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CHINA – MEASURES RELATED TO THE EXPORTATION OF VARIOUS RAW MATERIALS

Reports of the Panel

Addendum

This addendum contains Annexes A to F to the Reports of the Panel to be found in documents WT/DS394/R, WT/DS395/R and WT/DS398/R.

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SUBMISSIONS OF THE UNITED STATES

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EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

1. Despite China's commitments to limit or eliminate the use of export restraints during the course of its negotiations to accede to the WTO, China's export restraints have proliferated in number and kind. China now subjects over 600 items to non-automatic licensing and over 350 items to export duties. These export restraints have become increasingly restrictive over time; export quota amounts have decreased while export duty rates have increased.

2. The products subject to the export restraints at issue in this dispute are various forms of bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus, and zinc (together the "Raw Materials"). At issue in this dispute are four types of restraints that China imposes on the exportation of the Raw Materials: (1) export duties; (2) export quotas; (3) export licensing; and (4) minimum export price requirements. Each type of export restraint, including in some cases its administration, is inconsistent with China's obligations under the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and China's Protocol of Accession to the WTO ("Accession Protocol"), which incorporates commitments made by China in the Report of the Working Party on China's Accession to the WTO ("Working Party Report").

II. FACTUAL BACKGROUND

A. CHINA'S POLICIES FOR DEVELOPING AND PROMOTING ITS DOMESTIC INDUSTRY RELY ON RESTRAINING THE EXPORTATION OF RAW MATERIALS

3. China's economic development is guided and directed by various plans and policies formulated and issued by the central government, including the *Five Year Plans for National Economic and Social Development*. Over the period of the tenth and eleventh Five-Year Plans, spanning the years 2001 to the present, China has achieved remarkable progress in its industrial growth and development. This growth, however, comes at the expense of the rest of the world. China's production of industrial raw materials and processed goods has increased dramatically. China's exports of processed, value-added goods have also increased. However, China's exports of industrial raw materials have decreased.

4. These trends are the result of a deliberate strategy that China employs to optimize the conditions for realizing its economic and industrial ambitions. China's industrial strategy is to leverage and exploit the differences in the international and domestic markets for raw materials and downstream, processed products, using restraints on exports as the linchpin. The export restraints that China imposes on the Raw Materials are part of this industrial policy, which is predicated on advantaging China's domestic producers and industries, but distorts the international economic marketplace and is inconsistent with China's WTO obligations.

B. THE RAW MATERIALS

5. The nine industrial raw materials subject to the various export restraints imposed by China – bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus, and zinc – are either naturally occurring minerals or materials that have undergone some initial

processing. China is a leading global producer of all nine of these raw materials, which renders China's restraints on their exportation particularly distortive for non-Chinese consumers of these raw materials and of the products manufactured from them.

C. EXPORT DUTIES

6. China's obligations under paragraph 11.3 of Part I of the Accession Protocol require that China not impose export duties on products that are not listed in Annex 6 of the Accession Protocol. These obligations also require China to limit any export duties imposed on products that are listed in Annex 6 to the rates provided therein.

7. However, China imposes export duties on various forms of bauxite, coke, fluorspar, magnesium, manganese, silicon metal, and zinc,[1] even though none of these materials is listed in Annex 6. In addition, China also imposes export duties on yellow phosphorus (which is listed in Annex 6) at a rate that exceeds the maximum rate provided in Annex 6.

D. NON-AUTOMATIC EXPORT LICENSING FRAMEWORK

8. China restricts the exportation of various forms of bauxite, coke, fluorspar, manganese, silicon carbide, and zinc by subjecting their exportation to non-automatic export licensing.[2] MOFCOM, together with Customs, formulates, adjusts, and publishes a catalog listing all goods whose exportation is designated for restriction. Exportation of such goods requires approval by MOFCOM and is subject to export licensing that is, accordingly, not automatic.

9. Non-automatic export licensing (all references to "export licensing" hereinafter mean non–automatic export licensing) is the framework through which China imposes and administers the export quotas for bauxite, coke, fluorspar, silicon carbide, and certain forms of zinc, as discussed below. For these products, the non-automatic export licensing requirements function as a restriction on exportation additional to the restriction effected by the export quotas. Manganese and certain forms of zinc are subject to non-automatic licensing, but not quotas.

E. EXPORT QUOTAS

10. China restricts the exportation of various forms of bauxite, coke, fluorspar, silicon carbide, and zinc by subjecting the exportation of these materials to export quotas or prohibitions.[3] China maintains two systems for allocating export quotas: direct allocation or a quota bidding system. The export quotas on coke and zinc are allocated "directly". The export quotas on bauxite, fluorspar, and silicon carbide are allocated through a bidding system.

11. MOFCOM is responsible for setting the total amount of export quotas of the following year no later than October 31 of each year, distributing export quotas, evaluating applications for export quotas, determining whether to grant quotas, and in collaboration with Customs, is responsible for

[1] For purposes of the discussion of China's export duties, the terms "bauxite", "coke", "fluorspar", "magnesium", "manganese", "silicon metal", "yellow phosphorus", and "zinc" cover the forms of each of these Raw Materials listed in Chart of Raw Materials Subject to Export Duties (Exhibit JE-5).

[2] For purposes of the discussion of China's non-automatic export licensing, the terms "bauxite", "coke", "fluorspar", "manganese", "silicon carbide", and "zinc" cover the forms of each of these Raw Materials listed in Chart of Raw Materials Subject to Export Licensing and Quotas (Exhibit JE-6).

[3] For purposes of the discussion of China's export quotas, the terms "bauxite", "coke", "fluorspar", "silicon carbide," and "zinc" cover the forms of each of these Raw Materials listed in Chart of Raw Materials Subject to Export Licensing and Quotas (Exhibit JE-6).

formulating, adjusting, and publishing a catalog listing all goods subject to export quota. MOFCOM must approve the exportation of the goods listed in the catalog as subject to quota before they can be exported. Entities that are approved to export under the quotas are issued a certificate of quota. Only after an exporter obtains a certificate of quota can that exporter export the relevant products.

12. While China publishes the annual quota amounts for most products subject to quota, China did not publish the annual quota amount for coke. China instead publishes notices during the year announcing that MOFCOM is distributing the export quota on coke to specific enterprises. China has not published any quota amount in relation to the export quota on zinc in 2009.

13. ***Coke Export Quota Application Process.*** China requires enterprises to apply to receive an allocation of coke under the export quota for a given year in October of the previous year. As part of that application process, China requires enterprises to satisfy certain criteria in order to be eligible to receive an allocation under the quota. Those criteria include having exported a certain amount of coke in previous years, and in the case of certain enterprises, having a certain minimum registered capital. Applicant enterprises who do not satisfy the requisite criteria are not permitted to export coke under the quota. China also requires enterprises applying to export coke under the quota to submit a number of documents including prior export invoices.

14. China empowers the CCCMC with responsibility for reviewing and evaluating the applications of enterprises seeking to export coke under the quota. Ultimately, MOFCOM publishes the list of all companies that satisfy the eligibility criteria on the basis of the CCCMC's advice.

15. In addition, MOFCOM administers different application processes for Chinese enterprises and foreign-invested enterprises. While the 2009 application procedures for foreign-invested enterprises do not appear to be published, the measures allocating portions of the quotas to foreign-invested enterprises in 2009 make clear that such enterprises are subject to an application and approval process for the coke export quota.

16. While China also imposes export quotas on zinc, China has not published any measures in 2009 announcing the quantities of zinc that may be exported under the quota or any measures setting forth application procedures for enterprises seeking to export under the quota.

17. ***Export Quota Bidding.*** China allocates the export quotas on bauxite, fluorspar, and silicon carbide through a bidding process. Enterprises seeking to export the materials subject to the bidding procedure are required to satisfy certain eligibility criteria in order to participate in the bidding process including criteria relating to minimum registered capital and prior export experience. The enterprises that satisfy such criteria and participate in the bidding process must submit a bid price and bid quantity for the material they are seeking to export. China then awards portions of the quota beginning with the bidding enterprise that submits the highest bid price. The enterprises that are awarded a portion of the quota must pay a "total award price" (*i.e.*, the enterprise's bid price multiplied by its bid quantity) in order to export.

18. MOFCOM has established Bidding Offices composed of *inter alia* representatives of the CCCMC to administer aspects of the bidding process. The Bidding Office's – and therefore the CCCMC's – responsibilities include reviewing the applications of bidding enterprises to determine whether they satisfy the requisite eligibility criteria. Applicant enterprises are also required to submit certain documents including a balance sheet and income statement, and information including registered capital, net profit, and prior export volumes and values.

F. EXPORT LICENSING ADMINISTRATION AND REQUIREMENTS

19. China controls and restricts the exportation of bauxite, coke, fluorspar, manganese, silicon carbide, and zinc through an export licensing system that conditions the issuance of licenses and the usage of those licenses in various ways.[4]

20. There are three types of export licenses, which determine where and how many times a particular license can be declared and used. Licenses must be obtained from particular license issuing entities depending on the product being exported and/or the type of exporter applicant. Export license issuing entities review applications based on a variety of factors and documents including documents of approval issued by MOFCOM in addition to the export contracts, exporter management qualifications, and other materials to be submitted, none of which are further identified or defined in the *Export Licensing Rules* or related licensing measures. Export licensing entities and individual staff members of such entities are subject to sanctions for violating the rules and regulations applicable to export license issuance.

G. MINIMUM EXPORT PRICE REQUIREMENT

21. China restrains the exportation of bauxite, coke, fluorspar, magnesium, silicon carbide, yellow phosphorus, and zinc by imposing a minimum price requirement on their exportation.[5] China implements this restraint through a non-transparent system. Based on statements made by China and documents submitted by Chinese exporters in US courts, it appears that export prices that are set by the CCCMC are observed by exporters through an official "system of self-discipline" and further reinforced through the availability of penalties imposed by MOFCOM, and through China's licensing authorities and Customs.

III. LEGAL DISCUSSION

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

22. Paragraph 11.3 of the Accession Protocol contains a commitment by China to "eliminate all taxes and charges applied to exports" except in two specific situations: (1) where the taxes and charges are covered by Article VIII and applied consistently with the requirements of Article VIII; and (2) where the taxes and charges are imposed on products listed in Annex 6 at a rate less than or equal to the *ad valorem* percentage specified for those products in Annex 6.

23. China imposes "temporary" export duties at *ad valorem* rates ranging from 10 to 40 per cent on various forms of bauxite, coke, fluorspar, magnesium, manganese, silicon metal, and zinc. These duties are charges applied to exports that are termed "export duties" in China's measures. The export duties resulting from the application of these duty rates are not applied "in conformity with the provisions of Article VIII of the GATT 1994" because export duties do not fall within the scope of that Article. Furthermore, none of the products on which these export duties are imposed is listed in Annex 6. Accordingly, China's maintenance of these temporary export duties is inconsistent with China's commitment under paragraph 11.3 of the Accession Protocol.

[4] As set forth above, for purposes of the discussion of China's non-automatic export licensing, the terms "bauxite", "coke", "fluorspar", "manganese", "silicon carbide", and "zinc" cover the forms of each of these Raw Materials listed in Chart of Raw Materials Subject to Export Licensing and Quotas (Exhibit JE-6).

[5] *See* Chart of Raw Materials Subject to Minimum Export Prices (Exhibit JE-7) for products subject to minimum export price requirements.

24. China also imposes a "regular" *ad valorem* export duty at a rate of 20 per cent on yellow phosphorus. In addition to this regular export duty, China imposes a "special" export duty rate for yellow phosphorus to 50 per cent, resulting in a total export duty rate of 70 per cent effective 1 January 2009. The export duty resulting from the application of these duty rates to exports of yellow phosphorus is explicitly excluded from the coverage of Article VIII of the GATT 1994. The maximum *ad valorem* export duty rate permitted to be applied to yellow phosphorus under Annex 6 is 20 per cent. Accordingly, the export duty rate of 70% applied to the exportation of yellow phosphorus is inconsistent with China's commitment under paragraph 11.3 of the Accession Protocol.

B. CHINA'S EXPORT QUOTAS ARE INCONSISTENT WITH CHINA'S OBLIGATIONS UNDER ARTICLE XI:1 OF THE GATT 1994

25. Article XI:1 of the GATT 1994 explicitly prohibits Members from instituting or maintaining a restriction or prohibition made effective through a quota on the exportation of any product. However, China subjects the exportation of various forms of bauxite, coke, fluorspar, silicon carbide, and zinc to quotas. These export quotas are therefore in breach of China's obligations under Article XI:1 of the GATT 1994. As China subjects the exportation of zinc to a quota, but does not publish any export quota for zinc, China effectively sets the export quota for zinc at zero. As a result, China prohibits the exportation of zinc, in contravention of Article XI:1 of the GATT 1994.

26. China's export quotas on bauxite, coke, fluorspar, silicon carbide, and zinc are also inconsistent with paragraphs 162 and 165 of the Working Party Report, which contain enforceable commitments with respect to the elimination of export restrictions.

C. CHINA'S ADMINISTRATION AND ALLOCATION OF ITS EXPORT QUOTAS IS INCONSISTENT WITH CHINA'S OBLIGATIONS UNDER THE ACCESSION PROTOCOL, THE WORKING PARTY REPORT, AND THE GATT 1994

27. ***Trading Rights***. China's commitments under paragraph 5.1 of Part I of the Accession Protocol and paragraphs 83 and 84 of the Working Party Report (commonly referred to as China's "trading rights" commitments), require China to give all foreign enterprises and individuals, as well as all enterprises in China, the right to export most products. Furthermore, China explicitly committed to eliminate its examination and approval system and to eliminate certain eligibility criteria for obtaining or maintaining the right to export including criteria relating to prior export experience and minimum registered capital. However, in its administration of the quotas for coke, which is directly allocated, and the quotas for bauxite, fluorspar, and silicon carbide, which are allocated through a bidding process, China breaches these commitments by impermissibly requiring exporters to satisfy certain criteria in order to be eligible to receive an allocation of the coke quota or participate in the quota bidding process.

28. ***Partial and Unreasonable Administration***. China's administration of its export quotas is also inconsistent with Article X:3(a) of the GATT 1994, which requires Members to administer certain measures described in Article X:1 in a "uniform, impartial and reasonable manner."

29. China empowers a private party – the CCCMC – to have direct involvement in the administration of the export quota on coke, which is allocated directly, and the export quotas on bauxite, fluorspar, and silicon carbide, which are allocated through the bidding system. The CCCMC evaluates enterprises' applications to export under the quota and determines whether they satisfy the relevant eligibility criteria. In that role, the CCCMC also obtains access to sensitive and confidential information, including past export invoices in the case of the coke quota, and balance sheets and income statements in the case of the export quotas allocated through bidding. The involvement of the

CCCMC – an association of private commercial participants in a common industry – renders China's administration of these export quotas partial and unreasonable in contravention with Article X:3(a) of the GATT 1994.

30. ***Total Award Price***. Article VIII:1(a) of the GATT 1994 prohibits "fees and charges of whatever character . . . imposed . . . on or in connection with exportation" where such fees are not "limited in amount to the approximate cost of services rendered..." Enterprises that are awarded a portion of the export quota for materials subject to quota bidding are required to pay a total award price in order to export the materials. The total award price therefore constitutes a "fee or charge of whatever character . . . imposed . . . in connection with . . . exportation" within the meaning of Article VIII:1(a). The total award price is also not limited to the approximate cost of services rendered. Thus, the total award price is inconsistent with China's obligations under Article VIII:1(a) of the GATT 1994. The total award price is also inconsistent with paragraph 11.3 of the Accession Protocol as a "tax or charge" imposed on the exportation of products that are not listed in Annex 6.

D. CHINA'S EXPORT LICENSING FOR PRODUCTS SUBJECT TO RESTRICTED EXPORTATION IS INCONSISTENT WITH CHINA'S OBLIGATIONS UNDER ARTICLE XI:1 OF THE GATT 1994 AND PARAGRAPHS 162 AND 165 OF THE WORKING PARTY REPORT

31. China uses licensing to subject the exportation of designated products to restriction. China identifies such goods on a positive list of products subject to export licensing published annually. The list that China published for 2009 includes various forms of bauxite, coke, fluorspar, manganese, silicon carbide, and zinc, indicating that the exportation of these products is designated by the state as restricted. Furthermore, the export licensing required to export the these restricted products is not automatic. In contrast, China also maintains an automatic export licensing system. Article 15 of the *Foreign Trade Law* instructs MOFCOM and its partner institutions to grant approval whenever exporters seeking to export the unrestricted goods subject to automatic licensing apply for the automatic licenses. However, for goods whose exportation is designated for restriction, MOFCOM is not required to grant its approval to applicant exporters and is authorized to impose various conditions on their exportation.

32. Export licensing is thus a measure that restricts the exportation of these products in breach of China's obligations under Article XI:1 of the GATT 1994. Paragraphs 162 and 165 of the Working Party Report contain enforceable commitments with respect to the elimination of non-automatic export licensing. China's export licensing is also inconsistent with paragraphs 162 and 165 of the Working Party Report and paragraph 1.2 of China's Accession Protocol.

E. CHINA'S MINIMUM EXPORT PRICE REQUIREMENT IS INCONSISTENT WITH CHINA'S OBLIGATIONS UNDER THE GATT 1994

33. China's minimum export price requirement for bauxite, coke, fluorspar, magnesium, silicon carbide, yellow phosphorus, and zinc, as described above, prohibits the exportation of these products if the export price does not meet a designated minimum. This constitutes a restriction on the exportation of these materials in contravention of China's obligations under Article XI:1 of the GATT 1994.

34. Furthermore, China administers the minimum export price requirement for yellow phosphorus through an enhanced enforcement mechanism known as the Price Verification and Chop ("PVC") procedure. The PVC procedure involves the participation of the CCCMC in the customs clearance process for yellow phosphorus. The CCCMC's participation permits the flow of exporters' sensitive commercial information to representatives of parties with interests that are in conflict with the

exporters. This contravenes China's obligation to administer its laws, regulations, decisions, and rulings pertaining to restrictions on exports in an impartial and reasonable manner under Article X:3(a) of the GATT 1994.

35. Finally, China's failure to publish its laws, regulations, decisions, and rulings pertaining to the minimum export price requirement for these Raw Materials, is inconsistent with China's obligations under Article X:1 of the GATT 1994.

IV. CONCLUSION

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

ANNEX A-2

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF THE COMPLAINANTS AT THE FIRST SUBSTANTIVE MEETING

I. INTRODUCTION

1. On behalf of the complainants, we would like to begin by thanking the Panel and the Secretariat staff for taking on this task. Our delegations look forward to working with you, and with the delegation of China, as you carry out your work. The complainants have attempted to consolidate their views in a joint statement, to be read by the three complaining parties. This statement will be supplemented by statements by individual complaining parties.

2. The measures at issue in this dispute restrain the exportation of nine types of industrial raw materials from China. These raw materials are important inputs for the manufacture of steel, aluminum, and chemicals – and their downstream products. China's export restraints are barriers to trade that severely distort the conditions of competition in the global marketplace.

II. CHINA'S EXPORT RESTRAINTS

3. ***Export Duties.*** In contravention of its obligations in paragraph 11.3 of its Accession Protocol, China imposes export duties on the exportation of various forms of bauxite, coke, fluorspar, magnesium, manganese, silicon metal, and zinc, even though China did not reserve the right to impose export duties on any of these products. For yellow phosphorus, China did reserve the right to impose export duties up to 20%. However, as of the date of filing of the consultations request in this dispute, China's frequently changing export duties on yellow phosphorus stood at 70%.

4. ***Export Quotas.*** The second form of export restraint we have asked you to examine is an export quota. Article XI:1 of the GATT 1994 prohibits such export quotas. Yet China subjects the exportation of bauxite, coke, fluorspar, silicon carbide, and zinc to quotas. China has made these quotas more and more restrictive over time.

5. ***Non-Automatic Export Licensing***. Contrary to Article XI:1 of the GATT 1994, China subjects the exportation of bauxite, coke, fluorspar, manganese, silicon carbide, and zinc – to export licensing that is not automatic.

6. ***Minimum Export Prices.*** China subjects the exportation of bauxite, coke, fluorspar, manganese, magnesium, silicon carbide, yellow phosphorus, and zinc to a minimum export pricing system that constitutes an impermissible export restriction under Article XI:1. Specifically, exportation of these raw materials is subject to a system that prevents exportation unless the seller meets or exceeds the minimum export price.

7. ***Administration of the Export Restraints***. The complainants have also asked the Panel to examine a number of requirements China imposes in the administration of its export restraints in light of China's obligations under the trading rights commitments in China's Accession Protocol and Working Party Report, and with China's obligations under Article X of the GATT 1994. These administration-related claims address China's imposition of eligibility criteria on enterprises seeking to export products subject to export quota, impartial or unreasonable administration of the minimum

export pricing and of the application process for products subject to export quota, and failure to publish measures related to minimum export pricing.

III. THE MEASURES WITHIN THE PANEL'S TERMS OF REFERENCE ARE THOSE SET OUT IN THE PANEL REQUESTS, WHICH FRAME THE "MATTER" REFERRED TO THE PANEL BY THE DSB

8. Next, we would like to address the issue of the "identity of the measures at issue" in this dispute. Contrary to China's arguments, all of the 2009 measures were very much at issue when consultations were requested and when the Panel was established, on 21 December 2009. The matter that the DSB referred to the Panel, and thus the Panel's terms of reference, is the consistency of those 2009 export restraint measures with China's WTO obligations. The complainants are therefore entitled to findings and recommendations on these measures. In addition, failure to examine and make findings regarding the 2009 measures would effectively create a "moving target" for both the complainants and the Panel in this dispute.

IV. CHINA'S PROFFERED JUSTIFICATIONS FOR ITS IMPOSITION OF EXPORT DUTIES AND EXPORT QUOTAS ON THE RAW MATERIALS

9. ***Export Duties.*** China does not contest that the export duties being challenged are imposed inconsistently with its obligations in paragraph 11.3 of the Accession Protocol, or that these export duties fall outside of the exceptions explicitly provided in paragraph 11.3. Instead, China invokes the exceptions in Article XX of the GATT 1994 as justifications. However, Article XX is not available as a justification for a breach of China's obligations in paragraph 11.3 of the Accession Protocol.

