

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

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

OTHER APPELLANT SUBMISSION OF THE UNITED STATES OF AMERICA

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Service List

APPELLANT

H.E. Mr. Yi Xiaozhun, Permanent Mission of the People's Republic of China

THIRD PARTIES

H.E. Mr. Angelos Pangratis, Permanent Delegation of the European Union

H.E. Mr. Fernando de Mateo y Venturini, Permanent Mission of Mexico

H.E. Mr. Alberto Juan Dumont, Permanent Mission of Argentina

H.E. Mr. Roberto Azevedo, Permanent Mission of Brazil

H.E. Mr. John Gero, Permanent Mission of Canada

H.E. Mr. Mario Matus, Permanent Mission of Chile

H.E. Mr. Eduardo Muñoz, Permanent Mission of Colombia

H.E. Mr. Miguel Carbo Benites, Permanent Mission of Ecuador

H.E. Mr. Jayant Dasgupta, Permanent Mission of India

H.E. Mr. Shinichi Kitajima, Permanent Mission of Japan

H.E. Mr. Park Sang-ki, Permanent Mission of Korea

H.E. Mrs. Elin Østebø Johansen, Permanent Mission of Norway

H.E. Dr. Abdolazeez S. Al-Otaibi, Permanent Mission of Saudi Arabia

Mr. Yi-fu Lin, Permanent Mission of the Separate Customs Territory of Taiwan, Penghu,
Kinmen and Matsu

H.E. Mr. Bozkurt Aran, Permanent Mission of Turkey

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Short Form	Full Citation
<i>Argentina – Footwear (Panel)</i>	Panel Report, <i>Argentina – Measures Affecting Imports of Footwear, Textiles Apparel and Other Items</i> , WT/DS56/R, adopted 22 April 1998, as modified by the Appellate Body Report, WT/DS56/AB/R
<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 – Auto Parts (Panel)</i>	Panel Report, <i>China – Measures Affecting Imports of Automobile Parts</i> , WT/DS339/340/342/R, adopted 18 July 2008, as modified by the Appellate Body Report, WT/DS339/340/342/AB/R
<i>EC – Chicken Cuts (AB)</i>	Appellate Body Report, <i>European Communities - Customs Classification of Frozen Boneless Chicken Cuts</i> , WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005
<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 – IT Products (Panel)</i>	Panel Report, <i>European Communities and Its Member States – Tariff Treatment of Certain Information Technology Products</i> , wt/DS375/376/377/R, adopted 16 August 2010
<i>US – Customs User Fee</i>	GATT Panel Report, <i>United States – Customs User Fee</i> , L/6264, BISD 35S/245, adopted 2 February 1988
<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. Introduction

1. In its Report,¹ the Panel addressed critical problems challenged by the United States, as well as by Mexico and the European Union, related to China's export restraints on various forms of bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus, and zinc (together the "Raw Materials"). The Panel undertook its responsibility of reviewing the challenged measures with thoroughness and issued a report reflecting careful consideration of the evidence and arguments the parties presented to it and sound analysis.

2. The United States submits this Other Appellant Submission in order to address one limited area of concern in the Panel Report. In particular, the United States appeals the Panel's conclusion that China's requirement that enterprises pay a fee or charge in order to export bauxite, fluorspar, or silicon carbide under its export quota regime is not inconsistent with Article VIII:1(a) of the *General Agreement on Tariffs and Trade 1994* (GATT 1994) or Paragraph 11.3 of China's Protocol of Accession to the WTO ("Accession Protocol").

3. In addition, as set forth in this Other Appellant Submission, the United States, together with Mexico, seeks to address an additional area of potential concern – but only on a conditional basis. In the event that, pursuant to China's appeal of the Panel's "recommendation with respect to the 'series of measures' that have an ongoing effect through annual replacement measures,"² the Appellate Body grants China's request to "reverse the Panel's recommendations in paragraphs 8.8; 8.15 and 8.22 of the Panel Report to the extent that they apply to replacement measures,"³ and the Appellate Body also finds that no recommendation should have been made

¹ Report of the Panel, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R ("Panel Report").

² China's Appellant Submission, Section III.

³ China's Appellant Submission, para. 167.

on the “series of measures” as they existed as of the date of panel establishment, only then would the United States and Mexico ask the Appellate Body to review the Panel’s interpretation and conclusion that it could not make recommendations on the basis of findings of inconsistency with respect to the 2009 export quota and export duty measures that were annually recurring and in effect on the date of panel establishment.

II. Executive Summary

A. Appeal of the Panel’s Finding Relating to the Fee Charged in the Administration and Allocation of the Export Quota for Bauxite, Fluorspar, and Silicon Carbide

4. At issue in this case is China’s imposition of WTO-inconsistent export restraints on certain industrial raw materials used as inputs in the steel, aluminum, and chemicals industries. The challenged export restraints include export duties, export quotas, export licensing requirements, and minimum export price requirements, as well as requirements related to the administration and allocation of the export quotas such as prior export performance and minimum capital requirements, and fees.

5. In its Report, the Panel correctly found, among other things, that China’s export quotas on bauxite, coke, fluorspar, silicon carbide, and its export ban on zinc, are inconsistent with China’s obligations under Article XI:1 of the GATT 1994.⁴ The Panel also correctly found that prior export performance and minimum capital requirements that China imposes on applicants seeking access to export under these quotas breaches China’s commitments under paragraphs 1.2 and 5.1 of China’s Accession Protocol, read in combination with Paragraphs 83(a), (b), and (d)

⁴ Panel Report, para. 8.3.

and Paragraphs 84(a) and (b) of the Report of the Working Party on China’s Accession to the WTO.

6. However, the Panel also found that China’s requirement that exporters pay a fee or charge in order to receive an allocation of the export quotas that China imposes on bauxite, fluor spar, and silicon carbide is not inconsistent with Article VIII of the GATT 1994 or with Paragraph 11.3 of China’s Accession Protocol. Should China choose to comply with the Panel’s recommendation to bring its export quota measures into conformity with its WTO obligations by removing the export quotas at issue, the consistency or inconsistency of the fee requirements related to the administration and allocation of these quotas would become moot. In the event that China does not remove the export quotas at issue, the Panel’s findings on the fees related to quota administration and allocation would continue to present systemic concerns. Accordingly, the United States is seeking the Appellate Body’s review of this Panel finding.

7. In evaluating whether this fee or charge, referred to in this Appeal as the “quota allocation fee,”⁵ is inconsistent with Article VIII of the GATT 1994, the Panel erred in construing the meaning of “imposed on or in connection with exportation” for purposes of Article VIII:1(a). While acknowledging that payment of the fee is a condition of exportation,⁶ the Panel reasoned that the “allocation of export quotas through a quota bidding process” is not a

⁵ The Panel found that “Article VIII:1(a) refers to *all* fees and charges of *whatever* character *except* duties or internal taxes of the kind under Article II of the GATT 1994.” Panel Report, para. 7.821 (emphasis in original). China has not appealed this finding. China’s *Quota Bidding Measures* (Exhibit JE-77) and *Quota Bidding Implementation Rules* (Exhibit JE-78) refer to the quota allocation fee as the “total award price.” U.S. First Written Submission, paras. 175-176. China, and the Panel, referred to it as the “bid-winning price.” E.g., China’s First Written Submission, para. 575.

