the reasons discussed below, China’s appeal lacks merit and should be rejected.

**B. The Panel Correctly Found That the Plain Meaning of Paragraph 11.3 Does Not Permit Article XX Exceptions to Justify Violations of China’s Export Duty Commitments**

107. The Panel found, as all parties agreed, that China’s Accession Protocol forms an integral part of the WTO Agreement and that commitments in the Working Party Report that are incorporated into the Accession Protocol by reference are binding and enforceable.<sup>139</sup>

Accordingly, the Panel proceeded to interpret the provisions of China’s Accession Protocol in accordance with the customary rules of interpretation of public international law.<sup>140</sup>

108. As noted above, Paragraph 11.3 of China’s Accession Protocol provides, “China shall eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of this Protocol or applied in conformity with the provisions of Article VIII of the GATT.”

109. Annex 6, in turn, lists and provides maximum duty rates for 84 products, and includes the following paragraph:

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<sup>139</sup> Panel Report, paras. 7.113-7.114; China’s Appellant Submission, para. 201.

<sup>140</sup> Panel Report, para. 7.115.

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 the presently applied rates, except under exceptional circumstances. If such circumstances occurred, China would consult with affected members prior to increasing applied tariffs with a view to finding a mutually acceptable solution.

110. Under the rules of treaty interpretation, the starting point for interpreting meaning is the ordinary meaning of the text.<sup>141</sup> Based on the ordinary meaning of the terms “shall eliminate,” the Panel concluded that, “At the time of China’s accession to the WTO, WTO Members and China agreed that China would not maintain any export tariff taxes and charges, except on those 84 products and within the maximum levels provided in Annex 6, or if such charges could be justified under GATT Article VIII.”

111. On appeal, China claims that the two exceptions set forth in Paragraph 11.3 – an exception for Annex 6 that is applicable only to *applied* rates, and an exception for taxes and charges applied in conformity with the provisions of Article VIII of the GATT 1994 – somehow authorize China to justify under Article XX export duties in excess of the maximum levels set out in Annex 6, as well as export duties on products not even listed in Annex 6. As explained below, China’s arguments misconstrue the relevance of these two exceptions, and the Panel’s interpretation of the plain meaning of Paragraph 11.3 should be upheld.

112. With respect to Annex 6, China argues that the reference to “exceptional circumstances” in the note in Annex 6 covers the exceptions provided for in Article XX.<sup>142</sup> As the Panel properly recognized, however,

“[T]he ordinary meaning of these two sentences of Annex 6 is very clear. The use of the term ‘maximum levels’ sets a definitive ceiling in excess of which China may not impose

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<sup>141</sup> See, e.g., *Japan – Alcohol (AB)*, pp. 10-11.

<sup>142</sup> China’s Appellant Submission, para. 218.

export duties. Furthermore, the second sentence makes clear that any increase *in the export duty rates applied* at the time of the conclusion of China’s Accession Protocol could be effected only in exceptional circumstances following consultations with affected Members.”<sup>143</sup>

113. China’s assertion that Annex 6 makes the Article XX exceptions applicable to violations of Paragraph 11.3 has no textual basis. To the contrary, nothing in Annex 6 or its note provides a basis for finding that the Article XX exceptions are available to justify a violation of the commitments in Paragraph 11.3. Instead, the first sentence of the note makes clear that China committed not to impose export duties on the 84 products listed in the annex above the rates set out in the annex: those rates “are maximum levels which will not be exceeded.” The maximum levels set out for the 84 products in Annex 6 are between 20 and 40 percent. The second and third sentences of the note impose a further obligation on China: even if the applied rate for one of the 84 products listed in Annex 6 is below the maximum rate, China is not free to raise the applied rate up to the maximum rate. Instead, China may do so only in “exceptional circumstances,” and only after consulting with affected Members. The fact that China accepted this additional obligation regarding applied rates for the 84 products in Annex 6 cannot be read as providing any basis for China to violate its commitments not to impose export duties on those products above the maximum rates set out in the annex. Moreover, nothing about this additional obligation not to raise applied rates for the products listed in Annex 6 can be seen as any basis for China to violate its commitments not to impose any export duties at all with respect to the products not listed in Annex 6.<sup>144</sup>

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<sup>143</sup> Panel Report, para. 7.127 (emphasis added).

<sup>144</sup> U.S. Answers to the Panel’s First Set of Questions, para. 50; U.S. Second Written Submission, para. 21; Mexico’s Written Submission, para. 55. On appeal, China suggests that because the Panel found that China had not consulted regarding the export duties at issue (based

114. China attempts to avoid this lack of textual basis for its assertion that Annex 6 incorporates Article XX by focusing on the Annex 6 note’s use of the phrase “except under exceptional circumstance” and arguing that Annex 6 and Article XX have “substantive overlap.”<sup>145</sup> China’s argument is absurd. Annex 6 and Article XX “overlap” only to the extent that each establishes potential exceptions applicable to certain obligations – the commitments with respect to applied rates on the 84 products listed in Annex 6, and the GATT 1994, respectively.

115. On appeal, China also argues that the exception in Paragraph 11.3 for duties or charges imposed in conformity with GATT Article VIII confirms that the Article XX exceptions are likewise available for violations of Paragraph 11.3.<sup>146</sup> China did not present this argument to the Panel. However, at issue in this dispute is China’s commitment in Paragraph 11.3 to eliminate export duties. By its terms, as China admits, Article VIII applies to “fees and charges” other than export duties.

116. Moreover, it does not follow that WTO Members intended to incorporate a reference to one GATT 1994 provision, namely Article XX, by virtue of referring to an entirely different provision, namely Article VIII. The fact that Paragraph 11.3 singles out Article VIII and not any other provisions of the GATT 1994 suggests the opposite. As the Panel observed, “Notably, the

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on China’s concession to that effect), Annex 6 must permit China to apply export duties to all products and demonstrates an intent to make Article XX applicable to the specific obligations in Paragraph 11.3. China’s Appellant Submission, paras. 213-215. None of the Panel Requests included a claim that China had violated the obligation to consult under Annex 6, so it is unclear on what basis the Panel purported to make a finding to that effect. Moreover, as explained above, this interpretation has no basis in the text.

<sup>145</sup> China’s Appellant Submission, paras. 216-219.

<sup>146</sup> China’s Appellant Submission, paras. 224-227.

language in Paragraph 11.3 expressly refers to Article VIII, but leaves out reference to other provisions of the GATT 1994, such as Article XX.”<sup>147</sup>

117. China’s argument is premised on an incorrect assumption regarding the effect of Article XX. China appears to assume that if a tax or charge that would otherwise breach Article VIII met the conditions of Article XX then it would be “in conformity with” Article VIII. This is not correct. Indeed, even within the context of the GATT 1994, Article XX does not mean that a measure that meets the conditions of Article XX would be consistent with Article VIII. Article XX only means that Article VIII would not prevent the application of that measure. This is confirmed by the approach taken by panels and by the Appellate Body in past disputes. There, panels and the Appellate Body have taken the position that it is appropriate to find first that a measure breaches the relevant article (here, Article VIII) and only then look to see whether it may nonetheless be maintained in light of Article XX. This only confirms that the language in Paragraph 11.3 providing an exception for a tax or charge applied “in conformity with” Article VIII would not refer to such a tax or charge that was in breach of Article VIII but nonetheless could fall within the terms of Article XX.

**C. The Panel Correctly Found That Relevant Context Supports the Finding that Article XX Is Not Applicable**

118. China also accuses the Panel of relying on the “mere fact” that Paragraph 11.3 includes the two specific exceptions to conclude that the Article XX exceptions do not apply.<sup>148</sup>

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<sup>147</sup> Panel Report, para. 7.129.

<sup>148</sup> China’s Appellant Submission, para. 223. In part China dismisses the relevance of the inclusion of specific exceptions in Paragraph 11.3 because, according to China, many provisions have specific exceptions and are also subject to general exceptions. The example cited by China, Article XI:2, does not support its arguments because Article XI is part of the

119. The Panel correctly concluded, “The deliberate choice of language providing for exceptions in Paragraph 11.3, together with the omission of general references to the WTO Agreement or to the GATT 1994, suggest . . . that the WTO Members and China did not intend to incorporate into Paragraph 11.3 the defences set out in Article XX of the GATT 1994.”<sup>149</sup> In other words, the Panel did not rely solely on Paragraph 11.3’s incorporation of two exceptions in reaching this conclusion. The Panel also looked to the context provided by other provisions of China’s Accession Protocol and Working Party Report and noted that, unlike Paragraph 11.3, such provisions do incorporate general references to the WTO Agreement or the GATT 1994.<sup>150</sup>

**1. Paragraphs 5.1, 11.1, and 11.2 of the Accession Protocol, Paragraphs 155 and 156 of the Working Party Report, and Article XX of the GATT 1994 Itself Support the Panel’s Finding**

120. First, the Panel noted that Paragraph 5.1 of China’s Accession Protocol, which the Appellate Body examined in *China – Audiovisual Products*, includes a general reference to the WTO Agreement.<sup>151</sup> Specifically, Paragraph 5.1 of China’s Accession Protocol includes the introductory clause, “Without prejudice to China’s right to regulate trade in a manner consistent with the WTO Agreement . . . .”

121. As the Panel observed, in *China – Audiovisual Products*, the Appellate Body interpreted this language to mean that Article XX was available as a defense to the commitments in Paragraph 5.1 of China’s Accession Protocol.<sup>152</sup> The language of Paragraph 11.3 is in sharp

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GATT 1994. China’s Appellant Submission, para. 222.

<sup>149</sup> Panel Report, para. 7.129.

<sup>150</sup> Panel Report, paras. 7.120, 7.124, 7.129, 7.136-7.138, 7.144-7.146.

<sup>151</sup> Panel Report, paras. 7.117-7.120, 7.124, 7.129.

<sup>152</sup> Panel Report, para. 7.119; *China – Audiovisual Services*, paras. 218-230.

contrast to the language of Paragraph 5.1, however. The language of Paragraph 11.3 is specific and circumscribed; it sets forth particular commitments to eliminate export duties and two exceptions applicable to those commitments. Paragraph 11.3 includes no reference to Article XX, to the GATT 1994, or to WTO obligations more generally. China’s interpretation of the scope of its commitments under Paragraph 11.3 would render the language in Paragraph 5.1 superfluous. Such an interpretation would be disfavored under a key tenet of customary rules of treaty interpretation, namely that an “interpretation must give meaning and effect to all the terms of a treaty.”<sup>153</sup>

122. The Panel was also appropriately struck by the contrast between the language of Paragraph 11.3 of China’s Accession Protocol and the language of Paragraphs 11.1 and 11.2.<sup>154</sup>

As the Panel observed, Paragraphs 11.1 and 11.2, which immediately precede Paragraph 11.3, do include more general references to the GATT 1994:

1. China shall ensure that customs fees or charges applied or administered by national or sub-national authorities shall be in conformity with the GATT 1994.
2. China shall ensure that internal taxes and charges, including value-added taxes, applied or administered by national or sub-national authorities shall be in conformity with the GATT 1994.

123. Like Paragraph 5.1, the language in these two provisions is quite different than the language in Paragraph 11.3. Whereas Paragraphs 11.1 and 11.2 affirm China’s obligations to apply or administer certain measures “in conformity with the GATT 1994,” Paragraph 11.3 establishes an obligation with respect to export duties not found in the GATT 1994, and then sets forth the exceptions that apply to that obligation. As the Panel explained, “[T]his difference in

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<sup>153</sup> *U.S. – Gasoline (AB)*, p. 23.

<sup>154</sup> Panel Report, paras. 7.136-7.138.



wording between the three sequential sub-paragraphs is evidence of a deliberate choice by China and the WTO Members in setting out China's rights and obligations and it must be given effect and respected."<sup>155</sup>

124. The Panel also properly found support for its interpretation of Paragraph 11.3 in Paragraphs 155 and 156 of the Working Party Report.<sup>156</sup> China dismisses the relevance of Paragraphs 155 and 156 in its appeal on the grounds that China has assumed no obligations under those provisions.<sup>157</sup> The Panel acknowledged that Paragraphs 155 and 156 are not part of the explicit commitments made by China in its Accession Protocol.<sup>158</sup> The Panel properly viewed these paragraphs as relevant context, however, because in them WTO Members voiced concerns over taxes and charges that China applied exclusively to exports, and expressed the view that such taxes and charges should be eliminated unless applied in conformity with Article VIII of the GATT 1994 or listed in what was then Annex 6 to the Draft Protocol.<sup>159</sup> Paragraphs 155 and 156 also make clear that, at the time, China represented that it maintained export duties on 84 products.<sup>160</sup> As such, the Panel correctly looked to Paragraphs 155 and 156 to confirm that WTO Members did not intend for the Article XX exceptions to apply to China's commitment to eliminate export duties.

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<sup>155</sup> Panel Report, para. 7.138.

<sup>156</sup> Panel Report, paras. 7.143-7.146.

<sup>157</sup> China's Appellant Submission, para. 237.

<sup>158</sup> Panel Report, para. 7.145.

<sup>159</sup> Working Party Report, para. 155; *see also* Panel Report, para. 7.145.

<sup>160</sup> Working Party Report, para. 156.

125. Finally, the Panel found that the text of Article XX of the GATT 1994 itself indicates that the Article XX exceptions relate only to the GATT 1994.<sup>161</sup> The *chapeau* of Article XX provides, “[N]othing *in this Agreement* shall be construed to prevent the adoption or enforcement by any contracting party of measures . . . .”<sup>162</sup> The Panel accorded meaning to the terms “in this Agreement” and found that this language “suggests that the exceptions therein relate only to the GATT 1994, and not to other agreements.”<sup>163</sup> The Panel noted that Article XX has been incorporated by reference into some other covered agreements.<sup>164</sup> This is not the case with Paragraph 11.3 of China’s Accession Protocol, however.

126. China does not address the meaning of the reference to “this Agreement” in Article XX on appeal. Rather, China argues that China’s “right to regulate,” including through measures that would fall within the Article XX exceptions, applies unless it has been expressly excluded.<sup>165</sup> China’s arguments in this regard should be rejected, as discussed in detail in section IV.D below.

127. In sum, the text of Paragraph 11.3 makes clear that Article XX is not available as an exception to violations of the Paragraph 11.3 commitments to eliminate export duties. The related paragraphs of the Working Party Report indicate that WTO Members had specific concerns about China’s imposition of export duties and reflect China’s commitment to eliminate

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<sup>161</sup> Panel Report, para. 7.153.

<sup>162</sup> Emphasis added.

<sup>163</sup> Panel Report, para. 7.153.

<sup>164</sup> Panel Report, para. 7.153 (citing the *Agreement on Trade-Related Investment Measures*). Conversely, this means that Article XX has not been incorporated into other covered agreements. Where negotiators intended Article XX to be incorporated, they have so indicated.

<sup>165</sup> China’s Appellant Submission, paras. 282-286.

them. In concluding that the Article XX exceptions do not apply to violations of that commitment, the Panel interpreted the plain language of Paragraph 11.3, and relevant provisions of the GATT 1994, China's Accession Protocol, and the Working Party Report, in a harmonious manner, one that gives effect to the text of each provision.

**2. The Panel Correctly Found That Paragraph 170 of the Working Party Report Does Not Support China's Claim That Article XX Exceptions Are Available for Violations of Paragraph 11.3**

128. China argues that the Panel erred in failing to conclude that Paragraph 170 of the Working Party Report means that the Article XX exceptions apply to violations of its export duty commitments under Paragraph 11.3 of China's Accession Protocol. China's argument is without merit.

129. In its full context, Paragraph 170 reads as follows:

**D. INTERNAL POLICIES AFFECTING FOREIGN TRADE IN GOODS**

**1. Taxes and Charges Levied on Imports and Exports**

169. Some members of the Working Party expressed concern about the application of the VAT and additional charges levied by sub-national governments on imports. Non-discriminatory application of the VAT and other internal taxes was deemed essential.

170. The representative of China confirmed that upon accession, China would ensure that its laws and regulations relating to all fees, charges or taxes levied on imports and exports would be in full conformity with its WTO obligations, including Articles I, III:2 and 4, and XI:1 of the GATT 1994, and that it would also implement such laws and regulations in full conformity with these obligations. The Working Party took note of this commitment.

130. Based on the context of Paragraph 170, it is clear what the negotiators saw as the purpose of this paragraph. Paragraph 169 states the concern: namely, some Members were concerned about internal policies, especially those adopted by sub-national governments, that imposed

discriminatory taxes and other charges that would affect foreign trade in goods. In Paragraph 170, China responds to this concern: namely, China confirmed that its laws relating to all fees, charges, or taxes levied on imports and exports would be in full conformity with its WTO obligations. It is untenable to believe – as China argues – that the negotiators intended for this confirmation that China would ensure that internal, sub-national measures were WTO-compliant reflects any intent to apply Article XX exceptions to China’s export duty commitments in Paragraph 11.3 of the Accession Protocol.