10. By its terms, Article XX applies strictly to the GATT 1994. The referenced "Agreement" in the *chapeau* of Article XX is the GATT 1994. In *China – Publications and Audiovisual Products*, the issue was whether the Article XX exceptions applied to China's trading rights commitment in paragraph 5.1 of the Accession Protocol. The Appellate Body's finding that Members agreed to apply the Article XX exceptions to paragraph 5.1 was based on the specific language of paragraph 5.1. This language is not found in and is in sharp contrast to paragraph 11.3.Additional relevant context also supports the conclusion that Article XX is not available as a defense for a breach of the export duty commitment.

11. ***Export Quotas***. China does not deny that the export quotas being challenged contravene the obligation in Article XI:1 of the GATT 1994. Instead, China claims that the export quotas on coke and silicon carbide are justified under Article XX(b) of the GATT 1994 and that the export quota on refractory grade bauxite is justified pursuant to Article XI:2(a) or, failing that, Article XX(g) of the GATT 1994.

V. CHINA HAS FAILED TO ESTABLISH THAT ITS MEASURES FULFILL THE CRITERIA SET OUT IN ARTICLE XX OF THE GATT 1994

12. ***China's Export Quota on Fluorspar and Refractory-Grade Bauxite Is Not Justified by Article XX(g) of the GATT 1994***. China's duties on fluorspar exports and China's quota on refractory grade bauxite exports fail to satisfy the requirements of Article XX(g). First, China provides no argument or support for the assertion that these export restraints "relate to" the conservation of these raw materials, which has been interpreted as meaning "primarily aimed at" the conservation of a natural resource and having a "close and substantial relationship of means and ends" between the means presented by the measure at issue and the ends of conservation.

13. Rather than directly address the question of whether the measures at issue are made effective in conjunction with restrictions on domestic production or consumption of fluorspar and refractory grade bauxite, China merely asserts that it has "adopted a comprehensive set of measures relating to the conservation" of fluorspar and refractory grade bauxite. Many of these measures came into effect in 2010. Of the remaining measures, China fails to address how these measures constitute "restrictions" on domestic production or consumption of fluorspar or refractory grade bauxite. China also characterizes its purported right to adopt these export restraints as an issue of "sovereignty" over its natural resources, and also purports to find support in the principles of "conservation" and "sustainable development". The sovereignty of a WTO Member over its natural resources is not at issue under Article XX(g). Regarding the requirements of the *chapeau* of Article XX, China has made no serious attempt in its first submission to satisfy its burden. Accordingly, China has failed to meet its burden under the *chapeau*.

14. ***China's Export Duties on Magnesium, Manganese, and Zinc, and Export Quotas on Bauxite and Silicon Carbide Are Not Justified by Article XX(b)***. China contends that certain of its export duties and export quotas are justified pursuant to Article XX(b), because the export restraints result in less production of the products, and therefore, less environmental pollution. However, the measures do not satisfy the elements of Article XX(b). As the Appellate Body has stated, "a 'necessary measure is...located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to' ". The exportation of the products at issue is entirely unrelated to environmental pollution. As China itself argues, it is the production of these products, not their export, that causes pollution. Thus, restraints on the export of the products at issue bear no direct relationship to China's environmental goals. The restraints, however, do have a direct economic effect in terms of providing a competitive advantage to China's industrial users of raw materials. China's arguments under Article XX(b) also raise serious systemic concerns, because under China's approach, Article XX(b) would justify a WTO-inconsistent export restriction on any product whose production causes pollution, or on any economically advantageous or energy efficient product.

15. With respect to scrap, China has failed to establish that the export duties are contributing to, let alone necessary to, accomplishing increased secondary production. China's model is instead based on unsubstantiated assumptions regarding supposed increases in secondary production. In addition, China's estimates of increased secondary production that supposedly could result from the export duties is decidedly modest. Much of the production and trade data presented by China's own economist also contradicts China's reasoning. Finally, there are a number of reasonably available, WTO-consistent measures that China could take to more directly address its stated health objectives. China also fails to satisfy its burden to demonstrate that these measures satisfy the elements of the *chapeau* of Article XX.

16. With respect to the metals, coke, and silicon carbide, China also significantly downplays the effects of China's policies downstream and the environmental damage that results from increased downstream production using the raw materials as inputs. In addition, primary production of the metals at issue has increased in recent years. Finally, there are a number of reasonably-available, WTO-consistent measures that China could take to more directly address its health objectives. China also fails to satisfy its burden to demonstrate that these measures satisfy the elements of the *chapeau* of Article XX.

VI. CHINA'S EXPORT QUOTA ON BAUXITE IS NOT JUSTIFIED UNDER ARTICLE XI:2(A) OF THE GATT 1994

17. As a threshold matter, as the party invoking the defense under Article XI:2(a), China bears the burden of establishing that its export quota on refractory-grade bauxite satisfies all of the elements of

the exception. China has failed to do so. China's interpretation of the terms in Article XI:2(a) is also flawed, and relies heavily on the measures of other Members, which are not in the Panel's terms of reference and are irrelevant to this dispute.

18. China's arguments also depend heavily on the supposed methodology employed by "criticality" assessments developed by the United States and the European Union. These studies do not purport to address the requirements of Article XI:2(a) of the GATT 1994 and in fact are not relevant – let alone authoritative – as to the question of whether China's measures satisfy the requirements of Article XI:2(a). This fact renders much of China's discussion of the export quota on refractory-grade bauxite beside the point as it relates to Article XI:2(a).

19. China's assertion that refractory-grade bauxite is essential to China appears to be based in large part on the assertion that refractory-grade bauxite is indispensable for the production of iron and steel, as well as other products such as glass, ceramics, and cement. This line of reasoning is untenable as it would suggest that any input into large-scale industrial operations would qualify as an essential product under Article XI:2(a). With respect to "critical shortage," China neglects to meaningfully analyze that term, and instead merely collapses the "essential products" and "critical shortage" inquiries in Article XI:2(a). China also relies heavily on assertions that refractory-grade bauxite is "finite" or "limited" in its availability. This is not sufficient to establish a "critical shortage." Finally, China's export quota is not "temporarily applied."

VII. CONCLUSION

20. Having taken on obligations as part of its negotiated accession to the WTO, China now, for reasons that do not appear to be anything other than industrial policy, appears to want to forego those obligations. We ask the Panel to help ensure that China abides by its commitments.

ANNEX A-3

CLOSING ORAL STATEMENT OF THE UNITED STATES AT THE FIRST SUBSTANTIVE MEETING

1. Mr. Chairman and members of the Panel, on behalf of the United States, we would like to comment on a few matters in our closing statement.

2. We would like to take this opportunity to reiterate that there are two different sets of terms of reference issues raised by China. The first set relates to China's preliminary ruling request submitted on March 30, 2010, and on which the complainants and China have provided submissions to the Panel and participated in an oral hearing. We understand the Panel reserved its decision with respect to two matters raised by that preliminary ruling request and that the Panel seeks to resolve those two issues promptly.

3. With respect to the issues raised in the preliminary ruling request, China's only remaining argument from that request in its first written submission is in Section II.B of China's submission. In that section, and throughout the panel meeting, China simply reasserted its arguments from the preliminary ruling process as it relates to Section III of the complainants' Panel requests. However, those arguments are without merit for the reasons discussed in our submissions to the Panel during the preliminary ruling process. We recall that the Panel stated in its preliminary ruling that the Panel would wait to make its final ruling on certain matters after having a chance to review the parties' first written submissions. This is consistent with the reasoning that under Article 6.2, a responding party's argument that there is an alleged defect in the panel request may be examined in light of the claims advanced in the first submission. China has failed to and indeed cannot show any defect.

4. In this regard, in an attempt to keep its Article 6.2 claims from the preliminary ruling process alive, China continues to argue that the Panel requests at issue fail to satisfy the requirement in Article 6.2 that in stating a claim, a panel request must set forth a plain connection between the measures at issue and the legal obligations that they breach. However, China misstates the standard as articulated in past disputes. The panel requests satisfy the requisite standards of Article 6.2.

5. The second set relates to China's terms of reference objections under Article 6.2 of the *Understanding on the Rules and Procedures Governing the Settlement of Disputes* ("DSU") raised in China's first written submission, and for which China did not request a preliminary ruling. With respect to this set of issues, we note that China attempted during the panel meeting to blur the lines between the preliminary ruling issues and the new terms of reference issues in China's first written submission. Those terms of reference issues raised in China's first written submission are not within the scope of the preliminary ruling request. While the complainants have coordinated to prepare an oral statement responding to a number of China's arguments in its first written submission, we will respond to China's remaining arguments including those relating to terms of reference in our rebuttal submission and in responding to the Panel's questions.

6. We would also like to respond to a few more points raised by China. We have heard a lot from China about its sovereignty over natural resources and its economic policies. These statements merely confirm that the export restraints at issue are designed to serve China's economic goals and are not related to protection of the environment or conservation. Furthermore, the sovereignty of China is not at issue in this dispute.

7. China repeatedly invokes its supposed status as a developing country. This is an issue that was discussed at the time of China's accession to the WTO as reflected at paragraphs 8 and 9 of the Working Party Report. Members of the Working Party did not agree to give China the benefit of special provisions as a developing country Member in the context of China's export restraint commitments. Nor are there special provisions for China in relation to Articles XI or XX of the GATT 1994. Indeed, we find China's argument particularly striking in this context, where it is seeking an exemption from its obligations on the basis of its supposed developing country status in relation to raw material inputs, even in spite of the fact that China is now the world's largest steel producer.

8. In a similar vein, China also repeatedly invokes Article XXXVI in yet another attempt to evade its obligations. In addition to the fact that Article XXXVI contains no commitments or obligations, there is no basis to support the notion that this provision weakens China's obligations under Article XI of GATT 1994 or paragraph 11.3 of China's Accession Protocol or, in any way, affects the standard under GATT 1994 Article XX or Article XI:2(a).

9. The "update" that China provided in its opening statement regarding an 16 August 2010, measure repealing three 1997 measures, brings us back to our point on the Panel's terms of reference. China has demonstrated that its measures can appear and disappear with ease. The measures that the complainants challenged in our panel requests are those export restraints in effect in 2009. The Panel should make findings and recommendations on the 2009 export restraints to prevent China from continually moving the target and shielding its measures from review.

10. With respect to China's "right to regulate" arguments, an overarching problem emerges. China is seeking exemptions from obligations without any basis in the text of the WTO Agreement. Just as other WTO Members are not permitted to breach their obligations unless an exception is explicitly provided for in the WTO Agreement and unless the conditions for that exception are met, so too China, as another Member of the WTO, has taken commitments to which it must adhere. Otherwise, the rules-based trading system would cease to exist.

11. With respect to China's proffered defenses, we offer the following comments. On China's defense under Article XX(g) of the GATT 1994, we note that Article XX(g) requires that a measure must be "related to conservation," and Article XX(g) contains an "even-handedness" requirement. China has not come close to meeting these requirements.

12. With respect to China's defense under Article XX(b) of the GATT 1994, we note that in China's discussion of Article XX(b) in its oral statement, China suggests that a measure may be justified under Article XX(b) if the measure contributes to sustainable development. This assertion is without merit.

13. Finally, regarding China's defense under Article XI:2(a) of the GATT 1994, we observe that China's interpretation of Article XI:2(a) would bring every production input within the coverage of Article XI:2(a). This is inconsistent with the text and purpose of Article XI:2(a). Additionally, China's arguments regarding the requirement of a "critical shortage" in Article XI:2(a) boil down to reading out from that provision the word "critical".

14. These are the issues we addressed in our oral statement and at this first substantive meeting of the Panel with the parties. As we look ahead, we will be addressing all of these issues in greater detail. In particular, we will be responding to China's factual assertions, legal arguments, and economic theories advanced in support of its justifications for imposing its export duties and export quotas. We will also be addressing issues that we did not have the opportunity to touch on at this meeting, including China's arguments regarding the consistency of its non-automatic export licensing,

minimum export price regime, quota administration, as well as China's responses to our trading rights and transparency claims under the GATT 1994, China's Accession Protocol, and Working Party Report.

15. We look forward to re-convening with the Panel and the other parties at the second substantive meeting. Thank you.

ANNEX A-4

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE UNITED STATES

I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15. As the United States set forth in its first written submission, China subjects the exportation of various forms of bauxite, coke, fluorspar, silicon carbide, and zinc to quotas. China has confirmed that it maintains a prohibition on the exportation of zinc. These export quotas and the export prohibition on zinc are inconsistent with Article XI:1 of the GATT 1994 and paragraphs 162 and 165 of the Working Party Report and paragraph 1.2 of China's Accession Protocol. China has failed to establish that its export quota on one subset of one form of bauxite is justified pursuant to Article XI:2(a) or Article XX(g) of the GATT 1994. China has also failed to establish that its export quotas on coke and silicon carbide are justified pursuant to Article XX(b) of the GATT 1994.

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

17. China's selective defense of the export quota imposed on "bauxite" only insofar as the quota applies to "high alumina clay" highlights the fact that China's efforts are focused essentially on defending a non-existent or fictional measure. There is no export quota on high alumina clay. Because China does not defend the export quota on "bauxite" as a whole, China has already

effectively conceded the inconsistency of that quota. The export statistics China cites raise the possibility and the serious concern that, through China's allocation of the export quota on "bauxite," China may be effecting an export prohibition on "aluminum ores and concentrates."

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

19. In examining whether China's export quota on bauxite, as applied to high alumina clay, relates to the conservation of high alumina clay, the operative question is whether there is a close and genuine relationship of ends and means between the goal of high alumina clay conservation and the means presented by that part of the export quota that applies to exports of high alumina clay. As above in the case of fluorspar, the answer to this question is also no.

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

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

22. China contends that the export quotas on coke and silicon carbide are justified pursuant to Article XX(b) of the GATT 1994. China's arguments in support of this defense are the same as those advanced in the context of China's export duties on coke, magnesium metal, and manganese metal. In other words, China argues that the production of coke and silicon carbide result in environmental

pollution. The export quotas, according to China, are "necessary" to reduce production of these materials in China, and therefore reduce pollution. China's defense fails for the same reasons as discussed above in the context of the export duties on magnesium metal, manganese metal, and coke.

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

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

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

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

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

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

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

VI. EXPORT LICENSING

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

VII. MINIMUM EXPORT PRICE

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

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

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

32. There are three additional measures that China fails to identify that are within the Panel's terms of reference by virtue of being included in both the consultations and panel requests: *Measures for the Administration of Trade Social Organizations*; *Regulations for Personnel Management of Chambers of Commerce*; and *CCCMC Charter*. In addition, four measures are in the Panel's terms of reference even though they were not identified in both the U.S. consultations request and the U.S. panel request: *CCCMC Export Coordination Measures; Bauxite Branch Coordination Measures*; *Bauxite Branch Charter*; and the *"System of self-discipline."* These measures are within the Panel's terms of reference because they implement the coordination mandate of the *1994 CCCMC Charter* and the *2001 CCCMC Charter* in the manner described by the Appellate Body in *Japan – Film*. Three measures that were specifically identified in the panel request but not listed in the consultations request are nevertheless included within the Panel's terms of reference: *Notice of the Rules on Price Reviews of Export Products by the Customs*; *CCCMC PVC Rules*; *Online PVC Instructions*. These measures are all part of the same PVC procedure of which the *2002 PVC Notice* and the *2004 PVC Notice*, which were consulted on, form a part. The inclusion of these three measures in the panel request did not, "expand the scope of the dispute" as the Appellate Body described in *US – Continued Zeroing*. These measures are therefore also properly within the panel's terms of reference**.**

33. China also asked the Panel to refrain from making findings on measures because those measures have "expired" and findings would "serve no purpose." China also asserted that the Panel has no authority to make recommendations on these measures. The Panel has the authority and obligation to make findings and recommendations on certain measures which, contrary to China's arguments and assertions, continue to be in effect. The Panel has the authority and obligation to make

findings and recommendations on the other measures in order to secure a positive solution to this dispute.

VIII. CONCLUSION

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

ANNEX A-5

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF THE UNITED STATES AT THE SECOND SUBSTANTIVE MEETING

1. China maintains a number of restraints on the exportation of important raw materials for which China is one of the world's leading producers. The export restraints that China maintains on these raw materials are inconsistent with paragraph 11.3 of China's Accession Protocol and Article XI:1 of the GATT 1994 respectively. Although China has asserted no defense with respect to several of the export restraints, China does invoke exceptions under Article XX of the GATT 1994 in relation to certain of the restraints. None of China's defenses withstands scrutiny.

2. **Article XX Exceptions of the GATT 1994 Are Not Applicable to China's Commitments in Paragraph 11.3 of the Accession Protocol**: The exceptions in Article XX of the GATT 1994 are not available as a defense to a breach of the commitments in paragraph 11.3 of the Accession Protocol. The non-applicability of Article XX is plain from the text of paragraph 11.3, read in its context. The application of the Appellate Body's reasoning in *China – Audiovisual Products* further shows that Article XX cannot be used in an attempt to justify a breach of paragraph 11.3.

3. **China's Export Duties on Coke, Magnesium, Manganese, and Zinc and Its Export Quotas on Coke and Silicon Carbide Do Not Satisfy the Criteria Set Out in Article XX(b):** The evidence is abundant that China's export restraints are not environmental measures, but instead were adopted to support China's industries that use the raw materials covered in this dispute. Even China's statements prepared for presentation to this Panel betray that the export restraints at issue are in place to promote China's economic advancement. China relies heavily on high-level government policy documents that express a goal of "controlling" or "restricting" the export of high-energy-consumption, highly polluting, or resource-intensive products. But, other high-level Chinese government documents place the intention to control the export of highly-polluting products in the context of China's economic policies. The structure of China's measures also shows that their objectives are the promotion of the export of higher value-added downstream products, not environmental protection. China's measures are restraints on exports of raw materials, but the export of the materials at issue is unrelated to environmental pollution. Thus, there is no environmental justification for discriminating against users of the raw materials outside China vis-a-vis users inside China. At best, the export restraints at issue may have indirect, incidental environmental benefits. China's argument that an indirect relationship between the measure and the stated objective is irrelevant is illogical and unpersuasive. Each claimed Article XX defense must be examined on its own merits, in light of the facts and circumstances of the particular dispute. The fact that a measure could, at best, make an indirect contribution to the stated objective, is quite relevant to the question of whether the measure at issue satisfies the requirements of Article XX(b).

4. The *post hoc* environmental justification presented by the consultants that China has retained for the purposes of this dispute provides further confirms that China's defense under Article XX(b) is without merit. An examination of those arguments shows that China has presented no evidence that the export restraints are making a material contribution to China's stated environmental objective. The economic model by Dr. Olarreaga is flawed and unreliable. China also fails to submit evidence that the export duties on scrap products have resulted in increased levels of secondary production of magnesium metal, manganese metal and zinc. China's consultant, Dr. Humphreys, has also made a number of additional assertions that are unsupported by any evidence or are highly speculative. China also has no legitimate response to the fact that if China is concerned with the environmental impacts of raw material production, China has reasonably available alternatives that would directly address

China's supposed environmental concerns. As a result, China cannot meet its burden of establishing that its measures are "necessary" for the protection of human life or health. China has also not met its burden of establishing that environmental controls on production would likewise not meet China's goals. China's reliance on *Brazil – Tyres* in this regard is also misplaced. With respect to the *chapeau* of Article XX, China has not even made a serious attempt to show that its measures meet the *chapeau*'s requirements, despite the fact that China has the burden to do so.

5. Finally, the Panel might consider the serious negative systemic implications of a contrary finding. As it relates to the export restraints on the metals, coke, and silicon carbide, China's defense would permit a WTO-inconsistent export restriction on any product whose production causes pollution, simply because the export restriction could lead to reduced production of the product at issue. With respect to scrap products, China's defense suggests that a WTO-inconsistent export restraint may be imposed on any industrial input on the grounds that it is more environmentally friendly than other industrial inputs.

6. **China Has Not Established that Its Export Duties and Export Quotas on Fluorspar and Bauxite Satisfy the Requirements of Article XX(g):** China's Article XX(g) arguments only apply to export duties on fluorspar and that portion of its export quota on bauxite covering high alumina clay – which is only one of the several forms of bauxite covered by China's bauxite quota. These export restraints are not conservation measures under the Article XX(g) exception. China has attempted to bolster its Article XX(g) arguments by taking actions over the course of 2010 – indeed, while this matter is under the Panel's consideration – to reduce the number of export restraints imposed on fluorspar and bauxite and to introduce a number of measures directed at the production of fluorspar and high alumina clay (the 2010 Fluorspar and High Alumina Clay Measures). China's efforts to make these export restraints appear more like conservation measures in 2010 are also unavailing.

7. The focus of "conservation" is protective oversight exercised to benefit the state, use, or amount of the natural resource. The export restraints on fluorspar and high alumina clay benefit China's domestic users of fluorspar and high alumina clay by providing them with an important advantage over their foreign competitors. China strains to incorporate into the term "conservation" the concept of self-interested economic and social gain. China's interpretation of the term "conservation" must be rejected because it would subvert the GATT 1994's disciplines on export restraints and non-discrimination**.**

8. The second clause of Article XX(g) requires that an otherwise non-conforming measure be "made effective in conjunction with restrictions on domestic production or consumption," which is "a requirement of *even-handedness* in the imposition of restrictions." The pre-2010 measures China has proffered as constituting components of a conservation program are not domestic restrictions and even in China's own view, are not sufficient to establish a defense under Article XX(g). The 2010 Fluorspar and High Alumina Clay Measures also are not restrictions under Article XX(g) because the mining and production targets are set at levels higher than actual mining and production, showing that they are not intended to restrict the amount of fluorspar produced in 2010. Additionally, China's measures are not even-handed. The facts here, as in *Canada – Herring and Salmon*, present an easy case under Article XX(g): the export restraints on fluorspar high alumina clay are imposed primarily to benefit China's domestic processors – at the expense of foreign processors. Using an example, China argues that its export restraints work together with production restrictions to create domestic consumption restrictions on fluorspar and high alumina clay, making them even-handed. China's hypothetical is fundamentally flawed in at least four important ways. Its measures are not even-handed.