⁶ Panel Report, para. 7.845.

fee or charge “imposed on or in connection with . . . exportation, or in exchange for a service rendered.” However, the Panel overlooked the fact that an exporter must bid, and in turn pay, the quota allocation fee, subject to a minimum bid price set by China, in order to be awarded an export license and in turn export the raw materials. In evaluating whether the requirement to pay the quota allocation fee is covered by Article VIII:1(a), the Panel improperly dismissed the relevance of Article VIII:4, which specifically refers to fees and charges relating to quantitative restrictions as among the types of fees and charges that can be considered to have been imposed “in connection with . . . exportation.” The Panel also erred in applying Article VIII:1(a) by finding that Article VIII does not apply to the quota allocation fee because no service was rendered in exchange for it. The Panel’s analysis of China’s quota allocation fee under Paragraph 11.3 of China’s Accession Protocol flowed from its Article VIII:1(a) analysis, and was flawed in turn.

B. Conditional Appeal by the United States and Mexico of the Panel’s Interpretation and Conclusion Relating to the Making of Recommendations on Export Quota and Export Duty Measures that Were Annually Recurring and in Effect on the Date of Panel Establishment

8. The United States and Mexico request the Appellate Body’s review of the Panel’s recommendations on the export quota and export duty measures only on the condition that, pursuant to China’s appeal, the Appellate Body grants China’s request to “reverse the Panel’s recommendations in paragraphs 8.8; 8.15 and 8.22 of the Panel Report to the extent that they apply to replacement measures.”⁷ and the Appellate Body also finds that no recommendation should have been made on the “series of measures” as they existed as of the date of panel

⁷ China’s Appellant Submission, para. 167.

establishment. Should this event occur, then the United States and Mexico would ask the Appellate Body to determine whether the Panel erred, under Articles 6.2, 7.1, 11, and 19.1 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”), in the Panel’s interpretation and conclusion that it could not make recommendations on the 2009 export quota and export duty measures that were annually recurring and in effect as of the date of panel establishment.

9. The United States and Mexico would note that the Co-Complainants’ Panel Requests and arguments before the Panel were structured and made with the objective of obtaining a recommendation that is clearly aimed at securing a positive resolution to this ongoing dispute over, among other things, China’s export quotas and export duties.

10. The United States and Mexico would then ask the Appellate Body to examine the Panel’s approach to making recommendations on the export duties and export quotas that it found China was imposing in breach of China’s WTO obligations and conclude that the Panel had erred by not making a recommendation with respect to the 2009 measures that were annually recurring and in effect on the date of panel establishment because: (1) under DSU Articles 6.2, 7.1, 11, and 19.1, the Panel’s terms of reference and the relevant point in time forming the basis for its examination of and findings and recommendations on the contested annual export quota and export duty measures was the date of panel establishment; and (2) the Appellate Body’s statement in *US – Certain EC Products* does not apply to recommendations on the annually recurring export quota and export duty legal instruments in effect on the date of panel establishment because they did not “cease to exist.”

11. Finally, the United States and Mexico would explain that the interpretation that they put forth on the appropriate basis for making recommendations on the export quota and export duty annually recurring legal instruments ensures clarity in the dispute settlement process and prevents the risk that problems challenged in WTO dispute settlement could evade review or solution.

III. The Panel Erred in Interpreting and Applying Article VIII of the GATT 1994

12. The United States appeals the Panel’s findings on issues of law and legal interpretations that serve as the basis for the conclusion that China’s requirement for enterprises to pay a quota allocation fee in order to export bauxite, fluorspar, and silicon carbide under its export quota regime is not inconsistent with Article VIII:1(a) of the GATT 1994 and Paragraph 11.3 of China’s Accession Protocol. First, the Panel incorrectly concluded that China’s quota allocation fee does not constitute a fee or charge “in connection with . . . exportation,” notwithstanding that payment of the fee is a requirement for exportation, imposed in relation to the administration of a quantitative restriction. Second, the Panel determined that the requirement to pay the quota allocation fee falls outside the scope of Article VIII’s prohibition on fees or charges in connection with exportation that are not “limited to the approximate cost of service rendered” because it does not relate to a service rendered.

A. Factual Background

13. China requires exporters to pay a fee or charge in order to obtain a portion of the quotas for bauxite, fluorspar, and silicon carbide. Pursuant to China’s *Quota Bidding Measures* and *Quota Bidding Implementation Rules*, in addition to satisfying certain eligibility criteria, enterprises seeking to export any of those raw materials must submit a bid price and quantity for

the material they seek to export.⁸ China awards portions of the quota by ranking the bid prices of all qualified bidding enterprises in descending order, and adding up the bid quantities proposed by the bidding enterprises one after another from the beginning of the ranking.⁹ When the total bid quantity is equal to the total quantity of available quota, the enterprises whose bid quantities are included in the total quantity of the quota are the successful bidding enterprises.¹⁰

14. In order to be awarded a portion of the quota, a bidding enterprise's bid price must meet or exceed the base (or minimum) bid price that has been set by the MOFCOM Bidding Committee.¹¹ An enterprise must also conform with the rules governing bid quantities, including being above the minimum and below the maximum bid quantity.¹²

15. Enterprises that are awarded a portion of the quota for export must pay a quota allocation fee prior to export. This fee represents the enterprise's unit award price (its bid price) multiplied

⁸ U.S. First Written Submission, paras. 167-168; *see also Quota Bidding Measures* (Exhibit JE-77); *Quota Bidding Implementation Rules* (Exhibit JE-78); *see also 2009 First Round Fluorspar Bidding Procedures* (Exhibit JE-93), *2009 First Round Bauxite Bidding Procedures* (Exhibit JE-94), *2009 First Round Silicon Carbide Bidding Procedures* (Exhibit JE-95).

⁹ U.S. First Written Submission, para. 170; *see also Quota Bidding Measures* (Exhibit JE-77), Article 19; *Quota Bidding Implementation Rules* (Exhibit JE-78), Article 13.

¹⁰ U.S. First Written Submission, para. 170; *see also Quota Bidding Measures* (Exhibit JE-77), Articles 19 and 20; *Quota Bidding Implementation Rules* (Exhibit JE-78), Articles 13 and 14.

¹¹ U.S. First Written Submission, paras. 169, 172, 179; *see also Quota Bidding Measures* (Exhibit JE-77), Article 16; *Quota Bidding Implementation Rules* (Exhibit JE-78), Article 7; *2009 First Round Fluorspar Bidding Procedures* (Exhibit JE-93), *2009 First Round Bauxite Bidding Procedures* (Exhibit JE-94), *2009 First Round Silicon Carbide Bidding Procedures* (Exhibit JE-95).

¹² U.S. First Written Submission, paras. 169, 173, 179; *see also Quota Bidding Measures* (Exhibit JE-77), Article 17; *Quota Bidding Implementation Rules* (Exhibit JE-78), Article 8; *2009 First Round Fluorspar Bidding Procedures* (Exhibit JE-93), *2009 First Round Bauxite Bidding Procedures* (Exhibit JE-94), *2009 First Round Silicon Carbide Bidding Procedures* (Exhibit JE-95).

by its total award quantity (its bid quantity). An enterprise must pay the fee before applying for an export license and in turn being able to export.¹³ The Panel acknowledged that “payment of a bid-winning price is necessary to receive a quota allocation for products subject to a quota bidding regime in China”¹⁴

B. The Panel’s Interpretation and Application of Article VIII:1(a)

16. The Panel found that China’s requirement that exporters pay a quota allocation fee is not inconsistent with Article VIII:1(a) of the GATT. In reaching this conclusion, the Panel misapplied the phrase “imposed on or in connection with . . . exportation” as used in Article VIII:1(a). In particular, the Panel incorrectly reasoned that this payment is not a fee or charge “imposed on or in connection with . . . exportation” – notwithstanding that this payment is a legal prerequisite for exportation, and is a requirement imposed in relation to the administration of a quantitative restriction.¹⁵

17. The Panel also misconstrued the meaning of the requirement in Article VIII:1(a) that a fee or charge in connection with exportation “shall be limited in amount to the approximate cost of services rendered.” The Panel found correctly that the required quota allocation fee is not

¹³ U.S. First Written Submission, paras. 175-176, 321. Pursuant to China’s *Import and Export Regulations*, exporters of goods whose exportation is limited by quotas must present a certificate of quota to Customs for declaration and examination. The *Quota Bidding Measures* and the *Quota Bidding Implementation Rules* provide that such certificates will only be issued to enterprises upon payment of the total award price. U.S. First Written Submission, para. 321; *see also Import and Export Regulations* (JE-73), Article 41; *Quota Bidding Measures* (Exhibit JE-77), Articles 26 and 30; *Quota Bidding Implementation Rules* (Exhibit JE-78), Articles 21 and 30.