131. China claims that the text of Paragraph 11.3 and Paragraph 170 have “substantial overlap” and that the Panel erred in concluding that Paragraph 170 does not apply to export duties, but rather to domestic taxes.<sup>166</sup> China argues further that, in light of this supposed substantial overlap, the reference in Paragraph 170 to “in full conformity with its WTO obligations” means that Paragraph 170, and in turn Paragraph 11.3, incorporates the Article XX exceptions.<sup>167</sup>

132. China’s arguments regarding Paragraph 170 ignore the text of Paragraph 11.3 itself and the relevant context provided by Paragraphs 155, 156, and 159 of the Working Party Report and Article XX of the GATT 1994, discussed above, and misconstrue the Panel’s analysis of Paragraph 170. The Panel did not simply conclude that Paragraph 170 applies to “domestic taxes” rather than “export duties.” The Panel noted more precisely, and correctly, that Paragraph 170 “does not refer to China’s *specific obligations on export duties.*”<sup>168</sup> The Panel properly

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<sup>166</sup> China’s Appellant Submission, paras. 236-239.

<sup>167</sup> China’s Appellant Submission, paras. 247-259.

<sup>168</sup> Panel Report, para. 7.141 (emphasis added).

distinguished between Paragraph 170 and Paragraph 11.3, which establishes a specific obligation to eliminate export duties that is not set forth in the GATT 1994.<sup>169</sup> The Panel's finding is supported by the text of Paragraph 11.3, which sets forth this new commitment with respect to export duties and the exceptions applicable to that commitment, i.e., Annex 6 and taxes and charges applied in conformity with Article VIII of the GATT 1994. In contrast, Paragraph 170 affirms China's obligations under the WTO Agreement. Paragraph 170 does not change the fact that there is no textual basis for concluding that Article XX is an exception to the commitment in Paragraph 11.3.

133. The Panel also correctly rejected China's attempt to draw an analogy between Paragraph 170 and Paragraph 5.1 of China's Accession Protocol for similar reasons.<sup>170</sup> Contrary to China's suggestion, in rebutting China's attempt to extrapolate from Paragraph 170 an exception not found in Paragraph 11.3, the Complainants did not rely solely on the fact that Paragraph 5.1 and Paragraph 170 do not include identical language.<sup>171</sup> Instead, the Complainants explained that Paragraph 5.1 and Paragraph 170 are not analogous because Paragraph 5.1 contains a commitment as well as an introductory phrase to the effect that the commitment is "without prejudice to the right to regulate trade in a manner consistent with the WTO Agreement."<sup>172</sup> Paragraph 11.3 similarly contains a commitment, with two specific exceptions. As noted above, in contrast, Paragraph 170 affirms China's WTO commitments, in the context of concerns about

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<sup>169</sup> Panel Report, paras. 7.141-7.142.

<sup>170</sup> Panel Report, para. 7.139.

<sup>171</sup> China's Appellant Submission, para. 250.

<sup>172</sup> U.S. Answers to the First Set of Panel Questions, para. 52; U.S. Second Written Submission, paras. 22-23; Mexico's Second Written Submission, paras. 25-26.

measures adopted by sub-national governments.<sup>173</sup> Moreover, whether or not the language in Paragraphs 5.1 and 170 is characterized as similar, no language akin to that appearing either in Paragraph 5.1 or in Paragraph 170 appears in or can be imputed to Paragraph 11.3. Indeed, the absence of such language supports the Panel’s finding that Paragraph 11.3 reflects a deliberate choice as to what exceptions should be available for violations of that provision.

134. In addition, as detailed above, the Panel found support for its conclusions regarding the applicability of Article XX to violations of Paragraph 11.3 of the Protocol in Paragraphs 11.1 and 11.2 of the Protocol as well as Paragraphs 155 and 156. Although China argues on appeal that Paragraph 170 provides more relevant context than Paragraphs 155 and 156,<sup>174</sup> as the Panel noted, Paragraph 155 reflects concerns with export duties specifically and has the same content as Paragraph 11.3, including the reference to its specific exceptions, and Paragraph 156 refers to duties on 84 products.<sup>175</sup>

135. The Panel’s rejection of China’s reliance on Paragraph 170 was grounded in the text of Paragraph 11.3, as well as Paragraph 170 and relevant context in the Accession Protocol and Working Party Report. As such, China’s insistence that the “in full conformity with its WTO

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<sup>173</sup> On appeal, China attempts to make much of the Panel’s statements to the effect that Paragraph 170 affirms commitments under the GATT 1994, as opposed to the WTO Agreement more broadly. China’s Appellant Submission, paras. 242-246. China’s assertions miss the point of the Panel’s statements. The Panel observed – correctly – that Paragraph 11.3 includes an obligation to *eliminate export duties* that is not found in the GATT 1994, and thereby distinguished Paragraph 11.3 from Paragraph 170, which, as noted above, does not include such a specific commitment. Panel Report, paras. 7.141-7.142.

<sup>174</sup> China’s Appellant Submission, paras. 237-238.

<sup>175</sup> Panel Report, para. 7.145.

obligations” language in Paragraph 170 makes the Article XX exceptions available to violations of Paragraph 11.3 of the Accession Protocol should again be rejected on appeal.

**3. The Preamble to the WTO Agreement Does Not Provide a Basis for Concluding that Article XX Exceptions Apply to Violations of Paragraph 11.3**

136. China argues in addition that the Preamble to the WTO Agreement provides context that indicates that China may justify violations of its Paragraph 11.3 export duty commitments through recourse to Article XX of the GATT 1994.<sup>176</sup> According to China, the Panel failed to interpret Paragraph 11.3 in light of the Preamble.<sup>177</sup> However, the Preamble to the WTO Agreement neither provides a textual basis for concluding that Article XX applies to violations of Paragraph 11.3, nor negates the text and context demonstrating that Members intended that Article XX not apply. The Preamble does not make the exceptions provided for in the covered agreements interchangeable. China’s arguments on this point largely overlap with its arguments as to the primacy of its inherent “right to regulate,” which is discussed in detail in the next section.

**D. An Inherent “Right to Regulate” Does Not Permit Recourse to Article XX for Violations of China’s Export Duty Commitments, and Is in No Way Hampered by the Panel’s Finding To That Effect**

137. China asserts finally that, in concluding that Article XX is not available to justify violations of its commitments in Paragraph 11.3 of the Accession Protocol, the Panel deprived it of its sovereign right to act in accordance with the principles reflected in the Article XX

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<sup>176</sup> China’s Appellant Submission, paras. 266-268.

<sup>177</sup> China’s Appellant Submission, para. 270.

exceptions.<sup>178</sup> As noted above, China cites the Preamble to the *WTO Agreement* as context that indicates that Paragraph 11.3 cannot be read in the way that the Panel interpreted that provision.<sup>179</sup> According to China, the Preamble indicates that the specific commitments set forth in the covered agreements are a “means to an end,”<sup>180</sup> such that China’s “inherent right to regulate trade to achieve non-trade objectives” supersedes the specific commitments of the covered agreements.

138. China argues further that, as reflected in the Preamble, the “inherent right to regulate” applies throughout the covered agreements.<sup>181</sup> China faults the Panel for interpreting Paragraph 11.3 so as to prevent China from justifying export duties pursuant to Article XX without “explicit confirmation” that Article XX applies.<sup>182</sup> China claims that, in so doing, the Panel failed to recognize China’s inherent power to regulate trade through imposing export duties.<sup>183</sup> According to China, the Panel also “distorted the balance of rights and obligations established in China’s *Accession Protocol*” by concluding that Article XX exceptions do not apply to China’s

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<sup>178</sup> China’s Appellant Submission, para. 262.

<sup>179</sup> China’s Appellant Submission, paras. 266-268. China also argues that the Panel’s reasoning yields an “absurd” outcome, namely that China could turn to Article XX to justify export quotas but not duties. China’s Appellant Submission, para. 269. Given the concerns expressed by WTO Members about China’s use of export duties, reflected in Paragraphs 155 and 156 of the Working Party Report, as well as the plain language of Paragraph 11.3 requiring the elimination of export duties, this is not an absurd outcome. In fact, in a number of disputes Members have relied on Article XX to justify import restrictions. *See U.S. – Shrimp (AB)*, *EC – Asbestos (AB)*, *Brazil – Tyres (AB)*. And in this dispute China attempted to justify certain of its export quotas under Article XX.

<sup>180</sup> China’s Appellant Submission, para. 272.

<sup>181</sup> China’s Appellant Submission, para. 274.

<sup>182</sup> China’s Appellant Submission, paras. 282-283.

<sup>183</sup> China’s Appellant Submission, para. 284.



specific commitments with respect to export duties in Paragraph 11.3.<sup>184</sup> China asserts that such an “imbalanced” outcome cannot reflect a “delicate balance of rights and obligations.”<sup>185</sup> China asserts, as it did before the Panel, that because the “inherent right to regulate” is not “bestowed by international treaties, such as the WTO Agreement,” no language is necessary making the Article XX exceptions applicable to violations of the export duty commitments in Paragraph 11.3.<sup>186</sup>

139. China’s arguments are flawed in several respects, and should be rejected.

140. First, contrary to China’s claims, the Panel nowhere suggested that it is the WTO Agreement that confers an inherent right to regulate or that, in entering the WTO, Members abandoned their right to regulate.<sup>187</sup> Nor have the Complainants suggested as much. Instead, as explained in detail above, the Panel correctly found that under Paragraph 11.3 China agreed to specific textual disciplines on China’s ability to impose export duties.<sup>188</sup> In other words, Paragraph 11.3 explicitly limits China’s right to impose export duties. The Panel’s conclusion is consistent not only with the text of Paragraph 11.3, but also with the understanding that, as reflected in previous Appellate Body reports, in entering into the WTO, Members agree to disciplines on their right to regulate trade, which are reflected in the text of the covered agreements.

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<sup>184</sup> China’s Appellant Submission, para. 274.

<sup>185</sup> China’s Appellant Submission, para. 293.

<sup>186</sup> China’s Appellant Submission, para. 282.

<sup>187</sup> China’s Appellant Submission, paras. 276, 282, 285.

<sup>188</sup> In other words, Paragraph 11.3 “expressly remove[s], or condition[s], the enjoyment of” China’s right to use export duties. China’s Appellant Submission, para. 282.

141. The Panel recognized that WTO Members have a sovereign right to regulate trade. However, the Panel likewise recognized that negotiation of accession to the WTO is an exercise of that sovereign right.<sup>189</sup> These negotiations yield a “delicate balance of rights and obligations, which are reflected in the specific wording of each commitment set out in these documents.”<sup>190</sup>

142. The Panel correctly rejected China’s claim that its “inherent right to regulate” somehow supersedes the commitments set forth in China’s Accession Protocol.<sup>191</sup> While Members have a right to regulate, with respect to trade, they have agreed to disciplines on their right to regulate in the WTO Agreement and its Annexes. Indeed, as the Appellate Body recognized in *China – Audiovisual Services*, because WTO Members have an inherent right to regulate, it was necessary to agree on rules that constrain that right in the context of trade.<sup>192</sup> In that dispute, the Appellate Body explained that, “With respect to *trade*, the *WTO Agreement* and its Annexes . . . operate to, among other things, discipline the exercise of each Member’s inherent power to regulate by requiring WTO Members to comply with the obligations that they have assumed thereunder.”<sup>193</sup>

143. The Appellate Body similarly recognized in *Japan – Alcohol*: “The WTO Agreement is a treaty – the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits they expect to derive as Members of the

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<sup>189</sup> Panel Report, para. 7.156.

<sup>190</sup> Panel Report, para. 7.112.

<sup>191</sup> Panel Report, para. 7.157.

<sup>192</sup> U.S. Second Written Submission, para. 20; Mexico’s Second Written Submission, para. 23.

<sup>193</sup> *China – Audiovisual Services (AB)*, para. 222 (emphasis added).

WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the *WTO Agreement*.<sup>194</sup>

144. China’s obligation to eliminate export duties, plainly set forth in Paragraph 11.3, is one such commitment. The text of Paragraph 11.3 itself, read with the context provided by China’s Working Party Report, confirms that WTO Members did not intend for the Article XX exceptions to apply to China’s Paragraph 11.3 commitments on export duties.<sup>195</sup> Paragraph 11.3 instead includes its own exceptions to this commitment. The Panel acknowledged that to allow an exception to commitments where no such exception was contemplated or provided for in the text to which Members agreed “would change the content and alter the careful balance achieved in the negotiation of China’s Accession Protocol,” thereby “undermin[ing] the predictability and legal security of the international trading system.”<sup>196</sup>

145. Second, as explained above, China’s argument that it is entitled to invoke the Article XX exceptions for violations of Paragraph 11.3 without any specific treaty language to that effect would render the introductory clause in Paragraph 5.1 (and language in Paragraphs 11.1 and 11.2) superfluous. The Appellate Body’s finding in *China – Publications and Audiovisual Products* that Article XX is available for violations of Paragraph 5.1 of China’s Accession Protocol was grounded in the language of that provision, not a “right to regulate” in the

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<sup>194</sup> *Japan – Alcohol (AB)*, p. 15.

<sup>195</sup> Complainants’ Opening Statement, para. 64.

<sup>196</sup> Panel Report, para. 7.159. As the Appellate Body explained in *India – Patents*, “The legitimate expectations of the parties to a treaty are reflected in the language of the treaty itself. The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the Vienna Convention.” *India – Patents (AB)*, para. 45.

abstract.<sup>197</sup> Similarly, the language in Paragraph 11.3 stands in contrast to the language in the accession documents of other WTO Members with respect to their obligations on export duties.<sup>198</sup> Paragraph 11.3, in contrast, includes a specific commitment accompanied by specific exceptions.

146. China’s citation to language in other agreements related to WTO Members’s ability to regulate, including the *Agreement on Technical Barriers to Trade* (“TBT Agreement”), the *Agreement on Import Licensing Procedures* (“Import Licensing Agreement”), the *General Agreement on Trade in Services* (“GATS”), and the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (“TRIPS Agreement”), is similarly unavailing.<sup>199</sup> These agreements do not support China’s arguments. They do not address the applicability of Article XX exceptions to China’s obligations with respect to export duties under Paragraph 11.3 of the Accession Protocol. Nor do they inform an interpretation of or negate the text of that provision, which clearly sets forth an obligation to eliminate export duties, subject to two specific

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<sup>197</sup> *China – Audiovisual Services*, paras. 219-228. In *China – Audiovisual Services*, the Appellate Body concluded, “[W]e read the phrase ‘right to regulate trade in a manner consistent with the WTO Agreement’ as a reference to: (1) . . . the power of Members to take specific types of regulatory measures in respect of trade in goods when those measure satisfy prescribed WTO disciplines and meet specified criteria; and (2) certain rights to take regulatory action that derogates from obligations under the *WTO Agreement* – that is, to relevant exceptions.” *China – Audiovisual Services*, para. 223.

<sup>198</sup> See Report of the Working Party on the Accession of Ukraine, WT/ACC/UKR/152, paras. 512, 240 (“The representative of Ukraine confirmed that at present export duties were applied only to the goods listed in Table 20(a). He further confirmed that Ukraine would reduce export duties in accordance with the binding schedule contained in Table 20(b). He also confirmed that as regards these products, Ukraine would not increase export duties, nor apply other measures having an equivalent effect, unless justified under the exceptions of the GATT 1994.”).

<sup>199</sup> China’s Appellant Submission, paras. 277-281.

exceptions. Moreover, as the Panel noted, the TRIMs Agreement, TBT Agreement, TRIPS Agreement, and the GATS, as well as the *Agreement on the Application of Sanitary and Phytosanitary Measures*, either expressly incorporate the right to invoke the Article XX exceptions (unlike Paragraph 11.3 of the Accession Protocol) or include their own exceptions and flexibilities.<sup>200</sup>

147. Third, China’s insistence that it is not advocating for the right to ignore its WTO commitments because it must still comply with the requirements of Article XX<sup>201</sup> does not address the relevant issue in this dispute. China’s reference to the “obligations set out in a relevant exception” suggests that the exceptions are the starting point for an analysis of WTO-consistency. However, the starting point for an analysis of WTO-consistency is whether a measure is consistent with a Member’s WTO obligations and, if not, whether any applicable exceptions apply.<sup>202</sup> Under the text of Paragraph 11.3 of China’s Accession Protocol, which is one such obligation, Article XX is not an applicable exception.

148. Finally, China’s argument that it is entitled to invoke Article XX exceptions for violations of Paragraph 11.3 of its Accession Protocol because it is the only WTO Member with export duty commitments lacks a textual basis.<sup>203</sup> Even if this were true, this is not a textual basis for determining the exceptions that apply to China’s export duty commitment. The fact that a WTO Member has undertaken a particular commitment that not all WTO Members have

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<sup>200</sup> Panel Report, para. 7.153.