9. **China's Export Quota on Bauxite as Applied to High Alumina Clay Is Not Justified by Article XI:2(a)**: China's defense under Article XI:2(a) as it relates to a subset of one of the products subject to an export quota on bauxite does not withstand scrutiny. *First*, China's defense only relates to one subset of one of the products on which China imposes its export quota. *Second*, China's assertion that the complaining party bears the burden of establishing that the conditions of Article XI:2 are not met is without merit. The Appellate Body's clear statement in *US – Shirts and Blouses* confirms the US position that Article XI:2(a) is an affirmative defense. And, contrary to China's suggestion, the Appellate Body's reasoning in that dispute is not "obsolete" *Third*, while China's argument regarding "essentialness" requirement places great weight on the supposed lack of substitutes for high alumina clay in steel production, there are a number of substitutes, including certain of the other forms of bauxite on which China maintains its export quota. Moreover, China's reading of "essential" would severely weaken the disciplines in Article XI:1. *Fourth*, China's arguments regarding the supposed "critical shortage" of high alumina clay reflect an improper reading of the relevant terms. The mere limited amount of reserves of a product is not sufficient to amount to a critical shortage. Similarly, the existence of supply constraints does not establish a "critical shortage" for purposes of Article XI:2(a). While China has failed to establish that its export quota as applied to high alumina clay satisfies the requirements of Article XI:2(a), China's statements in this dispute do confirm that the objective of the export quota on bauxite is the rapid and dramatic growth of China's steel industry.

10. **The United States Is Entitled to Findings and Recommendations on the Export Quotas, Duties, and Export Licensing Requirements Effective in 2009:** The United States is entitled to findings and recommendations on the fluorspar export quota, the bauxite export duties, and the yellow phosphorus special export duties. China has not conceded the WTO inconsistency of these export restraints and they are susceptible to quick and easy re-imposition by China. Accordingly, findings and recommendations on these measures are critical to securing a positive solution to this dispute.

11. **China's Argument that the Panel Should Make Findings and Recommendations Only on the Export Restraints Effective in 2010 Must Be Rejected:** The changes that China made to the scope of its export quotas and export duties in 2010 changed the essence of the measures in the Panel's terms of reference (i.e., the ones imposed in 2009). Reviewing the export restraints only as they were modified and maintained in 2010 would shield from review aspects of the export restraints and permit China to create a "moving target" that impinges on the rights under the DSU afforded to complainants. Furthermore, it is not consideration of China's defenses that would be untimely if the Panel limited its review to the measures within its terms of reference, what is untimely is China's belated efforts to introduce measures that it considers helpful in satisfying the requirements of the defenses it has invoked in this dispute. Finally, making findings and recommendations on 2010 measures because 2009 measures have "expired" is clearly not the correct approach – logically or practically – for the settlement of disputes at the WTO, and it is not one that finds support in the text of the DSU.

12. China's Measures Administering and Allocating the Export Quotas Are Inconsistent with China's Obligations Article X:3(a) of the GATT 1994: China argues, citing language from the Appellate Body Report in *US – OCTG Sunset Review* that the United States has not substantiated this claim "through 'solid evidence.'" The nature of this Article X:3(a) claim is distinct from the one made in *US - OCTG Sunset Review* and is similar to the one made in *Argentina – Leather*. The United States has adduced arguments and evidence that are more than sufficient, in quantity and quality, to substantiate these claims.

13. **Export Licensing**: Whether China wishes to call its export licensing requirements "automatic" or "non-automatic," export licensing maintained under Articles 16 and 19 of the *Foreign*

Trade Law provides China with the authority, the ability, and the discretion to control and restrict the exportation of the subject products. China's invocation of the Import Licensing Agreement is inapposite to this claim regarding its export licensing. Finally, the Article XI:1 prohibition on import and export restrictions extends to more than just limits on the quantity of imports and exports. Article XI:1 has been consistently interpreted by GATT 1947 and WTO panels to cover restrictions on importation and exportation that are not limited to "quantitative" restrictions.

14. **The Minimum Export Price Requirement Is Inconsistent with Article XI:1 of the GATT 1994**: With respect to China's argument that no single MEP-related measure appears to impose a minimum export price requirement, the United States observes that an export restraint, like any other measure, can consist of a number of separate and distinct legal instruments that work together to affect trade. Furthermore, in relation to the terms of reference issues, to the extent that MEP-related legal instruments set forth in the US submissions are considered not to be within the Panel's terms of reference, those legal instruments are nevertheless evidence of the existence of a minimum export price system that must be considered in the Panel's review of this claim under Article XI:1.

15. **Conclusion**: As a final note, China asserts in its second written submission that the United States has abandoned certain claims. This is not correct. To clarify any confusion, the United States is also providing, as Exhibit US-1, a chart of the US claims in this dispute.

ANNEX A-6

CLOSING ORAL STATEMENT OF THE UNITED STATES AT THE SECOND SUBSTANTIVE MEETING

1. Mr. Chairman, members of the Panel, we would like to thank you and the Secretariat staff assisting you for your efforts during this panel meeting and throughout this proceeding. As this is our last opportunity to address you in person, we would like to take a few moments to touch on some of the issues raised in this dispute.

I. ARTICLE VIII:1 OF GATT 1994

2. To begin, we would like to address a few arguments presented by China regarding the US claim that China's total award price requirement maintained as part of China's administration of the export quotas on bauxite, fluorspar, and silicon carbide is inconsistent with China's obligations in Article VIII:1 of the GATT 1994, because it constitutes a fee or charge imposed in connection with exportation and is not limited to the approximate cost of services rendered. We would like to make four points in response to the arguments China has raised in its submissions.

3. First, China's oral statement yesterday confirms that nothing remains of China's contention that the total award price falls outside the scope of Article VIII. As the United States has set forth, the total award price is a fee or charge imposed in connection with exportation that is not limited to the cost of services rendered. And, China has no response to this. Therefore, we urge the Panel to find that the total award price is inconsistent with Article VIII:1(a). Having no valid textual argument, China proceeds to offer distractions in the form of example mis-characterizations of the measures of other Members, and statements about the supposed implications of the Panel's finding.

4. Second, China contends without proper basis that the United States is a keen supporter of the use of auctions to allocate quotas. Even beyond the fact that US measures are not at issue here, none of the supposed examples presented by China in paragraphs 388-95 of its second written submission involve the use of auctions to allocate a quota – import or export. Accordingly, these "examples" – even if they were relevant to the Panel's assessment of China's measures – bear no relationship to the use of auctions to allocate a quota.

5. Third, China contends that the GATT 1994 does not prescribe a specific means of allocating a quota. But, this is beside the point. Even if China were correct that the GATT does not <u>prescribe</u> a particular means of allocating a quota, GATT 1994 Article VIII:1(a) <u>prohibits</u> a fee or charge imposed in connection with exportation that is not limited to the cost of services rendered. As the total award price requirement imposed by China is such a fee or charge, it is prohibited by the GATT 1994.

6. Fourth, while China had asserted in its second written submission that the WTO covered agreements neither prescribe nor condone any specific means of quota allocation, China contended in yesterday's oral statement that WTO Members have agreed on rules that discipline how quotas must be allocated, presumably in order to establish a basis for invoking Article XIII:2 of the GATT 1994 as context. China's reliance on Article XIII:2 is, in any event, misplaced. Not only is Article XIII:2 limited to import restrictions, it is silent on the question of fees. Furthermore, Article XIII:2 does not work even by analogy since it does not – to use China's terms – prescribe or condone any specific means of quota allocation.

II. ARTICLE XX(B) OF GATT 1994

7. Turning to China's defense under Article XX(b), China wants to rewrite Article XX(b) to allow GATT-inconsistent measures that are necessary for economic growth. But, that is not what Article XX(b) provides. Article XX(b) permits a GATT-inconsistent measure that is "necessary to protect human, animal or plant life or health." And, to respond to the point that China has both economic and environmental goals, we agree with China and the passage from the European Union document that China cites that these goals are not necessarily competing goals. However, that tells us nothing about whether China is acting in conformity with its WTO obligations. As we stated in our second written submission, the WTO rules provide a firm foundation for international trade and development; contrary to China's argumentation, China's pursuit of its economic objectives neither justifies China's breach of those rules nor provides a basis for reading the WTO Agreement so as to weaken or nullify those rules.

8. To briefly summarize another point in relation to the Article XX(b) defense, China's failure to analyze the downstream effects highlights our main point that a measure restricting only foreign users of raw materials is not in fact an environmental measure at all. Rather, it is a measure intended to benefit its domestic industry that uses the raw materials.

9. If China were concerned about the environmental effects of raw material production, it would adopt measures – such as production controls or pollution controls – that directly affect environmental effects of raw material production.

10. China's assertions of a comprehensive regulatory framework for environmental protection are not supported by the evidence. The export restraints are not part of any such framework. Furthermore, the existence of domestic environmental regulations – the effects and effectiveness of which China was not able to tell us today – is not sufficient to establish that such measures are not available as alternatives for purposes of Article XX(b). And, China's arguments to the contrary reflect a mis-reading of the Appellate Body report in *Brazil – Tyres*.

III. ARTICLE XX(G) OF GATT 1994

11. Our sessions yesterday and today were helpful in crystallizing important issues on Article XX(g).

12. China has conceded that its restrictions on fluorspar and bauxite prior to the introduction of the 2010 fluorspar and high alumina clay measures (2010 Measures) was not justified under Article XX(g). Accordingly, we heard China say that:

- The quota on fluorspar and the duties on bauxite were "withdrawn" in recognition of their WTO-inconsistency; and

- The duties on fluorspar and the quota on bauxite – as it is applied to high alumina clay – were WTO-inconsistent until the 2010 Measures took effect.

This means that the Panel's Article XX(g) review is limited now only to an examination of whether the 2010 Measures satisfy the requirements of Article XX(g).

13. This implicates the question of the Panel's terms of reference and how the 2010 Measures relate to the measures challenged by the complainants in this dispute. We have made our views clear today that the 2010 Measures may be considered as evidence to the extent they are relevant for

findings on the challenged measures as they existed on the date the DSB established this Panel.[6] We also made clear our view that the Panel could examine the 2010 Measures for purposes of making in-the-alternative or *arguendo* findings that the 2010 Measures do not, in any event, satisfy the requirements of Article XX(g).

14. The United States would like to focus on China's representation today that its 2010 Measures are the measures addressed to the conservation of resources while its export restraints are addressed at "allocating" those resources, once they have been produced. This underlies an important flaw in China's Article XX(g) argument: China focuses on presenting the question as one of allocating the shares of the resources. However, the disciplines at issue are addressed to the terms of trade in those resources, which must be non-discriminatory.

15. This also raises the issue of China's chapeau argument in the context of Article XX(g), which China articulated for the first time in its Second Oral Statement yesterday. We would like to make two points in response.

16. First, China tries to distinguish the Appellate Body's clear statement in *US – Gasoline* that the non-discrimination in the Article XX chapeau applies on not only an MFN basis but also a national treatment basis. China argues that *US – Gasoline* should be distinguished on the grounds that the measure at issue in *US – Gasoline* was an import restriction while the measures at issue in this dispute are export restraints. This is not a basis for making such a distinction.

17. Second, China argues that any resulting discrimination from the application of its measures is not unjustifiable discrimination because it is uniquely positioned as a "resource-endowed country that enjoys a sovereign right over natural resources found within its territory.[7] We would all be in trouble if it were true that China were unique in this way. But it is not true. And because it is not true, it would be detrimental to the multilateral trading system to endorse China's arguments on Article XX(g).

IV. CONCLUSION: CHINA'S LITIGATION STRATEGY

18. In concluding, the United States notes that, earlier today, China imputed to the United States a particular litigation "strategy." In fact, to the extent that we have a litigation "strategy," it is very straightforward:

- The United States did not bring this case lightly.

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[6] *See EC – Customs (AB)*, para. 186 ("We agree with the conclusion of the Panel that 'the steps and acts of administration that pre-date or post-date the establishment of a panel may be relevant to determining *whether or not a violation* of Article X:3(a) of the GATT 1994 *exists at the time of establishment*.'") (italics added); para. 187 ("[T]he Panel's review should therefore have focused on these legal instruments *as they existed and were administered at the time of establishment of the Panel*.") (italics added); para. 254 ("As we explained above, had the Panel properly identified the measures at issue, its task would have been to determine whether the measures at issue had been administered collectively in a uniform manner *at the time the Panel was established*, that is to say, in March 2005. In order to make this determination, the Panel could rely on *evidence* that pre-dated or post-dated the time of the Panel's establishment *to the extent that it was evidence relevant for the assessment of whether the European Communities acted consistently with Article X:3(a) at the time of the Panel's establishment*.) (third set of italics added; footnotes omitted); para. 259 ("In any event, although Exhibits EC-167, EC-168, and EC-169 might have arguably supported the view that uniform administration had been achieved by the time the Panel Report was issued, *we fail to see how these exhibits showed uniform administration at the time of the establishment of the Panel*.") (italics added).

[7] China's opening oral statement at the second panel meeting, para. 223.

- US industries using these resources have struggled under China's export restraints.

- We have raised our serious concerns regarding these export restraints with China many times, over many years.

- We devoted serious time and energy to trying to resolve our differences and concerns and to researching and reviewing China's measures – both the export restraints and any production measures – to try to understand the situation.

- When we could not resolve our concerns, we initiated a formal dispute at the WTO on these export restraints.

19. It is China that has deployed a clever litigation "strategy" here. By manipulating its export measures and introducing new measures, China has arranged a matrix of restraints and defenses to maximize its ability to find the one formula that will provide it with a roadmap to justify *all* of its export restraints – both the ones at issue in this dispute and the myriad export restraints China imposes that are not within the scope of this dispute. China has asserted:

- An Article XI:1 defense for a quota;

- An Article XX(g) defense for a quota;

- An Article XX(g) defense for a duty;

- An Article XX(b) defense for duties;

- An Article XX(b) defense for quotas; and

- An Article XX(b) defense for the combination of both a quota and a duty.

20. This strategy reinforces the *post hoc* nature of China's defenses. These restraints have existed for a long time. These defenses have existed in the GATT 1994 for a long time. And the goals served by these defenses have been present for an even longer time. However, China's efforts to justify these measures and to connect particular measures to particular defenses and goals are new – and presented for the purpose of this litigation. China has expressly acknowledged this today in the context of Article XX(g).

21. The United States asks the Panel to *see China's efforts for what they are* and to find accordingly. We thank you for your attention.

ANNEX B

SUBMISSIONS OF THE EUROPEAN UNION

ANNEX B-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE EUROPEAN UNION

1. China subjects the exportation of the Raw Materials to four types of restrictions: (a) export quotas; (b) export duties; (c) export licenses; and (d) minimum export price requirements. These export restrictions are incompatible with a number of provisions of the GATT and of China's Accession Protocol.

1. Export Quotas

2. China imposes export quotas on a number of Raw Materials. These export quotas are imposed through a number of measures, including China's Foreign Trade Law, Regulation on the Administration of the Import and Export of Goods, Measures for the Administration of Export Quotas, Measures on Export Quota Bidding and a number of administrative decisions, notices and announcements which, among other things, list the particular Raw Materials that are subject to export quotas each year, list the conditions for the allocation of the export quotas and describe the allocation of export quotas to particular enterprises.

3. The European Union considers that these export quotas are inconsistent with Article XI of the GATT. The European Union also considers that these export quotas are inconsistent with Article 1.2 of China's Accession Protocol, in combination with paragraphs 162 and 165 of the Working Party Report.

4. In addition, China fails to publish the total export quota amount for Zinc ores and concentrates, the conditions for the allocation of these export quotas and invitations for applicants interested to obtain such export quotas. The European Union considers that, through this practise, China effectively sets an export quota of zero quantity for Zinc ores and concentrates and, therefore, prohibits the exportation of Zinc ores and concentrates. The European Union considers that this is inconsistent with Article XI of the GATT and with Article 1.2 of China's Accession Protocol in combination with paragraphs 162 and 165 of the Working Party Report. If China allocates such export quotas to some enterprises, then China's failure to properly and timely publish the rules for the allocation and the invitation for applications is inconsistent with Article X:1 of the GATT.

5. China also fails to publish the total amount of the export quota for Coke. The European Union considers that this is inconsistent with Article X:1 of the GATT.

2. Allocation of quotas

6. The European Union considers that a number of conditions that China imposes on applicant enterprises in order to grant them export quotas are inconsistent with the GATT and China's Accession Protocol. These conditions include the following.

7. First, applicants must have achieved a certain volume of exports during the previous years. The European Union considers that this condition is inconsistent with Article 5.1 and Article 1.2 of China's Accession Protocol, in combination with paragraphs 83(a) and 83(d) of the Working Party Report. These provisions expressly provide that China should eliminate the "prior experience" requirement as a condition for the grant to enterprises of the trading right to export goods from China, including the Raw Materials.

8. In addition, this condition has the effect of preventing new applicants from obtaining an export quota (because new applicants would not have the requisite prior exportation experience). Foreign companies are more likely to be "new applicants", than Chinese companies. As a result, this condition restricts the foreign companies' trading rights to export the Raw Materials. For these reasons, the European Union considers that this condition is inconsistent with Article 5.2 and Article 1.2 of China's Accession Protocol in combination with paragraphs 84(a) and 84(b) of the Working Party Report.

9. Second, applicants must have a minimum registered share capital. The European Union considers that this condition is inconsistent with Article 5.1 and Article 1.2 of China's Accession Protocol, in combination with paragraphs 83(b), 83(d) and 84(a) of the Working Party Report. These provisions require China to eliminate the minimum registered share capital requirement, together with the examination and approval system for the grant of the trading right to export goods (including the Raw Materials) at the end of the "phase-in" period, i.e., the end of 2004.

10. Third, applicants must posses "business management capacity". China's authorities have the right to refuse the grant of export quotas to enterprises which, in the Chinese authorities' view, do not possess such "business management capacity". There is no definition of "business management capacity" in Chinese legislation. This condition is vague and opaque and allows the Chinese authorities unfettered discretion on whether to accept or refuse applications for export quotas. The European Union considers that this allows China to administer its export quota allocation system in a manner which is not consistent with GATT Article X:3(a).

3. Export duties

11. Article 11.3 of China's Accession Protocol provides that China would not impose any duties, taxes or other type of charges on the exportation of goods, with two exceptions: (a) export duties up to a certain expressly defined duty rate on a list of goods included in Annex 6 of China's Accession Protocol or (b) if such taxes and charges are applied in conformity with the provisions of Article VIII of the GATT 1994.

12. Despite these commitments, China imposes export duties on a number of Raw Materials which are not included in Annex 6 of China's Accession Protocol. By their very nature, these export duties do not fall within the scope of Article VIII of the GATT. For these reasons, the European Union considers that those export duties are inconsistent with Article 11.3 of China's Accession Protocol.

13. In addition, China imposes export duties on Yellow Phosphorus. This is one of the raw materials which is included in Annex 6 of China's Accession Protocol. However, the rate of export duty imposed on it exceeds the maximum rate of duty provided for in Annex 6. For this reason, the European Union considers that this export duty imposed by China on yellow phosphorous is inconsistent with Article 11.3 of China's Accession Protocol.

4. Export Licensing

14. China subjects the exportation of a number of Raw Materials to a non-automatic licensing obligation. The European Union considers that this non-automatic export licensing obligation is inconsistent with Article XI of the GATT and with Article 1.2 of China's Accession Protocol, in combination with paragraphs 162 and 165 of the Working Party Report.

15. In addition, China may refuse the grant of export licenses to particular enterprises on the basis of a number of criteria and conditions. These criteria and conditions include the Chinese authorities' assessment of the applicants' "management qualifications", as well as "other documents of approval" issued by China's Ministry of Commerce at its sole discretion. The Chinese authorities also have the discretion to require applicants to produce undefined "other documents" in support of their application. These criteria and conditions allow the Chinese authorities excessive discretion to accept or refuse applications for export licenses on the basis of non-objective justifications. This is why the European Union considers that these criteria and conditions are inconsistent with Article 5.1 and Article 1.2 of China's Accession Protocol, in combination with 83(d), 84(a) and 84(b) of the Working Party Report.

16. In the alternative to the previous claim, the European Union considers that China's failure to publish sufficient definitions and explanations on the interpretation of these criteria and conditions is inconsistent with GATT Article X:1.

17. Moreover and again in the alternative, the European Union considers that this nexus of vague and opaque criteria and conditions, together with the corresponding discretion allowed to the Chinese authorities, make China's administration of its export licensing system inconsistent with GATT Article X:3(a).

5. Minimum Export Price Requirement

18. China has set up a system whereby it controls the prices at which the Raw Materials are exported and ensures that exportation takes place only at a price equal or above a set minimum export price. This system is imposed through a number of measures, including the rules of operation of the relevant Chinese Chamber of Commerce, China's rules on export licensing and China's customs laws and regulations. The minimum export price system is enforced through (a) "*self-discipline*" among exporters, within the context of the operation of the relevant Chinese Chamber of Commerce; (b) penalties imposed by China's Ministry of Commerce; (c) China's export license issuing entities; and (d) China customs' authorities.

19. The existence of the minimum export price system has been confirmed by China's Ministry of Commerce in statements made and documents submitted in various court proceedings in the United States. It has also been confirmed by Chinese exporters and members of the relevant Chinese Chamber of Commerce in court proceedings in the United States. However, the operation of the minimum export price system is largely opaque, because it is based on rules that are not published.

20. China's legal framework on the minimum export price system is highly non-transparent. Although evidence demonstrates that certain measures related to the establishment and functioning of the minimum export price requirement do exist, they remain unpublished or were not published promptly. For example, the *2001 CCCMC Charter* was published only eight years after it came into effect. The European Union considers that China's failure to publish its laws, regulations, decisions and administrative rulings pertaining to the minimum export price requirement is inconsistent with Article X:1 of the GATT.

21. In addition, China administers the minimum export price system for yellow phosphorus through the enhanced enforcement procedure known as the "Price Verification and Chop" procedure. This procedure requires the participation of the CCCMC in the export clearance process. The European Union considers that CCCMC's role in verifying export contracts in the Customs clearance process and the danger of inappropriate flow of sensitive business information constitute unreasonable and partial administration which is inconsistent with Article X:3(a) of the GATT.

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

ANNEX B-2

OPENING ORAL STATEMENT OF THE EUROPEAN UNION AT THE FIRST SUBSTANTIVE MEETING

1. In addition to our views on the issues addressed in the joint oral statement, the European Union would like to clarify a few points of fact. These are points of fact underpinning both the European Union's claims and China's defence in the fields of Export Licenses and Export Quotas.

I. CHINA'S ASSERTIONS IN RELATION TO ITS EXPORT LICENCES

2. We begin with China's assertions in relation to its export licenses.

A. ARE CHINA'S EXPORT LICENSES AUTOMATIC OR NON-AUTOMATIC?

3. China asserts vigorously that its export licensing system is "automatic" (in paragraph 783). China includes in its first written submission official statements issued by the competent Chinese authorities and confirming that Chinese law does not allow its license issuing agencies any discretion to reject applications for export licenses (in paragraph 777). Official statements of the Chinese authorities confirm that Chinese law extends this "automaticity" to all goods subject to an export licensing requirement, irrespective of whether they are also subject to an export quota or not (in paragraphs 773 and 774).