¹⁴ Panel Report, para. 7.845.

¹⁵ Panel Report, paras. 7.845; *see also* U.S. First Written Submission, paras. 322-324; U.S. Answers to the First Set of Panel Questions, para. 9.

related to the cost of any service rendered.¹⁶ As we will discuss in more detail below, this fact should require a finding that the fee is inconsistent with China’s obligations under Article VIII:1(a) of the GATT 1994 and Paragraph 11.3 of China’s Accession Protocol. Instead, the Panel concluded that, because the quota allocation fee is unrelated to the approximate cost of any service rendered,¹⁷ it falls outside of the Article VIII:1 disciplines altogether. In other words, according to the Panel, if a Member were to impose a fee or charge in connection with exportation for a service rendered, the cost should be limited to the approximate cost of that service pursuant to Article VIII:1(a). But, if a Member were to impose a fee or charge in connection with exportation unrelated to any service, the Member is free to do so at any level unfettered by the disciplines of Article VIII:1(a). Such a result is untenable, as we will discuss in more detail below.

1. The Panel Incorrectly Found That China’s Quota Allocation Fee Is Not “In Connection With Exportation” Under Article VIII:1

18. The Panel’s analysis of whether the measures at issue impose a fee or charge “in connection with . . . exportation” and are therefore covered by Article VIII:1(a) is flawed in important respects. In particular, the Panel misconstrued the text and relevance of Article VIII:4 and relied instead upon the concept of “services rendered” to limit the meaning of “in connection with . . . exportation.”

¹⁶ Panel Report, para. 7.850.

¹⁷ Panel Report, paras. 7.846, 7.850.

19. The Panel properly recognized that “in connection with . . . exportation” has a “broad temporal view.”¹⁸ The Panel explained that Article VIII:1 refers to fees or charges that are applied not only “at the moment in time of exportation,” but also “in association with exportation.”¹⁹ Under this interpretation, which is sound, China’s quota allocation fee meets the test because, pursuant to Chinese law, enterprises must pay the fee in order to receive an export license, which in turn is necessary to export the raw materials. As such, it constitutes a “fee[], charge[], formalit[y], [or] requirement” that is “imposed . . . in connection with . . . exportation.”

20. However, the Panel erred by adding an additional test: that fees and charges “in connection with . . . exportation” would “typically” be limited to “specific fees, charges, formalities or requirements, associated with customs-related documentation, certification and inspection, and statistical matters.”²⁰ This interpretation has no foundation in the text of Article VIII. Article VIII:1(a) applies to “[a]ll fees and charges of whatever character.”

21. Moreover, this interpretation is inconsistent with the context provided by the exemplary list in Article VIII. In particular, Article VIII:4 states, “The provisions of this Article shall extend to fees, charges, formalities and requirements imposed by governmental authorities in connection with importation and exportation, including those related to: . . . (b) quantitative restrictions; (c) licensing.” China’s quota allocation fee clearly falls within these examples. As

¹⁸ Panel Report, para. 7.823; *see also* U.S. Response to the First Set of Panel Questions, paras. 9-10.

¹⁹ Panel Report, para. 7.823.

²⁰ Panel Report, para. 7.832. In reaching this conclusion, the Panel determined that the meaning of “in connection with” exportation is informed by the additional language in Article VIII:1(a) that fees and charges must be “limited in amount to the cost of services rendered,” and also looked to the surrounding provisions in Article VIII as context. Panel Report, para. 7.825.

explained above, the quota allocation fee is such a fee or charge because exporters seeking to export raw materials subject to a quota, i.e., quantitative restriction, must pay the fee in order to export.

22. In addition, it is unclear why the quota allocation fee requirement is not a “fee[], charge[], formalit[y] or requirement[], associated with customs-related documentation, certification and inspection, and statistical matters.” Payment of the quota allocation fee is a requirement imposed on exporters. Exporters must pay the fee in order to receive an export license, which is necessary for customs clearance and exportation.

23. An additional element of the Panel’s reasoning that the quota allocation fee is not a fee “in connection with . . . exportation,” involving a comparison between Article VIII and Article XI, likewise does not support the Panel’s conclusion. The Panel first notes that quantitative restrictions, such as a quota or license requirement, may be WTO-inconsistent under GATT 1994 Article XI:1 and that Article VIII must regulate “something different” than Article XI:1.²¹ The United States understands these statements to be true: Article XI addresses, for example, whether a quantitative restriction is permissible, and Article VIII addresses, for example, whether a fee associated with the administration of a permissible quantitative restriction is permissible.

24. But then the Panel’s analysis reaches an unsupportable conclusion: namely, the Panel finds that Article VIII applies “more narrowly” to fees, charges, formalities, and requirements, such as those relating to quantitative restrictions or licensing, that are imposed on or in connection with exportation.²²

²¹ Panel Report, paras. 7.830-7.831.

²² Panel Report, para. 7.831.

25. Indeed, Article VIII:4 makes clear that Article VIII:1 applies to fees or charges related to quantitative restrictions and licensing. At the same time, Article VIII:1 also makes clear where it is governing “something different” than other provisions of the GATT 1994 by excluding “taxes within the purview of Article III.” Indeed, the Panel found that “Article VIII:1(a) refers to *all* fees and charges of *whatever* character *except* duties or internal taxes of the kind under Article III of the GATT 1994.”²³ Yet the Panel appeared to suggest that there is some (undefined) point in time at which a fee or charge is sufficiently removed from customs processing at the border to escape the disciplines of Article VIII.²⁴ This view cannot be reconciled with the Panel’s correct findings that Article VIII has a “broad temporal scope” and that China’s quota allocation fee is necessary to receive a quota allocation, which in turn is necessary to receive a license and finally to export.

26. The Panel’s analysis overlooks the fact that the U.S. challenge to China’s quota allocation fee under Article VIII was different than the U.S. challenge under Article XI.²⁵ Before the Panel, the United States successfully challenged China’s export quotas on bauxite, fluor spar, and silicon carbide as WTO-inconsistent quantitative restrictions under Article XI:1.²⁶ The subject of the U.S. claim under Article VIII addressed a different issue. In addition to imposing

²³ Panel Report, para. 7.821 (emphasis in original).

²⁴ Panel Report, paras. 7.832, 7.847 (finding that the quota allocation fee “is determined and assigned to the applicant enterprise at a point well before the exporter enters into a binding commitment to export the good subject to a quota. Indeed, an enterprise that is awarded a portion of the quota may decide to export less or none of the allocated quota, if it desires. The precise moment when an enterprise will export under the assigned quota allocation, or whether that enterprise will export at all, is not known at the time the bidding price is determined.”).

²⁵ U.S. Second Written Submission, para. 372.

