

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

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

ORAL STATEMENT OF THE UNITED STATES OF AMERICA

November 7, 2011

1. Good morning, Mr. Chairman and members of the Division. On behalf of the United States, we would like to thank you for the opportunity to appear before you today.

I. Introduction: This Dispute Is about an Ambitious Industrial Policy Premised on the Use of Trade Tools Fundamentally at Odds with the Rules of the Multilateral Trading System

2. We would like to begin today by taking a step back and appreciating what this dispute is about. At the heart of this dispute is a far-reaching industrial policy aimed at protecting and promoting China’s domestic industries at the expense of those of China’s trading partners, and adopted without regard to China’s WTO obligations. This policy is effectuated through the use of a set of export restraints imposed on a wide range of industrial raw materials – including the nine types of raw materials at issue in this dispute that are used as inputs in the manufacture of steel, aluminum, and chemicals. These export restraints are blunt trade measures that are, by China’s own admission, facially inconsistent with WTO rules.

3. In the course of China’s accession to the WTO, China represented that it was in the process of reducing its use of export restraints and that, by 1999, it subjected only 58 categories of products covering a total of 73 items to non-automatic export licensing and export restrictions.¹ At the time, China also indicated that it subjected 84 items to export duties.² In response to the concerns expressed by members of the Working Party with respect to both types of export restraints,³ in particular as applied to “raw materials or intermediate products that could

¹ Working Party Report, para.158 (Exhibit JE-3); *see also* U.S. First Written Submission, para. 1.

² Working Party Report, para. 156 (Exhibit JE-3); *see also* U.S. First Written Submission, para. 2.

³ Working Party Report, paras. 155, 164.

be subject to further processing,”⁴ China committed, as part of its accession, to eliminate their use, subject only to certain limited, well-defined exceptions.⁵

4. In the years since its accession, however, China’s use of export restraints has intensified in number, type, and severity. For example, at the time this dispute was initiated in 2009, China subjected over 600 items to non-automatic export licensing and export quotas⁶ and over 350 items to export duties.⁷

5. While on the one hand China has been departing from its own WTO commitments by adopting export restraints on key raw materials, on the other hand, China unquestionably has obtained tremendous benefit from the market access resulting from other Members’ compliance with their commitments. In the first seven years after China’s accession to the WTO, export-driven growth has doubled China’s Gross Domestic Product. And China’s manufacturing sector, as measured by the value added by manufacturing, increased more than five fold.⁸

6. These overall trends are further illustrated by the specific materials at issue in the dispute. During the time that China has maintained its export restraints on these raw materials, between 2005 and 2009, China dramatically increased its production of the downstream steel and aluminum produced from these materials. While global annual production of steel and

⁴ Working Party Report, para. 164.

⁵ See Working Party Report, para. 165 and Accession Protocol, para. 11.3.

⁶ See 2009 Export Licensing List (Exhibit JE-22); see also U.S. First Written Submission, para. 90.

⁷ See 2009 Tariff Implementation Program (Exhibit JE-21); see also U.S. First Written Submission, para. 69.

⁸ See U.S. First Written Submission, para. 26, footnote 21 (citing Exhibit JE-11).

aluminum increased only modestly, China’s production has skyrocketed.⁹ At the same time, China’s exports of these and other downstream goods have also grown at explosive rates. For example, between 2000 and 2008, Chinese exports of steel sheet and plate and aluminum increased over 700 percent.¹⁰

7. Before the panel, China’s approach was not to deny these facts. Instead, China offered a number of different defense theories, hoping to find a road map for continuing to pursue an industrial policy predicated on the use of export restraints. The Panel rejected each and every one of China’s theories.

8. On appeal, we note that very few of the substantive issues that China has chosen to appeal would result in a change in the outcome of this dispute. Instead, China’s efforts appear to be focused on loosening WTO disciplines and establishing a general basis under WTO rules for accommodating its policy of actively restraining exports of the raw materials for which it is a world leading producer. In our statement today, we will focus on addressing in greater detail six of the issues before you.