4. China also provides official statements from its competent authorities stating that Chinese law allows its export license issuing agencies to perform only a review of a purely procedural nature (in paragraph 771). If the required documents are there, Chinese law obliges the agencies to grant the export license automatically. China asserts that its authorities have always granted all export licenses applied for, provided that the required documents were duly submitted together with the application (in paragraph 776).

5. China also asserts that Chinese law provides for an exhaustive list of documents that must be submitted together with the application (in paragraph 793) and that Chinese law does not allow its license issuing agencies any discretion to request additional documents (in paragraph 795).

6. The European Union welcomes these unequivocal official statements, issued by the competent Chinese authorities and interpreting the Chinese legislation and regulation in relation to China's export licenses. The European Union invites the Panel to incorporate these statements in its final Report to the DSB. The European Union notes that these statements have a legal importance, which was confirmed in the report of the panel in case DS152, known as *US – Section 301 Trade Act*.

7. If this was indeed the proper interpretation of China's regulation of its export licensing system, then the European Union would not have raised claims against it in the present dispute. The European Union has engaged in this dispute settlement procedure in good faith and with a view to resolve the dispute, as required by the DSU.

8. However, there are a few points of fact that seem to indicate that the story may not be as China presents it in its first written submission. The European Union would be most interested in hearing, together with the Panel and the other participants, China's explanations on the following points.

9. The first point is the relation between the provisions of Article 15 and Article 19 of China's Foreign Trade Law. These provisions draw a distinction between, on the one hand, "freely exported goods", which may be subject to automatic export licenses and, on the other hand, goods "subject to export restriction" through an export license. The only logical interpretation of these provisions is that the export licenses imposed on the second category of goods are not automatic. Otherwise, why would such a second category of goods exist?

10. China tries to argue that the word "restriction" in its legislation should not be interpreted as a "restriction" in the sense of the GATT. But we are not discussing the interpretation of the GATT at this stage. We are exploring a simple point of fact. Does the Chinese legislation treat differently the goods "subject to export restriction", from the goods that are "freely exported"? Are the export licenses provided for in Article 19 of the Foreign Trade Law as "automatic" as the export licenses provided for in Article 15 of the Law? Do the Chinese license issuing agencies have the discretion to refuse the grant of Article 19 licenses for different reasons than the Article 15 licenses? And, most importantly: the export licenses imposed on the Raw Materials at issue in this case, are they based on Article 15 or on Article 19 of the Law? We would be most interested to hear China's responses to these questions.

11. The second point that we would like to discuss is what is required by applicants in order to get an export license. China asserts in paragraph 816 of its first written submission that its law provides for an exhaustive list of documents to be submitted together with the application. But is this list of documents really exhaustive?

12. China provides a list of these documents in paragraphs 793 and 794 of its first written submission. The footnotes in these paragraphs refer to Article 11 of the Measures for the Administration of Export Licenses. They cover paragraphs 1 to 4 of Article 11. But, there is no reference to paragraph 7 of Article 11. And what does paragraph 7 say? It says that "for other goods subject to export licensing, the export licenses shall be issued on the basis of the documents of approval issued by the Ministry of Commerce".

13. The "other goods" are goods that are not subject to an export quota. In the present case this would cover Manganese and certain types of Zinc, as China acknowledges in paragraph 817 of its first written submission. But, what are these other "documents of approval issued by the Ministry of Commerce"?

14. China asserts in paragraphs 817 and 822 of its first written submission that none were required for Manganese and unwrought Zinc in 2010. But, which provision of Chinese law imposes a restriction on the Ministry of Commerce's discretion to expand that list of documents of approval for specific goods or for specific time periods, through the issuance of a new "Catalogue of goods subject to export licensing"? The European Union would welcome China's explanations on these points.

15. The third point that we would like to discuss is the discretion enjoyed by the Chinese export license issuing agencies in accepting or refusing to grant an export license. China asserts that Chinese law imposes on the licensing issuing agencies the obligation to perform a simple procedural review of the application materials. But, is this review really only procedural?

16. China accepts in paragraph 786 of its first written submission that the export license issuing agencies have the discretion to reject applicants that do not posses "business qualifications". The European Union had suggested a translation of that term as "management qualifications", but is happy to accept for purposes of our discussion today the translation offered by China.

17. China, in paragraphs 786 and 820, asserts that the only thing an applicant must do in order to satisfy the requirement for a showing of "business qualification" is to provide its business license and/or the document proving that it is authorised to perform import-export activities. Nothing else and nothing more.

18. The European Union has not seen an official statement from the competent Chinese authorities, publicly acknowledging that this is the interpretation to be given to the requirement for a showing of "business qualifications", or "management qualifications", or however China wishes to translate that term. If such a statement is made and incorporated into the report of the Panel, the European Union would be prepared to take it into consideration in good faith and in an effort to resolve the dispute.

B. CHINA'S ASSERTION IN FOOTNOTE 1111 OF ITS WRITTEN SUBMISSION

19. Another small point which we wish to clarify is China's statement in footnote 1111 of its first written submission. There, China states that the European Union has acknowledged in its first written submission the "fact" that "export licenses for all products at issue in this dispute have always been granted and within three days".

20. China's statement is evidently not correct. The European Union has never acknowledged and does not acknowledge today that China has always granted all requested export licenses.

21. China bases its statement on paragraph 162 of the European Union's first written submission. A simple read of that paragraph shows that the European Union is describing the provisions of China's Measures for the Administration of Export Licenses, which provide the time generally required for the issuance of an export license. There is no reference to the actual practice followed by the Chinese export license issuing authorities and no reference to their having always granted all requested export licenses.

II. CHINA'S ASSERTIONS IN RELATION TO ITS EXPORT QUOTAS

A. THE SITUATION WITH ZINC ORES

22. We now turn to China's assertions in relation to its export quotas. A first, small point of fact which we wish to clarify is the situation with Zinc ores and concentrates. China states in paragraphs 559, 641 and 740 of its first written submission that it has not "made effective" that export quota in 2010, or that "MofCom has not authorized for 2010 any quota for zinc".

23. The European Union would be grateful if China could explain the meaning of these statements. What does it mean not to have "made effective" an export quota? Does it mean that the exportation of the good is free and without restrictions? Or, does it mean that China acknowledges that it has imposed an export ban on Zinc ores and concentrates?

24. The European Union has raised a claim under Article X:1 of the GATT, because China has not published the export quota for Zinc ores and concentrates. China responds that it has not "omitted to publish the quota for zinc", because there is no quota for Zinc. The EU welcomes clarification from China regarding whether China has imposed an export ban on zinc ores and concentrates.

B. CHINA'S CLAIMS IN PARAGRAPHS 346 TO 349 OF ITS WRITTEN SUBMISSION

25. A more interesting point is raised by China's assertion that the European Union has not identified the Chinese measures which impose the export quotas (in paragraphs 346 to 349).

26. These assertions of China are probably the result of a misunderstanding. The European Union has provided in the Facts section of its first written submission a number of references to the Chinese laws, regulations, decisions, notices and announcements that subject the relevant Raw Materials to export quotas and regulate the administration, management and allocation of these export quotas.

27. The European Union's first written submission presents the facts relating to China's export quotas in 3 sections: first a general overview of the Chinese rules on the management of export quotas (in paragraphs 62 to 70), then a presentation of the Chinese rules for the management of the export quotas allocated directly (in paragraphs 71 to 90) and finally a presentation of the Chinese rules for the management of the export quotas allocated through bidding (in paragraphs 91 to 115). Throughout these sections there are numerous references to specific provisions of China's Foreign Trade Law; Regulation on the Administration of the Import and Export of goods; Measures for the Administration of Export Quotas; Measures on export quota bidding; and Implementation rules on export quota bidding. As mentioned in paragraph 199, the European Union challenges the consistence of all these provisions with the WTO Agreements.

28. But this is not all. The European Union's first written submission contains subsections for each Raw Material subject to an export quota. In each such subsection, there are references to the various Chinese Notices, Announcements and Communications through which the export quota is imposed and managed for each Raw Material. We shall spare the Panel and the parties and third parties from the torture of a recitation of all the footnotes in the European Union's first written submission and the numbers and titles of the corresponding Chinese legal provisions. A simple read of the relevant parts of the Facts section of the submission shows that the measures at issue in this dispute are clearly identified. Again, as mentioned in paragraph 199, the European Union challenges the consistency of all these provisions with the WTO Agreements.

29. However, if China considers that it has issued even more measures imposing export quotas on the Raw Materials, which the European Union has not mentioned in its submission, we would be happy if China could provide the Panel with a complete list. This list would be useful for the Panel's analysis of China's compliance with Article X:1 of the GATT.

C. THE SITUATION WITH COKE

30. Finally, a clarification is required on the facts relating to the Coke export quota. The European Union would like to thank China for clarifying the fact that it does not apply to Coke the general Measures for the Administration of Export Quotas (in paragraphs 737 and 738). The European Union would be grateful if China could provide copies of the provisions of Chinese law that govern the procedure for the determination of the total quantity of the Coke export quota.

31. China states that it does not determine the total amount of the Coke export quotas, before it invites interested enterprises to submit their application for an export quota. China states that it does not publish the total amount of Coke export quota before such invitation, because there is no total amount of Coke export quota to be published.

32. China has not provided copies of its legal provisions, or official statements from its competent authorities confirming the facts as described in its first written submission. If China provides such documentation, the European Union would be prepared to take it into consideration.

33. On a different point, the European Union notes that China raised an objection against that claim in paragraphs 31 to 35 of its written submission. China asserts that the European Union "did not include any statement in its Panel Request that could serve to identify the alleged omission to publish the amount for the export quota for Coke".

34. The European Union considers that these statements of China are probably the result of a misunderstanding. The European Union invites China to read the first paragraph of the European Union's Panel Request, where it is clearly stated that China "does not publish certain measures pertaining to the requirements, restrictions or prohibitions on exports". We consider that this language sufficiently shows that the European Union was raising a claim of non-publication of measures. The specific mention of zinc in the fourth paragraph of the Panel Request, for illustrative purposes, cannot be interpreted as an exclusion of all the other goods that are the subject of the current proceedings.

III. CONCLUSION

35. Mr. Chairman, members of the Panel, the European Union thanks you for your attention and patience.

ANNEX B-3

CLOSING ORAL STATEMENT OF THE EUROPEAN UNION AT THE FIRST SUBSTANTIVE MEETING

1. The European Union would like to thank the Panel and the WTO Secretariat for the opportunity to put its views forward in this dispute and to have a good discussion which we have enjoyed.

2. Further to agreeing with and supporting the views expressed by the United States of America in their closing statement, the European Union would like to make some brief comments on two points.

3. The first point relates to Article 6.2 of the DSU. The underlying theme or *leitmotiv* of this Article is to guarantee procedural fairness. This means in essence that the defendant should get a reasonable notice in the Panel Request about the claims in the dispute in order to allow for a proper preparation of the case. It became very clear that China did not suffer any prejudice in this case and was perfectly able to prepare its case properly. In the past, both the Appellate Body and Panels have been very generous and not thrown out claims in the absence of prejudice. The European Union thus urges this Panel to follow past practice and not to throw out any claims made in this dispute, as there has been no prejudice caused to the respondent in this case.

4. The second point that the European Union would like to make is to repeat the importance and systemic implications which is the subject of Question 8 in the set of questions put by the Panel to the parties in this dispute today.

5. The European Union cautions against an extended application of exceptions in the GATT 1994, specifically those found in Article XX of the GATT 1994, to non-GATT obligations. This will open the door to an extremely slippery slope. Thank you.

ANNEX B-4

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE EUROPEAN UNION

I. GENERAL ISSUES

1. China has acknowledged the WTO inconsistency of its export quotas on zinc ores and concentrates and most forms of bauxite, as well as of its export duties on manganese ores and silicon metal. China asserts that it has not imposed export quotas on fluorspar and export duties on bauxite and yellow phosphorus in 2010. The European Union considers that the Panel should make findings and issue recommendations on the WTO inconsistency of the export restrictions imposed on these goods too.

2. In addition, the European Union considers that the Panel should not exercise judicial economy on the claims based on China's Accession Protocol.

II. THE EUROPEAN UNION HAS ESTABLISHED *PRIMA FACIE* ALL ITS CLAIMS

A. EXPORT QUOTAS

3. Both objections raised by China against the European Union's claims on export quotas should be rejected. First, the European Union has properly identified in its first written submission the challenged export quotas and the Chinese legislative instruments which evidence the existence of the challenged export quotas. Second, Article XI:2(a) of the GATT is an affirmative defence, which China (and not the European Union) must invoke and establish.

B. EXPORT LICENSING

4. As a matter of fact, China's export licenses are non-automatic and discretionary. The export licenses are non-automatic because they are based on Article 19 and not on Article 15 of China's Foreign Trade Law. They are also discretionary, because of the provisions of Article 11(7) of the *Measures for the administration of export licenses* and Article 5(5) of the *Working rules on issuing export licenses.* A detailed analysis of the relevant Chinese legal provisions supports the European Union's arguments.

5. China's export licenses are incompatible with GATT Article XI and the provisions of China's Accession Protocol, because they are non-automatic and discretionary. The existence of that discretion is *by itself* the quantitative restriction, because it produces additional transaction costs and uncertainties that hinder trade. Therefore, there is no need to show that China has actually exercised the discretion.

6. In addition, China's failure to publish the definition and list of the documents provided for in Article 5(5) of the *Working Rules* and of the documents provided for in Article 11(7) of the *Measures* is inconsistent with Article X:1 of the GATT.

7. China's administration of its export licensing system is not consistent with Article X:3(a) of the GATT. First, the identified Chinese legislative instruments are administrative in nature and, therefore, can be challenged under Article X:3(a).

8. Second, the identified provisions create the *possibility* and the *danger* of an administration that is not uniform, impartial and reasonable. In accordance with the report of the panel in *Argentina – Hides*, an inherent *possibility*, or *danger* of a prejudice to some traders that *might* create a negative impact on traders is sufficient to establish *prima facie* a violation of Article X:3(a) of the GATT. This possibility and risk result from the absence of any definition of the conditions on the basis of which MOFCOM may require additional materials, or may issue special documents of approval in administering China's export licenses. This creates the inherent *danger* that different "other materials" may be required and different other "documents of approval" may be issued in relation to applicants that otherwise are in the same situation. Such administration does not satisfy the requirement of uniformity. The same set of facts result in an administration which does not satisfy the requirements of impartiality and reasonableness.

C. ADMINISTRATION OF EXPORT QUOTAS

9. First, China's administration of its export quota allocation system is inconsistent with China's Accession Protocol. China continues to impose as a prerequisite for participating in export quota allocation procedures the achievement of certain "levels of prior exports" and the existence of a certain "minimum registered share capital". China's Accession Protocol expressly provides that China must abolish these requirements. In addition, these requirements prevent foreign enterprises from participating in export quota allocation procedures: no foreign enterprise was awarded an export quota in 2009.

10. Second, China's administration of its system for the direct allocation of export quotas is inconsistent with Article X:3(a) of the GATT. China's authorities can reject applicants for lack of "operation capacity". This administration has been applied to Zinc ores and concentrates until 2005. However, the Panel should make findings on that administration's consistency with Article X:3(a) of the GATT for a number of reasons.

11. The Panel should also find that this administration is not consistent with Article X:3(a) GATT, because the notion of "operation capacity" has not been defined and, therefore, there is a danger that different export quota allocation authorities may apply it differently to applicants in identical situations. Such administration does not meet the requirements of uniformity, impartiality and reasonableness in the sense of Article X:3(a) of the GATT.

III. CHINA'S DEFENCES SHOULD BE REJECTED

A. GATT ARTICLE XI:2(A) DEFENCE

12. China's export quota on "refractory grade bauxite/high alumina clay" does not meet the conditions for the application of Article XI:2 (a) of the GATT. First, from a WTO law point of view, China's examples are irrelevant. They do not constitute subsequent practice of the signatories to an international agreement in the meaning of Article 31(3)(b) of the Vienna Convention. Second, China's interpretation of the notion of "essential products" is too broad and if accepted would render Article XX(j) of the GATT redundant. Third, China's interpretation of the notion of "critical shortage" is too broad and if accepted would render Article XX(g) of the GATT redundant. For the purposes of Article XI:2(a), a shortage is "critical" when it can be relieved or prevented through the application of temporary measures, pending the return to normal market conditions. The limited reserves of a good, by themselves, are not an element that can support a finding of "critical shortage", because such shortages cannot be prevented or relieved through temporary measures. Likewise, there is no evidence that China's regulatory framework, or potential but unrealised risks of technological problems or social unrest, have created a "critical shortage" in the sense of Article XI:2(a) of the

GATT. Fourth, China's measures are not "temporarily applied" and cannot "prevent or relieve" the "critical shortage". They cannot "prevent or relieve" the critical shortage from occurring, because they cannot stop the exhaustion of the reserves.

B. GATT ARTICLE XX DEFENCE

1. GATT Article XX cannot be invoked for violations under paragraph 11.3 Accession Protocol

13. China cannot justify violations of its obligations under paragraph 11.3 of its Accession Protocol by invoking Article XX GATT, because the defence is only available for GATT violations or if it has been incorporated by reference in the constituent part of another agreement. Contrary to paragraph 5.1, paragraph 11.3 of China's Accession Protocol does not contain such a reference but has its own exception clause in Annex 6 of the Accession Protocol instead. Also, paragraph 170 of the Working Party Report neither explicitly nor implicitly refers to any GATT exceptions or flexibilities. The fact that Article XX GATT cannot serve as a justification for violations outside GATT has most recently been confirmed by the Panel in *US – Poultry (China)*.

2. China's export duties and quotas are not justified by Article XX(g) of the GATT

14. The European Union maintains that China has not demonstrated that its export duties on fluorspar and its export quotas on bauxite satisfy the criteria of Article XX(g) of the GATT.

15. In relation to its export duties on fluorspar, China has not shown, firstly, that its measures were related to the conservation of natural resources; secondly, that they form part of a comprehensive set of measures relating to the conservation of fluorspar; and, finally, that they were made effective in conjunction with restrictions on domestic production or consumption as envisaged by Article XX(g) of the GATT.

16. In the opinion of the European Union, the export duties that China maintains on fluorspar do not satisfy the "relating to" requirement envisaged in the text of Article XX(g) of the GATT. Moreover, the *Notice Regarding the 2009 Tariff Implementation Program* which imposes the export duties on fluorspar does not contain any evident causal link to the objective of the conservation of "exhaustible natural resources".

17. The European Union also maintains that the challenged export duties on fluorspar do not form part of a "*comprehensive set of measures relating to the conservation of fluorspar*", and that China's export duties are not made effective in conjunction with restrictions on domestic production or consumption. The only measures which specifically relate to fluorspar in the list of thirteen measures which China considers to "*manage the supply, production and use*" of fluorspar, came into being only after this Panel was established. Also, China's interpretation of "*even-handedness"* (i.e. treatment of domestic and foreign users of the raw materials in an "*even-handed*" manner) is not in line with the interpretation of this term by the Appellate Body in *US – Gasoline* and *US – Shrimp*.

18. Consequently, the European Union maintains that China has not established that the export duties it imposes on fluorspar satisfy the requirements of Article XX(g) of the GATT.

19. In relation to the export quota on bauxite, China fails to establish, firstly, that its measures relate in any way to the conservation of exhaustible resources; and, secondly, that they form part of a comprehensive set of measures relating to the conservation of bauxite; and, finally, that they are taken in conjunction with restrictions on domestic production and consumption.

20. Firstly, the specific Chinese measure which sets the export quotas for bauxite in 2009, that is the "Ministry of Commerce Announcement Regarding 2009 Agricultural and Industrial Products Export Quota Amounts (Announcement No. 83 of 2008)" merely announces the fact that the 2009 quota figures for agricultural and industrial product exports have been released, and that MOFCOM will accept applications for these quotas. There is no reference made, directly or indirectly, that the quotas imposed on bauxite relate in any way to the objective of conservation of a natural resource.

21. Secondly, the European Union maintains that most of the thirteen measures which China presents as its "*conservation policy for refractory-grade bauxite*" are of a general regulatory or fiscal character having no link to the export quotas that China imposes on bauxite.

22. Thirdly, some measures which China considers as forming part of its "*conservation policy for refractory-grade bauxite*" were enacted after this Panel's establishment. In the opinion of the European Union, China's export quotas on bauxite are not "*made effective in conjunction with restrictions on domestic production or consumption*", and thus do not satisfy the requirements of Article XX(g) of the GATT.

3. Export duties and quotas are not justified by Article XX(b)

23. In the opinion of the European Union, China's export duties on zinc scrap, magnesium metal scrap and manganese metal scrap, its export duties on coke, magnesium metal and manganese metal, and its export quotas on coke and silicon carbide cannot be justified under Article XX(b) of the GATT. Firstly, these restrictions do not meet the "*necessity*" test as established by panels and the Appellate Body in relation to Article XX(b) of the GATT, as they make no "material contribution" nor are they " apt to make a material contribution to the protection of human, animal or plant life or health". The European Union also maintains that there are reasonably available WTO-consistent alternative measures that China could have taken to protect health.

24. With regard to export duties on zinc scrap, magnesium metal scrap and manganese metal scrap, there is no evidence that China's objective for the imposition of the export duties was really that of reducing health risks which are associated with pollution. In particular, the asserted policy to increase secondary production through a "tax" on scrap cannot support or even make a "material contribution" towards China's supposed health objective.

25. Likewise, the European Union maintains that the export duties on coke, magnesium metal and manganese metal do not result in a decrease in the production of these raw materials and, on that basis, any reductions in pollution associated with their production, as China argues. Thus these measures are not "necessary" within the meaning of Article XX(b) of the GATT.

26. The European Union also submits that China's export quotas on coke and silicon carbide are not "*necessary"* to protect human, animal, plant life or health within the meaning of Article XX(b) of the GATT. The European Union challenges China's assertions that the export quotas on coke and silicon carbide "*make a material contribution*", or "*are apt to make a material contribution*" to the objective of health protection in China. It is also of the opinion that they are not based on any hard evidence, but merely on economic hypothesis which can be easily disproven.

4. Export duties and quotas do not satisfy the criteria of the *chapeau* of Article XX GATT

27. Finally, in the opinion of the European Union, China has not established that it meets the criteria for any of the elements of the *chapeau* and, thus it believes that China has failed to meet its burden under the *chapeau* of Article XX of the GATT.