²⁶ Panel Report, para. 8.3.

WTO-inconsistent quantitative restrictions on these products – subjecting them to quotas, export licensing,²⁷ and minimum export prices,²⁸ and imposing prior export performance requirements and minimum capital requirements on traders,²⁹– China requires that enterprises pay a quota allocation fee in order to be able to export.

27. The Panel’s reliance on a dispute settlement report under the GATT 1947 also does not support its conclusions. In particular, the Panel cited the finding of the GATT Panel in *US – Customs User Fee* “that the drafters intended the term ‘services’ to refer to ‘government activities closely enough connected to the processes of customs entry.’”³⁰ However, the cited discussion appears to relate to the meaning of “services rendered” rather than the question of whether a fee or charge is imposed “in connection with exportation.”³¹

28. Finally, the Panel’s citation to certain documents that preceded the conclusion of the GATT 1947 does not support its conclusion.³²

²⁷ Panel Report, para. 8.5(b), U.S. First Written Submission, paras. 340-342.

²⁸ Panel Report, para. 8.6(a), U.S. First Written Submission, paras. 348-355.

²⁹ U.S. First Written Submission, paras. 284-290.

³⁰ Panel Report, para. 7.832.

³¹ See U.S. Answers to the First Set of Panel Questions, para. 12.

³² Panel Report, para. 7.837. Although it determined that recourse to these documents was not necessary under Article 32 of the *Vienna Convention*, the Panel noted that the 1923 *International Convention Relating to the Simplification of Customs Formalities* aimed in part to reduce the number of fees imposed in connection with importation and exportation and to simplify customs-related laws, regulations, and formalities, but did not refer to systems or methods of quota allocation or licensing. The Panel also looked to the *Suggested Charter for an International Trade Organization of the United Nations*, as well as the Background Note of the GATT Negotiating Group on Non-Tariff Measures. *Id.* The Panel characterized these documents as indicating that “customs-related activities were a concern of participants in these negotiations.” Panel Report, para. 7.838. However, as noted above, when the GATT 1994 was drafted, the negotiators specifically included language in Article VIII covering “[a]ll fees and charges of whatever character” and provided an exemplary list of fees and charges to which Article VIII extends, including, *inter alia*, fees and charges relating to quantitative restrictions.

2. The Panel Erred in Concluding that Article VIII Is Not Applicable to the Quota Allocation Fee Because It Does Not Relate to Any Service Rendered

29. The Panel correctly found that “the assessed bid-winning price is not in any way related to the approximate cost of a service rendered.”³³ Nevertheless, because the Panel also deemed China’s quota allocation fee to be “much different in nature from a customs-related service supplied in exchange for a particular fee or charge,”³⁴ the Panel found in turn that the fee is not a “fee or charge . . . imposed in connection with . . . exportation” within the meaning of Article VIII:1(a).³⁵

30. Article VIII:1(a) requires that “[a]ll fees and charges of whatever character . . . imposed . . . on or in connection with importation or exportation shall be limited in amount to the approximate cost of services rendered” Nowhere does the text of the agreement say that a fee in imposed in connection with importation or exportation is exempt from scrutiny under Article VIII because the Member applying the fee renders no service. As an initial matter, such a reading of Article VIII is untenable – it would turn Article VIII on its head, allowing a Member to impose, for example, any fee at any level even where there was no service rendered.

China’s quota allocation fee is such a charge.

³³ Panel Report, para. 7.850. China has not appealed this finding, and did not contest before the Panel the U.S. point (*see* U.S. First Written Submission, paras. 325-329) that the quota allocation fee is not related to the approximate cost of a service rendered to individual exporters; rather, China argued that the fee is not “in connection with . . . exportation.” *See* China’s First Written Submission, paras. 579-592. China argued that Article VIII:1(a) “applies solely to fees and charges in the processing of customs entries.” *See* China’s First Written Submission, Section VII.2(a).

³⁴ Panel Report, para. 7.848.

³⁵ Panel Report, para. 7.851.

31. Moreover, this reading does not fit with the important context provided by the parenthetical in the first sentence of Article VIII. In the parenthetical, the drafters specifically excluded “import and export duties” and taxes within the purview of Article III from the types of fees and charges covered by Article VIII. Duties and taxes, however, do not render a “service.” Thus, if the drafters had intended for the term “fees and charges” to have some kind of built-in exemption for fees and charges that are not associated with a service rendered, the drafters would have had no need for the parenthetical that explicitly excluded duties and taxes from the scope of Article VIII.

32. No prior dispute settlement panel has adopted an interpretation like the Panel’s. To the contrary, the *US – Customs User Fee* panel found that where challenged activities could not be considered “services rendered,” the imposition of a fee in connection with those activities was necessarily inconsistent with Article VIII:1(a).³⁶ Specifically, in explaining the meaning of the requirement in Article VIII:1(a) that the fee or charge in question must be related to the approximate cost of services rendered, the panel stated, “The . . . requirement is actually a dual requirement, because *the charge in question must first involve a ‘service’ rendered*, and then the level of the charge must not exceed the approximate cost of that ‘service’.”³⁷ As the quota allocation fee is not related to any service, it does not satisfy this requirement in Article VIII:1(a).

33. In contrast, in this dispute, the Panel determined that where “fees or charges imposed in connection with exportation” do not involve a service rendered, “Article VIII does not apply” at

³⁶ *US – Customs User Fee*, paras. 100-101, 125(b).

³⁷ *US – Customs User Fee*, para. 69 (emphasis added).

all.³⁸ The Panel’s finding is inconsistent with the text of Article VIII:1(a) and should be reversed.

34. The fact that China’s quota allocation fee does not relate to the approximate cost of any service rendered to specific exporters but must nonetheless be paid in order to export weighs in favor of a finding that it is inconsistent with Article VIII:1(a), not a finding that it falls outside of the scope of Article VIII altogether. A reading of Article VIII reveals that Article VIII helps discipline the imposition of fees and charges in connection with exportation. Such fees and charges should not escape those disciplines where they are imposed but no service is provided.

35. The Panel’s findings appear to be based in part on its statement that China’s quota allocation fee has an element of variability. In particular, in addition to the minimum base price imposed by China, a putative exporter may bid an additional amount. The Panel reasoned that because prices paid for an allocation and submitted through bidding would necessarily be “variable,” quota allocation fees could not be related to any service rendered and would always violate Article VIII:1(a).³⁹ This argument has two fundamental problems and thus does not support the Panel’s conclusion. First, the mere fact of “variability” does not mean that a fee is necessarily disconnected from the service rendered. One can well imagine a fee that is variable, but where the level of the fee is associated with the approximate cost of the service rendered by a Member. Second, the mere finding that a certain type of fee might always be inconsistent with

³⁸ Panel Report, para. 7.846. *See also* U.S. First Written Submission, paras. 325-328. In *Argentina – Footwear*, the panel found that a tax imposed on imports for “statistical services,” which varied depending on the price of the import and was not subject to a fixed maximum amount, was inconsistent with Article VIII:1(a). The panel explained that the fee, “by its very nature, is not limited to the approximate cost of services rendered.” Panel Report, *Argentina – Footwear*, paras. 6.74-6.77.

³⁹ Panel Report, para. 7.850.

Article VIII does not mean that the fee should – for that reason alone – be found outside the scope of Article VIII. Instead, if the fee falls within the scope of Article VIII, and if it does not meet the requirement of being limited to the approximate cost of services rendered, then the negotiators intended for such a fee to be inconsistent with Article VIII.