II. Argument

Systemic and Procedural Issues

1. Application of GATT 1994 Article XX to China’s Commitment in Paragraph 11.3 of the Accession Protocol

9. In its appeal, China repeats the arguments that it made to the Panel that China may use Article XX of the GATT 1994 to justify imposing export duties in violation of Paragraph 11.3 of

⁹ See Exhibit JE-152 at 15.

¹⁰ See Exhibit JE-152 at 15.

its Accession Protocol.

10. In its Accession Protocol, China committed to eliminate export duties on all products, with a limited exception for 84 products set out on a defined and negotiated list. China’s Working Party Report makes clear why this commitment was included in the Protocol: namely, WTO Members had specific concerns about China’s use of export duties at the time of its accession.¹¹

11. Despite that commitment, China proliferated the application of its export duties to hundreds of products not identified on its defined and negotiated list. Twenty-one such products, by individual tariff codes, are at issue in this dispute.

12. As explained at length in the joint U.S.-Mexico Appellee Submission, China’s position that it may rely on Article XX to justify the imposition of export duties cannot be reconciled with the text of Paragraph 11.3 or of Article XX of the GATT 1994. It is furthermore belied by relevant context. We will not discuss all those arguments in our statement today, other than to reiterate that the Panel thoroughly considered China’s arguments in light of the text and context of Paragraph 11.3 and properly rejected them.

13. We would also like to respond here to one especially troubling argument. China argues that Article XX is applicable to Paragraph 11.3, despite the lack of any textual basis, because of its sovereign “right to regulate trade.”¹² However, as the Panel recognized, where a WTO Member, in its exercise of its sovereign “right to regulate trade,” has entered into an agreement,

¹¹ Working Party Report, paras. 155-156.

¹² See China’s Appellant Submission, Section IV.C.5.

it must abide by the terms of that agreement.¹³ The “sovereign right” does not negate the plain text of the Protocol or Article XX of the GATT 1994 and lead by some unexplained route to incorporating into Paragraph 11.3 of the Protocol the provisions of Article XX.

14. The non-applicability of Article XX does not mean, as China implies, that China is foreclosed from pursuing legitimate environmental, health, or conservation goals. China has multiple tools to achieve such ends. In doing so, however, China may not violate its clear commitment to eliminate export duties on all products except those covered in 84 specifically identified tariff lines.

2. Recommendations

15. Through its appeal of the Panel’s recommendations, China seeks to establish that, even if the Appellate Body agrees with the Panel that China’s export restraints are inconsistent with its WTO obligations, this dispute should result in no implementation or compliance consequences for China. This would be an absurd result and cannot be the correct outcome for this dispute. Fortunately, neither the Panel Report nor the DSU lead to the results China seeks.

16. As demonstrated in the appellee submissions, the Panel did not, as China asserts, make a recommendation on the 2010 measures, and China’s appeal can be rejected on that basis alone. The co-complainants are in agreement that the Panel’s approach to making recommendations is entirely appropriate in the context of this dispute and fully consistent with the DSU. Just because a trade barrier is established, in part, through an annually recurring legal instrument does not shield it from challenge, adjudication, and – if found WTO-inconsistent –

¹³ See Panel Report, para. 7.157.

recommendations to be brought into conformity, through dispute settlement. Nor does it permit a responding party to continually move the target at which complaining parties must aim in order to make their case and obtain findings and recommendations. China’s approach, rejected by the Panel, would have led to both types of negative systemic consequences.

17. The co-complainants firmly believe that obtaining recommendations is needed to “secure a positive solution”¹⁴ to this dispute. China agrees, since it was explicit in arguing to the Panel that, without recommendations, China would have no implementation obligations. While the co-complainants support the Panel’s approach to this issue, it is a reflection of the importance that the co-complainants attach to obtaining recommendations that all three have filed other appeals, employing different approaches, in order to secure recommendations under an alternate theory should the Appellate Body find fault with the Panel’s approach.