ANNEX B-5

EXECUTIVE SUMMARY OF THE OPENING AND CLOSING ORAL STATEMENTS OF THE EUROPEAN UNION AT THE SECOND SUBSTANTIVE MEETING

I. GENERAL POINTS RAISED BY CHINA'S SECOND WRITTEN SUBMISSION

A. "ABANDONED CLAIMS"

1. The fact that a complaining party does not repeat a claim at a particular stage of the proceedings does not mean that the party has withdrawn that claim (*EC - Selected Customs Matters*, para. 7.42).

B. THE BURDEN OF ESTABLISHING THE CONDITIONS OF ARTICLE XI:2(A)

2. China bears the burden of establishing the conditions of Article XI:2(a). In the past the Appellate Body and the panels have never required that a complainant needed to plead and prove Article XI:2(a) nor considered that e.g. XI:2(b) and XI:2(c) must be invoked and proven by the complaining party in order to establish a *prima facie* violation of Article XI:1 GATT. It is up to the defendant to plead and prove Article XI:2(a) GATT, if he so wishes.

C. THE IRRELEVANCE OF THE BOP-UNDERSTANDING FOR THE INTERPRETATION OF ARTICLE XI:2(A) GATT

3. The important difference in the scope of the *Understanding* and Article XI:2(a) is that Article XI:2(a) allows the *imposition* of trade restrictions, while Articles XII:3 and XVIII:10 GATT together with the *Understanding* allow the *removal* of trade restrictions. Therefore, the *Understanding* and Article XI:2(a) pursue opposing objectives. A broader definition of "essential products" in Article XI:2(a) leads to *more* restriction on trade, a broader definition of "essential products" in the *Understanding* leads to *fewer* restrictions on trade. Consequently, a potential common definition of "essential products" would lead to an incoherent application of the GATT.

D. THE IRRELEVANCE OF ARTICLE XXXVI:5 GATT FOR THE INTERPRETATION OF ARTICLE XI:2(A) GATT

4. The European Union (EU) does not express any view on whether China qualifies as a developing country. The use of Article XXXVI:5 as relevant context for the interpretation of Article XI would create a systemic problem: Article XI applies to all WTO Members, whereas Article XXXVI:5 relates only to developing countries. If Article XXXVI:5 could serve as "relevant context" for the interpretation of Article XI, this would lead to a different level of obligations under Article XI GATT depending on the classification of the Member in question. China cannot rely on a 1989 GATT Secretariat note circulated during the Uruguay Round Negotiations in the light of note TN/CTD/W/33 circulated on June 8, 2010.

E. THE PROPER INTERPRETATION OF ARTICLE X:3(A) GATT

5. The EU challenges China's "administration" of its export quota allocation system and export licensing system, i.e., the application by China of its relevant laws and regulations. E.g., the EU challenges the broad and unfettered discretion enjoyed by China's authorities in interpreting the notion of "operating capacity", when they select the enterprises that will be directly allocated an export

quota. The Appellate Body in *EC – Selected Customs Matters* does not require a complaining party to show that the elements of the defending party's "administration of laws" and regulations, such as those identified by the EU, must "*necessarily*" lead to an administration which is non-uniform, partial or unreasonable, in order to establish a violation of Article X:3(a) of the GATT.

II. CHINA'S GATT ARTICLE XX DEFENCES

A. APPLICABILITY OF THE ARTICLE XX GATT EXCEPTIONS TO PARAGRAPH 11.3 ACCESSION PROTOCOL

6. Paragraph 11.3 of China's Accession Protocol does not contain any direct or indirect incorporation of Article XX GATT, therefore violations by China of its obligations pursuant to paragraph 11 of the Accession Protocol cannot be justified by recourse to Article XX GATT.

B. CHINA'S DEFENCE UNDER ARTICLE XX(G)

7. Export restraints are not "*part and parcel*" of China's other measures which limit the supply of bauxite and fluorspar. The measures imposing the export duties on fluorspar and the quotas on refractory-grade bauxite, do not "*relate to"* conservation. The meaning of the phrase "*relating to"*, has been interpreted by the Appellate Body as meaning that a measure must be "*primarily aimed at"* the conservation of exhaustible natural resources in order to fall within the scope of Article XX(g). China's measures imposing export restrictions on fluorspar and bauxite are not targeted or "*primarily aimed at*" the goal of conservation of natural resources.

8. References to the Preamble of the WTO Agreement, the principle of sustainable development, as well as to other references and statements made in various international environmental fora, declarations or agreements have no relevance to the issue of whether the disputed measures satisfy the criteria established by Article XX(g) GATT. Chinese export restrictions were not made "*in conjunction with"* domestic restrictions on extraction or production. The "*timing"* of the domestic restrictions makes it obvious that the exclusive motivation has always been to pursue certain industrial policy objectives. China's "*conservation policies*" are made up of a number of unconnected measures, taken over a number of years, the majority of which do not even make a reference to fluorspar or bauxite. The only measures specifically referring to fluorspar and bauxite are the 2010 domestic restrictions on the mining and processing of fluorspar and "*refractory-grade bauxite*", introduced well after the establishment of this panel.

9. The EU's interpretation of the "even-handedness" requirement genuinely reflects the Appellate Body's interpretation in *US - Gasoline*.

10. China is not presenting any evidence on the quantitative effects of its measures on export and domestic consumption, which would allow an assessment of "even-handedness". The export duty on fluorspar constitutes an extra burden, as no export duty is paid by fluorspar users in China. Article XXXVI:5 and its Ad Note have no relevance to the correct interpretation of GATT Article XX(g).

C. CHINA'S DEFENCE UNDER ARTICLE XX(B)

11. The different environmental protection laws and regulations listed by China do not form a "*comprehensive environmental protection framework"* and have no causal link with, or relevance to, the export duties and quotas. They are made-up of *post-hoc* "environmental defences".

12. Statistics prove that production of the raw materials at issue in China has actually increased over the last five years. China is basing its ("*but-for*") defence on economic theories, developed or adjusted for this dispute which are flawed in many ways. China's whole case rests on the attempt to convince the Panel that because some economic studies say so, the export duties and quotas imposed do actually make (or "are apt to make") a "material contribution" towards China's goal of health protection - and that therefore they are "necessary" within the meaning of GATT Article XX(b). It remains unclear why actual data from the years in which China's export restrictions were already in place was completely ignored for the studies presented. The European Commission document cited by China actually states that "*scrap recovery for manganese was negligible"*. The 12-25% range quoted is in reality the percentage content of manganese found in "old scrap" of steel slag.

D. REASONABLY AVAILABLE ALTERNATIVES

13. The alternatives proposed by the co-complainants do not carry any of the risks mentioned in *Brazil – Retreaded Tyres*. There are more effective ways in which China can achieve its desired goal of protection of animal or plant life or health. The pollutants emitted from the processing of raw materials do not differentiate between raw materials intended for export or for domestic use.

E. THE REQUIREMENTS OF THE CHAPEAU OF GATT ARTICLE XX ARE NOT MET BY CHINA

14. The requirements of the Article XX *chapeau* must not be confused with those of Article XXXVI:5 of the GATT, with the customary norm of sovereignty over natural resources or with China's position as a "*developing country"* and "long-term economic growth" aims. China has failed to demonstrate that it meets the requirements of the *chapeau* and of sub-articles (b) and (g) of GATT Article XX.

III. CLOSING STATEMENT AND CONCLUSION

A. POINTS OF FACT

15. Several points of fact raised by China over the course of the hearing required further comment: The administration of China's export quota allocation system for zinc ores and concentrates until 2006 involved the application of the "operating capacity" criterion (para. 329 opening statement). Through this admission, China in essence acknowledges that it administered its laws and regulations as challenged by the EU under X:3(a) GATT. In *EC-Biotech* the panel confirmed that panels have the authority to make findings relating to measures expired even before the establishment of the panel (para. 7.1306). Contrary to China's statement (para. 339 opening statement) exhibit JE-82 lists the "foreign-invested enterprises" that received a coke quota in 2009. They are not "foreign companies", in the sense of paragraph 5.2 of the Accession Protocol and paragraphs 84(a) and 84(b) of the Working Party Report. Thus, no foreign company or individual has been allocated a Raw Material export quota. Further documents (para. 346 opening statement) in connection with a note to Appendix 1 of the 2010 Catalogue of goods subject to export licences call upon the panel to make the requested findings.

B. CHINA'S LEGAL INTERPRETATIONS

16. Regarding the legal interpretation presented by China over the course of the hearing it has to be clarified that the terms of Article XI:2(a) GATT must not be interpreted in a manner that would diminish the fundamental principles of Article XI:1 to nullity. An exception cannot be applied as to "frustrate or defeat" the basic rights and obligations set out in the substantive rules of the GATT (*US - Gasoline*, WT/DS2/AB/R, p. 22). The SPS Agreement is not relevant for the interpretation of

Article XI:2(a) GATT. Important differences between the texts of the SPS Agreement and Article XI:2(a) make it impossible to transpose principles of the former to the interpretation of the latter.

17. The EU did not state, as China alleged, that other WTO Members have a right to a share of China's natural resources. According to Article XX(g) GATT non-Chinese users have a right to be treated in an equitable, fair or even-handed manner when *trading* with China in these raw materials. Finally, regarding the "necessity" standard required by the Appellate Body under Article XX(b) GATT China has failed to prove that the export restrictions it has imposed have made a material contribution to the alleged decline of pollution levels resulting from EPR production (para. 277 opening statement).

18. The *leitmotiv* which could be drawn from China's replies to the Panel questions was that it gave unspecific, speculative, even random-sounding answers to the questions raised.

ANNEX C

SUBMISSIONS OF MEXICO

ANNEX C-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF MEXICO

I. INTRODUCTION

1. Despite China's commitments to limit or eliminate the use of export restraints during the course of its negotiations to accede to the WTO, China's export restraints have proliferated in number and kind. China now subjects over 600 items to non-automatic licensing and over 350 items to export duties. These export restraints have become increasingly restrictive over time; export quota amounts have decreased while export duty rates have increased.

2. The products subject to the export restraints at issue in this dispute are various forms of bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus, and zinc (together the "Raw Materials"). At issue in this dispute are four types of restraints that China imposes on the exportation of the Raw Materials: (1) export duties; (2) export quotas; (3) export licensing; and (4) minimum export price requirements. Each type of export restraint, including in some cases its administration, is inconsistent with China's obligations under the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and China's Protocol of Accession to the WTO ("Accession Protocol"), which incorporates commitments made by China in the Report of the Working Party on China's Accession to the WTO ("Working Party Report").

II. FACTUAL BACKGROUND

A. CHINA'S POLICIES FOR DEVELOPING AND PROMOTING ITS DOMESTIC INDUSTRY RELY ON RESTRAINING THE EXPORTATION OF RAW MATERIALS

3. China's economic development is guided and directed by various plans and policies formulated and issued by the central government, including the *Five Year Plans for National Economic and Social Development*. Over the period of the tenth and eleventh Five-Year Plans, spanning the years 2001 to the present, China has achieved remarkable progress in its industrial growth and development. This growth, however, comes at the expense of the rest of the world. China's production of industrial raw materials and processed goods has increased dramatically. China's exports of processed, value-added goods have also increased. However, China's exports of industrial raw materials have decreased.

4. These trends are the result of a deliberate strategy that China employs to optimize the conditions for realizing its economic and industrial ambitions. China's industrial strategy is to leverage and exploit the differences in the international and domestic markets for raw materials and downstream, processed products, using restraints on exports as the linchpin. The export restraints that China imposes on the Raw Materials are part of this industrial policy, which is predicated on advantaging China's domestic producers and industries, but distorts the international economic marketplace and is inconsistent with China's WTO obligations.

B. THE RAW MATERIALS

5. The nine industrial raw materials subject to the various export restraints imposed by China – bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus, and zinc – are either naturally occurring minerals or materials that have undergone some initial processing. China is a leading global producer of all nine of these raw materials, which renders

China's restraints on their exportation particularly distortive for non-Chinese consumers of these raw materials and of the products manufactured from them.

C. EXPORT DUTIES

6. China's obligations under paragraph 11.3 of Part I of the Accession Protocol require that China not impose export duties on products that are not listed in Annex 6 of the Accession Protocol. These obligations also require China to limit any export duties imposed on products that are listed in Annex 6 to the rates provided therein.

7. However, China imposes export duties on various forms of bauxite, coke, fluorspar, magnesium, manganese, silicon metal, and zinc[1], even though none of these materials is listed in Annex 6. In addition, China also imposes export duties on yellow phosphorus (which is listed in Annex 6) at a rate that exceeds the maximum rate provided in Annex 6.

D. NON-AUTOMATIC EXPORT LICENSING FRAMEWORK

8. China restricts the exportation of various forms of bauxite, coke, fluorspar, manganese, silicon carbide, and zinc by subjecting their exportation to non-automatic export licensing.[2] MOFCOM, together with Customs, formulates, adjusts, and publishes a catalog listing all goods whose exportation is designated for restriction. Exportation of such goods requires approval by MOFCOM and is subject to export licensing that is, accordingly, not automatic.

9. Non-automatic export licensing (all references to "export licensing" hereinafter mean non-automatic export licensing) is the framework through which China imposes and administers the export quotas for bauxite, coke, fluorspar, silicon carbide, and certain forms of zinc, as discussed below. For these products, the non-automatic export licensing requirements function as a restriction on exportation additional to the restriction effected by the export quotas. Manganese and certain forms of zinc are subject to non-automatic licensing, but not quotas.

E. EXPORT QUOTAS

10. China restricts the exportation of various forms of bauxite, coke, fluorspar, silicon carbide, and zinc by subjecting the exportation of these materials to export quotas or prohibitions.[3] China maintains two systems for allocating export quotas: direct allocation or a quota bidding system. The export quotas on coke and zinc are allocated "directly". The export quotas on bauxite, fluorspar, and silicon carbide are allocated through a bidding system.

11. MOFCOM is responsible for setting the total amount of export quotas of the following year no later than October 31 of each year, distributing export quotas, evaluating applications for export quotas, determining whether to grant quotas, and in collaboration with Customs, is responsible for formulating, adjusting, and publishing a catalog listing all goods subject to export quota. MOFCOM

[1] For purposes of the discussion of China's export duties, the terms "bauxite", "coke", "fluorspar", "magnesium", "manganese", "silicon metal", "yellow phosphorus", and "zinc" cover the forms of each of these Raw Materials listed in Chart of Raw Materials Subject to Export Duties (Exhibit JE-5).

[2] For purposes of the discussion of China's non-automatic export licensing, the terms "bauxite", "coke", "fluorspar", "manganese", "silicon carbide", and "zinc" cover the forms of each of these Raw Materials listed in Chart of Raw Materials Subject to Export Licensing and Quotas (Exhibit JE-6).

[3] For purposes of the discussion of China's export quotas, the terms "bauxite", "coke", "fluorspar", "silicon carbide", and "zinc" cover the forms of each of these Raw Materials listed in Chart of Raw Materials Subject to Export Licensing and Quotas (Exhibit JE-6).

must approve the exportation of the goods listed in the catalog as subject to quota before they can be exported. Entities that are approved to export under the quotas are issued a certificate of quota. Only after an exporter obtains a certificate of quota can that exporter export the relevant products.

12. While China publishes the annual quota amounts for most products subject to quota, China did not publish the annual quota amount for coke. China instead publishes notices during the year announcing that MOFCOM is distributing the export quota on coke to specific enterprises. China has not published any quota amount in relation to the export quota on zinc in 2009.

13. ***Coke Export Quota Application Process.*** China requires enterprises to apply to receive an allocation of coke under the export quota for a given year in October of the previous year. As part of that application process, China requires enterprises to satisfy certain criteria in order to be eligible to receive an allocation under the quota. Those criteria include having exported a certain amount of coke in previous years, and in the case of certain enterprises, having a certain minimum registered capital. Applicant enterprises who do not satisfy the requisite criteria are not permitted to export coke under the quota. China also requires enterprises applying to export coke under the quota to submit a number of documents including prior export invoices.

14. China empowers the CCCMC with responsibility for reviewing and evaluating the applications of enterprises seeking to export coke under the quota. Ultimately, MOFCOM publishes the list of all companies that satisfy the eligibility criteria on the basis of the CCCMC's advice.

15. In addition, MOFCOM administers different application processes for Chinese enterprises and foreign-invested enterprises. While the 2009 application procedures for foreign-invested enterprises do not appear to be published, the measures allocating portions of the quotas to foreign-invested enterprises in 2009 make clear that such enterprises are subject to an application and approval process for the coke export quota.

16. ***Zinc.*** While China also imposes export quotas on zinc, China has not published any measures in 2009 announcing the quantities of zinc that may be exported under the quota or any measures setting forth application procedures for enterprises seeking to export under the quota.

17. ***Export Quota Bidding.*** China allocates the export quotas on bauxite, fluorspar, and silicon carbide through a bidding process. Enterprises seeking to export the materials subject to the bidding procedure are required to satisfy certain eligibility criteria in order to participate in the bidding process including criteria relating to minimum registered capital and prior export experience. The enterprises that satisfy such criteria and participate in the bidding process must submit a bid price and bid quantity for the material they are seeking to export. China then awards portions of the quota beginning with the bidding enterprise that submits the highest bid price. The enterprises that are awarded a portion of the quota must pay a "total award price" (*i.e.*, the enterprise's bid price multiplied by its bid quantity) in order to export.

18. MOFCOM has established Bidding Offices composed of *inter alia* representatives of the CCCMC to administer aspects of the bidding process. The Bidding Office's – and therefore the CCCMC's – responsibilities include reviewing the applications of bidding enterprises to determine whether they satisfy the requisite eligibility criteria. Applicant enterprises are also required to submit certain documents including a balance sheet and income statement, and information including registered capital, net profit, and prior export volumes and values.

F. EXPORT LICENSING ADMINISTRATION AND REQUIREMENTS

19. China controls and restricts the exportation of bauxite, coke, fluorspar, manganese, silicon carbide, and zinc through an export licensing system that conditions the issuance of licenses and the usage of those licenses in various ways.[4]

20. There are three types of export licenses, which determine where and how many times a particular license can be declared and used. Licenses must be obtained from particular license issuing entities depending on the product being exported and/or the type of exporter applicant. Export license issuing entities review applications based on a variety of factors and documents including documents of approval issued by MOFCOM in addition to the export contracts, exporter management qualifications, and other materials to be submitted, none of which are further identified or defined in the *Export Licensing Rules* or related licensing measures. Export licensing entities and individual staff members of such entities are subject to sanctions for violating the rules and regulations applicable to export license issuance.

G. MINIMUM EXPORT PRICE REQUIREMENT

21. China restrains the exportation of bauxite, coke, fluorspar, magnesium, silicon carbide, yellow phosphorus, and zinc by imposing a minimum price requirement on their exportation.[5] China implements this restraint through a non-transparent system. Based on statements made by China and documents submitted by Chinese exporters in US courts, it appears that export prices that are set by the CCCMC are observed by exporters through an official "system of self-discipline" and further reinforced through the availability of penalties imposed by MOFCOM, and through China's licensing authorities and Customs.

III. LEGAL DISCUSSION

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

22. Paragraph 11.3 of the Accession Protocol contains a commitment by China to "eliminate all taxes and charges applied to exports" except in two specific situations: (1) where the taxes and charges are covered by Article VIII and applied consistently with the requirements of Article VIII; and (2) where the taxes and charges are imposed on products listed in Annex 6 at a rate less than or equal to the *ad valorem* percentage specified for those products in Annex 6.

23. China imposes "temporary" export duties at *ad valorem* rates ranging from 10 to 40 per cent on various forms of bauxite, coke, fluorspar, magnesium, manganese, silicon metal, and zinc. These duties are charges applied to exports that are termed "export duties" in China's measures. The export duties resulting from the application of these duty rates are not applied "in conformity with the provisions of Article VIII of the GATT 1994" because export duties do not fall within the scope of that Article. Furthermore, none of the products on which these export duties are imposed is listed in Annex 6. Accordingly, China's maintenance of these temporary export duties is inconsistent with China's commitment under paragraph 11.3 of the Accession Protocol.

[4] As set forth above, for purposes of the discussion of China's non-automatic export licensing, the terms "bauxite", "coke", "fluorspar", "manganese", "silicon carbide", and "zinc" cover the forms of each of these Raw Materials listed in Chart of Raw Materials Subject to Export Licensing and Quotas (Exhibit JE-6).

[5] *See* Chart of Raw Materials Subject to Minimum Export Prices (Exhibit JE-7) for products subject to minimum export price requirements.

24. China also imposes a "regular" *ad valorem* export duty at a rate of 20 per cent on yellow phosphorus. In addition to this regular export duty, China imposes a "special" export duty rate for yellow phosphorus to 50 per cent, resulting in a total export duty rate of 70 per cent effective 1 January 2009. The export duty resulting from the application of these duty rates to exports of yellow phosphorus is explicitly excluded from the coverage of Article VIII of the GATT 1994. The maximum *ad valorem* export duty rate permitted to be applied to yellow phosphorus under Annex 6 is 20 per cent. Accordingly, the export duty rate of 70% applied to the exportation of yellow phosphorus is inconsistent with China's commitment under paragraph 11.3 of the Accession Protocol.

B. CHINA'S EXPORT QUOTAS ARE INCONSISTENT WITH CHINA'S OBLIGATIONS UNDER ARTICLE XI:1 OF THE GATT 1994

25. Article XI:1 of the GATT 1994 explicitly prohibits Members from instituting or maintaining a restriction or prohibition made effective through a quota on the exportation of any product. However, China subjects the exportation of various forms of bauxite, coke, fluorspar, silicon carbide, and zinc to quotas. These export quotas are therefore in breach of China's obligations under Article XI:1 of the GATT 1994. As China subjects the exportation of zinc to a quota, but does not publish any export quota for zinc, China effectively sets the export quota for zinc at zero. As a result, China prohibits the exportation of zinc, in contravention of Article XI:1 of the GATT 1994.

26. China's export quotas on bauxite, coke, fluorspar, silicon carbide, and zinc are also inconsistent with paragraphs 162 and 165 of the Working Party Report, which contain enforceable commitments with respect to the elimination of export restrictions.