<sup>201</sup> China’s Appellant Submission, paras. 287-288.

<sup>202</sup> U.S. Answers to First Set of Panel Questions, para. 74.

<sup>203</sup> China’s Appellant Submission, para. 290.

made is not a proper basis for finding an exception applicable to that commitment.<sup>204</sup> For example, a single WTO Member might have a services commitment in a particular sector, but that would not provide a basis to allow that Member to rely on exceptions other than those expressly provided for in its services schedule the GATS, or to rely on an abstract right to regulate, to defend a breach of that commitment.

149. To be clear, neither China’s nor any other WTO Member’s right to promote non-trade interests, such as health or conservation interests, is at risk in this dispute.<sup>205</sup> China may pursue such interests. Indeed – setting aside the issue of whether the export duties imposed by China serve legitimate health or environmental ends – the Appellate Body has expressly recognized the ability of WTO Members to impose certain trade restrictions to address legitimate public health and environmental concerns.<sup>206</sup>

150. However, the existence of a right to regulate for conservation or public health 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.<sup>207</sup> As the Panel found, there is “no general umbrella exception” to a WTO Member’s obligations.<sup>208</sup>

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<sup>204</sup> U.S. Comments on China’s Answers to the First Set of Panel Questions, paras. 49-50.

<sup>205</sup> China’s Appellant Submission, para. 273. It should be noted that the export duties at issue in this dispute have nothing to do with regulation. They are straightforward breaches of China’s export duty commitments. U.S. Comments on China’s Answers to the First Set of Panel Questions, para. 48.

<sup>206</sup> See, e.g., *U.S. – Shrimp (AB)* (addressing an import restriction on shrimp harvested with commercial fishing technology that could adversely affect sea turtles); *EC – Asbestos (AB)* (addressing an import restriction with respect to asbestos).

<sup>207</sup> U.S. Answers to the First Set of Panel Questions, para. 47; Mexico’s Answers to the First Set of Panel Questions, Answer 35.

<sup>208</sup> Panel Report, para. 7.150.

China’s measures regulating trade must still comply with China’s WTO obligations or be justified by an *applicable* exception. Paragraph 11.3 of China’s Accession Protocol does not prevent China from undertaking measures other than export duties to promote legitimate health or conservation interests; China has a number of tools at its disposal to pursue such goals. But as explained above, with respect to the export duty commitments in Paragraph 11.3, the applicable exceptions are Annex 6 and taxes and charges applied in conformity with GATT Article VIII. Neither an abstract right to regulate trade nor Article XX of the GATT 1994 changes that fact.<sup>209</sup>

#### **E. Conclusion**

151. For the reasons discussed above, China’s request that the Appellate Body reverse the Panel’s findings in paragraphs 7.158, 7.159, 8.2(b)-(c), 8.9(b)-(c), and 8.16(b)- (c) should be rejected. The Panel’s findings that Article XX does not apply to violations of China’s export duty commitments in Paragraph 11.3 of the Accession Protocol are firmly based in the text of China’s WTO commitments and should be upheld.

#### **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)**

152. China alleges several errors by the Panel with respect to China’s attempt to defend its quota on high alumina clay (which China refers to as “refractory-grade bauxite”)<sup>210</sup> as a measure

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<sup>209</sup> U.S. Comments on China’s Answers to the First Set of Panel Questions, para. 51.

<sup>210</sup> The Complainants will, in this submission, refer to the material at issue for which China asserted a defense as “high alumina clay,” while noting that the Panel acknowledged that the parties used different terms and stated that it would use the terms interchangeably to refer to the same subset of bauxite. Panel Report, para. 7.239.

“temporarily applied to prevent or relieve [a] critical shortage[.]” under GATT Article XI:2(a).

China’s appeal should be rejected, for the reasons discussed below.

153. Throughout its presentation of its arguments on Article XI:2(a) China glosses over the fact that, during the Panel proceedings and again on appeal, China has equated the mere fact that there are limited reserves of high alumina clay with a “critical shortage.” That is, China’s own representations with respect to the export quota on bauxite indicate that the quota is designed to address the limited reserves of high alumina clay and ensure sufficient supply for its downstream users.<sup>211</sup> And the facts (and China’s own arguments) support the Panel’s finding that China considers that maintaining this quota until its reserves are depleted is consistent with Article XI:2(a) and China intends to maintain the quota accordingly.

#### **A. Factual Background**

154. Article XI:1 of the GATT 1994 provides,

No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted 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.

155. Pursuant to Article XI:2(a), the provisions of Article XI:1 “shall not extend to . . .

[e]xport prohibitions or restrictions temporarily applied to relieve critical shortages of foodstuffs or other products essential to the exporting contracting party.”

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<sup>211</sup> See, e.g., U.S. Answers to First Set of Panel Questions, paras. 24-26, 35-36; U.S. Comments on China’s Answers to the First Set of Panel Questions, para. 42.



156. China maintains an export quota on bauxite, a raw material used to produce aluminum metal, abrasives, refractories, cement, and various chemicals.<sup>212</sup> The Complainants challenged this quota as an impermissible quantitative restriction under GATT Article XI:1.<sup>213</sup>

157. China chose not to defend the export quota it imposed on bauxite, to the extent that the quota restricted exports of forms of bauxite other than the specific type of bauxitic material that China termed “refractory bauxite” or “refractory grade bauxite” and that the Complainants consider should more accurately be term “high alumina clay.” China attempted to justify the quota with respect to high alumina clay under Article XI:2(a). In particular, of relevance to this appeal,<sup>214</sup> China asserted that there is a critical shortage of high alumina clay or risk thereof “in light of refractory-grade bauxite’s importance in use as a product essential to the production of iron and steel, as well as other downstream products, and the considerable constraints on the supply of refractory-grade bauxite.”<sup>215</sup> China argued that whether a “critical shortage” exists depends upon a Member’s “tolerance for risk.”<sup>216</sup>

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<sup>212</sup> U.S. First Written Submission, paras. 33, 104-106; Mexico’s First Written Submission, paras. 36, 107-109.

<sup>213</sup> *See, e.g.*, U.S. First Written Submission, paras. 242-246; Mexico’s First Written Submission, paras. 245-250.

<sup>214</sup> China also argued that the Complainants bore the burden of demonstrating that China’s quota on bauxite was not justified under Article XI:2(a). *See, e.g.*, China’s First Written Submission, paras. 350-364. The Panel did not agree. Panel Report, paras. 7.209-7.213. China has not appealed the Panel’s findings in this regard.

<sup>215</sup> China’s First Written Submission, para. 430.

<sup>216</sup> China’s Answers to the First Set of Panel Questions, paras. 101-102; China’s Second Written Submission, para. 100.

158. To support its claim that China faces a “critical shortage” of high alumina clay, China asserted that high alumina clay is an exhaustible natural resource,<sup>217</sup> subject to an alleged 16-year reserve life.<sup>218</sup> China claimed that “[a]s a threshold matter, the very short remaining life span of this essential and exhaustible natural resource [refractory-grade bauxite] demonstrates the occurrence or risk of a critical shortage.”<sup>219</sup> China also argued that, because the export quota on

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<sup>217</sup> China’s First Written Submission paras. 467-472; China’s Answers to the First Set of Panel Questions, paras. 50, 109.

<sup>218</sup> China’s First Written Submission, para. 472. China identified a handful of related “supply constraints” to support its claim that China faces a “critical shortage” of refractory-grade bauxite: conservation measures China stated that it had adopted “to manage its raw materials in a sustainable manner;” China’s regulatory framework on the processing and extracting industries, for example, mining licensing, labor, health, and safety requirements; technologies for extraction and production, exploration of resources, recovery of minerals, and maintenance of existing industries, which China characterized as requiring significant capital investments that pose barriers to entry; acceptance of mining by local communities; demand by other countries for China’s refractory-grade bauxite; and limited exploitation of reserves outside of China. China’s First Written Submission, paras. 476-486. As the Complainants explained, however, very few products are free of such “supply constraints.” Complainants’ Oral Statement at the First Meeting of the Panel, paras. 141, 146; U.S. Second Written Submission, paras. 238-240; Mexico’s Second Written Submission, paras. 243-245. Moreover, China provided no evidence as to how those “supply constraints” operate to limit further the supply of refractory grade bauxite; available information suggested they had no such effect. U.S. Second Written Submission, para. 239; Mexico’s Second Written Submission, para. 244. The Panel rejected China’s arguments that such factors should be taken into account in determining whether there is a “critical shortage” of refractory grade bauxite and found that China had provided no evidence of disruption due to barriers to investment or disapproval by local communities. Panel Report, para. 7.352. China has not challenged the Panel’s consideration of these factors on appeal.

<sup>219</sup> China’s First Written Submission, para. 472. *See also* China’s Second Written Submission, para. 143 (“Demonstrably depleting reserves of an exhaustible and essential natural resource for which there is, at present, no substitute, and for which there is ever-increasing demand from foreign and domestic buyers, would seem quite clearly to demonstrate ‘une situation critique’. That being the case, 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).”).

high alumina clay is reviewed and revised annually, the quota is “temporarily applied for the duration needed to achieve the goals set out in Article XI:2(a) . . . .”<sup>220</sup>

159. The Panel agreed with the Complainants that China’s export quota on high alumina clay is not justified under Article XI:2(a) because the quota is not “temporarily applied” to either prevent or relieve a “critical shortage.” In its analysis, of relevance to this appeal, the Panel considered the meaning of the terms “temporarily applied” and “critical shortage.” Based on the ordinary meaning of those terms, the Panel reasoned that, “on its face, Article XI:2(a) would appear to justify measures that are applied for a limited timeframe to address ‘critical shortages’ of ‘foodstuffs or other products essential to the exporting contracting party.’”<sup>221</sup> The Panel reasoned further that a “critical shortage” is a “deficiency in the quantity of goods” that “must be of ‘decisive importance’ or ‘grave’, or even rising to the level of a ‘crisis’ or catastrophe.”<sup>222</sup>

160. In addition, the Panel agreed with the Complainants that the requirements that measures justified under Article XI:2(a) be applied “temporarily” informs the concept of a “critical shortage.” The Panel did not agree with China’s proposition that Article XI:2(a) permits long-term measures imposed to address an inevitable depletion of a finite natural resource because, as the Complainants had explained, the reserves would be continually depleted and remain finite – in other words, the conditions that purported to justify the measure would never cease to exist.<sup>223</sup>

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<sup>220</sup> China’s First Written Submission, paras. 430, 492.

<sup>221</sup> Panel Report, para. 7.255.

<sup>222</sup> Panel Report, para. 7.296.

<sup>223</sup> Panel Report, paras. 7.297, 7.305; *see also* U.S. Second Written Submission, para. 242. The Complainants also reasoned, in turn, that where there is no “critical shortage” of the product, the quota cannot be appropriately limited in time. Complainants’ Oral Statement at the First Meeting of the Panel, para. 147. The Complainants noted further that China’s assertions that the quota is annually reviewed is not evidence that the quota is applied only so long as

In fact, the Complainants had pointed out that China’s arguments would, in effect, exempt export restrictions on any exhaustible good from the disciplines of Article XI:1.<sup>224</sup> The Panel reasoned that, in addition, under the interpretation advanced by China, Article XI:2(a) would duplicate Article XX(g).<sup>225</sup>

161. The Panel then considered whether, based on the ordinary meanings of the terms, China’s export quota on high alumina clay is “temporarily applied . . . to prevent or relieve a critical shortage” such that the quota could be justified under Article XI:2(a).<sup>226</sup> In determining that the quota is not “temporarily applied . . . to prevent or relieve a critical shortage,” the Panel cited the facts that China has had an export quota in place since at least 2000; that China estimated that it had a 16-year reserve of bauxite, suggesting that it intends to maintain the measure until the reserves are depleted; and that China claimed its export quota to be part of a comprehensive conservation plan with respect to bauxite.<sup>227</sup> The Panel therefore concluded that China’s quota on high alumina clay, “which has already been in place for at least a decade with no indication of when it will be withdrawn and every indication that it will remain in place . . .” is not “temporarily applied.”<sup>228</sup>

162. The Panel also agreed with the Complainants that China does not face a “critical shortage” of high alumina clay. In particular, the Panel noted that a measure that is imposed for

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necessary to prevent or relieve a critical shortage. U.S. Second Written Submission, para. 241; Mexico’s Second Written Submission, para. 247.

<sup>224</sup> Complainants’ Oral Statement at the First Meeting of the Panel, para. 144; U.S. Oral Statement at the Second Meeting of the Panel, para. 101.

<sup>225</sup> Panel Report, paras. 7.257-7.258, 7.298-7.301

<sup>226</sup> Panel Report, paras. 7.346-7.353.

<sup>227</sup> Panel Report, para. 7.348.

<sup>228</sup> Panel Report, para. 7.350.

the remaining lifespan of a natural resource appears to address “something other than a ‘critical shortage’.”<sup>229</sup> In addition, in findings that China has not challenged, the Panel rejected China’s claims that certain regulatory environmental or conservation measures that China claimed to have imposed could demonstrate a “critical shortage,” and found that China had provided no evidence of barriers to investment or community disapproval that has disrupted the availability of high alumina clay.<sup>230</sup>

163. Accordingly, based on the ordinary meaning of the terms “temporarily applied” and “critical shortage” and an application of those terms to the evidence, the Panel concluded that China’s export quota on high alumina clay is not justified under Article XI:2(a). As explained in detail below, the Panel’s findings in this regard are sound, and should be upheld.

**B. The Panel Correctly Found That China's Export Quota on Bauxite Is Not “Temporarily Applied to Prevent or Relieve [a] Critical Shortage[]”**

164. On appeal, China faults the Panel’s legal interpretation of the terms “temporarily applied” and “critical shortage” as used in Article XI:2(a). China also argues that the Panel failed to conduct an objective assessment of the matter, as required under Article 11 of the DSU, by “assuming” that China’s export quota on high alumina clay would remain in place until reserves are depleted<sup>231</sup> and by finding that an export restriction imposed to address the exhaustibility of a natural resource cannot be temporarily applied.<sup>232</sup> China further accuses the Panel of “improperly narrow[ing] the scope of application of Article XI:2(a) in an inappropriate

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<sup>229</sup> Panel Report, para. 7.351.

<sup>230</sup> Panel Report, para. 7.352.

<sup>231</sup> China’s Appellant Submission, paras. 354-355.

<sup>232</sup> China’s Appellant Submission, paras. 367-371.

attempt to remedy the Panel’s perception of shortcomings in Article XI:2(a).”<sup>233</sup> China’s arguments misconstrue the Panel’s findings and should be rejected, for the reasons discussed below.

**1. The Panel Correctly Rejected China’s Attempt to Conflate Article XI:2(a) and Article XX(g)**

165. As an initial matter, it appears that China misunderstands the Panel’s analysis of the provisions of Article XI:2(a) compared to Article XX(g). China claims that the Panel made the erroneous finding that Articles XI:2(a) and XX(g) are “mutually exclusive.”<sup>234</sup> China argues that the Panel, “motivated by a desire to correct the Panel’s perception of shortcomings in the text of Article XI:2(a),”<sup>235</sup> concluded that Articles XI:2(a) and XX(g) “can *never* apply to a single measure that simultaneously relieves or prevents a critical shortage of an exhaustible natural resource and serves valid conservation objectives.”<sup>236</sup>

166. This is not an accurate characterization of the Panel’s findings. Rather, the Panel concluded that, under *China’s interpretation* of Article XI:2(a), under which a Member could impose an export restriction *for the purpose of* addressing limited reserves of a natural resource, Article XI:2(a) and Article XX(g) would be duplicative.<sup>237</sup>

167. The Panel in no way suggested that Article XI:2(a) is “bereft” of safeguards.<sup>238</sup> Indeed, the Panel recognized that “the right to invoke Article XI:2(a) is circumscribed, but in a much

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<sup>233</sup> China’s Appellant Submission, para. 386.

<sup>234</sup> China’s Appellant Submission, para. 375.

<sup>235</sup> China’s Appellant Submission, para. 381.

<sup>236</sup> China’s Appellant Submission, para. 380 (emphasis in original).

<sup>237</sup> Panel Report, paras. 7.256-7.258, 7.297-7.298.

<sup>238</sup> China’s Appellant Submission, para. 384.

different way.”<sup>239</sup> In particular, the text of Article XI:2(a) provides that it may only be invoked “temporarily . . . to prevent or relieve critical shortages.” China’s export quota on high alumina clay does not satisfy these conditions.

168. The Panel’s analysis does not exclude the possibility that, in theory, a measure could be justified under both Article XI:2(a) and Article XX, as China suggests. However, as even China admits, the measure must then meet the qualifications of both provisions.<sup>240</sup> Those qualifications are different. In particular, to be justified under Article XI:2(a), an export restriction must be applied to prevent or relieve a “critical shortage,” not a mere shortage caused solely by the fact that there are limited amounts of reserves of the product at issue, and the measure must be “temporarily” applied.