36. Finally, the Panel seemed to place some weight on a hypothetical discussion of economic efficiency.⁴⁰ This discussion does not support the Panel’s finding, however. As an initial matter, the Panel’s hypothetical discussion of efficiency was unconnected from any factual findings regarding the measures challenged by the United States and imposed by China. In particular, there is no evidence to support the notion that the minimum fee component of China’s quota allocation fee was determined based on “economic efficiency,” or that variable elements reflect prices in some hypothetical market. Rather, the record shows that China’s measures impose a quota allocation fee, including a minimum fee set by the Chinese government. On the record before the Panel, any discussion of some hypothetically efficient scheme of quota allocation is unconnected to the facts of this case. Moreover, the Panel does not connect its discussion of efficiency with the legal analysis required under Article VIII.⁴¹

3. Paragraph 11.3 of the Accession Protocol

37. The Panel also erred in finding that China’s imposition of a quota allocation fee is not inconsistent with Paragraph 11.3 of the Accession Protocol. In this regard, the Panel’s analysis flowed from its erroneous analysis of Article VIII:1(a). Paragraph 11.3 of the Protocol provides, “China shall eliminate all taxes and charges applied to exports unless specifically provided for in

⁴⁰ Panel Report, para. 7.849.

⁴¹ U.S. Second Written Submission, para. 372.

Annex 6 of this Protocol or applied in conformity with the provisions of Article VIII of the GATT 1994.” None of the materials subject to payment of the quota allocation fee (bauxite, fluorspar, or silicon carbide) is listed in Annex 6. And as explained above, through the requirement to pay a quota allocation fee China imposes a fee or charge that is not applied in conformity with Article VIII.⁴²

IV. Conditional Appeal of the Panel’s Decision not to Make Certain Recommendations on Annual Export Quota and Export Duty Measures by the United States and Mexico

A. Condition Triggering This Appeal

38. China has appealed “the Panel’s recommendations in paragraphs 8.8; 8.15 and 8.22 of the Panel Report that China must bring its export duty and quota measures into conformity with its WTO obligations to the extent that its recommendations apply to annual replacement measures.”⁴³ The United States and Mexico consider that the outcome of the Panel’s approach to making findings and recommendations in this dispute is consistent with the covered agreements and supported by the record in this dispute. For instance, the Panel recognized that the measures challenged by the United States and Mexico were made up of several instruments, some of which might be replaced on some regular basis.⁴⁴ In light of Complainants’ challenge, and with regard for the Appellate Body’s findings in *EC – Customs Matters* that a panel’s legal analysis should consider the measures and legal situation as it existed on the date of panel

⁴² U.S. First Written Submission, para. 330.

⁴³ China’s Appellant Submission, Section III.

⁴⁴ Panel Report, para. 7.17. *See also* Panel Report paras. 3.2 and (correlating the legal instruments making up each “series of measures” with each specific claim brought by the United States and Mexico).

establishment,⁴⁵ the Panel properly concluded that it would make findings and recommendations on the measures operating together (the so-called “series of measures”⁴⁶) to impose export duties or export quotas on each of the raw materials at issue.⁴⁷ The United States and Mexico will, therefore, explain in their appellee submissions that the Appellate Body should reject China’s request that certain elements of the Panel’s approach to making recommendations on the export duty and export quota measures be overturned.

39. However, should the Appellate Body, pursuant to China’s appeal, reverse “the Panel’s recommendation in paragraphs 8.8; 8.15 and 8.22 of the Panel Report to the extent that they apply to replacement measures” and should the Appellate Body find that no recommendation should have been made on the “series of measures” as they existed as of panel establishment, then the United States and Mexico seek review of the Panel’s interpretation⁴⁸ and conclusion⁴⁹ that it not make recommendations on the 2009 export quota and export duty measures that were in effect as of the date of panel establishment but that subsequently were superseded by other legal instruments.

B. The Panel Requests and the Approach Suggested to the Panel for Making Recommendations

⁴⁵ *EC – Customs Matters (AB)*, paras. 184-188.

⁴⁶ Panel Report, paras. 7.17, 7.60-7.68, 7.76, 7.80 (coke duties), 7.83 (fluorspar duties), 7.86 (magnesium duties), 7.89 (manganese duties), 7.94 (silicon metal duties), 7.97 (zinc duties), 7.218, 7.219 (bauxite quota), 7.220 (fluorspar quota), 7.221 (silicon carbide quota), 7.222 (coke quota), 7.223 (zinc quota), and 7.224.

⁴⁷ Panel Report, paras. 7.33(c) and (e), 7.218.

⁴⁸ Panel Report, paras. 7.26-7.32.

⁴⁹ Panel Report, para. 7.33(d).

40. When the Co-Complainants filed their Panel Requests on November 4, 2009, they challenged a number of export restraints, including export duties and export quotas, that China was imposing on various forms of a number of industrial raw materials.⁵⁰ These export restraints were imposed through the operation of a number of legal instruments, some of which are issued annually – or, as the Panel described it, through a “series of measures.”

41. The Co-Complainants set out the matter in the Panel Requests in a logical way that reflected the structure of the legal instruments that give effect to the challenged export duties and export quotas. For example, the Co-Complainants alleged “quantitative restrictions” in Section I of the Panel Requests, “as reflected in” the 25 separate, specifically-identified legal instruments listed. Similarly, in Section II of the Panel Requests, Co-Complainants alleged “export duties” “as reflected in” the 19 specifically-identified legal instruments listed.⁵¹

42. To address these trade barriers, the Co-Complainants sought findings that these measures identified in the Panel Requests were inconsistent with WTO rules. In addition, the Co-Complainants sought recommendations with respect to these measures – those recommendations would, among other things, ensure that the export duties and export quotas on the products at issue would be within the scope of any future compliance proceeding under Article 21.5 of the DSU.⁵² That the Dispute Settlement Body adopt a recommendation for China to bring into

⁵⁰ 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)).

⁵¹ WT/DS394/7, WT/DS395/7, and WT/DS398/6.

⁵² WT/DS394/7, WT/DS395/7, and WT/DS398/6, Sections I and II; U.S. First Written Submission, para. 382; U.S. Second Written Submission, para. 467; Mexico First Written Submission, para. 385; Mexico Second Written Submission, para. 471; EU First Written Submission, Section V; EU Second Written Submission, para. 468..

conformity inconsistent quantitative restrictions and export duties was a critical objective in achieving “a positive solution to the dispute” in terms of DSU Article 3.7.

43. In the circumstances of this dispute, the Panel Requests reflect the desire to obtain such recommendations in a straightforward way, addressing the “quantitative restrictions” and “export duties” as described, including the dozens of specific measures – which reflected the overall quantitative restrictions and export duties – as identified in the lists of measures in each section.

44. Throughout the panel proceeding, China tried to avoid responsibility for the challenged trade barriers by asking the Panel to shift the focus of its review from the measures as they existed at the time of panel establishment to later points in time.⁵³ Co-Complainants in turn asked the Panel to focus its review on the challenged measures in effect as of the date of its establishment – because shifting the focus of the Panel’s review, at China’s urging, to the later in time legal situation would be tantamount to permitting China to “move the target” and shield important parts of the export restraint regimes challenged by the Co-Complainants from review.⁵⁴

45. What we are seeking from this proceeding is, therefore, a recommendation that clearly is aimed at securing a positive resolution to this ongoing dispute over China’s export restraints. Such a positive resolution would not allow China to argue, for example, that an export duty or export quota squarely challenged by the Co-Complainants and found to be inconsistent

⁵³ See China’s First Written Submission, paras. 63-67; China’s Second Written Submission, paras. 6-18; China’s Opening Statement at the Second Panel Meeting, paras. 3-11.