C. CHINA'S ADMINISTRATION AND ALLOCATION OF ITS EXPORT QUOTAS IS INCONSISTENT WITH CHINA'S OBLIGATIONS UNDER THE ACCESSION PROTOCOL, THE WORKING PARTY REPORT, AND THE GATT 1994

27. ***Trading Rights***. China's commitments under paragraph 5.1 of Part I of the Accession Protocol and paragraphs 83 and 84 of the Working Party Report (commonly referred to as China's "trading rights" commitments), require China to give all foreign enterprises and individuals, as well as all enterprises in China, the right to export most products. Furthermore, China explicitly committed to eliminate its examination and approval system and to eliminate certain eligibility criteria for obtaining or maintaining the right to export including criteria relating to prior export experience and minimum registered capital. However, in its administration of the quotas for coke, which is directly allocated, and the quotas for bauxite, fluorspar, and silicon carbide, which are allocated through a bidding process, China breaches these commitments by impermissibly requiring exporters to satisfy certain criteria in order to be eligible to receive an allocation of the coke quota or participate in the quota bidding process.

28. ***Partial and Unreasonable Administration***. China's administration of its export quotas is also inconsistent with Article X:3(a) of the GATT 1994, which requires Members to administer certain measures described in Article X:1 in a "uniform, impartial and reasonable manner."

29. China empowers a private party B the CCCMC B to have direct involvement in the administration of the export quota on coke, which is allocated directly, and the export quotas on bauxite, fluorspar, and silicon carbide, which are allocated through the bidding system. The CCCMC evaluates enterprises' applications to export under the quota and determines whether they satisfy the relevant eligibility criteria. In that role, the CCCMC also obtains access to sensitive and confidential information, including past export invoices in the case of the coke quota, and balance sheets and income statements in the case of the export quotas allocated through bidding. The involvement of the

CCCMC – an association of private commercial participants in a common industry – renders China's administration of these export quotas partial and unreasonable in contravention with Article X:3(a) of the GATT 1994.

30. ***Total Award Price***. Article VIII:1(a) of the GATT 1994 prohibits "fees and charges of whatever character . . . imposed . . . on or in connection with exportation" where such fees are not "limited in amount to the approximate cost of services rendered...". Enterprises that are awarded a portion of the export quota for materials subject to quota bidding are required to pay a total award price in order to export the materials. The total award price therefore constitutes a "fee or charge of whatever character . . . imposed . . . in connection with . . . exportation" within the meaning of Article VIII:1(a). The total award price is also not limited to the approximate cost of services rendered. Thus, the total award price is inconsistent with China's obligations under Article VIII:1(a) of the GATT 1994. The total award price is also inconsistent with paragraph 11.3 of the Accession Protocol as a "tax or charge" imposed on the exportation of products that are not listed in Annex 6.

D. CHINA'S EXPORT LICENSING FOR PRODUCTS SUBJECT TO RESTRICTED EXPORTATION IS INCONSISTENT WITH CHINA'S OBLIGATIONS UNDER ARTICLE XI:1 OF THE GATT 1994 AND PARAGRAPHS 162 AND 165 OF THE WORKING PARTY REPORT

31. China uses licensing to subject the exportation of designated products to restriction. China identifies such goods on a positive list of products subject to export licensing published annually. The list that China published for 2009 includes various forms of bauxite, coke, fluorspar, manganese, silicon carbide, and zinc, indicating that the exportation of these products is designated by the state as restricted. Furthermore, the export licensing required to export the these restricted products is not automatic. In contrast, China also maintains an automatic export licensing system. Article 15 of the *Foreign Trade Law* instructs MOFCOM and its partner institutions to grant approval whenever exporters seeking to export the unrestricted goods subject to automatic licensing apply for the automatic licenses. However, for goods whose exportation is designated for restriction, MOFCOM is not required to grant its approval to applicant exporters and is authorized to impose various conditions on their exportation.

32. Export licensing is thus a measure that restricts the exportation of these products in breach of China's obligations under Article XI:1 of the GATT 1994. Paragraphs 162 and 165 of the Working Party Report contain enforceable commitments with respect to the elimination of non-automatic export licensing. China's export licensing is also inconsistent with paragraphs 162 and 165 of the Working Party Report and paragraph 1.2 of China's Accession Protocol.

E. CHINA'S MINIMUM EXPORT PRICE REQUIREMENT IS INCONSISTENT WITH CHINA'S OBLIGATIONS UNDER THE GATT 1994

33. China's minimum export price requirement for bauxite, coke, fluorspar, magnesium, silicon carbide, yellow phosphorus, and zinc, as described above, prohibits the exportation of these products if the export price does not meet a designated minimum. This constitutes a restriction on the exportation of these materials in contravention of China's obligations under Article XI:1 of the GATT 1994.

34. Furthermore, China administers the minimum export price requirement for yellow phosphorus through an enhanced enforcement mechanism known as the Price Verification and Chop ("PVC") procedure. The PVC procedure involves the participation of the CCCMC in the customs clearance process for yellow phosphorus. The CCCMC's participation permits the flow of exporters' sensitive commercial information to representatives of parties with interests that are in conflict with the

exporters. This contravenes China's obligation to administer its laws, regulations, decisions, and rulings pertaining to restrictions on exports in an impartial and reasonable manner under Article X:3(a) of the GATT 1994.

35. Finally, China's failure to publish its laws, regulations, decisions, and rulings pertaining to the minimum export price requirement for these Raw Materials, is inconsistent with China's obligations under Article X:1 of the GATT 1994.

IV. CONCLUSION

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

ANNEX C-2

ADDITIONAL OPENING ORAL STATEMENT OF MEXICO AT THE FIRST SUBSTANTIVE MEETING

1. As a final remark to be added to our views and conclusions expressed in the joint oral statement, Mexico would like to stress one additional point on China's first written submission.

2. In its submission, China tries to justify its export restraints, and even differentiate itself from other WTO Members, by considering itself a developing country in the need for industrialization and growth.[1]

3. However, China is not the only developing country in the need for industrialization and growth. In spite of China's developing country status, China is considered the second economy in the World and the main producer of many of the raw materials at issue in this dispute.

4. Furthermore, China's steel industry – a highly developed industry benefiting from its export restrains – contributed in 2009 to approximately 45% of the world's steel production, whereas Mexico, for example, contributed to less than 1.2% of that world's production. Thus, China's industrialization policy comes at the expense of other WTO Members and has a potentially more harmful effect against developing countries like Mexico.

5. Any Member benefiting from the WTO trading system must abide by the WTO rules, regardless of being considered as a developing or a developed country.

6. Mexico, as any other developing country in the WTO, seeks to create the most adequate policies to promote industrialization and growth, taking into consideration WTO flexibilities provided for developing countries. However, while seeking those policies, all WTO Members must abide by the WTO rules. Thus, like all other developing country members, China must also abide by WTO rules, including the flexibility limits and checks and balances provided therein.

7. Mr. Chairman and Members of the Panel and the Secretariat, this concludes Mexico's oral statement. We thank you for your attention, and would be pleased to respond to any questions you might have.

[1] See for example, China's first written submission, paras.128-130 and 480.

ANNEX C-3

CLOSING ORAL STATEMENT OF MEXICO AT THE FIRST SUBSTANTIVE MEETING

Mr. Chairman, we would just like to thank you, the Members of the Panel, the Secretariat and our counterparts, for your attention to our interventions throughout this hearing, and also thank you in advance for an additional and final comment we would like to make, specifically on China's opening statement, as it refers in many ways to political and conceptual positions towards the rights of China as a developing country and its sovereignty rights.

We might agree with the political discourse or the concepts, but unfortunately, those are far related or impossible to read as legal rights or obligations of a WTO Member. We have come here not to discuss the systemic concerns of a Member on how the WTO functions but to discuss the rights and obligations of Members under the WTO, and in this particular dispute, the application of the exceptions to those obligations, exceptions clearly contained in the GATT Agreement, including how they were legally reflected in China's Accession Protocol.

ANNEX C-4

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF MEXICO

I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

15. As Mexico sets forth in its first written submission, China subjects the exportation of various forms of bauxite, coke, fluorspar, silicon carbide, and zinc to quotas. China has confirmed that it maintains a prohibition on the exportation of zinc. These export quotas and the export prohibition on zinc are inconsistent with Article XI:1 of the GATT 1994 and paragraphs 162 and 165 of the Working Party Report and paragraph 1.2 of China's Accession Protocol. China has failed to establish that its export quota on one subset of one form of bauxite is justified pursuant to Article XI:2(a) or Article XX(g) of the GATT 1994. China has also failed to establish that its export quotas on coke and silicon carbide are justified pursuant to Article XX(b) of the GATT 1994.

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

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

possibility and the serious concern that, through China's allocation of the export quota on "bauxite," China may be effecting an export prohibition on "aluminum ores and concentrates."

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

19. In examining whether China's export quota on bauxite, as applied to high alumina clay, relates to the conservation of high alumina clay, the operative question is whether there is a close and genuine relationship of ends and means between the goal of high alumina clay conservation and the means presented by that part of the export quota that applies to exports of high alumina clay. As above in the case of fluorspar, the answer to this question is also no.

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

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

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

materials in China, and therefore reduce pollution. China's defense fails for the same reasons as discussed above in the context of the export duties on magnesium metal, manganese metal, and coke.

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

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

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

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

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

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

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

VI. EXPORT LICENSING

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

VII. MINIMUM EXPORT PRICE

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

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

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

32. There are three additional measures that China fails to identify that are within the Panel's terms of reference by virtue of being included in both the consultations and panel requests: Measures for the Administration of Trade Social Organizations; Regulations for Personnel Management of Chambers of Commerce; and CCCMC Charter. In addition, four measures are in the Panel's terms of reference even though they were not identified in both Mexico’s consultations request and Mexico’s panel request: CCCMC Export Coordination Measures; Bauxite Branch Coordination Measures; Bauxite Branch Charter; and the "System of self-discipline". These measures are within the Panel's terms of reference because they implement the coordination mandate of the 1994 CCCMC Charter and the 2001 CCCMC Charter in the manner described by the Appellate Body in *Japan – Film*. Three measures that were specifically identified in the panel request but not listed in the consultations request are nevertheless included within the Panel's terms of reference: Notice of the Rules on Price Reviews of Export Products by the Customs; CCCMC PVC Rules; Online PVC Instructions. These measures are all part of the same PVC procedure of which the 2002 PVC Notice and the 2004 PVC Notice, which were consulted on, form a part. The inclusion of these three measures in the panel request did not, "expand the scope of the dispute" as the Appellate Body described in *US – Continued Zeroing*. These measures are therefore also properly within the panel's terms of reference.

33. China also asked the Panel to refrain from making findings on measures because those measures have "expired" and findings would "serve no purpose." China also asserted that the Panel has no authority to make recommendations on these measures. The Panel has the authority and obligation to make findings and recommendations on certain measures which, contrary to China's arguments and assertions, continue to be in effect. The Panel has the authority and obligation to make

findings and recommendations on the other measures in order to secure a positive solution to this dispute.

VIII. CONCLUSION

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

ANNEX C-5

OPENING ORAL STATEMENT OF MEXICO AT THE SECOND SUBSTANTIVE MEETING

I. INTRODUCTION

1. Mr. Chairman and members of the Panel. I would first like to thank the Panel and the Secretariat Staff for the opportunity given to Mexico to present its views in this dispute.

2. Since the other co-complainants have already presented their arguments, which Mexico fully supports and incorporates into this opening statement[1], Mexico will only raise some additional issues that it considers of great importance in this dispute.

3. As Mexico has already explained, the export restraints imposed by China are designed to advance its economy through the promotion of the production of high-value added downstream products, and thus, pursue economic interests rather than environmental or conservationist interests. However in order to justify those restraints, throughout the proceedings of this dispute, China has presented arguments and suggested interpretations of the relevant exceptions within the WTO framework that not only should be rejected in the context of this dispute, but should also be rejected as they pose a potential systemic threat to the export framework within the WTO trading system.

II. THE PANEL SHOULD NOT ACCEPT CHINA'S REQUEST TO REFRAIN FROM RULING ON THE 2009 MEASURES

4. China argues that the Panel has the discretion to make findings concerning certain expired measures which were in effect during 2009 but ceased to exist on 2010, but encourages the Panel not to make findings on those expired measures.[2] As a practical matter, this means that China is requesting the Panel to refrain from ruling on the special export duty on yellow phosphorus, the export duty on bauxite, and the export quota on fluorspar.

5. However, contrary to China's argument, Mexico has explained that the Panel is not only authorized, but also charged by the DSU to make recommendations on the measures within its terms of reference, which include the special export duty on yellow phosphorus, the export duty on bauxite and the export quota on fluorspar.[3] Thus, the Panel should not accept China's request.

6. If the Panel accepts China's request and refrains from ruling on the consistency of the special export duty on yellow phosphorus, the export duty on bauxite and the export quota on fluorspar, it will be giving China the possibility to reinstate those measures at any time in the future, and the Panel will have not completely secured a positive solution to this dispute.

7. This reasoning, if applied on a general basis, could open the door to any defending Party to remove the inconsistent measure during the time of the WTO proceeding in order to avoid a ruling on the measure, and thereafter, reinstate the measure at any time. This will be to the detriment of the aim

[1] Including Exhibit JE- 176 presented by the United States in its oral statement, containing the Revised Chart B in Response to Question 2 from the Panel.

[2] China's second written submission, paras. 6-18.

[3] Mexico's second written submission, paras. 322-348.

of the dispute settlement mechanism of securing a positive solution to a dispute,[4] the aim of the recommendations and rulings made by the DSB of achieving a satisfactory settlement of the matter,[5] and the function of the panel of assisting the DSB in discharging its responsibilities under the DSU and the covered agreements.[6]

8. As already explained,[7] regarding this situation, the Appellate Body in *Chile – Price Band* System stated:

> We emphasize that we do not condone a practice of amending measures during dispute settlement proceedings if such changes are made with a view to shield a measure from scrutiny by a panel or by us …. [Generally] speaking, the demands of due process are such that a complaining Party should not have to adjust its pleading throughout the dispute settlement proceedings in order to deal with a disputed measure as a "moving target".[8]

9. Accordingly, Mexico requests the Panel to consider the potential systemic risk that the type of reasoning that China is requesting the Panel to apply would pose to the WTO trading system.

III. THE PANEL SHOULD REJECT CHINA'S ARGUMENT THAT ARTICLE XX EXCEPTIONS ARE AVAILABLE TO BREACHES OF ITS EXPORT DUTIES COMMITMENTS CONTAINED IN PARAGRAPH 11.3 OF THE ACCESSION PROTOCOL

10. China argues that the GATT article XX defenses are available to breaches of its export duties commitments contained in paragraph 11.3 of the Accession Protocol. In this dispute, this reasoning would mean that article XX defenses are available to the export duties imposed by China on coke, fluorspar, magnesium, manganese metal, and magnesium, manganese, and zinc scrap.

11. However, China is incorrect in its legal interpretation. As the co-complainants have explained, the article XX defenses are not available to breaches by China of its export duties commitments contained in paragraph 11.3 of the Accession Protocol[9] and the Panel should reject China's superficial reasoning.

12. In principle, article XX defenses, according to its chapeau, which states "nothing in this agreement" - and not any other language - , are available to breaches of the obligations contained in the GATT 1994. However, according to the reasoning of the Appellate Body in *China – Audiovisual Products*,[10] the article XX defenses can be available to breaches of obligations contained in provisions outside from the GATT 1994, but only if there is a textual basis within the provision containing that obligation, indicating that article XX defenses are available to it. In the case at issue, article XX defenses are not available to breaches of the export duties commitments contained in paragraph 11.3 of the Accession Protocol, in principle, because those commitments are outside from the GATT 1994, and also because there is no textual basis in paragraph 11.3 of the Accession Protocol, indicating the availability of the Article XX defenses.

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[4] Article 3.7 of the DSU
[5] Article 3.4 of the DSU
[6] Article 11 of the DSU
[7] Mexico's second written submission, para. 346
[8] Appellate Body Report in *Chile – Price Band System*, para. 144.
[9] Mexico's Second Written Submission, paras. 10 – 29.
[10] Appellate Body Report in *China – Audiovisual Products*, paras. 218 – 233.

13. However, in order to demonstrate that article XX defenses are available, China has offered various arguments:

(a) That according to China's interpretation of the Appellate Body's reasoning in *China – Audiovisual Products*, when ruling with respect to paragraph 5.1 of the Accession Protocol, China has an inherent right to regulate trade that allows it to breach any of its export duties commitments.[11] This argument has evolved throughout China's submissions to the argument that China has an inherent right to regulate trade that makes article XX exceptions available to breaches of its export duties commitments contained in paragraph 11.3 of the Accession Protocol.[12]

(b) That, at least with respect to goods related obligations, the WTO covered Agreements apply together as a single treaty instrument, as a single undertaking accepted by all the WTO Members, namely, the WTO Agreement, and thus, the covered agreements, read together as a single treaty framework, allow China to apply export duties, provided it complies with the requirements of the relevant exception in article XX, and its chapeau.[13]

(c) That paragraph 170 of the Working Party Report provides a language similar to the language of paragraph 5.1 of the Accession Protocol, that gives China the text in which to base the availability of article XX to the commitments in paragraph 11.3 of the Accession Protocol.[14]

14. China's first reasoning, if applied on a general basis, would mean that any defending party could claim that the article XX defenses are available for them to breaches of any commitment outside of the GATT 1994, because all the WTO Members have an inherent right to regulate trade that makes article XX available for them to any breach of any covered agreement or Accession Protocol.

15. China's second reasoning, if applied on a general basis, would mean that all the obligations related to trade in goods contained in all the covered agreements, could have available to them the defenses contained in the GATT 1994, regardless of the language of the obligation and the covered agreement in which that obligation is contained.

16. Finally, China's third reasoning, if applied on a general basis, would mean that the textual basis in which to base the availability of article XX could be inferred from other provisions, and not clearly indicated in the specific provision at issue.

17. Mexico again requests the Panel to consider the potential systemic risk that the type of reasoning that China is requesting the Panel to apply in order to make available for its export duties the article XX defenses would pose to the WTO trading system.

[11] China's first opening statement, paras. 61 – 83.
[12] China's second written submission, paras. 154-178.
[13] Id.
[14] Id.

IV. THE PANEL SHOULD REJECT THE INTERPRETATION OF ARTICLE XI:2(A) SUGGESTED BY CHINA TO JUSTIFY ITS EXPORT QUOTA ON BAUXITE, AS IT APPLIES TO HIGH ALUMINA CLAY

18. China has suggested an interpretation of article XI:2(a) in order to demonstrate that the export quota applied to bauxite, as it applies to high alumina clay, is justifiable under the exception contained in that provision.

19. Firstly, China argues that the burden of proof lies on the complaining Party with respect to the applicability of article XI:2(a), which China does not see as an affirmative defense.[15]

20. Contrary to China's assertions, the language of paragraph Article XI:(2)(a) demonstrates that this provision constitutes an exception to the obligations contained in article XI, an affirmative defense whose burden of proof lies on the defending party choosing to use this exception.

21. China's reasoning is legally flawed and, if accepted, will create a legal absurdity in which the complaining Party will have to predict the defense that the defending Party will use in its argument, and prove that those predicted arguments are not applicable for that defense. In the case at issue here, the co-complainants would have had to predict that China was going to use this exception to defend its export quota on bauxite, and then prove that the quota is not applied temporarily by China to prevent or relieve critical shortages of an essential product. This line of reasoning would present an absurd result.

22. Regarding the interpretation of the language of article XI:(2)(a), China offers an interpretation of the terms "temporary", "essential" and "critical shortage" that can be summarized as follows:

(a) The export quota applied to refractory grade bauxite is "temporarily applied" within the meaning of article XI:(2)(a) even though it is permanently applied, because the refractory grade bauxite will cease to exist in the future and the measure is periodically reviewed.[16]

(b) The export quota applied to refractory grade bauxite is "essential" within the meaning of article XI:(2)(a) because it is of value as an input for downstream processors of a powerful industry in China.[17]

(c) The export quota applied to refractory grade bauxite is applied to prevent or relive a "critical shortage" because some day the refractory grade bauxite will cease to exist.[18]

23. Yet again, China failed to offer a correct interpretation of these terms. If this interpretation is accepted, it would allow Members to impose export restrictions or prohibitions on any product which some day might cease to exist because they would be automatically considered as temporarily applied", and imposed to prevent or relief a "critical shortage". Also, the term "essential" would become almost self-judging. This situation will basically render null the terms "temporary", "essential" and "critical shortage".

[15] China's second written submission paras. 29 – 36.
[16] See, for example, China's first written submission, paras. 490 – 492.
[17] See, for example, China's first written submission, paras. 431 – 461.
[18] See, for example, China's first written submission, paras. 462 – 489.

24. It will also allow any WTO Member to impose export restrictions on any exhaustible natural resource, without the need to comply with the even handedness requirement of article XX(g), and the requirements of the chapeau.

25. Here again, Mexico requests the Panel to consider the potential systemic risk that the type of reasoning that China is requesting the Panel to apply would pose on the WTO trading system.

V. THE PANEL SHOULD REJECT THE INTERPRETATION OF ARTICLE XX:(G) SUGGESTED BY CHINA TO JUSTIFY ITS EXPORT QUOTA ON BAUXITE, AS IT APPLIES TO HIGH ALUMINA CLAY, AND ITS EXPORT DUTY ON FLUROSPAR

26. In order to justify its export quota on bauxite, as it applies to high alumina clay, and its export duty on fluorspar under article XX(g), China has offered and interpretation of the requirement of even handedness, suggesting that as long as some form of restriction is imposed on domestic users the requirement will be met, and that no particular distribution of the burden is required.[19]

27. China's suggested interpretation, if applied on a general basis, would mean that any minor requirement imposed on the domestic users, in contrast with a burdensome restriction imposed on the foreign users, will meet the requirement that the restriction is made effective in conjunction with domestic restrictions on production or consumption.

28. This interpretation is flawed and should be rejected by the Panel because it makes the even handedness requirement not even-handed.

VI. THE PANEL SHOULD REJECT THE INTERPRETATION OF ARTICLE XX(B) OFFERED BY CHINA TO JUSTIFY ITS EXPORT DUTIES ON COKE, MAGNESIUM METAL AND MANGANESE METAL, AND MAGNESIUM METAL, MANGANESE METAL AND ZINC SCRAP AND ITS EXPORT QUOTAS ON COKE AND SILICON CARBIDE

29. China has also suggested an interpretation of article XX(b) to justify its export duties on coke, magnesium metal, manganese metal, zinc, and magnesium metal, manganese metal and zinc scrap, and its export quotas on coke and silicon carbide that the Panel should reject.