169. As explained in the following sections, the Panel’s interpretation of the terms “temporarily applied” and “critical shortage” is grounded in the text of Article XI:2(a). The Panel’s analysis with respect to the respective roles that Articles XI:2(a) and XX(g) play in disciplining a Member’s measures directly responded to China’s attempt to read the word “critical” out of the text of Article XI:2(a).<sup>241</sup> China’s export quota on high alumina clay serves not to address a critical shortage, but rather to ensure that its downstream domestic industry has a steady supply of this raw material.<sup>242</sup> This attempt did not succeed before the Panel, and should

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<sup>239</sup> Panel Report, para. 7.301.

<sup>240</sup> China’s Appellant Submission, para. 380.

<sup>241</sup> *See, e.g.*, Panel Report, paras. 7.298, 7.302.

<sup>242</sup> China’s First Written Submission, para. 488; China’s Answers to the First Set of Panel Questions, para. 472 (“As a threshold matter, the very short remaining life span of this essential and exhaustible natural resource demonstrate the occurrence of risk of a critical shortage.”); China’s Second Written Submission, para. 143 (“Demonstrably depleting reserves of an exhaustible and essential natural resource for which there is, at present, no substitute, and for

not succeed on appeal. China’s misinterpretation of the term “critical shortage” will be discussed in more detail below.

## **2. The Panel Correctly Interpreted the Terms “Temporarily Applied”**

170. China agrees with the Panel’s finding that an export restriction under Article XI:2(a) must be imposed only for a limited and bounded period of time.<sup>243</sup> However, China appeals what it characterizes as the Panel’s exclusion of the “long-term” application of export restrictions.<sup>244</sup> China claims the Panel imposed an “absolute limit” on the time period on which an export restraint may be imposed under Article XI:2(a).<sup>245</sup>

171. China’s appeal is premised on a misconstruction of the Panel’s findings. The Panel did not interpret the terms “temporarily implied” so as to impose an “absolute limit” on the time period in which an export restraint may be imposed under Article XI:2(a), or categorically prohibit “long-term” measures. 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.’”<sup>246</sup> In fact, in its

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which there is ever-increasing demand from foreign and domestic buyers, would seem quite clearly to demonstrate ‘une situation critique’. That being the case, 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).”); Complainants’ Oral Statement at the First Meeting of the Panel, para. 144; U.S. Comments on China’s Answers to the First Set of Panel Questions, para. 40 (citing China’s First Written Submission, para. 458); U.S. Oral Statement at the Second Meeting of the Panel, para. 102.

<sup>243</sup> China’s Appellant Submission, para. 337.

<sup>244</sup> China’s Appellant Submission, para. 336.

<sup>245</sup> China’s Appellant Submission, para. 341.

<sup>246</sup> Panel Report, para. 7.255.



appeal, China admits that “the temporary duration of an export restriction must be defined *in relation to the time required* to prevent or relieve the critical shortage at issue.”<sup>247</sup>

172. In its analysis, the Panel was appropriately sensitive to the contextual relationship between the terms “temporarily applied” and “critical shortage.” In finding that Article XI:2(a) cannot be interpreted to permit “the long-term application of measures *in the nature of China’s export restrictions on refractory grade bauxite*,”<sup>248</sup> the Panel reasoned that a measure imposed for the purpose of addressing the limited reserves of a natural resource would be imposed until the time when the resource was depleted.<sup>249</sup> The duration of such a measure is not linked to the time period needed to prevent or relieve a “critical shortage.” Rather, because the available reserves would be continually depleted and, at any given point, be finite, the restriction could be imposed permanently.<sup>250</sup> The Panel correctly recognized that this is plainly inconsistent with the textual requirement that export restrictions be “temporarily applied.”

### **3. The Panel Correctly Interpreted the Terms “Critical Shortage”**

173. China claims that the Panel also erred in interpreting Article XI:2(a) “to exclude shortages caused, in part, by the exhaustibility of the product subject to the export restriction, or in the Panel’s words, by the ‘finite’ nature or ‘limited reserve[]’ of the product.”<sup>251</sup> According to China, the Panel’s finding means that “Article XI:2(a) cannot be used to justify export

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<sup>247</sup> China’s Appellant Submission, para. 339 (emphasis in original).

<sup>248</sup> Panel Report, para. 7.298 (emphasis added).

<sup>249</sup> Panel Report, para. 7.297.

<sup>250</sup> U.S. Answers to the First Set of Panel Questions, para. 26; U.S. Second Written Submission, para. 242; Mexico’s Second Written Submission, para. 247.

<sup>251</sup> China’s Appellant Submission, paras. 356, 363, 367.

restrictions on certain exhaustible natural resources . . . .”<sup>252</sup> China argues that Article XI:2(a) does not exclude from its application measures stemming from particular causes.<sup>253</sup>

174. However, Article XI:2(a) does exclude from its application measures that address shortages that are not “critical.” China concedes that the Panel properly concluded that a “critical shortage” means a “deficiency in quantity. . . that must be of ‘decisive importance’ or ‘grave’, or even rising to the level of a ‘crisis’ or catastrophe.”<sup>254</sup> This interpretation does not preclude a Member from addressing “critical shortages” of an essential exhaustible product. However, the shortage must be “critical.”

175. The text of Article XI:2(a) does not support the proposition that the finite availability of a product is sufficient to give rise to a “critical shortage” of that product. For one, the existence of a limited amount of reserves constitutes only a degree of shortage. A mere degree of shortage does not constitute a “critical” shortage, that is, one rising to the level of a crisis.<sup>255</sup>

176. In fact, the drafters warned against the interpretation offered by China. The drafters suggested that export restrictions justified under Article XI:2(a) “could be temporarily applied to cope with the consequences of a natural disaster, or to maintain year to year domestic stocks sufficient to avoid critical shortages of products . . . which are subject to alternative annual shortages and surpluses.”<sup>256</sup> A mere degree of shortage due to a limited amount of reserves is

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<sup>252</sup> China’s Appellant Submission, para. 363.

<sup>253</sup> China’s Appellant Submission, para. 358.

<sup>254</sup> China’s Appellant Submission, para. 357; Panel Report, para. 7.296. While China says it agrees with the Panel’s definition in paragraph 7.296, it provides different text in its Appellant Submission.

<sup>255</sup> U.S. Answers to First Set of Panel Questions, paras. 24-25.

<sup>256</sup> Complainants’ Opening Statement at the First Panel Meeting, para. 141 (citing CHN-180). In this Note by the Secretariat, the Secretariat confirms that this point regarding the

very different from, and does not rise to the level suggested by, such circumstances. Indeed, in response to a proposal to omit the word “critical,” the representative from the United Kingdom explained, “[I]f you take out the word ‘critical’, almost any product that is essential will be alleged to have a degree of shortage and could be brought within the scope of this paragraph.”<sup>257</sup>

These statements make clear that a mere showing of finite availability is not sufficient to demonstrate a critical shortage.

177. Moreover, Article XI:2(a) requires that an export restriction be “temporarily applied” to prevent or relieve a critical shortage of an essential product.<sup>258</sup> As such, the Panel properly reasoned that the requirement that an export restriction be imposed only “temporarily” informs the concept of what constitutes a critical shortage.<sup>259</sup> As explained above, an export restriction imposed for the purpose of addressing the finite availability of a resource cannot be “temporarily applied,” because the supposed need for the export restriction would never cease to exist.<sup>260</sup>

178. China’s argument that the “consequences” of a shortage, not the “cause,” are relevant to the Article XI:2(a) analysis<sup>261</sup> simply repackages China’s assertion that it is entitled to maintain an export quota on high alumina clay in order to ensure a steady supply for its domestic industry. The “consequences” of the alleged shortage with respect to high alumina clay in this dispute are

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meaning of “critical shortage” was incorporated into the corresponding provisions of the Havana Charter.

<sup>257</sup> Complainants’ Opening Statement at the First Panel Meeting, para. 143 (citing CHN-181); U.S. Answers to First Set of Panel Questions, para. 25.

<sup>258</sup> U.S. Comments on China’s Answers to the First Set of Panel Questions, para. 41.

<sup>259</sup> Panel Report, para. 7.297.

<sup>260</sup> Panel Report, para. 7.297; U.S. Answers to the First Set of Panel Questions, para. 26; U.S. Comments on China’s Answers to the First Set of Panel Questions, para. 30.

<sup>261</sup> China’s Appellant Submission, para. 359.

depletion of reserves and a lack of a guaranteed supply to China’s domestic downstream industries;<sup>262</sup> “to prevent” those consequences, China maintains that it can impose an export restriction under Article XI:2(a).<sup>263</sup>

179. The Panel made clear that it did not find that “a Member may never take anticipatory measures within the bounds of Article XI:2(a) to ‘prevent’ a ‘critical shortage’ before it occurs.”<sup>264</sup> Nor is this a fair implication of the Panel’s findings. Rather, the Panel properly rejected China’s claim that Article XI:2(a) would permit a measure to be applied to address a mere shortage, that is, the inevitable depletion of a resource. The Panel’s reasoning is consistent with the text of Article XI:2(a), which authorizes measures applied to address a “critical” shortage, and should be upheld.

**4. The Panel Correctly Found That China’s Export Quota on High Alumina Clay Is Not “Temporarily Applied . . . to Prevent or Relieve [a] Critical Shortage[]”**

180. Having considered the plain meaning of the text of Article XI:2(a), the Panel applied that interpretation to the facts in this dispute and correctly found that China does not currently face a “critical shortage” of high alumina clay and that its export restriction on high alumina clay cannot be considered to be “temporarily applied” within the meaning of Article XI:2(a).<sup>265</sup>

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<sup>262</sup> China’s First Written Submission, para. 488; China’s Second Written Submission, para. 110 (“The inevitable and intended *consequence* of an export restriction will be to ensure domestic supply of an essential product, and thereby prevent or relieve the critical shortage. Such a consequence cannot, however, *disqualify* the export restriction from coverage under Article XI:2(a), but instead confirms that the restriction is properly tailored to secure the textually-permitted objective it set out to achieve.”) (emphasis in original); U.S. Comments on China’s Answers to the First Set of Panel Questions, para. 40.

<sup>263</sup> China’s Second Written Submission, paras. 143, 145.

<sup>264</sup> Panel Report, para. 7.305.

<sup>265</sup> Panel Report, paras. 7.350-7.351.

181. China argues that the Panel committed both a legal error and a violation of DSU Article 11 in its analysis of China’s assertion that the export quota on high alumina clay is reviewed annually.<sup>266</sup> China considers that, in applying the word “temporarily,” the Panel did not consider that China’s measure is annually renewed. China argues further that the Panel failed to conduct an objective assessment of the matter under DSU Article 11 by “failing to assess properly” evidence related to China’s annual review and by “assuming” that China’s export quota on bauxite would remain in place until reserves are depleted.<sup>267</sup> According to China, the evidence related to the annual review of the export quota demonstrates that the quota is maintained only so long as is justified to address a critical shortage.<sup>268</sup>

182. Contrary to China’s claims, the Panel appropriately considered China’s arguments and evidence related to the supposed annual review of China’s export quota on high alumina clay in concluding that this quota is not “temporarily applied.” The Panel did not, as China suggests, simply assume that an export restriction on a natural resource would be applied until the reserves were depleted.<sup>269</sup> Rather, as explained above, the Panel logically reasoned that, where the limited reserves of a resource constitute the supposed need for an export restriction, a measure restricting exports of that resource could not be temporarily applied, because those conditions (the limited amount of reserves) would last indefinitely. Such circumstances stand in stark contrast to the types of circumstances identified by the drafters as constituting a “critical shortage,” discussed above.

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<sup>266</sup> China’s Appellant Submission, paras. 343-353.

<sup>267</sup> China’s Appellant Submission, paras. 354-355.

<sup>268</sup> China’s Appellant Submission, para. 354.

<sup>269</sup> China’s Appellant Submission, para. 350.

183. Moreover, the Panel’s findings that China’s export quota on bauxite in particular is not “temporarily applied,” notwithstanding any annual review, are supported by the record. With respect to China’s DSU Article 11 claims, as the Appellate Body recently recognized in *EC – Fasteners*, “not every error allegedly committed by a panel amounts to a violation of Article 11 of the DSU.”<sup>270</sup> The Appellate Body explained,

[A] panel is entitled, in the exercise of its discretion, to determine that certain elements of evidence should be accorded more weight than other elements. In doing so, a panel is not required to discuss, in its report, each and every piece of evidence. Moreover, in view of the distinction between the respective roles of the Appellate Body and panels, the Appellate Body will not interfere lightly with the panel’s fact finding authority, and cannot base a finding of inconsistency under Article 11 simply on the conclusion that [it] might have reached a different factual finding from the one the panel reached.<sup>271</sup>

184. In this dispute the Panel fully engaged with China’s assertions regarding the annual review of the export quota imposed on high alumina clay.<sup>272</sup> The Panel noted China’s claims that the export quota was determined on an annual basis, including its argument that this review provided an opportunity to set forth the reasons justifying continuation of the quota.<sup>273</sup> The Panel also recognized that China had provided a methodology that China uses to determine the amount of the export quota.<sup>274</sup>

185. However, the Panel also had before it evidence that China has imposed an export quota on bauxite since 2000,<sup>275</sup> as well as the reasons proffered by China to justify its export quota on

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<sup>270</sup> *EC – Fasteners (AB)*, para. 442.

<sup>271</sup> *EC – Fasteners (AB)*, para. 441 (internal quotations omitted).

<sup>272</sup> Panel Report, paras. 7.335-7.336.

<sup>273</sup> Panel Report, para. 7.335.

<sup>274</sup> Panel Report, para. 7.336.

<sup>275</sup> Panel Report, para. 7.348.

high alumina clay, in particular “the remaining reserve lifespan.”<sup>276</sup> The Panel noted that China claimed it had a 16-year reserve of high alumina clay.<sup>277</sup> And China asserted repeatedly in its submissions to the Panel that this reserve demonstrated a critical shortage.<sup>278</sup> As such, the Panel’s finding that this “suggests that China intends to maintain its measure in place until the exhaustion of remaining reserves (in keeping with its contention that it needs to restrain consumption), or until new technology or conditions lessen demand for refractory grade bauxite” is well-founded.<sup>279</sup>

186. This finding is not undermined by China’s arguments regarding the annual review of the quota on bauxite. While the Panel’s findings do not preclude a measure subject to an annual review from being justified under Article XI:2(a), the fact that a measure is set, reviewed, and applied on an annual basis is not evidence that the quota is applied only so long as is necessary to prevent or relieve a “critical shortage.”<sup>280</sup> The duration of such a measure is not linked to the time period needed to prevent or relieve a “critical shortage” – particularly where, as in this dispute, the supposed “critical shortage” is in fact a mere degree of shortage caused by limited amounts of reserves. The fact that an annual review is provided for does not change the fact that the amount of the reserves are limited. Regardless of the annual review of the quota, the record supports the Panel’s finding that the quota has been in place for over ten years with “no

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<sup>276</sup> Panel Report, para. 7.347.

<sup>277</sup> Panel Report, para. 7.348.

<sup>278</sup> China’s First Written Submission, para. 472; China’s Second Written Submission, para. 143.

<sup>279</sup> Panel Report, para. 7.348.

<sup>280</sup> U.S. Second Written Submission, para. 241; Mexico’s Second Written Submission, para. 246.

indication of when it will be withdrawn and every indication that it will remain in place until the reserves have been depleted . . . .”<sup>281</sup>

187. China also claims that the Panel committed both a legal error and a violation of DSU Article 11 in finding that an export restriction imposed to address the exhaustibility of a resource cannot be temporarily applied.<sup>282</sup> China views this finding as contradictory to other findings by the Panel with respect to technological developments.<sup>283</sup> According to China, such developments could end a critical shortage and therefore the justification for an export restriction imposed to address the finite reserves of an exhaustible resource.<sup>284</sup>

188. There is no inconsistency in the Panel’s findings. With respect to whether China’s export quota on high alumina clay is “temporarily applied,” the Panel explained, “China’s estimation of a 16-year reserve for bauxite suggests that China intends to maintain its measure in place until the exhaustion of remaining reserves (in keeping with its contention that it needs to restrain consumption), or until new technology or conditions lessen demand for refractory-grade bauxite.”<sup>285</sup> The Panel also cited potential technological developments, due to possible future advances in the ability to detect or extract reserves, as one of several grounds for rejecting China’s claims that it faced a critical shortage of high alumina clay, by virtue of bauxite’s 16-year lifespan.<sup>286</sup>

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<sup>281</sup> Panel Report, para. 7.350.

<sup>282</sup> China’s Appellant Submission, paras. 367, 373.

<sup>283</sup> China’s Appellant Submission, paras. 368-373.