⁵⁴ Complainants’ Joint Oral Statement at the First Panel Meeting, paras. 45, 51; U.S. Second Written Submission, paras. 341-343; U.S. Opening Statement at the Second Panel Meeting, paras. 109-111; Mexico’s Second Written Submission, paras. 346-348; Mexico’s Opening Statement at the Second Panel Meeting, paras. 6-9.

nevertheless does not need to be brought into compliance and any measure that claims to address those findings would fall outside of the terms of reference of an Article 21.5 compliance panel. Such an argument, if successful, would result in an endless loop of WTO dispute settlement proceedings that would be anything but the “positive solution” the Co-Complainants sought in bringing this dispute and that the DSU calls for.

C. The Panel’s Approach to Making Recommendations

46. The Panel concluded that it would make findings on the measures challenged by the Co-Complainants in their Panel Requests as those measures were in effect as of the date of panel establishment, *i.e.*, December 21, 2009.⁵⁵ That conclusion is not at issue in China’s appeal or in this conditional other appeal.

47. With respect to making recommendations, the Panel concluded that it would generally not make recommendations on any individual measure (or legal instrument) challenged by the Co-Complainants on which the Panel had made a finding of inconsistency, if that measure or instrument was no longer in existence as of the date on which the last filing of the parties was due in this panel proceeding, unless there was clear evidence that the measure has ongoing effect – which includes the annually recurring measures that relate to the imposition of export quotas and export duties.⁵⁶ With respect to the export quota and export duty measures, which are in part based on annually recurring measures, the Panel concluded that its approach would be to make recommendations – not on the measures or legal instruments separately – but on the “series of measures comprised of the relevant framework legislation, the implementing regulation(s), other

⁵⁵ Panel Report, paras. 7.24 and 7.33(a). *See also* Panel Report, paras. 8.2, 8.3, 8.9, 8.10, 8.16, and 8.17.

⁵⁶ Panel Report, para. 7.33(d).

applicable laws and the specific measure imposing export duties or export quotas in force at the date of the Panel’s establishment.”⁵⁷ As noted above, the Panel’s approach mirrors the approach set out in the Co-Complainants’ Panel Requests.

D. The Panel’s Error under DSU Articles 6.2, 7.1, 11 and 19.1

48. The United States and Mexico recall that the condition for this appeal will not be met unless the Appellate Body has already concluded, pursuant to China’s appeal, that the recommendation made by the Panel on the series of measures applies to “replacement measures” and has reversed the Panel’s recommendation with respect to those “replacement measures.” In that scenario, the Panel’s recommendation with respect to the “series of measures” as they existed as of panel establishment would remain undisturbed. However, should the Appellate Body also find that no recommendation should have been made on the “series of measures” as they existed as of panel establishment, then the United States and Mexico request the Appellate Body to consider this appeal.

49. In that case, the United States and Mexico would contend that the Panel erred under Articles 6.2, 7.1, 11, and 19.1 of the DSU by concluding that it not make recommendations on the 2009 export duty and export quota measures that were annually recurring and in effect on the date of panel establishment.⁵⁸

1. Under DSU Articles 6.2, 7.1, 11, and 19.1, the Panel Should Have Made a Recommendation with Respect to the 2009 Annual Measures

⁵⁷ Panel Report, para. 7.33(e).

⁵⁸ See Panel Report, para. 7.33(d). See also, Panel Report, para. 8.8.

50. The Panel was established on December 21, 2009.⁵⁹ Pursuant to Article 7.1 of the DSU, the Panel’s terms of reference, which were set upon the Panel’s establishment, were:

To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the United States in document WT/DS394/7, the European Communities in document WT/DS395/7 and Mexico in document WT/DS398/6, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.⁶⁰

Documents WT/DS394/7, WT/DS395/7 and WT/DS398/6 are the Panel Requests which set forth the “specific measures at issue” pursuant to DSU Article 6.2 which provides, in relevant part:

“[The request for the establishment of a panel] shall . . . identify the specific measures at issue”

51. Article 19.1 of the DSU states, in relevant part:

Where a panel . . . concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement.

(Emphasis added.) Accordingly, the Panel’s mandate was to make findings and recommendations on the measures set forth in the Panel Requests as of the date of panel establishment.

52. Article 11 of the DSU reinforces this conclusion. Article 11 provides that “a panel should make an objective assessment of the matter before it” The “matter” before it is defined in Article 6.2, which established the terms of reference of the Panel under Article 7.1, *i.e.*, to “examine the matter referred to the DSB” by the complaining party.

⁵⁹ WT/DSB/M/277, para. 75. *See also* Panel Report, para. 1.3.

⁶⁰ WT/DS394/8; WT/DS395/8; WT/DS398/7.

53. As the Appellate Body recalled in *EC – Customs Matters*, “[t]he term ‘specific measures at issue’ in Article 6.2 suggests that, as a general rule, the measures included in a panel’s terms of reference must be measures that are in existence at the time of the establishment of the panel.”⁶¹ The Appellate Body then went on to state that “the Panel’s review should therefore have focused on these legal instruments as they existed . . . at the time of the establishment of the panel.”⁶²

54. Here, it is undisputed that the Panel correctly found that the 2009 export duty and export quota measures that were annually recurring and in existence at the time of panel establishment but that subsequently were superseded by other legal instruments, were inconsistent with China’s obligations under Article XI:1 of the GATT 1994 and Paragraph 11.3 of the Accession Protocol.⁶³

55. On the basis of Article 19.1 of the DSU, however, and particularly in the circumstances of this dispute where recurrence was likely,⁶⁴ the Panel erred in not making a recommendation on the basis of the Panel’s finding that – as of the date of panel establishment – those measures were inconsistent with China’s WTO obligations.

56. The Panel did not make recommendations on the 2009 measures that were annually recurring as they existed on the date of panel establishment but that subsequently were superseded by other legal instruments. Instead, the Panel concluded that it could not make

⁶¹ *EC – Customs Matters (AB)*, para. 184 (citing *EC – Chicken Cuts (AB)*, para. 156).

⁶² *EC – Customs Matters (AB)*, para. 187.

⁶³ Panel Report, paras. 8.2, 8.3, 8.9, 8.10, 8.16, 8.17.

⁶⁴ Mexico Second Written Submission, para. 345; U.S. Second Written Submission, para. 340.

recommendations on those measures because they were “no longer in existence” as of the date on which the parties’ last filings were due in this panel proceeding.⁶⁵ This was in error because the Panel misconstrued its terms of reference and the relevant point in time for its analysis of these measures that were annually recurring.⁶⁶

57. The Panel’s misconstrual of the relevant DSU provisions as they apply to such measures created the risk of creating a “moving target” for the Co-Complainants that the Appellate Body and panels have recognized would be inappropriate.⁶⁷ The Panel nevertheless avoided this outcome by correctly finding, based on the structure of the Panel Requests, that the Co-Complainants had challenged measures comprising a series of instruments.⁶⁸

⁶⁵ Panel Report, para. 7.33(d). As the United States and Mexico also pointed out during the panel proceeding, the logic underlying the proposition that the Panel could not make a recommendation on an annual measure simply because it ceased to exist after the date of panel establishment is untenable. (See Panel Report, fn. 78 (referencing Joint First Oral Statement, para. 45). See also U.S. Second Written Submission, para. 331; U.S. Second Oral Statement, paras. 114-115; Mexico’s Second Written Submission, para. 336.) It also has no basis in the DSU. In fact, as the Panel correctly observed, referring to the panel report in *US – Stainless Steel (Mexico)*, the DSU does not contain any provision requiring a different mandate with respect to measures in effect as of the date of panel establishment that “expire” thereafter. (Panel Report, para. 7.29)

⁶⁶ China contends that recommendations on the 2009 measures that are annually recurring cannot be made because, having “expired,” they are no longer in dispute. (China’s Appellant Submission, paras. 111-114) Such a situation is not before the Appellate Body. Here, it is obvious that the dispute very much continues, especially because these are recurring measures.