30. China argues that its export duties on coke, magnesium metal, manganese metal, and its export quotas on coke and silicon carbide, are justified under article XX(b) because the production of these products is environmentally harmful and the export duties will lead to a reduction of production, and therefore, a reduction on the pollution associated with their production. China also argues that its export duties on magnesium metal, manganese metal and zinc scrap, are justified under article XX(b) because secondary production is less environmentally harmful and the export duties ensure a steady supply on scrap and facilitate a shift from primary production to secondary production.[20]

31. If the interpretation offered by China is accepted, and applied on a general basis, it would allow any WTO Member to freely impose export restraints on any product whose production causes pollution. The fact that most industries pollute at some level makes this interpretation even more dangerous.

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[19] China's second written submission, paras. 195-198.
[20] See, for example, China's second written submission, paras. 278 -289.

32. Also, since it is the production of those products that causes pollution and not their exports, accepting this interpretation would render the necessity requirement of article XX(b) null. It will make it so broad that any small contribution to the reduction of pollution could be considered as "necessary" for purposes of article XX(b).

33. Therefore, Mexico requests the Panel to consider the potential systemic risk that this type of reasoning might pose.

VII. THE PANEL SHOULD REFRAIN FROM EXERCISING JUDICIAL ECONOMY IN THIS DISPUTE

34. Finally, in order to secure a positive solution to this dispute, Mexico requests the panel to consider carefully whether the exercise of judicial economy could pose a risk to securing a positive solution to this dispute.

VIII. CONCLUSION

35. For the reasons set forth, Mexico requests this Panel to reject China's arguments and suggested interpretations, as they pose a serious risk to the WTO trading system.

36. Mexico insists that every Member of the WTO must comply with its obligations in good faith, and adjust its development policies to those rules, instead of trying to adjust those rules, through overly expansive interpretations of its exceptions, to its development policies, to the detriment of a rules based system. The Panel should not forget that the measures at issue are designed to serve China's economic advancement goals at the expense of the rest of the World.

ANNEX C-6

CLOSING ORAL STATEMENT OF MEXICO AT THE SECOND SUBSTANTIVE MEETING

1. Mr. Chairman and members of the Panel.

2. Mexico is here today as a co-complainant because the WTO inconsistent export restraints imposed by China not only are harmful for its relevant industries today, but also because China's economic advancement policy, based on those WTO inconsistent export restraints, represents a serious threat to their existence in the future.

3. Mexico has also systemic concerns that should be taken into account. China has presented defenses in this case that raise substantial systemic concerns for the WTO trading system. By distorting different legal standards of the law governing this dispute, China is attempting to accommodate the WTO Covered Agreements and its acceding commitments to its own economic interests. This Panel simply cannot side with China.

4. The systemic concerns raised in this dispute are the direct consequence of a defense designed to adjust the rules to China's economic advancement policies –based on the production of high value added downstream products- , and not the policies to the rules.

5. In its opening statement, Mexico enlisted some of the systemic negative implications that may arise if the Panel decides to side with China in this case.

6. For example, Mexico explained why the Panel shall make recommendations on the 2009 Measures. Under Art 19.1 of the DSU, Panels *"… shall recommend that the Member concerned bring the measure into conformity…"* when it finds a WTO violation. It is not a discretion but an obligation for this panel to make such recommendations if it finds the 2009 measures WTO inconsistent. Unlike in this dispute, in *US - Certain Products* the measure at issue was terminated before the panel request was filed and before the DSB established the panel, fixing the panel's terms of reference.

7. Mexico also explained the Panel the negative implications that the interpretations offered by China will bring to the terms "temporarily applied", "critical shortage" and "essential" in GATT article XI:2(a), the term "made effective in conjunction with restrictions on domestic production or consumption" in GATT article XX(g), the term "necessary" in GATT article XX(b), and the term "nothing in this Agreement" in the Chapeau of GATT article XX. Those terms do mean something and cannot be interpreted so broadly so as to be rendered null.

8. Not only China's interpretations go against the text of the GATT 1994, but also they go against previous Panel and Appellate Body Decisions unless, of course, they are taken out of context and misinterpreted.

9. For example, the Appellate Body in *Korea — Various Measures on Beef*, explained that the term "necessary" contained in article GATT XX(b):*"refers to a range of degrees of necessity. At one end of this continuum lies 'necessary' understood as 'indispensable'; at the other end, 'necessary' taken to mean as 'making a contribution to'*. The Appellate Body then explained that "*a 'necessary' measure is, in this continuum, located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'"*. China's offered interpretation goes against this decision of the Appellate Body.

10. Also, the Appellate Body in *US – Gasoline*, explained that the term *"made effective in conjunction with restrictions on domestic production or consumption"* in GATT article XX(g) is "*a requirement of evenhandedness in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources."* Again, China's offered interpretation goes against the Appellate Body's interpretation of the existence of a requirement of evenhandedness.

11. Once again, Mexico would like to request this Panel to reject China's arguments and suggested interpretations.

12. China is not the only WTO Member trying to seek the adequate policies that will ensure economic advancement in a short and long term. Every WTO Member wants economic growth, and developing the adequate policies is not an easy task. For any WTO Member, this task requires to take into account its WTO obligations and adjust those policies to the rules, and not to adjust the interpretation of those already agreed rules to those policies.

13. Mr. Chairman, finally, Mexico would only like to thank you, the other Members of the Panel, and the Members of the WTO secretariat, for your time during this hearing.

ANNEX D

SUBMISSIONS OF CHINA

ANNEX D-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF CHINA

I. TERMS OF REFERENCE

1. The first written submissions of the Complainants aggravate problems concerning the Panel's terms of reference. *First*, just *two* of the *fifteen* measures relating to the alleged minimum export price ("MEP") requirement can appropriately be considered within the Panel's terms of reference. *Second*, the Complainants continue to fail to present the problems in Section III of the Panel requests clearly, as there remain no concrete linkages between the measures at issue, the products they concern and the treaty provisions with which the measures are alleged to be inconsistent. *Third*, the European Union makes an argument relating to an alleged failure to publish the export quota on coke in its FWS, which was not mentioned in its Panel request. *Fourth*, the Complainants challenge several expired measures that should also be considered outside the Panel's terms of reference. *Finally*, the Complainants fail to seek sufficiently precise recommendations and rulings in respect of their claims in Section III of the Panel requests.

II. THE PRODUCTS AT ISSUE

2. Descriptions of the products at issue are included in Exhibits CHN-9, CHN-10, CHN-11, and CHN-12.

III. THE EXPORT DUTIES ALLEGEDLY INCONSISTENT WITH PARA. 11.3 OF THE *ACCESSION PROTOCOL*

3. The Complainants allege that the China violates Paragraph 11.3 of the *Accession Protocol* by: (i) imposing temporary duties on exports of bauxite, coke, fluorspar, magnesium, manganese, silicon metal, and zinc, which are not listed in Annex 6 to the *Accession Protocol*; and, (ii) subjecting exports of yellow phosphorus to a duty in excess of the *ad valorem* rate listed for item No. 11 in Annex 6 to the *Accession Protocol*. The European Union further claims that China has violated the obligation assumed under the note to Annex 6 to consult "with other affected WTO Members prior to the imposition" of the export duties on bauxite, coke, fluorspar, magnesium, manganese, silicon metal, and certain forms of zinc.

4. Before justifying the export duties pursuant to the GATT 1994, China recalls its concern that certain claims pertaining to export duties fall outside the Panel's terms of reference. *First*, the claims are based on the 2009 *Tariff Implementation Plan*, and other measures that have now expired or have been repealed. The Panel cannot make recommendations with respect to the repealed 2009 export duties. *Second*, as of 1 January 2010, China no longer subjects exports of bauxite to duties. *Third*, China does not impose an export duty on yellow phosphorus in excess of the rate specified in Annex 6. The Tariff Commission repealed the special export duty applicable to yellow phosphorus, as of 1 July 2009, prior to the Complainants' Panel requests. Under the 2010 *Tariff Implementation Plan*, consistent with Annex 6, exports of yellow phosphorus are subject solely to the regular duty rate of 20 per cent.

5. In addition, China acknowledges, as asserted by the European Union, that it failed, under the note to Annex 6 to the *Accession Protocol*, to consult "with other affected WTO Members prior to the imposition" of the export duties imposed on bauxite, coke, fluorspar, magnesium, manganese, silicon metal, and certain forms of zinc.

IV. THE EXPORT DUTIES APPLIED TO EXPORTS OF FLUORSPAR, COKE, MAGNESIUM, MANGANESE, AND CERTAIN FORMS OF ZINC ARE JUSTIFIED PURSUANT TO THE GATT 1994

A. THE EXPORT DUTY APPLIED TO FLUORSPAR IS JUSTIFIED PURSUANT TO ARTICLE XX(G) OF THE GATT 1994

6. The export duty of 15 per cent applied to fluorspar is justified pursuant to Article XX(g) because it is a measure relating to the *conservation* of an exhaustible non-renewable mineral resource, and is applied together with restrictions on domestic production and consumption.

1. Interpretation of Article XX(g) of the GATT 1994

7. Under Article XX(g), Members taking conservation-related measures to restrict the supply of a mineral resource must ensure that restrictions are imposed on domestic supply. Thus, Article XX(g) ensures that the burden of conservation-related measures is not imposed solely on foreign trade, but applies also to domestic trade. Article XX(g) must be interpreted in a manner that recognizes WTO Members' sovereign rights over their own natural resources. Pursuant to this well-recognized principle of international law, resource-endowed countries may manage the supply and use of their natural resources through conservation-related measures that foster the sustainable development of their own peoples. These rights must be exercised in the interests of a Member's *own* social and economic development. Provided that restrictions are imposed on domestic supply, Article XX(g) does not oblige resource-endowed countries to ensure that the economic development of other user-countries benefits equally or identically from the exploitation of their resources.

2. Application of Article XX(g) to the export duty imposed on fluorspar

8. Fluorspar is a non-renewable mineral with finite natural reserves that are susceptible to depletion, in quantity and quality, mostly as a result of human activity. It is a natural resource in high demand for a variety of industrial applications. Given the importance of fluorspar to China's economy, and given that China's reserves of this resource are limited, it has adopted a variety of measures that manage the supply and use of fluorspar over time. The need to do so is clear: while China's reserves of fluorspar constitute just nine per cent of estimated world resources, China accounts for almost two-thirds of world production. These measures ensure that this resource provides social and economic benefits over a longer period than would otherwise be the case; they are also an integral part of China's sustainable minerals policy to rely mainly on its own mineral resources to develop its economy. China's coherent policy includes elements such as a mineral resources tax and compensation fee, environmental standards, caps on extraction and initial processing, and an export duty. In particular, the extraction and processing caps manage the supply and use of fluorspar over time, by restricting the volume of fluorspar ore that may be taken from the ground, and also by restricting the volume of basic tradable fluorspar that may be produced.

9. There would be no point in China authorizing the limited extraction of fluorspar, in the exercise of its sovereign rights, if the benefits derived from China's use of the extracted resource were not optimized. Thus, measures balancing the *maintenance* and *use* of fluorspar resources, through *effective supply management*, are essential to ensuring China's optimal use over time of the available quantity of the resource. Such measures must be developed in tandem. From the perspective of Article XX(g), all of these measures aim at controlling supply and managing the use of the resource over time; that is, *conserving* the resource. Without China's export restrictions, the burden of China's supply limitations would be borne unduly by China's domestic users, which would undermine China's development.

10. Having established that the export duty on fluorspar is provisionally justified pursuant to Article XX(g), China also establishes that the export duty complies with the *chapeau* of Article XX.

B. THE EXPORT DUTIES APPLIED TO NON-FERROUS METAL SCRAP OF ZINC, MAGNESIUM METAL, AND MANGANESE METAL, AND TO COKE, MAGNESIUM METAL, AND MANGANESE METAL ARE JUSTIFIED PURSUANT TO ARTICLE XX(B) OF THE GATT 1994

11. China raises a defence under Article XX(b) to claims against export duties applied to: (i) zinc, magnesium metal, and manganese metal scrap, or "non-ferrous metal scrap products"; and, (ii) coke, magnesium metal and manganese metal, or EPR products.

1. Interpretation of Article XX(b) of the GATT 1994

12. Article XX(b) protects WTO Members' inherent right to regulate, *inter alia*, for the purpose of protecting human, animal or plant life or health. Panels and the Appellate Body have shown a degree of deference to a WTO Member's policy designed to "protect human, animal or plant life or health". In particular, Article XX(b) requires that the respondent's measure be "necessary" to achieve the stated objective. Assessing the "necessity" of a measure requires a panel to engage in a process of weighing and balancing a series of factors concerning, in particular: (i) the (relative) importance of the interests or values at stake; (ii) the extent of the contribution of the measure to the achievement of the measure's objective; and, (iii) the trade restrictiveness of the measure.

13. A measure can contribute to the stated objective in different ways, *i.e.*, (i) the measure can bring about a material contribution to the achievement of its objective; and, (ii) the measure can be apt to produce a material contribution to the objective pursued, even if the contribution is not "immediately observable".

14. In assessing the "necessary" character of a measure, the Appellate Body in *Brazil – Retreaded Tyres* stressed that a panel may consider that "certain complex public health or environmental problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures". With respect to such complex policies, the Appellate Body in *Brazil – Retreaded Tyres* found that a "necessary" measure could contribute, in the short- or long-term, to one of the objectives protected in Article XX(b), as part of a policy framework comprising different measures, resulting in possible synergies between those measures.

2. Application of Article XX(b) to the export duties applied to non-ferrous metal scrap of zinc, magnesium metal, and manganese metal, and to coke, magnesium metal, and manganese metal

15. China has adopted a comprehensive strategy for reducing risks to human, animal, and plant life and health resulting, directly or indirectly, from the high energy-consuming and polluting production of non-ferrous metals and other EPR products, or "health risks relating to metals production". This strategy is a core component of China's environmental policy, which has three key objectives, namely: (i) pollution reduction; (ii) energy conservation; and, (iii) transformation into a "circular economy", or "recycle economy". The key tenets of this policy are described in detail in Annex A to China's first written submission.

16. China identifies, in Annex B to its first written submission, the health risks related to the production, from crude ores, of magnesium, manganese, and zinc, due to high levels of pollution and energy intensity connected with that production. The production of ferrous and non-ferrous metals using recycled scrap, or so-called "secondary production", is significantly less polluting and more

energy efficient, thereby reducing risks related to non-ferrous metals production using crude ores. Secondary production from scrap metal consumes a fraction of the energy required for primary products, produces less noxious off-gases during the production processes, and reduces pollution relating to waste disposal once consumer products have reached the end of their lives.

17. The non-ferrous metal scrap products make a present material contribution, and are apt to contribute to the reduction of health risks related to metal production by: (i) in the short-term, reducing the level of pollution and energy intensity involved in the production, from crude ores, of magnesium metal, manganese metal, and zinc; and, (ii) in the medium- to long-term, contributing to the development and use of recycling technologies, and thus, a more sustainable secondary production of non-ferrous metals.

18. For China to achieve its objective of successful substitution of secondary production for primary production, it must control and manage its limited scrap resources. Export restraints on the products at issue are necessary to avoid domestic supply bottlenecks, and to ensure that scrap metal is retained in the domestic reprocessing cycle. Evidence presented by China supports the conclusion that export duties applied to the non-ferrous metal scrap products at issue make a material contribution to the objective of reducing risks to human, animal, and plant life or health.

19. The export duties applied to the non-ferrous scrap products, provisionally justified pursuant to sub-paragraph (b), satisfy the requirements of the *chapeau* of Article XX.

C. THE EXPORT DUTIES APPLIED TO COKE, MAGNESIUM METAL, AND MANGANESE METAL ARE JUSTIFIED PURSUANT TO ARTICLE XX(B) OF THE GATT 1994

20. The export duties applied to coke, magnesium metal, and manganese metal are justified pursuant to Article XX(b) because they are necessary for the protection of human, animal, and plant life or health by virtue of their contribution to the reduction of the polluting and energy-intensive production of coke, magnesium metal, and manganese metal.

21. The production of coke, magnesium metal, and manganese metal is harmful to human, animal, and plant life and health, due to high levels of pollution emission and energy-use. Most countries, including the Complainants, have chosen not to extract and produce sufficient quantities. Coke, magnesium metal and manganese metal are by all standards "dirty" products. For a long time, the worldwide production of EPR products operated to a large extent unregulated. That has changed significantly over the past three decades, such that strict environmental standards, especially in the European Union and the United States, have imposed considerable costs on industrial and mining activity in the industrialized world, which have, as a result, experienced a steady decline. Basic industrial producers in the European Union and the United States began to specialize in "sophisticated" goods that are high-tech, high value-added, and, importantly, less polluting than basic materials, minerals, and metals. Manufacturing these sophisticated products requires considerable amounts of basic materials, minerals, and metals. Heightened reliance by the Complainants on imports of these "dirty" products does not require China to be the source of first resort. The economies of many developed countries have the full technical capacity to produce these "dirty" products in their own domestic markets and in a far less polluting manner than China, as explained in Exhibit CHN-12.

22. The export duties on coke, magnesium metal, and manganese metal are an integral part of China's comprehensive environmental policy aimed at reducing the health risks related to the production of these products. China currently is in a transition phase, from an export-driven economy focused largely on rapid industrialization and growth led by exports of basic materials and

unsophisticated low-tech goods, to an economy that develops at a scale and pace that is environmentally, socially, and economically sustainable. The export duties at issue bring about a present material contribution to the objective of reducing the health risks resulting from the high levels of pollution and energy use connected with the production of coke, magnesium metal, and manganese metal. Under normal economic conditions, export duties reduce foreign demand, and therewith exports. This, in turn, decreases overall production. For heavily-polluting products, this immediately leads to important reductions in air, water, and soil pollution. The export duties signal Chinese manufacturers to slow down production and to lower output to sustainable levels. In industries characterized by slack responses to price changes, such a credible signal has a more immediate effect on producers and manufacturers than changes in market prices. Unrestrained exports would result in levels of production in China which exacerbate the very pollution effects China has determined are dangerous to human, animal, plant life and health. Export duties are an intervention tool that effectively addresses "production leakage" and the overproduction it entails, fully in line with Article XX(b). The export duties also are apt to make a material contribution to the reduction of health risks that result from high levels of pollution and energy use connected with the production of coke, magnesium metal, and manganese metal. These export duties are a WTO-consistent and efficient tool to speed up industry restructuring.

23. The export duties applied to coke, magnesium metal, and manganese metal, provisionally justified pursuant to sub-paragraph (b), satisfy the requirements of the *chapeau* of Article XX.

V. THE EXPORT QUOTAS ALLEGEDLY INCONSISTENT WITH ARTICLE XI:1 OF THE GATT 1994 AND PARAGRAPHS 162 AND 165 OF THE *WORKING PARTY REPORT*

A. THE COMPLAINANTS' FAILURE TO MAKE A *PRIMA FACIE* CASE THAT THE EXPORT QUOTAS ARE INCONSISTENT WITH ARTICLE XI OF THE GATT 1994

24. The Complainants allege that China's export quotas applied to refractory-grade bauxite, aluminium ores and concentrates, coke, fluorspar, silicon carbide, and zinc ores and concentrates are quantitative restrictions under Article XI:1.

25. The Complainants have not established a violation of Article XI, for two reasons. *First*, the European Union has not identified the measures allegedly imposing export quotas on bauxite, aluminium ores and concentrates, fluorspar, silicon carbide, and zinc ores and concentrates, and that are the subject of its Article XI:1 claims. Where the specific measures challenged are not identified, neither the Panel nor the DSB can make sufficiently precise recommendations under Article 19.1 of the DSU. *Second*, the *chapeau* to Article X1:2 states that the obligation in Article XI:1 shall "not extend to" types of export restrictions listed in Articles XI:2(a)-(c). The potential application of Article XI:2(a) of the GATT 1994 is clear, especially in light of the arguments raised by the Complainants in their first written submission, and the steps they have taken to secure access to supply-restricted products that they deem essential to the functioning of their own economies .

26. To the extent that the Panel finds the export quotas to be inconsistent with Article XI:1 and not justified under Articles XX(g) and/or XX(b), China asks the Panel to exercise judicial economy with respect to the Complainants' claims under paragraphs 162 and 165 *Working Party Report*, which solely confirm, and are duplicative of, the obligation assumed under Article XI:1.

B. ARTICLE XI:1 OF THE GATT 1994 DOES NOT APPLY TO THE EXPORT QUOTA APPLIED TO REFRACTORY-GRADE BAUXITE, BY VIRTUE OF ARTICLE XI:2(A)

1. Interpretation of Article XI:2(a) of the GATT 1994

27. Article XI:2(a) removes from the scope of Article XI:1 those export prohibitions or restrictions that, *inter alia*, are limited in application to the period of time required to remedy or avoid a situation in which the supply of a product that is important to the economic vitality of a Member is constrained to a degree that imperils the ability of that product to serve the purpose that gives it its importance. The Complainants have interpreted Articles XI:1 and XI:2(a) to permit, for periods exceeding 30-40 years, the maintenance of export prohibitions and restrictions on products that they deem essential for downstream domestic industries, and for which supply is or has the potential to be restricted, by virtue of strong foreign demand, physical exhaustibility, and/or domestic regulatory limits on access. These examples are compelling, as they reflect views concerning the proper interpretation of Articles XI:1 and XI:2(a) expressed *outside* the context of this litigation.

2. The export quota on refractory-grade bauxite is temporarily applied to prevent or relieve a critical shortage of this essential product

28. Refractory-grade bauxite is a product essential to China because it is indispensable for the production of iron and steel, and of other products such as glass, ceramics, and cement. While bauxite is a widely-occurring mineral, most deposits of bauxite available globally are insufficient for use as a refractory-grade product. China's bauxite reserves, however, are principally of high quality refractory-grade bauxite.

29. Consistent with the interpretation of the term "essential", minerals economists have developed methodologies to measure both the *importance in use* of a given product to an economy, and the *supply constraints* that put a brake on the ability of an economy to enjoy that use. Such "criticality assessments" help assess appropriate policy solutions to ensure access to scarce and exhaustible raw materials. Building on these standard criteria, China submits similar evidence in Exhibit CHN-10, which assesses the criticality of refractory-grade bauxite to China.