18. With respect to China’s arguments responding to the conditional other appeal by the United States and Mexico, the United States, on behalf of itself and Mexico, would like to make four comments.

19. First, China has either misunderstood or misrepresented the other appeal. We appeal the Panel’s apparent interpretation that it is constrained from making a recommendation on an individual measure – or legal instrument – that is annually recurring and was superseded during the panel proceeding. We are not, as China mis-states, trying to capture “replacement” or later-in-time measures as the basis for the Panel’s recommendation.¹⁵

¹⁴ See Article 3.7 of the DSU.

¹⁵ See China’s Appellee Submission, paras. 79-81.

20. We explicitly conditioned our other appeal on two conditions – the second with which China never engages. According to China, our conditional appeal is triggered “if the Appellate Body agrees with China that the Panel was not entitled to make a recommendation (regarding a so-called “series of measures”) that extends to replacement measures excluded from the Panel’s terms of reference.”¹⁶ This addresses only the first condition of our other appeal. However, we advance our other appeal only if: (1) China prevails in its argument and (2) the Appellate Body were also to conclude – despite the fact that China has not appealed this issue – that the Panel’s “series of measures” recommendation was somehow inappropriate. If the Appellate Body were, on the other hand, to limit the Panel’s recommendation on the “series of measures” only in the way China requests (that is, to clarify that it does not extend to the 2010 “replacement” measures), then there would still be a recommendation on the series of measures as they existed at the time of panel establishment, and the other appeal of the United States and Mexico would not need to be reached.

21. Second, in its appellee submission, China has misrepresented our position regarding the Appellate Body’s statement in *US – Certain EC Products*. We do not, as China asserts, “accept” or “recognize” that “panels cannot make recommendations regarding expired measures” as a result of *US – Certain EC Products*.¹⁷ If China believes that this is our position, then China has completely missed the point of our arguments on appeal and before the Panel.

22. To be clear: it has been our position consistently throughout this proceeding that the

¹⁶ China’s Appellee Submission, para. 39.

¹⁷ China’s Appellee Submission, paras. 75 and 83

Appellate Body’s statement in *US – Certain EC Products* cannot be stripped of its context and applied as a formalistic, blanket rule.¹⁸ In that dispute, a recommendation was not needed because the underlying, inconsistent measure – a bonding requirement – had ceased to be effective even before the panel was established. Thus, at the relevant point of time for the panel’s analysis, the measure was no longer in dispute, and the complaining party did not consider that it would continue to be a problem. Indeed, the EC’s appeal in that dispute concerned not the recommendation on the bonding requirement but the panel’s failure to make findings and recommendations on a subsequent measure.

23. Third, in its appellee submission, China mistakenly relies on the panel report in the *U.S. – Poultry Funding* dispute. In that dispute, however, China as the complaining party did not even seek recommendations from the panel. Moreover, the circumstances in that dispute are different than in the present dispute. Recommendations are needed here because the export quotas and export duties that the Panel found to be inconsistent continue to be a cause of dispute between the parties, even if the annually recurring instruments effective at the time of panel establishment have been superseded by subsequent measures.

24. Fourth and finally, we would like to point out that China continues to misunderstand certain basics. Contrary to China’s arguments, the issue on appeal is not about whether the Panel’s recommendations “extend to” legal instruments or measures that may come into effect at a later time. That question – of the potential applicability of DSB recommendations to some

¹⁸ U.S. Other Appellant Submission, paras. 59-63; Mexico’s Other Appellant Submission, para. 16; U.S. Second Written Submission, Section IV.C; Mexico’s Second Written Submission, Section IV.C.

future measures – is an issue to be addressed in a possible proceeding under Article 21.5 of the DSU, and cannot be decided hypothetically, and in advance of any actual proceeding. Rather, the issue is whether the Panel made recommendations on the basis of findings that measures or series of measures were inconsistent as of a certain fixed point in time – and whether that fixed point in time was, as provided by the DSU, the date of panel establishment.