<sup>284</sup> China’s Appellant Submission, paras. 369-371.

<sup>285</sup> Panel Report, para. 7.348.

<sup>286</sup> Panel Report, para. 7.351.



189. Whether a measure is applied until remaining reserves are exhausted or until technological developments slow the rate of exhaustion, the application of the export quota is not temporary. In either case, it is tied not to the time period needed to address a “critical shortage,” but rather to the depletion of reserves. In either case, the amount of reserves are finite. As explained by the Panel and above, the fact that there is a limited amount of reserves of a product does not, by itself, constitute a critical shortage.

190. Moreover, as a factual matter, the hypothetical situation in which technological developments allow for a slower rate of reserve depletion does not negate the record evidence demonstrating that China intends to maintain its export quota to guarantee a supply for its domestic industry until the reserves are depleted.<sup>287</sup> Accordingly, the Panel’s conclusion that China’s export quota on high alumina clay is not “temporarily applied . . . to prevent or relieve a critical shortage” is legally sound and supported by the evidence.

### **C. Conclusion**

191. For the reasons discussed above, China’s request that the Appellate Body reverse the Panel’s interpretation and application of Article XI:2(a) in paragraphs 7.257-7.258, 7.297-7.302, 7.305, 7.306, 7.346, 7.349, 7.351, 7.354, and 7.355 of the Panel Report should be rejected. The Panel’s interpretation of Article XI:2(a), and its conclusion that China’s export quota on high alumina clay is not justified thereunder, should be upheld.

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<sup>287</sup> In arguing that high alumina clay is an “essential product” for purposes of Article XI:2(a), China insisted that the substitutes identified by Complainants were not available due to the cost of the material or the cost of switching suppliers. China’s Opening Statement at the Second Meeting of the Panel, paras. 143-144, 146-148. The Panel agreed with China that, regardless of the substitutability of other products, “refractory-grade bauxite would continue as an important intermediary product to the production of steel and would continue to serve as an important driver for the Chinese economy.” Panel Report, para. 7.344.

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

192. In Section VI of its Appellant Submission, China takes issue with the Panel’s interpretation of the phrase “made effective in conjunction with” in Article XX(g) of the GATT 1994, as set out in paragraph 7.397 of the Panel Report, 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 domestic restrictions.” Contrary to China’s assertion, the Panel’s interpretation is correct.

193. The Panel’s interpretation of this phrase is made in accordance with the ordinary meaning of the terms of Article XX(g) in their context and in the light of the object and purpose of the GATT 1994, as provided under the general rule of treaty interpretation set forth in Article 31 of the *Vienna Convention on the Law of Treaties*. It is also consistent with and supported by the interpretation of the same phrase made by the Appellate Body and WTO and GATT panels.

194. As in the other sections of China’s Appellant Submission, China’s arguments and presentation on this issue are based on critical omissions and inaccurate characterizations of relevant facts, the Panel’s reasoning and analysis, and the Complainants’ arguments before the Panel. In order to provide context for understanding the Panel’s approach, before addressing China’s legal arguments the Complainants will first summarize the relevant facts, developments, and arguments from the panel proceedings related to the Panel’s interpretation of Article XX(g).

**A. Background from the Panel Proceeding**

**1. The Goal Served by China’s Export Restraints**

195. In setting out its *prima facie* case, the Complainants observed that in 2009, China imposed export duties on 373 different products<sup>288</sup> and export quotas on 33 different categories of products.<sup>289</sup> The Complainants also recalled that in its highest level policy documents, China had articulated that it employed export restraints in order to propel the growth of China's industry and economy.<sup>290</sup>

196. In the course of the panel proceedings, however, China invoked a variety of different exceptions under the GATT 1994 in its attempt to justify the various export restraints<sup>291</sup> challenged in this dispute as measures serving conservation, environmental, or short supply goals.<sup>292</sup> China also decided not to attempt to justify certain of the challenged export restraints.<sup>293</sup>

## 2. The Export Restraints China Sought to Justify under Article XX(g)

197. On the date of panel establishment, *i.e.*, December 21, 2009, China maintained both export quotas and export duties on various forms of bauxite and fluorspar. As of January 1, 2010, China changed the scope of its application of export quotas and export duties; the various

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<sup>288</sup> 2009 Tariff Implementation Program (Exhibit JE-21).

<sup>289</sup> 2009 Export Licensing List Notice (Exhibit JE-22), Article 1(1)-(2).

<sup>290</sup> See U.S. First Written Submission, paras. 25-31; Complainants' Joint Oral Statement at the First Panel Meeting, paras. 15-18.

<sup>291</sup> Complainants note that they have argued and the Panel concluded that the Article XX exceptions in the GATT 1994 are not applicable to the commitment in paragraph 11.3 of the Accession Protocol. China has appealed this conclusion of the Panel and Complainants' response is set forth in Section IV of this submission.

<sup>292</sup> See Chart set forth in Panel Report at 80.

<sup>293</sup> In addition to the fluorspar quota, bauxite duties, and bauxite quota on bauxite products other than high alumina clay that have been mentioned already, China also chose not to attempt to justify its silicon metal duties; duties on manganese ores and concentrates; and its export ban on zinc ores and concentrates. See Chart set forth in Panel Report at 80.

forms of bauxite that had been subject to both an export quota and export duties became subject only to an export quota while the various forms of fluorspar that had been subject to both an export quota and export duties became subject only to export duties.

198. In the course of the panel proceedings, China chose not to defend the export quota it imposed on fluorspar and the export duties it imposed on bauxite at the time of panel establishment. China also chose not to defend the export quota it imposed on bauxite – to the extent that the quota restricted exports of forms of bauxite other than the specific type of bauxitic material that China termed “refractory bauxite” or “refractory grade bauxite” and that the Complainants consider should more accurately be termed “high alumina clay.”

199. Instead, China’s strategy was to attempt to justify its imposition of an export quota on high alumina clay (even though the export quota, as defined in its measures, covered other forms of bauxite) and export duties on fluorspar as conservation measures excepted under Article XX(g) of the GATT 1994.

### **3. China’s “Litigation Strategy” and Arguments**

200. As noted above in Section III in response to China’s appeal relating to the Panel’s recommendations, over the course of 2010, while the panel proceedings were underway, China issued a number of legal instruments which it invoked as facts in support of its arguments that its export quota for bauxite, as applied to high alumina clay, and its export duties on fluorspar were motivated by conservation goals. Specifically:<sup>294</sup>

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<sup>294</sup> See Section III.A.2 above; *see also* U.S. Second Written Submission, para. 322; Mexico’s Second Written Submission, para. 327.

- China claimed that on January 2, 2010, China brought into effect the *Circular of the General Office of the State Council on Taking Comprehensive Measures to Control the Extraction and Production of High Alumina Clay and Fluorspar*;<sup>295</sup>
- China claimed that On March 1, 2010, China brought into effect the *Public Notice on Fluorspar Industry Entrance Standards*<sup>296</sup> and the *Public Notice on Refractory-Grade Bauxite (High Alumina Bauxite) Industry Entrance Standards*;<sup>297</sup>
- China claimed that On April 20, 2010, China brought into effect *Circular on Passing Down the 2010 Controlling Quota of Total Extraction Quantity of High Alumina Clay and Fluorspar*;<sup>298</sup>
- China claimed that On May 19, 2010, China brought into effect *Circular of the Ministry of Land and Resources on Passing Down the Controlling Quota of the 2010 Total Production Quantity of High-alumina Refractory-Grade Bauxite and Fluorspar*.<sup>299</sup>
- China claimed that On June 1, 2010, China brought into effect the *Notice Adjusting the Applicable Tax Rates of Resource Taxes of Refractory Grade Clay and Fluorspar*<sup>300</sup> (2010 Fluorspar and High Alumina Clay Measures).

201. China introduced these legal instruments over the course of 2010, as the panel proceeding progressed, and attempted<sup>301</sup> to proffer them as evidence of “restrictions on domestic production

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<sup>295</sup> *Circular of the State Council’s General Office on the Adoption of Comprehensive Measures to Control the Mining and Production of Fireclay and Fluorspar* (State Council [2010] No. 1, January 2, 2010) (Exhibit JE-167). See Exhibit CHN-87.

<sup>296</sup> Exhibit CHN-96.

<sup>297</sup> Exhibit CHN-275.

<sup>298</sup> *Circular on the Allocation of the 2010 Mining Control Targets Applicable to High-Alumina Clay Ore and Fluorspar Ore* (Ministry of Land and Resources (2010) No. 187, April 20, 2010) (Exhibit JE-168). See Exhibit CHN-97.

<sup>299</sup> *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). See Exhibit CHN-98.

<sup>300</sup> *Notice Adjusting the Applicable Tax Rates of Resource Taxes of Refractory Grade Clay and Fluorspar* Cai Shui [2010] No. 20 (Ministry of Finance and the General Administration of Taxation, effective June 1, 2010) (Exhibit CHN-90).

<sup>301</sup> In Section III above, the Complainants address China’s attempts to proffer these measures as evidence as part of its justification for the imposition of these export restraints on

or consumption” for purposes of Article XX(g) of the GATT 1994 in its effort to justify the export quota it had maintained on high alumina clay since at least 2000<sup>302</sup> and the export duties it had maintained on fluorspar since 2006.<sup>303</sup>

#### **4. China’s Article XX(g) Arguments before the Panel**

202. Before the Panel, China’s arguments relating to the various elements of Article XX(g) consistently sought to weaken the requirements of Article XX(g) such that even a severe export restraint could be justified by the most nominal of domestic measures, and even where domestic production and consumption were increasing. The Panel rejected these arguments.

203. While introducing new measures and attempting to proffer them as facts in support of its arguments that it could satisfy the requirement under Article XX(g) that it have in place restrictions on domestic production or consumption, China also advocated a novel interpretation of the other elements under Article XX(g) that would have significantly weakened the requirements of the exception, in order to accommodate facts and evidence that it could not change in the course of the panel proceeding.

204. With respect to the requirement that measures excepted under Article XX(g) relate to the purpose of conservation, the Panel noted, the Complainants submitted evidence demonstrating that:

. . . there is a substantial increase in the domestic consumption of fluorspar and refractory-grade bauxite, while exports do not appear to have grown at the same

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high alumina clay and fluorspar in 2010, during the panel proceeding.

<sup>302</sup> Panel Report, para. 7.348.

<sup>303</sup> China’s Answers to the Second Set of Panel Questions, para. 22; Exhibit CHN-439; U.S. Answers to the Second Set of Panel Questions, No. 3; Mexico’s Answers to the Second Set of Panel Questions, No. 3.

pace. For example, ‘[f]rom 2000 to 2009, Chinese consumption of fluorspar reflected growth of approximately 124%’. Starting from 2008, China’s annual refractory-grade bauxite (ores) and fluorspar extraction steadily increases, with fluorspar’s extraction registering an increment of 60% from 2009 to 2009. Moreover, for example, ‘[i]n 2008, although far less fluorspar was exported from China in its raw material form than in 2000, more fluorspar in total was exported from China than in 2000 due to the substantial increase in exports of downstream products containing fluorspar’.<sup>304</sup>

China did not contest these facts. Instead, China advanced an interpretation of Article XX(g) that would have provided shelter to measures promoting a WTO Member’s national interests and its own progress and economic development in the name of conservation.<sup>305</sup>

205. China also acknowledged that the clause “made effective in conjunction with restrictions on domestic production or consumption” had been interpreted by the Appellate Body as a requirement of “even-handedness.”<sup>306</sup> However, according to China, all that Article XX(g) requires in terms of “even-handedness” in imposing export restraints on raw materials, was the imposition of some restriction on domestic supply. As China argued: “Provided that restrictions are imposed on domestic supply, Article XX(g) does not oblige resource-endowed countries to ensure that the economic development of other user-countries benefits equally or identically from the exploitation of their resources.”<sup>307</sup>

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<sup>304</sup> Panel Report, para. 7.429.

<sup>305</sup> See China’s First Written Submission, paras. 97-153 (in particular, paras. 142 and 151-153).

<sup>306</sup> China’s First Written Submission, para. 150.

<sup>307</sup> China’s First Written Submission, para. 153.

206. The Panel rejected the interpretation China advocated. As the Panel observed, “WTO Members cannot rely on Article XX(g) to excuse export restrictions adopted in aid of economic development if they operate to increase protection of the domestic industry.”<sup>308</sup>

207. China also made persistent attempts to blur the requirements established by the different elements of Article XX(g). In arguing that its export restraints on fluorspar and high alumina clay satisfied the requirements of Article XX(g), China did not argue that its export restraints: (1) relate to the conservation of an exhaustible natural resource; and (2) are made effective in conjunction with; (3) restrictions on domestic production or consumption. Instead, China argued that, by adopting a “comprehensive set of measures relating to the conservation of” fluorspar<sup>309</sup> and high alumina clay,<sup>310</sup> and that the export restraints formed a part of that set of measures,<sup>311</sup> it had satisfied the requirements of Article XX(g) that its export restraints be “made effective in conjunction with domestic restrictions.”<sup>312</sup>

208. The Panel rejected these attempts. Instead of adopting China’s analytical structure, the Panel’s approach adhered to a strict interpretation of the requirements arising under each of the different elements set forth in the text of Article XX(g) – *i.e.*, that the challenged export restraints: (1) “relate to the conservation of exhaustible natural resources;”<sup>313</sup> and (2) be “made effective in conjunction with;”<sup>314</sup> (3) “restrictions on domestic production or consumption.”<sup>315</sup> In

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<sup>308</sup> Panel Report, para. 7.386.

<sup>309</sup> China’s First Written Submission, paras. 156-190.

<sup>310</sup> China’s First Written Submission, paras. 498-521.

<sup>311</sup> China’s First Written Submission, paras. 187 (fluorspar), 520 (high alumina clay).

<sup>312</sup> China’s First Written Submission, paras. 191 (fluorspar), 522 (high alumina clay).

<sup>313</sup> Panel Report, paras. 7.362-7.386.

<sup>314</sup> Panel Report, paras. 7.387-7.392, 7.395-7.408.

<sup>315</sup> Panel Report, paras. 7.387-7.392, 7.393-7.394.



particular, the Panel interpreted the requirement under Article XX(g) that the challenged measure be “made effective in conjunction with” restrictions on domestic production or consumption to mean that the export restraints at issue not simply be applied alongside other measures that might have some relationship to “conservation;” the Panel required that the export restraints at issue have a very specific relationship measures that specifically restricting domestic production or consumption – *i.e.*, that the export restraints ensure the effectiveness of those domestic production or consumption restrictions.<sup>316</sup>

## **B. The Panel’s Interpretation Is Correct**

209. It is important to recall that Article XX provides for “general exceptions” to the affirmative obligations set forth in the GATT 1994.<sup>317</sup> Article XX(g) provides an exception for measures that serve conservation goals. Measures excepted under Article XX(g) are those:

relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

210. In its appeal, China seeks once again to erode the specific relationship Article XX(g) requires between the challenged measure and the restrictions on domestic production or consumption. The Panel’s interpretation, however, is unassailable and uncontroversial.

### **1. China’s Argument**

211. China requests the Appellate Body’s review of the Panel’s interpretation of the phrase “made effective in conjunction with” in Article XX(g). China argues that the Panel erred in interpreting this phrase as meaning that “restrictions on domestic production or consumption

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<sup>316</sup> Panel Report, paras. 7.397-7.398, 7.408.

<sup>317</sup> *See, e.g., U.S. – Gasoline (AB)*, at 17.

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 domestic restrictions.”<sup>318</sup>

212. According to China, based on the ordinary meaning of the text of Article XX(g), “made effective in conjunction with” should be interpreted to mean only “be applied jointly with.”<sup>319</sup>

China also argues that the Panel’s interpretation incorrectly imposes a “second purpose” on a challenged measure seeking shelter pursuant to Article XX(g).<sup>320</sup>

213. China’s arguments are fundamentally flawed. First, the Panel’s interpretation is grounded in the ordinary meaning of the words in Article XX(g) and supported by the context of Article XX(g); it is China’s interpretation of the phrase that effectively reads the phrase out of Article XX(g). Second, China’s characterization of the Panel’s interpretation as requiring a challenged measure to serve two separate purposes ignores the Panel’s reasoning and even-handedness and is based on a fundamental misunderstanding of the Panel’s and the Appellate Body’s and prior panel’s interpretation and reasoning. Accordingly, the Appellate Body should reject China’s arguments and uphold the Panel’s interpretation.

**2. The Panel’s Interpretation Is Made in Accordance with the Ordinary Meaning of the Terms in Article XX(g) in Their Context and in Light of the Object and Purpose of the GATT 1994**

214. 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

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<sup>318</sup> Panel Report, para. 7.397.

<sup>319</sup> China’s Appellant Submission, para. 406.