⁶⁷ See, e.g., *Chile – Price Band System (AB)*, para. 144; *EC – IT Products (Panel)*, para. 7.140.

⁶⁸ Panel Report, para. 7.9. (“The Panel recalls that it was established on 21 December 2009. This is the date the DSB mandated the Panel to examine the claims of the United States, the European Union and Mexico relating to a series of measures taken by China and identified in the complainants’ Panel Requests.”) (Emphasis added.)

58. However, other Panel Requests may not be framed in a similar way. The correct approach to the relevant DSU provisions in the context of challenging annually recurring measures would have avoided this risk. Consider the implications of the approach that the Panel adopted: if the parties' last filings in this dispute had happened to be due in January 2011 instead of December 2010, China would have alleged that a new series of "replacement measures" had come into effect and that the Panel was therefore precluded from making recommendations on even the 2010 measures. This would have resulted in re-creating the risk that the Panel had tried to avoid.

2. The Appellate Body's Statement in *US – Certain EC Products* Does Not Apply to the Annually Recurring Export Quota and Export Duty Legal Instruments Because They Did Not "Cease to Exist"

59. The Panel appeared to find that the annually recurring export quota and export duty legal instruments "ceased to exist" by the end of the panel proceeding.⁶⁹ The Panel also appeared to consider itself therefore constrained in making a recommendation on the basis of those legal instruments, pursuant to the Appellate Body's statement in *US – Certain EC Products* that the panel in that dispute had erred in making a recommendation on a measure that had ceased to exist.⁷⁰ However, this constraint does not apply to the Panel's findings on the export quota and export duty annual measures.

60. First, as the Panel itself correctly noted, in *US – Certain EC Products*, the measure that the Panel found had ceased to exist had ceased to exist prior to the establishment of the panel.⁷¹

⁶⁹ See Panel Report, para. 7.31.

⁷⁰ Panel Report, paras. 7.26-7.32.

⁷¹ Panel Report, para. 7.27.

Here, the annual export quota and export duty measures were in effect as of the date of panel establishment.

61. Second, the measure at issue in *US – Certain EC Products* was not one that is maintained over time through the annual recurrence of legal instruments. Once the bonding requirement in *US – Certain EC Products* ceased to exist, its legal effect was lost. Here, the annual export quota and export duty measures serve to maintain the imposition of export quotas and export duties over time despite the fact that the specific legal instruments setting particular export duty levels or export quota amounts on certain products recur annually.⁷² Once these individual legal instruments are superseded, the measure nonetheless maintains legal effect through the recurrence of the next year’s legal instrument.

62. The Panel itself found that the export quota and export duty measures continue to be maintained, despite the lapsing and recurrence of the annual measures.⁷³ In fact, it was because the Panel considered that its formalistic approach in concluding that these annual legal instruments “cease to exist” at the point when one lapses and is superseded by the next resulted in a risk that export restraints imposed in part through annual measures would “evade WTO

⁷² These measures continue in effect until the next measure takes effect. The *2009 Tariff Implementation Program* (Exhibit JE-21), *2009 Export Licensing Catalog* (Exhibit JE-22), *2010 Tariff Implementation Program* (Exhibit CHN-5), and *2010 Export Licensing Catalog* (Exhibit CHN-7) indicate, when they are announced, that they will become effective on January 1 of the coming calendar year. They do not indicate a date certain on which they will lose effect.

⁷³ The Panel found that the export quotas and export duties were imposed as the result of the collective operation of a series of measures, which included framework regulations as well as annual circulars that take effect on January 1 of each year. Panel Report, paras. 7.17, 7.60-7.68, 7.76, 7.80 (coke duties), 7.83 (fluorspar duties), 7.86 (magnesium duties), 7.89 (manganese duties), 7.94 (silicon metal duties), 7.97 (zinc duties), 7.218, 7.219 (bauxite quota), 7.220 (fluorspar quota), 7.221 (silicon carbide quota), 7.222 (coke quota), 7.223 (zinc quota), and 7.224.

dispute settlement review merely through their expiration during the Panel proceedings,” that the Panel addressed the export quotas and export duties findings and recommendations on the basis of the “series of measures.”⁷⁴

63. Accordingly, the Panel erred, under DSU Articles 6.2, 7.1, 11 and 19.1, in failing to make recommendations on the basis of the export quota and export duty measures that were recurring but were subsequently superseded – as they were found to be inconsistent as of the date of panel establishment.

E. Systemic Considerations

64. As the Panel noted, a very large number of legal instruments were introduced, amended, and repealed by China throughout the panel process.⁷⁵ As a result of this intensive legislative activity, with respect to the export duties and export quotas, over the course of the panel proceeding, China : (1) decreased the burden of export restraints imposed on two products – bauxite and fluorspar (both had been subject to both export quotas and duties at time of panel establishment, but only one restraint after January 1, 2010),⁷⁶ and (2) introduced, many of them for the first time, a multitude of legal instruments that it attempted to use to bolster its arguments for justifying the imposition of the lightened load of export restraints on bauxite and fluorspar under Article XX of the GATT 1994.⁷⁷

⁷⁴ See Panel Report, para. 7.218.

⁷⁵ See Panel Report, paras. 7.5-7.6, 7.18, 7.32.

⁷⁶ See China’s First Written Submission, paras. 63-67.

⁷⁷ See Panel Report, paras. 7.31-7.32. See also U.S. SWS, para. 322 and MX SWS, para. XXX (“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*. On March 1, 2010, China brought into effect the *Public Notice on Fluorspar Industry Entrance Standards* and the *Public Notice on Refractory-Grade*

65. In order to seek a positive solution to this dispute, Mexico and the United States requested the panel to make findings and recommendations on the export quota and export duty legal instruments identified in their Panel Requests.⁷⁸

66. These export duties and quotas are established and administered on an annual basis in accordance with China’s legal framework. In fact, as was demonstrated during the panel proceeding, China has the ability to bring into effect new export duties and new quotas at any point in the year, within days of announcing them.⁷⁹

67. After the panel establishment, China adjusted the export quotas and duties for bauxite⁸⁰ and fluorspar⁸¹ by removing the export duties on bauxite and the export quota for fluorspar.

Taking into account the nature of this dispute, the removal or adjustment of any particular export

Bauxite (High Alumina Bauxite) Industry Entrance Standards. 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*. 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*. These four measures were introduced and brought into effect for the first time in 2010. On June 1, 2010, China brought into effect the *Notice Adjusting the Applicable Tax Rates of Resource Taxes of Refractory Grade Clay and Fluorspar* (2010 Fluorspar and High Alumina Clay Measures).” (footnotes omitted))

⁷⁸ The Panel Requests and Consultations Requests of Mexico and the United States set forth and describe export restraints China imposes on industrial raw materials, including: (1) export duties on bauxite, coke, fluorspar, magnesium, manganese, silicon metal, yellow phosphorus, and zinc, and (2) export quotas on bauxite, coke, fluorspar, silicon carbide, and zinc. The Consultations and Panel Requests set forth non-exhaustive lists of the legal instruments in which Mexico understood these measures were reflected. *See* México Second Written Submission, para. 333; U.S. Second Written Submission, para. 335.