3. *Terms of Reference*

25. In appealing the Panel’s conclusion that Section III of the Panel Requests satisfies the requirements of Article 6.2 of the DSU, China hopes to erase the Panel’s findings of inconsistency with respect to all of China’s export quota administration, export licensing, and minimum export price requirements. The result of China’s appeal, if successful, would be serious. However, China’s appeal does not raise serious questions of legal interpretation.

26. We have set out our arguments exhaustively in the joint U.S.-Mexico Appellee Submission. However, we emphasize that the standard of DSU Article 6.2 is straightforward. It requires that a panel request be sufficient to define the scope of a dispute and meet the due process requirements of providing notice to, among others, the responding party. Section III of the Panel Requests satisfies those requirements. It is structured like many dozens of other WTO panel requests, including ones found by panels and the Appellate Body to be sufficient under Article 6.2 of the DSU by, among other things, providing a brief summary of the legal basis to permit China to begin preparing its defense. Responding to legal challenges at the WTO can often be difficult. While China may very well have experienced difficulty in responding to the claims made by the complainants in this dispute, that difficulty is not a result of insufficiency of

the Panel Requests. DSU Article 6.2 does not require that a panel request set out arguments such that a responding party be able to “finish” preparing its defense.¹⁹

GATT 1994 Issues

27. China’s appeal relating to the GATT 1994’s affirmative obligations and exceptions would significantly diminish the scope of the disciplines under the GATT 1994. China does so by arguing that the obligations at issue in Articles VIII and XI do not actually impose significant disciplines, and by arguing that the defenses or exceptions at issue under Articles XI and XX do not require rigorous showings of the purposes that can serve to excuse deviations from the rules.

4. Requirements of Article VIII of the GATT 1994

28. On its face, Article VIII applies to the quota allocation charge at issue in this dispute. This is clear from the first sentence of Article VIII, which provides that the article applies “to fees and charges of whatever character . . . in connection with importation or exportation.” The applicability of Article VIII to China’s charge is further proven by Article VIII, paragraph 4, which contains an illustrative list of covered fees and charges. That list explicitly covers fees and charges relating to “quantitative restrictions” and relating to “licensing.” Remarkably, China never even addresses this explicit language in the illustrative list. Nor does China even dispute that the fee or charge at issue in this dispute must be paid as a prerequisite to export. For these reasons alone, China’s arguments must fail.

29. Instead, China takes the position that Article VIII does not apply at all to fees and

¹⁹ See Panel Report, *Australia – Apples*, para.7.929; see also *China – Electronic Payment Services*, Preliminary Ruling (WT/DS413/4), para. 37.

charges collected where no service is provided.²⁰ As explained in our Other Appellant Submission, this interpretation has no basis in the text. And as a practical matter, there is likewise no basis for China’s suggestion that there is less “mischief” associated with a government charging an importer or exporter for no service whatsoever than overcharging for a service.²¹

30. China attempts to further weaken the disciplines of Article VIII by suggesting that to fall within the scope of those disciplines a fee or charge must also be shown not to represent an indirect protection to domestic products or a taxation for fiscal purposes.²² However, Article VIII requires both that fees be limited in amount to the approximate cost of services rendered “and” that fees not represent an indirect protection or a taxation for fiscal purposes. These are two separate obligations with respect to fees: A fee is inconsistent with Article VIII if it violates either of these conditions. If a Member establishes that a fee or charge is not limited to the approximate cost of services rendered, as the United States has done, then contrary to China’s suggestion, there is no need to show or allege an indirect protection to domestic products.

5. Defense under Article XI:2(a) of the GATT 1994

31. In this dispute China invoked Article XI:2(a) in a way that it was plainly not intended to be used. If adopted, China’s reasoning would allow Article XI:2(a) to be used to justify export prohibitions and restrictions far beyond those temporarily applied to prevent or relieve a critical shortage. As explained in the joint U.S.-Mexico Appellee Submission, the finite availability of a

²⁰ See China’s Appellee Submission, Section IV.D.2.c.