<sup>320</sup> China’s Appellant Submission, para. 410.

consumption required under Article XX(g). China argues that the Panel’s conclusion that “the purpose of the export restrictions must be to ensure the effectiveness of those domestic restrictions” is not supported by the text or context of Article XX(g). However, China fails to take into account the Panel’s consideration of the interpretation of this phrase by the Appellate Body and other panels, and the object and purpose of Article XX(g).

215. The Appellate Body has interpreted Article XX(g) in two disputes: *U.S. – Gasoline* and *U.S. – Shrimp*. In these disputes, the United States, as the respondent, defended the challenged measures under Article XX(g) as relating to the conservation of clean air (in *U.S. – Gasoline*) and relating to the conservation of sea turtles (in *U.S. – Shrimp*). In both cases, the particular interpretive question defining how the operation of the challenged measure should be conjoined with the operation of the domestic restrictions was not implicated. In *U.S. – Gasoline*, this was because the challenged measure affecting imports in that dispute (a regulation implementing the Clean Air Act) was also the same measure establishing the restrictions on domestic production or consumption required by Article XX(g).<sup>321</sup> Similarly, in *U.S. – Shrimp*, the conjunction of the operation of the challenged measure – a regulation addressing the mode of harvesting of imported shrimp – with the domestic restriction – a nearly concurrently implemented regulation addressing the same mode of harvesting domestic shrimp – was found by the Appellate Body to satisfy easily the “made effective in conjunction with” requirement of Article XX(g).<sup>322</sup>

216. The only other time that a respondent, like China, has asserted Article XX(g) as a defense where the challenged measure – also an export restriction on a raw/unprocessed product

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<sup>321</sup> *U.S. – Gasoline (AB)*, at 4-6.

<sup>322</sup> *U.S. – Shrimp (AB)*, paras. 143-145.

– was distinct and wholly separate from the restrictions on domestic production or consumption which the respondent argued the challenged measure was “made effective in conjunction with,” was early on, in 1988, in the GATT dispute *Canada – Herring and Salmon*. There, Canada invoked Article XX(g) to justify an export ban it had imposed on unprocessed herring and salmon. Both parties to the dispute accepted that Canada had in place restrictions on the domestic production of these species of fish.<sup>323</sup> Canada argued that the export ban was “an integral and longstanding part of a system aimed at maintaining compliance with domestic production controls” by helping to provide the statistical foundation for the harvesting restrictions<sup>324</sup> and increasing the socio-economic benefits to Canada from its fish conservation program.<sup>325</sup>

217. The *Canada – Herring and Salmon* panel considered that Article XX(g) required that the challenged export restraint could not have simply “any” relationship with conservation and “any” conjunction with production restrictions; instead, “a particular relationship and conjunction are required.”<sup>326</sup> With respect to the required conjunction, that panel concluded that the challenged export restriction “could . . . only be considered to be made effective ‘in conjunction with’ production restrictions *if it was primarily aimed at rendering effective these restrictions*’.”<sup>327</sup>

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<sup>323</sup> *Canada – Herring and Salmon* (GATT), paras. 3.29, 4.4.

<sup>324</sup> *Canada – Herring and Salmon* (GATT), paras. 3.35, 4.7.

<sup>325</sup> *Canada – Herring and Salmon* (GATT), paras. 3.37, 4.7.

<sup>326</sup> *Canada – Herring and Salmon* (GATT), para. 4.5 (original emphasis).

<sup>327</sup> Panel Report, para. 7.395 (citing *Canada – Herring and Salmon* (GATT), para. 4.6)(emphasis in original).

218. The panel in *Canada – Herring and Salmon* came to this conclusion after considering the context and object and purpose of Article XX in the GATT 1947. That panel noted that, “as the preamble of Article XX indicates, the purpose of including Article XX(g) in the General Agreement was not to widen the scope for measures serving trade policy purposes but merely to ensure that the commitments under the General Agreement do not hinder the pursuit of policies aimed at the conservation of exhausti[ble] natural resource[s].”<sup>328</sup> As a result, that panel came to its conclusion that the challenged export restriction needed to be primarily aimed at rendering effective domestic restrictions on the basis of the understanding that “the terms ‘in conjunction with’ in Article XX(g) had to be interpreted in a way that ensures that the scope of possible actions under that provision corresponds to the purpose for which it was included in the General Agreement.”<sup>329</sup>

219. The Panel appropriately noted the *Canada – Herring and Salmon* panel’s conclusion in its analysis.<sup>330</sup> Accordingly, the Panel concluded that, in its view, “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 domestic restrictions.” The interpretation of the *Canada – Herring and Salmon* panel and, by extension, of this Panel, therefore, is in accordance with the ordinary meaning of the terms of this phrase in their context and in the light of the object and purpose of Article XX(g).

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<sup>328</sup> *Canada – Salmon and Herring (GATT)*, para. 4.6.

<sup>329</sup> *Canada – Salmon and Herring (GATT)*, para. 4.6.

<sup>330</sup> Panel Report, para. 7.395 (citing *Canada – Herring and Salmon (GATT)*, para. 4.6)(emphasis in original).

220. The Panel’s consideration of and reliance on the *Canada – Herring and Salmon* panel’s interpretation is important and appropriate because *Canada – Herring and Salmon* was the first dispute in which the “made effective in conjunction with” requirement of Article XX(g) was substantively interpreted; because it is the only other dispute in which Article XX(g) has been invoked in the context of challenged restraints on exportation;<sup>331</sup> and because in *Canada – Salmon and Herring*, as in this dispute, the responding party sought to justify the imposition of export restrictions under Article XX(g) by proffering measures affecting domestic production, seemingly unrelated to the export restrictions, as conservation-motivated restrictions on domestic production with which the export restrictions were supposedly made effective. In the context of determining whether the export restraints constitute legitimate conservation measures that Article XX(g) was designed to exempt from the GATT’s trade-liberalizing disciplines,<sup>332</sup> therefore, the Panel appropriately drew upon the *Canada – Salmon and Herring* panel’s reasoning and concluded that, in order to qualify as an excepted conservation measure under Article XX(g), the export restrictions not only needed to be applied jointly with restrictions on domestic production or consumption, but also needed to ensure the effectiveness of those domestic restrictions.

221. Finally, China’s interpretation that Article XX(g) requires only that domestic restrictions “be applied jointly with” the challenged export restrictions would effectively read out of Article

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<sup>331</sup> The other two disputes in which Article XX(g) has been considered are *U.S. – Gasoline* and *U.S. – Shrimp*, both of which involved challenges to measures affecting imports.

<sup>332</sup> See *U.S. – Shrimp (AB)*, at 17 (Article XX “enumerat[es] the various categories of governmental acts, laws or regulations which WTO Members may carry out or promulgate in pursuit of differing legitimate state policies or interests outside the realm of trade liberalization . . .”).

XX(g) the phrase “made effective in conjunction with.” If “made effective in conjunction with” had been intended to mean only “be applied jointly with,” Article XX(g) could have been drafted to read:

(g) relating to the conservation of exhaustible natural resources, ~~if such measures are made effective in conjunction~~ with restrictions on domestic production or consumption.

Article XX(g) was not so drafted. The Panel’s interpretation that gives effect to the phrase “made effective in conjunction with” in Article XX(g).

### **3. The Panel’s Interpretation Does Not Require That the Export Restraints at Issue Have a “Second Purpose”**

222. China also argues that the Panel’s interpretation incorrectly imposes a “second purpose” on a challenged measure seeking justification pursuant to Article XX(g).<sup>333</sup> According to China, the context of Article XX(g) supports an interpretation that Article XX(g) requires only that a challenged measure “relate to conservation” but does not require that the challenged measure also ensure the effectiveness of the domestic production or consumption restrictions.<sup>334</sup>

However, these arguments are based on a fundamental mischaracterization/misunderstanding of the Panel’s interpretation and premised on a complete disregard for the object and purpose of Article XX(g).<sup>335</sup>

223. The most fundamental flaw in China’s argumentation on this point is the failure to appreciate that the Panel’s interpretation of “made effective in conjunction with” does not create a “second purpose” that the challenged export restrictions must serve under Article XX(g) but is,

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<sup>333</sup> China’s Appellant Submission, para. 410.

<sup>334</sup> China’s Appellant Submission, para. 409.

<sup>335</sup> Panel Report, paras. 7.402-7.408.

instead, part and parcel of the single determination that must be made pursuant Article XX(g) – *i.e.*, identifying and separating legitimate conservation measures that should be excepted from the disciplines of the GATT 1994, from measures that are designed instead to protect domestic interests and create domestic advantages.

224. As China noted,<sup>336</sup> in *U.S. – Gasoline*, the Appellate Body concluded that the clause “made effective in conjunction with restrictions on domestic production or consumption” is a “requirement that measures concerned impose restrictions, not just in respect of imported gasoline but also with respect to doemsti gasoline. The clause is a requirement of *even-handedness* in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources.”<sup>337</sup>

225. The Panel’s interpretation of the clause “made effective in conjunction with restrictions on domestic production or consumption” included a relevant discussion of the “requirement of even-handedness,”<sup>338</sup> which China’s argument ignores. In that discussion, the Panel elaborated that “the very essence of the conservation objective set forth in Article XX(g)” is that “if a WTO Member is not taking steps to manage the supply of natural resources domestically, it is not entitled to seek cover of Article XX(g) for measures it claims are helping to conserve the resource for future generations.”<sup>339</sup>

226. After recalling the GATT panel’s findings in *Canada – Herring and Salmon* and the Appellate Body’s statements in *U.S. – Gasoline*, the Panel concluded that:

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<sup>336</sup> China’s Appellant Submission, para. 405.

<sup>337</sup> *U.S. – Gasoline (AB)*, at 20-21.

<sup>338</sup> Panel Report, paras. 7.402-7.408.

<sup>339</sup> Panel Report, para. 7.406.



In sum, paragraph (g) of Article XX can justify GATT-inconsistent trade measures if such measures along with parallel domestic restrictions aimed at the conservation of natural resources and are primarily aimed at rendering effective parallel domestic restrictions operating for the conservation of natural resource. *A contrario*, Article XX(g) cannot be invoked for GATT-inconsistent measures whose goal or effects is to insulate domestic producers from foreign competition in the name of conservation.<sup>340</sup>

227. As discussed above, the panel in *Canada – Herring and Salmon* interpreted “made effective in conjunction with” to mean that the challenged export restrictions needed to be primarily aimed at making effective restrictions on domestic production or consumption in light of the object and purpose of Article XX(g). This would ensure that GATT commitments do not hinder the pursuit of legitimate conservation policies while at the same time ensuring that Article XX(g) does not create a loophole for trade policies that are not “primarily aimed at” conservation goals.<sup>341</sup> Similarly, the Appellate Body in *U.S. – Gasoline* recalled that the terms of Article XX(g) “may not be read so expansively as seriously to subvert the purpose and object” of the affirmative disciplines contained in the GATT 1994. At the same time, those affirmative disciplines may not “be given so broad a reach as effectively to emasculate Article XX(g) and the policies and interests it embodies.”<sup>342</sup>

228. In *U.S. – Gasoline*, the Appellate Body specifically placed its interpretation of the “even-handedness” requirement of Article XX(g) in the context of determining whether a challenged

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<sup>340</sup> Panel Report, para. 7.408.

<sup>341</sup> *Canada – Herring and Salmon (GATT)*, para. 4.6.

<sup>342</sup> *U.S. – Gasoline (AB)*, at 18.

measure is “designed” for or “primarily aimed at” conservation goals<sup>343</sup> or whether it is instead “naked discrimination for protecting locally-produced goods.”<sup>344</sup>

229. Scrutiny, under Article XX(g), of challenged measures like China’s export restraints, including whether they ensure the effectiveness of domestic restrictions that are presumed to be conservation-related, is an integral part of the unified task of distinguishing legitimate conservation measures that the trade disciplines of the GATT were not meant to apply from other types of measures for which the GATT’s obligations were created to discipline.

#### **4. The Consequences of China’s Interpretation Are Not Tenable**

230. If accepted, China’s interpretation would significantly weaken the standard for determining the legitimacy of conservation measures that should be considered to fall “outside the realm of trade liberalization.”<sup>345</sup> It would upset the delicate balance in the “relationship between the affirmative commitments [of the GATT] and the policies and interests embodied in the ‘General Exceptions’ listed in Article XX” that the Appellate Body in *U.S. – Gasoline* observed<sup>346</sup> and expand the scope of possible actions excused under Article XX(g) beyond that which the panel in *Canada – Herring and Salmon* considered appropriate.<sup>347</sup> China’s arguments on appeal, consistent with the ones it made before the Panel, seek to weaken the requirements of Article XX(g) such that even a severe export restraint could be justified by the most nominal of domestic measures with which it had the most tenuous of conjunctions.

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<sup>343</sup> *U.S. – Gasoline (AB)*, at 21 and 22.

<sup>344</sup> *U.S. – Gasoline (AB)*, at 21.

<sup>345</sup> *U.S. – Shrimp (AB)*, at 17.

<sup>346</sup> *U.S. – Gasoline (AB)*, at 18.

<sup>347</sup> *Canada – Salmon and Herring (GATT)*, para. 4.5.

### **C. Conclusion**

231. For all of the foregoing reasons, the Complainants ask the Appellate Body to reject China’s arguments and uphold the Panel’s interpretation of the phrase “made effective in conjunction with” in Article XX(g) to require that the purpose of the challenged export restrictions must be to ensure the effectiveness of 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**

232. China appeals the Panel’s interpretation and application of the trading rights commitments in Paragraphs 1.2 and 5.1 of China’s Accession Protocol, read in combination with Paragraphs 83(a), 83(b), 83(d), 84(a), and 84(b) of the Working Party Report. In particular, China appeals the Panel’s finding that China committed “to eliminate any ‘examination and approval system’” from December 11, 2004.<sup>348</sup> Contrary to China’s assertion, the central issue before the Panel with respect to China’s trading rights commitments was not whether China is entitled to maintain allocation rules for a WTO-consistent quota.<sup>349</sup> None of the quotas at issue in this dispute are WTO-consistent. Rather, the issue before the Panel, and again on appeal, is whether China’s imposition of prior export and minimum capital requirements is consistent with China’s trading rights commitments.

### **A. Factual Background**

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<sup>348</sup> China’s Appellant Submission, para. 432.

<sup>349</sup> China’s Appellant Submission, para. 444.

233. China's trading rights commitments are set forth in Part I, Paragraphs 5.1 and 5.2 of the Accession Protocol, and Part I, Paragraph 1.2, to the extent that it incorporates the commitments referred to in Paragraphs 83 and 84 of the Working Party Report.

234. Paragraph 5.1 of China's Accession Protocol provides,

Without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement, China shall progressively liberalize the availability and scope of the right to trade, so that, within three years after accession, all enterprises in China shall have the right to trade in all goods throughout the customs territory of China, except for those goods listed in Annex 2A which continue to be subject to state trading in accordance with this Protocol. Such right to trade shall be the right to import and export goods. . . . For those goods listed in Annex 2B, China shall phase out limitation on the grant of trading rights pursuant to the schedule in that Annex. China shall complete all necessary legislative procedures to implement these provisions during the transition period.

235. Paragraph 1.2 of the Accession Protocol states, in relevant part,

This Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement.

236. Paragraphs 83 and 84 are both referred to in paragraph 342. Paragraph 83 explains, in relevant part,

(a) The representative of China confirmed that, upon accession China would eliminate for both Chinese and foreign-invested enterprises any export performance, trade balancing, foreign exchange balancing and prior experience requirements, such as in importing and exporting, as criteria for obtaining or maintaining the right to import and export.

(b) With respect to wholly Chinese-invested enterprises, the representative of China stated that although foreign-invested enterprises obtained limited trading rights based on their approved scope of business, wholly Chinese-invested enterprises were now required to apply for such rights and the relevant authorities applied a threshold in approving such applications. In order to accelerate this approval process and increase the availability of trading rights, the representative of China confirmed that China would reduce the minimum registered capital requirement (which applied only to wholly Chinese-invested enterprises) to obtain trading rights to RMB 5,000,000 for year one, RMB 3,000,000 for year two, RMB 1,000,000 for year three and would eliminate the examination and approval system at the end of the phase-in period for trading rights.

(d) The representative of China also confirmed that within three years after accession, all enterprises in China would be granted the right to trade. Foreign-invested enterprises would not be required to establish in a particular form or as a separate entity to engage in importing and exporting nor would new business license encompassing distribution be required to engage in importing and exporting.

237. Paragraph 84 states,

(a) The representative of China reconfirmed that China would eliminate its system of examination and approval of trading rights within three years after accession. At that time, China would permit all enterprises in China and foreign enterprises and individuals, including sole proprietorships of other WTO Members, to export and import all goods (except for the share of products listed in Annex 2A to the Draft Protocol reserved for importation and exportation by state trading enterprises) throughout the customs territory of China. Such right, however, did not permit importers to distribute goods within China. Providing distribution services would be done in accordance with China’s Schedule of Specific Commitments under the GATS.