⁷⁹ Complainants’ Oral Statement at the First Panel Meeting, paras. 43-44; Mexico Second Written Submission, para. 345; U.S. Second Written Submission, para. 340.

⁸⁰ Panel Report, fn. 41. *See also* Panel Report, paras. 7.73 and 7.74

⁸¹ *See* Panel Report, para 7.220. *See also*, Mexico Second Written Submission, paras. 346 and 347; U.S. Second Written Submission, paras. 341-342.

duty or quota after the date of the establishment of the Panel and the introduction of new measures relevant to China's attempts to justify those export restraints, could have effectively prevented the Co-Complainants from getting recommendations on the challenged measures found to be inconsistent as of the date of panel establishment. In this type of scenario, a WTO Member would have little clarity on the scope of the provisions at issue in the challenge that it brings.

68. China requested the Panel not to consider the measures challenged by Mexico and the United States in the terms of reference of the Panel because by January 1, 2010, China made adjustments or modifications of the measures challenged by the Co-Complainants and over the course of 2010, China introduced a large number of measures relating to the fluorspar and bauxite industries that it sought to employ for the purpose of bolstering its defensive arguments. Accordingly, it was inappropriate for the Panel to make recommendations on measures that took effect on January 1, 2010, mainly because this results in the creation of a "Moving Target" and permits China to shield its measures from review.⁸²

69. What Mexico and the United States were seeking in findings and recommendations on the 2009 export quota and export duty measures that were annually recurring identified in their Panel Requests was the ability to secure a positive solution to this dispute, and avoid litigating the same issue again.

70. In this conditional other appeal, considering the annual nature and particular characteristics of the export quotas and duties legal instruments subject to the dispute, Mexico

⁸² Mexico Second Written Submission, paras. 346 – 348; U.S. Second Written Submission, paras. 341-343.

and the United States have put forth an interpretation that not only is an appropriate interpretation for this dispute, but is also a correct and reasonable interpretation from a systemic point of view.

71. Considering the particular circumstances of this dispute, this interpretation will also avoid creating a loophole in the system. Such a loophole would create the risk that complainants that have endured the effects of trade distortive practices and initiate a WTO dispute as a last resort, could find themselves taking aim at appearing and disappearing targets. It would permit any WTO Member to effectively avoid having recommendations issue on contested measures – such as these annual recurring measures – that are found to be inconsistent, by removing that measure during the panel proceedings and permitting the Member to reinstate the measure at any time during the future without consequence. This would mean that a complainant could be left in a cycle of trying to capture the contested measures without any positive results.

V. Conclusion

72. In summary, while the United States supports the Panel’s analysis on the majority of our claims, there are flaws in the Panel’s analysis of the meaning of Article VIII:1(a) of the GATT 1994. The Panel’s conclusions as to the scope of Article VIII:1(a) are inconsistent with the Panel’s own finding, cited above, that “in connection with exportation” has a “broad temporal view.”⁸³ Article VIII:4 confirms that Article VIII:1(a) applies to measures relating to

⁸³ Panel Report, paras. 7.823-7.824. The panel in *China – Auto Parts* considered the meaning of “in connection with” in the context of Article II, which provides disciplines on, *inter alia*, “all other duties or charges of any kind imposed on or in connection with importation” The *Auto Parts* panel contrasted the “in connection with importation” language with “on importation,” which “*had a strict and precise temporal element*” and linked the obligation “at the moment [the product] enters the territory of another Member.” *China – Auto Parts*, paras. 7.177, 7.184 (emphasis in original).

quantitative restrictions and import licensing. There is no textual basis for finding that a measure imposing a fee or charge in order to be allocated a quota and in turn be able to export is necessarily not subject to the disciplines of Article VIII:1(a). Accordingly, the United States respectfully requests that the Appellate Body reverse the Panel’s findings on issues of law and legal interpretations under Article VIII:1(a) and Paragraph 11.3 of the Protocol, reflected in paragraphs 7.827-7.839, 7.844-7.851, 7.859-7.861, and 8.4(e) of the Panel Report, and complete the analysis by applying the correct legal standard. Because exporters are required to pay the quota allocation fee in order to obtain an allocation of the quota and in turn export bauxite, fluorspar, or silicon carbide, and because there is no dispute this fee is not related to the approximate cost of any service rendered to specific exporters, the Appellate Body should find that the quota allocation fee is inconsistent with China’s obligations under Article VIII:1(a) of the GATT 1994. Furthermore, because the fee is not applied in conformity with Article VIII, and neither bauxite, fluorspar, nor silicon carbide is listed in Annex 6 of Paragraph 11.3 of China’s Accession Protocol, the Appellate Body should find the fee is inconsistent with China’s obligations under Paragraph 11.3.

73. In addition, the United States and Mexico appreciate that there is a possibility that the Appellate Body, pursuant to China’s appeal relating to the Panel’s recommendation on the export quota and export duty measures, could grant China’s request to “reverse the Panel’s recommendations in paragraphs 8.8; 8.15 and 8.22 of the Panel Report to the extent that they apply to replacement measures”⁸⁴ and the Appellate Body could also find that no recommendation should have been made on the “series of measures” as they existed as of the

⁸⁴ China’s Appellant Submission, para. 167.

date of panel establishment. Because obtaining recommendations is critical to a complainant's ability to secure a positive solution to a dispute, the Co-Complainants are submitting Other Appeals on the issue on the condition that, as a result of China's appeal, the Co-Complainants are left without a recommendation on the export quotas and export duties.

74. Should the contingency on which the U.S. and Mexico's other appeal is premised occur, the United States and Mexico would contend that the Panel's interpretation and conclusion that it could not make a recommendation with respect to the 2009 export quota and export duty measures that were annually recurring and in effect on the date of panel establishment but that were later superseded by other legal instruments was in error because: (1) under DSU Articles 6.2, 7.1, 11, and 19.1, the Panel should have made a recommendation on those 2009 annual measures; (2) the Appellate Body's statement in *US – Certain EC Products* does not apply to those 2009 measures; and (3) failing to do so creates a risk in the WTO dispute settlement system that problems found to be inconsistent could nevertheless evade review or solution.

75. Accordingly, the United States and Mexico would respectfully request that the Appellate Body reverse the Panel's legal conclusion, reflected in paragraphs 7.33(d), 8.8, and 8.22 of the Panel Report, that it not make a recommendation on the 2009 export quota and export duty measures that were annually recurring and in effect on the date of panel establishment but that were subsequently superseded by other legal instruments; and make the recommendation that the DSB request China to bring the export quota and export duty measures as they existed on the date of panel establishment into conformity with its WTO obligations on the basis of the findings of inconsistency of those measures reflected in paragraphs 7.76 (bauxite duties); 7.80-7.81, 7.591, 7.615, 7.616 (coke duties); 7.84-7.85, 7.468, 7.614 (fluorspar duties); 7.88-7.89, 7.591,

7.611, 7.616 (magnesium duties); 7.92 (manganese ores and concentrates duties); 7.92-7.93, 7.591, 7.611, 7.616 (unwrought manganese waste and scrap and unwrought manganese powder); 7.97-7.98 (silicon metal duties); 7.101, 7.611, 7.616 (zinc duties); 7.219, 7.224, 7.353, 7.467, 7.613 (bauxite quota); 7.220, 7.224 (fluorspar quota); 7.221, 7.224, 7.591, 7.615 (silicon carbide quota); 7.222, 7.224, 7.591, 7.615 (coke quota); 7.223, 7.224 (zinc ban); 8.2, 8.3, 8.16, and 8.17 of the Panel Report.