²¹ See China’s Appellee Submission, para. 302.

²² See China’s Appellee Submission, Section IV.D.3.

resource does not itself establish a critical shortage, and a measure imposed to address such a situation is not “temporarily applied”.

32. The Panel Report is clear and correct with respect to what must constitute a “critical shortage” and “temporarily applied”. Indeed, China agrees that “temporarily applied” refers to a “limited and bounded period of time”,²³ and that “critical shortage” refers to a “deficiency in quantity that rises to the level of decisive importance or crisis.”²⁴ China nonetheless insists that it is entitled to invoke Article XI:2(a) to ensure a steady supply for the lifetime of the reserves of a non-renewable product, on the basis that the quota is purportedly reviewed every year²⁵ and that some technological development might arise to address that limited lifespan.²⁶ As explained in our joint appellee submission, the Panel properly recognized that a measure imposed to address the fact that there are limited reserves of a natural resource is not “temporarily applied” because the available reserves will continually be depleted.

33. With respect to claims under Article 11 of the DSU, China relies on an alleged annual review process and the possibility of technological developments to fault the Panel for finding that its bauxite quota is not temporarily applied to prevent or relieve a critical shortage. However, the annual review process does not support China’s arguments. Rather, the annual review documentation confirms that China imposes the quota to secure a supply of its finite bauxite resources for domestic users. It fully supports the Panel’s finding that this quota will be

²³ See China’s Appellant Submission, para. 337.

²⁴ See China’s Appellant Submission, para. 357.

²⁵ See China’s Appellant Submission, paras. 353-354.

²⁶ See China’s Appellant Submission, paras. 368-371.

maintained until that supply runs out.

34. In its DSU Article 11 claim with respect to technological developments, China suggests that a WTO Member would be permitted to impose an export prohibition or restriction in light of the possibility that a change in technology might materialize. This approach would place the burden on the complaining Member to demonstrate that no technological developments were possible. But it is the Member seeking to justify an export prohibition or restriction under Article XI:2(a) that has to demonstrate that the prohibition or restriction is temporarily applied to prevent or relieve a critical shortage.²⁷

6. *The GATT 1994 Article XX(g) Exception*

35. Similarly, China's appeal related to the Panel's findings and conclusions on the Article XX(g) exception attempts to loosen the requirements for justifying restrictive or discriminatory trade measures as "conservation" measures. We note that China's appeal, in one sense, is extremely narrow – China seeks only to reverse the Panel's interpretation that "made effective in conjunction with" in Article XX(g) requires that a challenged measure ensure the effectiveness of any restrictions on domestic production or consumption. China does not appeal the Panel's finding that China failed to satisfy the Article XX(g) defense because it had not adopted restrictions on domestic production or consumption. Nevertheless, in another sense, China's argument is extraordinarily broad. Article XX(g) is an exception carefully tailored to ensure the legitimacy of a conservation measure that negatively impacts trade. If accepted, China's

²⁷ See Panel Report, paras. 7.211-7.213; Appellate Body Report, *US – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, p. 16 (adopted May 23, 1997).

interpretation would transform Article XX(g) into a formalistic checklist; it would shelter GATT-inconsistent measures if a responding party can show that it happens to have in place domestic restrictions, regardless of how or whether the challenged measure is conjoined with those domestic restrictions.

III. Conclusion

36. Global interdependence in the trade in raw materials is a fact of today's world economy and should be considered an achievement of the multilateral trading system. The WTO's rules provide for strong disciplines on the trade in raw materials – both in terms of liberalizing that trade and in terms of defining the conditions under which deviation from liberalization can be legitimately justified. China's own economic and industrial ambitions are premised on its continued access to the markets of its trading partners. Under the WTO's rules, China's trading partners are likewise entitled to rely on China's adherence to its commitments.

37. This concludes our statement. We welcome the opportunity to answer any questions that you may have.