(b) With respect to the grant of trading rights to foreign enterprises and individuals, including sole proprietorships of other WTO members, the representative of China confirmed that such rights would be granted in a non-discriminatory and non-discretionary way. He further confirmed that any requirements for obtaining trading rights would be for customs and fiscal purposes only and would not constitute a barrier to trade. The representative of China emphasized that foreign enterprises and individuals with trading rights had to comply with all WTO-consistent requirements related to importing and exporting, such as those concerning import licensing, TBT and SPS, but confirmed that requirements relating to *minimum capital and prior experience would not apply*.<sup>350</sup>

238. The Complainants explained that, pursuant to Paragraph 5.1 of the Accession Protocol and Paragraphs 83 and 84 of the Working Party Report, China committed to provide all enterprises in China the right to trade in the raw materials at issue.<sup>351</sup> Under Paragraph 5.1, China must grant the “right to trade” to “all enterprises” in China; grant the “right to trade” with respect to all goods not listed in Annexes 2A and 2B; and complete all necessary legislative

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<sup>350</sup> Emphasis added.

<sup>351</sup> U.S. First Written Submission, para. 266; Mexico’s First Written Submission, para. 269.

procedures to implement its trading rights commitments within three years, that is, by December 11, 2004.<sup>352</sup>

239. The Complainants explained further that Paragraph 83(d) of the Working Party Report confirms the obligation in Paragraph 5.1 that China committed to provide trading rights to all enterprises in China by December 11, 2004.<sup>353</sup> The Complainants also noted that Paragraph 84(a) of the Working Party Report confirms that China’s obligations with respect to trading rights apply to all enterprises in China, and that China committed to eliminate its “examination and approval” system within three years of accession.<sup>354</sup>

240. The Complainants explained further that Paragraphs 83(a) and 83(b) prohibit China from imposing certain specific restrictions on the right to trade. In particular, Paragraph 83(a) makes clear China’s commitment not to impose on Chinese or foreign-invested enterprises any prior experience requirements in exporting as criteria for obtaining or maintaining the right to export.<sup>355</sup> Paragraph 83(b) confirms China’s commitment to eliminate the “examination and approval” system for enterprises to be granted trading rights, including by eliminating any minimum registered capital requirements. Paragraph 84(b) also confirms that, in granting

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<sup>352</sup> U.S. First Written Submission, para. 266; Mexico’s First Written Submission, paras. 269. The second sentence of Paragraph 5.1 defines the “right to trade” as the “right to import and export goods.” U.S. First Written Submission, para. 267. None of the raw materials at issue is covered by Annex 2A or 2B. U.S. First Written Submission, paras. 270-271.

<sup>353</sup> U.S. First Written Submission, para. 274; Mexico’s First Written Submission, para. 277.

<sup>354</sup> U.S. First Written Submission, para. 275; Mexico’s First Written Submission, para. 278.

<sup>355</sup> U.S. First Written Submission, para. 276; Mexico’s First Written Submission, para. 279.

trading rights to foreign enterprises in China, China committed to eliminate prior experience and minimum registered capital requirements.<sup>356</sup>

241. The Complainants then explained that, notwithstanding these commitments, China limits the right of enterprises to export coke, bauxite, fluorspar, and silicon carbide. In particular, China requires an exporter to comply with certain conditions, including having prior export experience and minimum registered capital, to export coke under its coke quota.<sup>357</sup> In addition, China imposes prior export experience and minimum capital requirements on exporters wishing to export bauxite, fluorspar, or silicon carbide under the quotas.<sup>358</sup> Thus, instead of granting all enterprises in China the right to export these products, China continues to subject enterprises seeking to export to an examination and approval system. As such, the Complainants pointed out, China’s imposition of these requirements in order to export coke, bauxite, fluorspar, or silicon carbide is directly contrary to its trading rights commitments.<sup>359</sup>

242. China did not dispute that exporters must satisfy minimum export performance and minimum registered capital requirements in order to export.<sup>360</sup> However, China argued that Paragraph 5.1 of the Accession Protocol and Paragraphs 83 and 84 of the Working Party Report recognized its inherent “right to regulate,” and that China can impose such restrictions on the

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<sup>356</sup> U.S. First Written Submission, para. 277 (citing *China – Audiovisual Products (Panel)*, paras. 7.249-7.252, 7.260-7.266, 7.285-7.299, 7.313-7.314, 7.318-7.324); Mexico’s First Written Submission, para. 280.

<sup>357</sup> U.S. First Written Submission, paras. 278-282; Mexico’s First Written Submission, paras. 281-285.

<sup>358</sup> U.S. First Written Submission, paras. 284-288; Mexico’s First Written Submission, paras. 287-291.

<sup>359</sup> U.S. First Written Submission, paras. 282, 288; Mexico’s First Written Submission, paras. 285, 291.

<sup>360</sup> China’s First Written Submission para. 622.

right to export because it maintains a quota on the products at issue.<sup>361</sup> China asserted that, because those quotas are WTO-consistent, so are the minimum export performance and minimum capital requirements.<sup>362</sup>

243. The Panel rejected China’s arguments that its prior export performance and minimum registered capital requirements are automatically consistent with its trading rights commitments simply because, according to China, they are consistent with other WTO obligations, namely GATT Articles X and XIII and Article 3.5(j) of the Import Licensing Agreement.<sup>363</sup> Instead, the Panel found that China’s prior export performance and minimum registered capital requirements are inconsistent with Paragraphs 1.2 and 5.1 of China’s Accession Protocol, read in conjunction with Paragraphs 83(a), 83(b), 83(d), 84(a), and 84(b) of the Working Party Report.

244. China’s arguments on appeal largely echo its arguments before the Panel. The Panel’s conclusion is based on the plain meaning of the relevant provisions and should be upheld, as discussed below.

**B. The Panel Correctly Found That China’s Imposition of Prior Export Performance and Minimum Registered Capital Requirements Is Not Consistent With China’s Trading Rights Commitments**

245. China does not dispute that it imposes prior export performance and minimum capital requirements on companies seeking to export. Nor does China dispute that, at least “in the ordinary course,” it must provide the right to trade to all enterprises and eliminate prior export performance and minimum capital requirements.<sup>364</sup> The main thrust of China’s appeal is that its

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<sup>361</sup> China’s First Written Submission, paras. 623-632.

<sup>362</sup> China’s First Written Submission, paras. 629, 632.

<sup>363</sup> Panel Report, paras. 7.664, 7.667.

<sup>364</sup> China’s Appellant Submission, para. 468.



obligations in Paragraphs 83 and 84 are qualified, such that it is entitled to maintain export quotas and to administer those quotas using prior export performance and minimum registered capital requirements.<sup>365</sup> According to China, the Panel “neglected” Paragraph 5.1 in concluding otherwise.<sup>366</sup> China also asserts that the Panel improperly impaired China’s right to administer export quotas.<sup>367</sup> China repeats that, so long as its method for allocating a quota complies with Article XI, X, and XIII, that method is permissible.<sup>368</sup>

246. The Panel properly rejected China’s argument that Paragraph 5.1 allows China to breach its trading rights commitments in the manner China suggests.<sup>369</sup> On appeal, China claims that the Panel erroneously found that China was required to eliminate “any” examination and approval system by 11 December 2004, including eliminating prior export performance and minimum registered capital requirements.<sup>370</sup> China challenges the Panel’s finding that Paragraph 83 imposes “additional specific restrictions on China’s right to regulate trade,” namely the elimination of prior export performance requirements and of its “examination and approval system,”<sup>371</sup> as well as the Panel’s finding that Paragraphs 83 and 84 include “further commitments” beyond those set forth in the GATT 1994.<sup>372</sup>

247. China’s assertions ignore the fact that Paragraphs 83 and 84 include specific commitments – to eliminate its examination and approval process, including the prior export

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<sup>365</sup> China’s Appellant Submission, paras. 439-443.

<sup>366</sup> China’s Appellant Submission, para. 459.

<sup>367</sup> China’s Appellant Submission, paras. 449-454.

<sup>368</sup> China’s Appellant Submission, paras. 455-456.

<sup>369</sup> Panel Report, paras. 7.663-7.668.

<sup>370</sup> China’s Appellant Submission, paras. 447, 469.

<sup>371</sup> China’s Appellant Submission, para. 445 (citing Panel Report, para. 7.655).

<sup>372</sup> China’s Appellant Submission, para. 445 (citing Panel Report, para. 7.665).

experience and minimum capital requirements – that are not found elsewhere in the WTO

Agreement. As the Panel explained,

Paragraph 83(a) directs China to eliminate any ‘export performance’ and ‘prior experience requirements’. Paragraph 83(b) directs China to reduce the minimum registered capital requirements gradually, eliminating its ‘examination and approval system’ at the end of 11 December 2004. Paragraph 83(d) confirms that enterprises would be granted the ‘right to trade’. Paragraph 84(a) requires China to permit ‘all enterprises in China and foreign enterprises and individuals...of other WTO Members to export...all goods’. In addition, Paragraph 84(b) ‘confirms’ that these rights would be granted in a non-discriminatory and non-discretionary way.<sup>373</sup>

248. In turn, the Panel found that China imposed “a form of examination and approval based on prior export performance and minimum registered capital requirements that China committed to eliminate . . . .”<sup>374</sup> The Panel’s conclusion that China’s prior export performance and minimum capital requirements are inconsistent with Paragraphs 1.2 and 5.1 of the Accession Protocol, read in combination with Paragraphs 83(a), 83(b), and 83(d),<sup>375</sup> is therefore grounded in the text of those provisions, not in an abstract statement that China agreed to eliminate “any” examination and approval system.

249. Contrary to China’s suggestion, the Panel’s findings create no inconsistency between Paragraph 5.1 and Paragraphs 83 and 84. The introductory language of Paragraph 5.1 (“without prejudice to the right to regulate trade in a manner consistent with the WTO Agreement”) confirms that the trading rights commitments do not prejudice China’s ability to regulate trade in a manner consistent with the WTO Agreement. In its appeal, China appears to overlook the fact

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<sup>373</sup> Panel Report, para. 7.666; *see also* U.S. First Written Submission, paras. 274-277; Mexico’s First Written Submission, paras. 277-280.

<sup>374</sup> Panel Report, para. 7.668.

<sup>375</sup> *See, e.g.*, Panel Report, paras. 7.669, 7.670, 8.4(a), 8.4(b), 8.18(a), 8.18(b).

that the prior export performance and minimum capital requirements at issue in this dispute are not WTO-consistent. They violate trading rights commitments in the Accession Protocol and Working Party Report that are an integral part of the WTO Agreement. And they do not regulate trade other than by limiting which enterprises may apply to export under the quota.<sup>376</sup> As such, China’s argument on appeal, as before the Panel, amounts to an assertion that pursuant to the introductory language in Paragraph 5.1 its trading rights commitments are without prejudice to its right to breach those commitments.<sup>377</sup> China’s argument that this language allows it to maintain any regulation, even in contravention of the commitments in its Accession Protocol and Working Party Report, administering a WTO-consistent quota if that quota is consistent with other provisions of the WTO Agreement is therefore entirely circular.

250. Moreover, the Panel correctly found that the obligations cited by China with respect to the allocation and administration of quotas (Articles X and XIII) are “distinct from and additional to those relating to Article XI and GATT possible justifications.”<sup>378</sup> This finding is undisputed. As such, China’s suggestion that Complainants needed to demonstrate the WTO-inconsistency of its prior export performance and minimum capital requirements under other provisions of the WTO Agreement is without merit. As explained above, China has obligations with respect to such requirements in Paragraph 5.1 and Paragraphs 83 and 84. And

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<sup>376</sup> The Panel reasoned that the regulation of the “rights that the covered agreements affirmatively recognize as accruing to WTO Members,” which the Appellate Body found was encompassed by the “rights” language in Paragraph 5.1, must be read in light of the obligations set forth in China’s Accession Protocol and Working Party Report. Panel Report, paras. 7.653, 7.665.

<sup>377</sup> U.S. Second Written Submission, para. 350; Mexico’s First Written Submission, para. 353.

<sup>378</sup> Panel Report, para. 7.664.

the Complainants demonstrated, based on the ordinary meaning of Paragraph 5.1 and Paragraphs 83 and 84, that those requirements are not consistent with China’s trading rights obligations.

251. China’s arguments to the effect that the Import Licensing Agreement and Article XIII of the GATT 1994 contemplate the use of historical performance in allocating quotas are likewise unavailing.<sup>379</sup> Citation to these provisions does not support China’s argument. Article XIII provides for allocation based on historical performance where a quota is allocated among supplying countries, as opposed to individual importers or exporters. The Import Licensing Agreement provides that a Member “should” consider import performance when allocating non-automatic import licenses (which are not at issue in this dispute).<sup>380</sup> Neither provision can be read as overriding China’s trading rights obligations.

252. Finally, China claims that, aside from overlooking Paragraph 5.1, the Panel misinterpreted Paragraph 83(b) when it found 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) is “much more limited” and applies only to the examination and approval system for wholly Chinese-invested enterprises.<sup>381</sup>

253. China’s position appears to be that China is allowed to maintain a minimum capital requirement for foreign-invested companies. This argument (which China did not present to the Panel) is in no way supported by the text of China’s trading rights commitments. As explained

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<sup>379</sup> China’s Appellant Submission, paras. 464-465.

<sup>380</sup> U.S. Second Written Submission, para. 351; Mexico’s Second Written Submission, para. 354.

<sup>381</sup> China’s Appellant Submission, paras. 469-471.

above, Paragraph 83(b) confirms China’s commitment to eliminate its “examination and approval” system for enterprises to be granted trading rights, including by eliminating any minimum capital requirements. Paragraph 83(d) requires that, within three years of accession, China grant “all enterprises in China . . . the right to trade.” Paragraph 84(a) confirms that, also within three years, “China would eliminate its system of examination and approval of trading rights . . . .At that time, China would permit all enterprises in China and foreign enterprises and individuals, including sole proprietorships of other WTO Members, to export and import all goods . . . .” Also, Paragraph 84(b) confirms that trading rights “would be granted in a non-discriminatory way” and that, in granting trading rights to foreign enterprises in China, China committed to eliminate prior experience and minimum capital requirements. In short, there is no basis for concluding that China is permitted to maintain an examination and approval system that applies only to foreign-invested enterprises. Indeed, Paragraphs 83 and 84 provide the opposite.

### **C. Conclusion**

254. For the reasons discussed above, China’s request that the Appellate Body 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) should be rejected. The Panel findings with respect to its trading rights commitments in Paragraphs 5.1 and 1.2 of the Accession Protocol and Paragraphs 83 and 84 of the Working Party Report should be upheld.

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

255. 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. Specifically, 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.<sup>382</sup> China requests the Appellate Body reverse the Panel’s findings in paragraphs 7.921, 7.946, 7.948, and 7.958 and the Panel’s recommendations in paragraphs 8.5(b), 8.8, 8.12(b), 8.15, 8.19(b), and 8.22.<sup>383</sup>

256. As discussed in detail below, at its core, China’s argument with respect to the Panel’s interpretation and application of Article XI:1 of the GATT 1994, and the Panel’s assessment of the matter under DSU Article 11, is that a measure that creates uncertainty and lack of predictability cannot be a “restriction” covered by Article XI:1 of the GATT 1994. However, the Panel’s interpretation and conclusion on this matter are supported by the ordinary meaning of the word “restriction” in its context; by the interpretations and conclusions of other panels of Article XI:1; by the text of Article 4 and footnote 1 of the *Agreement on Agriculture* and the Appellate Body’s interpretation thereof; as well as by the facts presented to the Panel in this dispute.

257. As in the other sections of China’s Appellant Submission, China’s arguments and presentation on this issue are based on critical omissions and inaccurate characterizations of relevant facts, the Panel’s reasoning and analysis, and the Complainants’ arguments before the

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<sup>382</sup> See China’s Appellant Submission, para. 475 and Section VIII.D.

<sup>383</sup> China’s Appellant Submission, paras. 476 and 603.

Panel. In order to provide context for understanding the Panel’s approach, before addressing China’s legal arguments the Complainants will first summarize the relevant facts, developments, and arguments from the panel proceedings related to the Panel’s findings on China’s export licensing requirements, before addressing China’s legal arguments.

## **A. Background**

### **1. China’s Export Licensing System**

258. In its description of the “factual background” for its appeal of the Panel’s export licensing finding, China fails to address certain important elements of China’s export licensing system. The first is the fact that the export licensing system challenged in this dispute is one established under Chinese law for the purpose of restricting the exportation of goods.

259. As the Panel found, China’s laws provide that the exportation of goods is generally “free” and unrestricted except in cases where goods have been designated for export “restriction.”<sup>384</sup> For goods not designated for “restriction,” China’s laws provide that a system of “automatic licensing” may be used for statistical purposes.<sup>385</sup> In such an “automatic licensing” system, licenses are granted as a matter of course, without implicating any discretion on the part of the license issuing authority.<sup>386</sup>

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<sup>384</sup> Panel Report, para. 7.879 (referencing *Foreign Trade Law*, Article 15 (Exhibit JE-72), and *Regulation on Import and Export Administration*, Article 4 (Exhibit JE-73)).

<sup>385</sup> Panel Report, para. 7.879 (referencing *Foreign Trade Law*, Article 15 (Exhibit JE-72)).

<sup>386</sup> *Foreign Trade Law*, Article 15 (Exhibit JE-72) (“For goods subject to automatic licensing for import and export, if the consignor or consignee applies for automatic licensing prior to handling customs formalities, the State Council’s foreign trade department and the institutions entrusted thereby shall grant the license.”) (Emphasis added).

260. For goods that China designates for “restricted exportation,” China employs a licensing system pursuant to a separate provision in its laws.<sup>387</sup> Under that provision, goods can only be exported “with approval” – meaning that the granting of licenses is conditioned on the decision-making of a licensing authority and implicating the exercise of discretion on the part of such an authority.<sup>388</sup>

261. It is in the context of this legal framework for China’s export licensing system that the Panel found that the discretion and uncertainty flowing from Article 11(7) of the *2008 Export License Administration Measures* and Articles 5(5) and 8(4) of the *2008 Export Licensing Working Rules* constituted a restriction in contravention of Article XI:1 of the GATT 1994.

## 2. The Panel’s Analysis and Findings

262. The Panel found that an export licensing system that implicates discretion by conditioning the granting of export licenses on the fulfillment of prerequisites is not, by itself, enough to constitute a “restriction” under Article XI:1 of the GATT 1994.<sup>389</sup> However, the Panel considered that if such a licensing system implicated discretion, on the part of the licensing

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<sup>387</sup> Panel Report, para. 7.879 (referencing *Foreign Trade Law*, Article 19 (Exhibit JE-72), *Regulation on Import and Export Administration*, Article 35 (Exhibit JE-73), and *2008 Export License Administration Measures*, Article 2 (Exhibits CHN-342, JE-74)).

<sup>388</sup> *Foreign Trade Law*, Article 19 (Exhibit JE-72) (“The State applies quota and licensing system to the management of goods subject to import or export restrictions, while applying the licensing system to the management of technologies that are restricted from import or export. Goods and technologies that are subject to the administration of quotas or licenses can only be imported or exported with approval from the foreign trade department of the State Council independently or jointly with other departments of the State Council in accordance with the State Council’s rules.”) (Emphasis added.)

<sup>389</sup> Panel Report, para. 7.917-7.918.



authority, to grant or deny export licenses “based on unspecified criteria,” this would be enough to constitute a “restriction” for purposes of Article XI:1 of the GATT 1994.<sup>390</sup>

263. The Panel considered that it did not matter whether, in fact and in actual practice, licenses were never denied. The Panel reasoned that “the possibility” of denial would be ever-present where the decision-making of a license issuing authority was not disciplined by specific criteria, and that the resulting lack of certainty for applicants would mean that the system would “always have a restrictive or limiting effect.”<sup>391</sup>

264. The Panel then examined the “design and structure” of China’s export licensing measures to determine whether the criteria established for the granting of licenses appropriately disciplined the exercise of discretion and ensured the certainty required for an export licensing system to conform to Article XI:1 of the GATT 1994. The Panel noted that, in setting out materials that export license applicants must submit in order to obtain a license for goods that are subject to export licensing only (and not also the restriction of export quotas), Article 11(7) of the *2008 Export License Administration Measures* refers to the submission of undefined “other documents of approval” and Articles 5(5) and 8(4) of the *2008 Export Licensing Working Rules* refer to undefined “other materials.”<sup>392</sup> The Panel determined that the lack of specificity in these requirements “creates uncertainty as to an applicant’s ability to obtain an export license” and that “[t]his uncertainty amounts to a restriction on exportation that is inconsistent with Article XI:1.”<sup>393</sup>

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<sup>390</sup> Panel Report, para. 7.921.

<sup>391</sup> Panel Report, para. 7.921.

<sup>392</sup> Panel Report, para. 7.944.

<sup>393</sup> Panel Report, para. 7.948.

**B. The Panel Correctly Interpreted and Applied Article XI:1 of the GATT 1994 and Correctly Found that China’s Export Licensing System Is Inconsistent with China’s WTO Obligations**

**1. China’s Arguments on Appeal**

265. China argues that the Panel’s interpretation of “restriction” in Article XI:1 is incorrect. In China’s view, the fact that China’s measures create a “possibility” that export licenses might be denied is insufficient to and “uncertainty” for applicants is not sufficient to constitute a “restriction” under Article XI:1 of the GATT 1994. For China, a measure must “*mandate*[] and, hence, *necessarily* lead[] to WTO-inconsistent conduct” for it to breach WTO rules.<sup>394</sup> This is so because, as long as a licensing authority is afforded discretion under the law, it must be granted a presumption that it will exercise that discretion in a WTO-consistent way. According to China, therefore, just because its export licensing authorities can deny export licenses at will, does not mean that those authorities will do so and, as long as China’s export licensing authorities continue to grant export licenses (or in the absence of evidence of individual instances of denials at will), China’s export licensing system cannot be considered to “restrict” exports.

266. Accordingly, China argues that the Panel erred in its interpretation of “restriction” under Article XI:1 of the GATT 1994<sup>395</sup> and, as a consequence, both erred in applying this interpretation of Article XI:1 in finding China’s export licensing system to be in breach,<sup>396</sup> and in making this in the absence of evidence that any license applications have been denied or that

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<sup>394</sup> China’s Appellant Submission, para. 554.

<sup>395</sup> China’s Appellant Submission, Section VIII.D.2.

<sup>396</sup> China’s Appellant Submission, Section VIII.D.3.

China’s licensing authorities have requested unspecified documents in the export application process.<sup>397</sup>

267. The Complainants will address each of these arguments in turn below.

**2. The Panel Correctly Found that the Uncertainty or Unpredictability Inherent in a Discretionary Export Licensing System Can Constitute a Restriction under Article XI:1 of the GATT 1994**

268. As noted above, in interpreting the requirements of Article XI:1, the Panel considered that unpredictability and uncertainty in an export licensing system were sufficient to amount to an export “restriction” prohibited by Article XI:1 of the GATT 1994. China considers this to be error because, in China’s view, a “restriction” under Article XI:1 of the GATT 1994 (and any other breach of WTO rules) requires certainty – in this case, certainty that the number of actual exports will be restricted through the denial of export licenses.<sup>398</sup> For a number of reasons, China’s arguments should be rejected.

269. First, the Complainants note that the Panel’s interpretation is consistent with the ordinary meaning of “restriction” in its context and supported by the interpretations undertaken by other panels. As the Panel noted, the Appellate Body has not yet interpreted the term “restriction” in Article XI:1, however, many WTO panels have. The interpretation of the panels in *Colombia – Ports of Entry* and *India – Quantitative Restrictions* were considered by the Panel as especially instructive in examining China’s export licensing system, which implicates discretion on the part of the licensing authorities that results in uncertainty, constitutes a “restriction” for purposes of Article XI:1 of the GATT 1994, was well-supported.

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<sup>397</sup> China’s Appellant Submission, Section VIII.D.4, para. 597.

<sup>398</sup> China’s Appellant Submission, para. 541.

270. The panel in *Colombia – Ports of Entry* examined the ordinary meaning of the word “restriction” and the interpretations of prior WTO and GATT panels. That panel noted that “restrictions” under Article XI:1 have been considered to be broad in scope and that such “restrictions” can cover measures that negatively affect competitive opportunities.<sup>399</sup> The *Colombia – Ports of Entry* panel then concluded that “restrictions” can include “measures that create uncertainties and affect investment plans, restrict market access for imports, or make importation prohibitively costly.”<sup>400</sup>

271. In *India – Quantitative Restrictions*, the panel also considered the fact that panels had construed “restriction” under Article XI:1 to be broad in scope. That panel interpreted “restrictions” as meaning “a limitation on action, a limiting condition or regulation” and, in examining an import licensing system, concluded that “a discretionary or non-automatic import licensing requirement is a restriction prohibited by Article XI:1.”<sup>401</sup>

272. Second, the Panel’s interpretation that a “restriction” on exportation can result from the lack of certainty and predictability in a discretionary export licensing system is also supported by the Appellate Body’s interpretation in *Chile – Price Band System* regarding “import restrictions” in the context of Article 4 and footnote 1 in the *Agreement on Agriculture*. There, the Appellate Body noted that Article 4 of the *Agreement on Agriculture* addresses “Market Access” and that negotiators in the Uruguay Round had decided that certain border measures restricting imports should be converted into ordinary customs duties, in order to ensure enhanced market access for

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<sup>399</sup> *Colombia – Ports of Entry*, paras. 7.233-7.240.

<sup>400</sup> *Colombia – Ports of Entry*, para. 7.240; see Panel Report, para. 7.894.

<sup>401</sup> *India – Quantitative Restrictions*, paras. 5.128-5.129; see Panel Report, paras. 7.895-7.896.

imports.<sup>402</sup> The Appellate Body examined footnote 1 in the *Agreement on Agriculture*, which enumerates examples of such measures, in considering whether Chile’s system of “variable import levies” constituted the type of import restricting measure covered by the footnote. The Appellate Body found that the levies at issue were characterized by “a lack of transparency and a lack of predictability” in the duties that would result from such measures. The Appellate Body then concluded that:

This lack of transparency and this lack of predictability are liable to restrict the volume of imports. As Argentina points out, an exporter is less likely to ship to a market if that exporter does not know and cannot reasonably predict what the amount of duties will be.<sup>403</sup>

As is obvious to traders and commercial actors in the real world, lack of predictability and certainty in regulatory regimes such as taxation and especially in approval processes such as export licensing, can affect expectations, incentives, and behaviors with significant [cost-increasing and inhibiting] consequences. The Panel’s interpretation appropriately accounts for these realities.

273. Third, footnote 1 to the *Agreement on Agriculture* itself provides further support for the Panel’s interpretation. As noted above in the context of the Appellate Body’s analysis in *Chile – Price Bands*, footnote 1 enumerates examples of certain border measures restricting imports that negotiators decided should be converted into ordinary customs duties. Footnote 1 states, in relevant part:

These measures include quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures

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<sup>402</sup> *Chile – Price Band System (AB)*, para. 200.

<sup>403</sup> *Chile – Price Band System (AB)*, para. 234 (emphasis added).

maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties . . . .

(Emphasis added.) Article 4 and footnote 1 to the *Agreement on Agriculture* echo important elements of Article XI:1 of the GATT 1994, which provides, in relevant part:

No prohibitions or restrictions, other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained . . . on the importation . . . or on the exportation or sale for export of any product . . . .

Like Article XI:1, Article 4 of the *Agreement on Agriculture* is a trade liberalizing provision; like Article XI:1, footnote 1 enumerates examples of the types of trade measures subject to discipline; like Article XI:1, the list in footnote 1 is non-exhaustive (Article XI:1 covers “other measures” through which prohibitions or restrictions on importation or exportation are “made effective” while footnote 1 covers “similar border measures”) and explicitly includes licenses while excluding duties.

274. As noted above, with respect to licensing, footnote 1 to the *Agreement on Agriculture* explicitly identifies “discretionary import licensing” as one type of measure which, according to the Appellate Body in *Chile – Price Bands*, restricts imports that can no longer be maintained. This provides further support for the Panel’s interpretation that a discretionary export licensing system can constitute a restriction on exportation for purposes of Article XI:1 of the GATT 1994.

275. Finally, the Complainants observe that China itself asserts unequivocally that “[t]he object and purpose underlying Article XI:1 is to protect competitive opportunities for exports,

rather than trade flows.”<sup>404</sup> China’s argument directly contradicts this principle. According to China’s argument, China’s export licensing system can only be considered to restrict exports in breach of Article XI:1 if it restricts trade flows through the denial of export licenses. However, according to China’s own assertion, Article XI:1 “protects competitive opportunities.” A breach of Article XI:1 could therefore be effected by a restriction on these competitive opportunities – through uncertainty and unpredictability in export licensing, without the occurrence of actual denials of export licenses.

276. Accordingly, China’s argument should be rejected.

### **3. The Panel Correctly Applied Article XI:1 of the GATT 1994 to China’s Export Licensing Measures**

277. China also alleges that the Panel erred in applying its interpretation of Article XI:1 of the GATT 1994 to China’s export licensing measures. China argues that an impermissible “restriction” on exportation would only be effected when a license authority “requir[es] documents that impose a ‘limiting effect’ on exports.”<sup>405</sup> China argues that, because the provisions of the specific measures at issue – Article 11(7) of the *2008 Export License Administration Measures* and Articles 5(5) and 8(4) of the *2008 Export Licensing Working Rules* – are “ambiguous,” China’s licensing authorities are not mandated to require the submission of any undefined or unspecified documents from export license applicants. For China, the “possibility” that China’s licensing authorities might, under these provisions of China’s laws,

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<sup>404</sup> China’s Appellant Submission, para. 548 (referencing Panel Report, *Argentina – Hides and Leather*, para. 11.20; Panel Report, *Colombia – Ports of Entry*, para. 7.236; GATT Panel Report, *EEC – Oilseeds I*, paras. 150, 151; Panel Report, *U.S. – Taxes on Petroleum and Certain Imported Substances (“Superfund”)*, para. 5.2.1).

<sup>405</sup> China’s Appellant Submission, para. 581.

refrain from requiring unspecified documents from exporters means that there cannot be a finding of restriction on exportation for Article XI:1 purposes.

278. It is important to note what China does not argue in this context. China does not argue that Article 11(7) of the *2008 Export License Administration Measures* and Articles 5(5) and 8(4) of the *2008 Export Licensing Working Rules* do not permit China’s licensing authorities the discretion to require documents and materials that are not specified or defined. In fact, China explicitly accepts that these provisions provides its license issuing authorities a “choice” to require or not to require the submission of such documents.<sup>406</sup> China also accepts that its measures provide for the “possibility” of its licensing authorities to require unspecified documents that limit exports.<sup>407</sup>

279. Instead, China’s argument here is once again premised on China’s previous argument that the Panel erred in interpreting Article XI:1 “restrictions” and that uncertainty and unpredictability cannot themselves be sufficient to result in a restriction on exportation. The Complainants have addressed those arguments above and refers to them again as bases for rejecting China’s argument that the Panel incorrectly applied Article XI:1 of the GATT 1994 to China’s export licensing measures.

#### **4. The Panel Made an Objective Assessment of the Matter before It in Finding China’s Export Licensing System Is Inconsistent with Article XI:1 of the GATT 1994**

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<sup>406</sup> China’s Appellant Submission, para. 581 (“The ‘undefined’ and ‘unspecific’ nature of the additional documents means that, were Chinese license-issuing authorities to require such documents, they would face a choice between WTO-consistent action (requiring documents that avoid a ‘limitng effect’ on exports), and WTO-inconsistent action.(requiring documents that impose a ‘limiting effect’ on exports).”)

<sup>407</sup> China’s Appellant Submission, para. 582.



280. Finally, China argues that the Panel erred under Article 11 of the DSU in finding that the export licensing measures are inconsistent with Article XI:1 of the GATT 1994 because the Panel lacked an evidentiary basis for this finding. According to China, “there is no evidence to show that the ‘open-ended discretion’ at issue has ever been exercised in a WTO-inconsistent manner.”<sup>408</sup>

281. In making these arguments, China repeatedly emphasizes that the challenge and the findings made by the Panel are made on the basis of the “face of the measures” at issue or “as such.”<sup>409</sup> However, China acknowledges that it is its view that “it is not necessary to provide evidence of the application of a measure in support of an *as such* challenge.”<sup>410</sup> China alleges that the Panel’s error is in finding a breach of Article XI:1 of the GATT 1994 on the basis of the existence of lack of predictability and certainty only.

282. Once again, China’s argument that the Panel erred under DSU Article 11 is a recapitulation of its argument that the Panel’s interpretation of “restriction” in Article XI:1 is in error. The Complainants refer, once again, to their response to those arguments above as bases for rejecting China’s appeal on this point as well.

### **C. Conclusion**

283. For all of the foregoing reasons, the Complainants request that the Appellate Body reject China’s arguments and requests and uphold the Panel’s finding that China’s export licensing system is inconsistent with Article XI:1 of the GATT 1994.

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<sup>408</sup> China’s Appellant Submission, para. 598.

<sup>409</sup> China’s Appellant Submission, paras. 590, 593, 594, 596.

<sup>410</sup> China’s Appellant Submission, para. 596.

**IX. Conclusion**

284. For the reasons given in this submission, the Complainants respectfully request the Appellate Body to reject China's appeal in its entirety.