30. China imposes an export quota on refractory-grade bauxite to prevent or relieve a critical shortage. Measuring "shortage" requires comparing anticipated future demand, in light of the importance in use of the product, with future supply, in light of, *inter alia*, geological, commercial, and regulatory constraints. At current reserve and production rates, this comparison suggests a 16-year reserve life for China's refractory-grade bauxite. The very short remaining life span of this essential and exhaustible natural resource demonstrates the occurrence or risk of a critical shortage. Apart from the risk of a physical shortage, other constraints may disrupt the flow of a material through the value chain, including: (i) conservation measures to manage China's raw materials in a sustainable manner so as to ensure their long-term availability and benefits; (ii) the regulatory framework governing the industries that extract and process the product; (iii) the development and use of technologies aimed at efficient extraction and production, exploration of mineral resources, recovery of minerals, and maintenance of existing mining and processing industries; (iv) local or regional communities' acceptance of mining; (v) other WTO Members' appetite for China's refractory-grade bauxite; and, (vi) the difficulty experienced in the exploitation of reserves of high-quality bauxite with refractory characteristics elsewhere outside China. As part of China's effort to manage constrained supply and to prevent or relieve a critical shortage, which would deny it sufficient supply of this essential product, China applies a quota to exports of refractory-grade bauxite. Absent any export restriction, China's severely constrained supply of refractory-grade bauxite would be further diminished.

31. The export quota applied to bauxite is also applied temporarily, as evidenced by: (i) the annual publication of the *Export License Catalogue*; (ii) the annual determination of the amount of the quota, evidenced by a methodology paper submitted as Exhibit CHN-283; and, (iii) the biannual publication of notices announcing the specific bidding rules for each batch of bauxite. The adoption of these measures demonstrates that the quota is reviewed and assessed on an annual basis.

C. THE EXPORT QUOTA APPLIED TO REFRACTORY GRADE BAUXITE IS JUSTIFIED PURSUANT TO ARTICLE XX(G) OF THE GATT 1994

32. In the event that the Panel finds that the export quota on refractory-grade bauxite is inconsistent with Article XI:1, China demonstrates that the export quota is justified pursuant to Article XX(g). At paragraph 7, China summarized its interpretation of Article XX(g).

33. Refractory-grade bauxite is an exhaustible natural resource with qualities that make it essential to the production of, *inter alia*, iron and steel. China has already explained the importance in use of Chinese refractory-grade bauxite for producing iron and steel, etc., thereby contributing to China's economic and social development. For these reasons, China must conserve its own refractory-grade bauxite to enable the unique benefits of this natural resource to be preserved and enjoyed for future generations. As a result, China has adopted a comprehensive conservation policy for refractory-grade bauxite, comprising closely intertwined measures. Through these measures, China promotes the sustainable use and husbanding of its refractory-grade bauxite resources by restricting or burdening the current exploitation, production, and use of its own refractory-grade bauxite resources, thus ensuring that future generations can also enjoy the social and economic benefits resulting from the industrial applications of refractory-grade bauxite.

34. China has subjected the extraction and processing of refractory-grade bauxite to quantitative caps, imposing limits on the volumes of the product that are available for use. These measures, along with other burdens imposed on extraction and processing, form an integral part of China's conservation policy for refractory-grade bauxite. China, thus, conserves its own resources of refractory-grade bauxite through a comprehensive policy aimed at balancing preservation of refractory-grade bauxite against its use. The quota applied to exports of refractory-grade bauxite is an integral part of that policy.

35. The export quota on refractory-grade bauxite, provisionally justified pursuant to Article XX(g), complies with the *chapeau* of Article XX.

D. THE EXPORT QUOTAS APPLIED TO COKE AND SILICON CARBIDE ARE JUSTIFIED PURSUANT TO ARTICLE XX(B) OF THE GATT 1994

36. The export quotas applied to coke and silicon carbide are justified pursuant to Article XX(b) because they are necessary to reduce health risks resulting from the high levels of pollution and energy-use in connection with the production of both products. The export quotas at issue make a material contribution to the reduction of health risks resulting from high levels of pollution and energy use connected with the production of both products. At Exhibit CHN-124 and CHN-147, China estimates the effects of the export quotas on coke and silicon carbide on the domestic production in China. This evidence demonstrates that a significant decrease of air pollutants resulting from export quotas on coke and silicon carbide contributes to an improvement in air quality across China and, in particular, in the densely-populated areas surrounding the manufacturing plants. In addition to the *immediate* beneficial effects on human, animal, and plant life or health, China's export quotas are apt to make a material contribution to the reduction of health risks resulting from high levels of pollution and energy use connected with the production of both products. If China were to *eliminate* the export

quotas on coke and silicon carbide, this would seriously impact the efficacy of *other* important measures, geared at sustainably reducing pollution in these two industries, thus jeopardizing China's long-term environmental strategy as a whole.

37. The export quotas applied to coke and silicon carbide, provisionally justified pursuant to sub-paragraph (b), satisfy the requirements of the *chapeau* of Article XX.

E. THE EXPORT QUOTA ON ZINC ORES AND CONCENTRATES HAS NOT BEEN MADE EFFECTIVE FOR EXPORTS IN 2010

38. China has not made effective the export quota for zinc ores and concentrates in 2010.

F. THE PANEL SHOULD EXERCISE JUDICIAL ECONOMY WITH RESPECT TO THE CLAIMS UNDER PARAGRAPHS 162 AND 165 OF THE *WORKING PARTY REPORT* PERTAINING TO THE EXPORT QUOTAS APPLIED TO BAUXITE, COKE, SILICON CARBIDE, AND ZINC ORES AND CONCENTRATES

39. If the Panel does not accept the consistency with or justification of the export quotas pursuant to the GATT 1994, China asks the Panel to restrict its analysis to findings that the export quotas are inconsistent with Article XI:1, and to exercise judicial economy with respect to the same claim under paragraphs 162 and 165 *Working Party Report*. The obligation to eliminate export restrictions, assumed by China under Paras. 162 and 165, merely confirms the obligation assumed by all WTO Members under Article XI:1.

VI. THE ADMINISTRATION OF CHINA'S WTO-CONSISTENT EXPORT QUOTAS

A. THE BID-WINNING PRICE FALLS OUTSIDE THE SCOPE OF THE OBLIGATION ASSUMED UNDER ARTICLE VIII:1(A) GATT 1994 AND PARA. 11.3 *ACCESSION PROTOCOL*

40. The Panel should reject claims that the bid-winning price is inconsistent with Article VIII:1(a) and Para. 11.3 *Accession Protocol*. Article VIII:1(a) does not include a *residual general prohibition* on all fees and charges. The words used in Article VIII, in light of the surrounding circumstances, demonstrate that this provision relates to fees and formalities *in connection with the processing of customs entries*. Allocation of a quota through bidding is not a step in the process of customs clearance and transit. The bidding process takes place at a much earlier point in time, *even before exporters have made any binding commitments to export*.

41. Moreover, a Member's chosen method of allocating a WTO-consistent quota is part of the *administration* of that quota, subject, therefore, to the provisions of the GATT 1994 that discipline a Member's administration of its quotas and other measures of general application. In Exhibit CHN-306, China demonstrates that quota auctions have no effect on the total amount exported, or on the final export price. A quota-winning bid does not restrict trade flows over and above the initial quota volume that the auction is designed to allocate.

42. Finally, the bid-winning price is not a "tax" or "charge" "applied to exports"; thus, paragraph 11.3 does not apply.

B. CLAIMS PERTAINING TO THE ELIGIBILITY OF AN EXPORTER FOR QUOTA ALLOCATION

43. The minimum export performance and capital requirements are eligibility criteria for allocating WTO-consistent export quotas applied to bauxite, coke, and silicon carbide. So long as China complies with all WTO disciplines governing the administration of a WTO-consistent quota

with respect to these eligibility criteria, China does not restrict trading rights in a manner prohibited by paragraph 5.1 of the *Accession Protocol*, and paragraphs 83 and 84 of the *Working Party Report*. Also, the European Union has not established its claim under paragraph 5.2 of the *Accession Protocol* and paragraphs 84(a) and 84(b) of the *Working Party Report*, with respect to its assertion that "foreign enterprises are more likely to be new applicants for export quotas than Chinese companies".

44. The "operation capacity" of the applicant is its capacity to undertake commodity exports, or in other words, the operational ability of the applicant to carry out the mechanics of an export transaction. There is nothing non-uniform, partial, or unreasonable about considering, among other objective factors, an applicant's ability to execute exports, before allocating it part of the quota. Such a criterion ensures quota fill, and avoids wasting the quota on applicants who cannot achieve quota fill. Moreover, the European Union points to no evidence concerning the application of the "operation capacity" requirement. It does not state a claim concerning the administration of the measure that is cognizable under Article X:3(a).

45. With respect to the CCCMC involvement in the administration of export quota allocation, Mexico and the United States have offered an improper legal characterization of the facts. The CCCMC Secretariat, and not CCCMC members, are involved in the administrative process leading to quota allocation. Even were the involvement of the CCCMC Secretariat to present an inherent risk of impartial and unreasonable administration, effective safeguards are in place to prevent or remedy the risks of conflict of interest described by Mexico and the United States.

C. CLAIMS PERTAINING TO THE PUBLICATION OF QUOTAS

46. With respect to the quota on certain zinc products, the MOFCOM has not authorized any quota for zinc for 2010. Accordingly, China has not omitted to publish the quota for zinc, and rules governing its allocation, under Article X:1.

47. With respect to the publication of the quota for coke, the EU has neglected to include this matter in its Panel request. In any event, China has published on time the amount of the quota for coke.

VII. CHINA'S AUTOMATIC EXPORT LICENSE REQUIREMENT AND ITS ADMINISTRATION

48. WTO Members have the right to decide how to regulate goods, provided they exercise that right in a manner consistent with their WTO obligations. Pursuant to Article XI:1, in regulating imports and exports, Members cannot *restrict the quantity* of imports or exports. As a result, a claim under Article XI:1 requires proof that an otherwise permissible regulation has an impermissible "*limiting effect*" on the *quantity* of imports or exports. An import or export license issued *automatically*, that is, in all cases, has *no limiting effect on the quantity of exports*, and is instead permissible regulation. Indeed, WTO Members recognize in the *Import Licensing Agreement* that automatic licensing is not only permissible, but affirmatively useful for certain purposes.

49. China's export license requirement is automatic, because, under Chinese law, an export license is automatically granted within three days of submitting an application, provided a valid and complete set of documents is submitted with the application – and irrespective of whether exports of the product are subject to a quota. As a result, the export license requirement does not limit the quantity of exports of bauxite, coke, manganese, silicon carbide, and zinc, and does not violate Article XI:1.

50. To the extent the Panel finds China's export license requirement to be inconsistent with Article XI:1, China requests that the Panel exercise judicial economy with respect to the Complainants' claims under Para. 5.1 *Accession Protocol*, and paragraphs 83(d), 84(a), 84(b), 162, and 165 of the *Working Party Report*.

51. Consistent with Article X:1, China has published the list of documents that must be submitted to obtain an export license, and the definition and method of verification of the "business qualification" of an applicant.

52. Finally, the Panel must reject the European Union's Article X:3(a) claim relating to the administration of China's export licensing system, alleging "based on a nexus of ... vague and opaque provisions and requirements", because the European Union provided neither interpretative argument nor evidence.

VIII. CHINA'S ALLEGED MEP REQUIREMENT AND ITS ADMINISTRATION

53. Leaving aside terms of reference issues, the Complainants' factual assertions regarding the alleged MEP requirement are incorrect, *because China no longer operates an export price coordination system*. The Complainants have failed to establish that: (i) following the repeal of export price coordination, China continued to impose and enforce an MEP; (ii) no exports of yellow phosphorus and bauxite occurred below the alleged coordinated prices; and, (iii) the alleged requirement constitutes a restriction on exportation under Article XI:1.

54. The Panel should not make findings regarding the claim that the administration of the MEP requirement through the chop system violates Article X:3(a), because the chop system was – as the Complainants recognize – formally repealed in May 2008, long before this dispute commenced. As a result, there no longer exists any MEP to administer. In any event, the Panel cannot make recommendations regarding the administration of measures that have ceased to exist.

55. Apart from those alleged MEP-related measures that no longer apply or have been formally repealed and therefore require no publication pursuant to Article X:1, China has published the 2010 CCCMC Charter.

ANNEX D-2

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT BY CHINA AT THE FIRST SUBSTANTIVE MEETING

I. INTRODUCTION

1. In Section II, China provides an update on the status of certain measures concerning the alleged MEP, requirement, as it relates to China's arguments concerning the Panel's terms of reference. In Sections III and IV, China places the matters at issue in a broader public international law context, and demonstrates that this relevant context confirms China's interpretation of Articles XI and XX GATT 1994. In Section V, China responds to specific questions raised by the third parties concerning Article XI:2(a) GATT 1994. Finally, in Section VI, China addresses the availability of Article XX in defense of claims under Paragraph 11.3 of the *Accession Protocol.*

II. TERMS OF REFERENCE – MEP MEASURES

2. China objects to the inclusion in the Panel's terms of reference of all but two measures related to China's alleged MEP requirement, because these measures were not included in the Complainants' Panel Requests and/or Consultation Requests. At paragraph 39 of its first written submission, China listed these measures in Table 1. Many of the measures listed in Table 1 have also expired, or were superseded or formally repealed. For the avoidance of doubt, on 16 August 2010, MOFCOM and the General Administration of Customs formally repealed two of the measures listed in Table 1, namely: (i) the 1997 *Circular on Printing and Circulating Relevant Provisions regarding Price Review of Export Commodities by the Customs*, including its annexes (also not listed in the Consultation Requests); (ii) the 2002 *Circular on the Adjustment of the Catalogue of Export Commodities Subject to Price Review by the Customs* (also not listed in the Panel Requests). Making findings with respect to these, and other, expired measures serves no purpose, even assuming, *quod non*, that they fall within the Panel's terms of reference. Moreover, the Panel may not make recommendations regarding these measures.

III. THE SOVEREIGN RIGHT OF A WTO MEMBER TO EXPLOIT ITS NATURAL RESOURCES TO ACHIEVE SUSTAINABLE DEVELOPMENT THROUGH ECONOMIC DIVERSIFICATION

3. What is fundamentally at stake in these disputes is the sovereign right of a developing country Member of the WTO to chart a course, over time, towards sustainable development through the exploitation of its natural resources. Consistent with international law, the WTO covered agreements allow a Member to use a range of policy tools, including export policy, to pursue these objectives, with the ultimate goal of enabling its sovereign natural resource endowment to deliver development that is sustainable. Indeed, the principle of sovereignty over natural resources; the objective of sustainable development; and, the objective of economic diversification beyond trade in raw materials, set forth in Article XXXVI:5 GATT 1994, support China's interpretation of Articles XI and XX GATT 1994.

4. *First*, pursuant to the customary international norm of permanent sovereignty over natural resources, a State has the inherent right "freely to use and exploit their natural wealth and resources wherever deemed desirable by them for their own progress and economic development", as recognized in U.N. G.A. Resolution 626 (VII). WTO Members have accepted the relevance of this customary norm to WTO disciplines. Notably, the Complainants have expressed their view that the principle is fully compatible with, and indeed an inherent part of, WTO disciplines. In accordance

with Article 31(3)(c) VCLT, the customary norm of sovereignty over natural resources is a relevant rule of international law, applicable to all States, to be taken into account in interpreting the WTO covered agreements.

5. *Second*, it is well-established in international law that a State's sovereign right to exploit its own natural resources is intimately linked to its "progress and economic development" – a link rarely as evident as it is in these disputes. Although China's economy is large, according to the IMF's 2010 *World Economic Outlook*, when assessed on a per capita basis, and adjusted for purchasing power parity, China's 2009 gross domestic product ranked *100th out of 183 countries*. It is, therefore, critical for China to leverage its natural resource endowments to secure its own "progress and economic development", through the production and export of more sophisticated, technologically-advanced processed products. The Preamble to the *WTO Agreement* underscores the Members' commitment to use trade to, for example, "raise[e] standards of living" and "ensur[e] full employment". Those same objectives are expressed in Article XXXVI:1(a) of the GATT 1994. The Preamble also records WTO Members' explicit recognition of the role that the exploitation of natural resources plays in achieving not only development, but development that is *sustainable*. Exploiting natural resources "in accordance with the objective of sustainable development" requires resource-rich Members to reconcile competing goals. In other words, also highlighted by the Brundtland Commission, achieving development that is sustainable requires a resource-rich State to confront a delicate balance: while natural resources hold the potential to drive development, uncontrolled use will lead to irreversible resource depletion and environmental degradation, to the detriment of future generations, and at the expense of the State's long-term capacity to develop.

6. *Third*, the WTO's commitment to development is reflected throughout the covered agreements, including in Part IV GATT 1994 on "Trade and Development". At the very same time that the principle of sovereignty over natural resources became accepted as a norm of customary international law, the Contracting Parties amended the GATT 1947 to introduce Part IV. Article XXXVI:5 of the GATT 1994 encourages resource-rich developing country Members to use their sovereign natural resources to enhance their own economic development, confirming the customary norm. Specifically, it calls upon developing countries to diversify economic activity beyond the export of "unsophisticated" primary products such as the natural resources at issue in these disputes. It constitutes relevant context for interpreting Articles XI:2(a) and XX of the GATT 1994, and has been described by the Secretariat as a "GATT provision[] relating to export restrictions and charges".

IV. THE INTERPRETATION OF ARTICLES XI AND XX OF THE GATT 1994 IN LIGHT OF THE PRINCIPLE OF SOVEREIGNTY OVER NATURAL RESOURCES AND THE OBJECTIVES OF SUSTAINABLE DEVELOPMENT AND ECONOMIC DIVERSIFICATION

A. THE MEANING OF ARTICLE XI:2(A) OF THE GATT 1994 IN LIGHT OF THE PRINCIPLE OF SOVEREIGNTY OVER NATURAL RESOURCES AND THE OBJECTIVES OF SUSTAINABLE DEVELOPMENT AND ECONOMIC DIVERSIFICATION

7. Article XI:2(a) applies to export restrictions or prohibitions on "foodstuffs or other products essential to the exporting [Member]". The sole limitation on the type of product covered by Article XI:2(a) is that it must be "essential to the exporting [Member]". Context, in the form of the term "other products", demonstrates that the provision is not limited to products essential to ensure food security. Under Article XI:2(a), a product may be essential for reasons other than subsistence. Paragraph 4 to the *BOP Understanding* confirms this reading, defining an "essential product" to include one that serves as an "input[] needed for production". Article XXXVI:5 and its *Ad* Note

provide additional context confirming that the essential nature of a "primary product" for a developing country may derive from the product's role in securing economic diversification through the development of domestic processing industries. Specifically, the provision confirms that measures designed by developing country Members to foster the "processing of primary products and the development of manufacturing industries" are not only legitimate, but encouraged by the WTO Membership. Finally, this reading is also consistent with the customary norm of sovereignty over natural resources, which was developed *in recognition of* the "essential" role of natural resources.

B. THE MEANING OF ARTICLE XX(G) OF THE GATT 1994 IN LIGHT OF THE PRINCIPLE OF SOVEREIGNTY OVER NATURAL RESOURCES AND THE OBJECTIVES OF SUSTAINABLE DEVELOPMENT AND ECONOMIC DIVERSIFICATION

8. Article XX(g) protects a Member's right to take measures relating to the conservation of exhaustible natural resources, provided they apply in conjunction with restrictions on domestic production or consumption.

9. The phrase "relating to conservation" encompasses measures that have an objective and discernible connection or relationship to conservation. In the case of non-renewable natural resources that are exploited commercially, conservation aims to manage human use of a resource over time, balancing its exploitation today with its preservation for tomorrow. A key component of conservation is, therefore, controlling and managing the supply of the resource to achieve this balance – which is the function of China's restrictions on domestic and export supply of refractory-grade bauxite and fluorspar. These measures preserve a portion of the resources for exploitation tomorrow, and they manage the limited supply available for exploitation today. Such management of the resources is fully consistent with the authority of a State to use its own resources for its own progress and development.

10. Under Article XX(g), measures "relating to conservation" must be taken "in conjunction with restrictions on domestic production or consumption". As such, conservation-related measures imposed on foreign trade must be applied along with domestic restrictions. As the Appellate Body in U*S - Gasoline* confirmed, the text of Article XX(g) does not require that the domestic and foreign supply of a resource be burdened in an identical manner. This interpretation is confirmed by the principle of sovereignty over natural resources. As already stated at paragraph 4 above, pursuant to that principle, States are entitled to use their own resources "for their own progress and economic development". Therefore, States are not required to subject foreign supply of a resource to identical restrictions as those imposed on domestic supply. If Article XX(g) were interpreted otherwise, it would depart from the customary norm with no textual basis to support that incursion on sovereignty.

11. Article XXXVI:5 and its *Ad* Note also confirm that Article XX(g) does not require identity between the restrictions on domestic and foreign supply of natural resources. As noted, in Article XXXVI:5, WTO Members recognize the objective of achieving economic diversification of developing country economies through the development of industries to process primary products.

C. THE MEANING OF ARTICLE XX(B) OF THE GATT 1994 IN LIGHT OF THE OBJECTIVE OF SUSTAINABLE DEVELOPMENT

12. The objective of sustainable development informs that Article XX(g) allows WTO Members to "protect and preserve the environment" while at the same time achieving social and economic development goals. For this reason, pursuant to Article XX(b), China has the right to protect the health of its citizens and environment at its chosen level of protection now and into the future. Consistent with the objective of sustainable development, Article XX affirms the right to adopt trade

measures, as part of a comprehensive set of interacting policy instruments, to internalize costs of environmental pollution and contribute to reducing pollution and energy consumption.

D. THE MEANING OF THE *CHAPEAU* TO ARTICLE XX OF THE GATT 1994 IN LIGHT OF ARTICLE XXXVI GATT 1994 AND THE OBJECTIVE OF ECONOMIC DIVERSIFICATION

13. Finally, measures taken in the exercise of a Member's sovereign right over natural resources, to promote sustainable development through "economic diversification", are not a "disguised restriction on international trade", under the *chapeau* to Article XX. Such measures are taken, pursuant to a customary norm of international law, to pursue objectives *explicitly* sanctioned by the covered agreements – either in the Preamble to the *WTO Agreement* or in Article XXXVI:5. Hence, they cannot constitute a disguised or otherwise illegitimate restriction that would be rendered impermissible under the *chapeau*.

V. THIRD PARTIES' INTERPRETATION OF ARTICLE XI:2(A) OF THE GATT 1994

14. In their third party submissions, Canada and Korea addressed the meaning and relevance of Article XI:2(a).

15. *First*, China is puzzled by Canada's statement that "the test is quite different" in Article XI:2(a) than it is in Article XX(g).[1] In particular, Canada observes that "there are no chapeau requirements" in Article XI:2(a), in contrast to Article XX(g),[2] meaning that there is a "heightened need to be attentive" in interpreting and applying Article XI:2(a).[3] If Canada's suggestion is that the Panel should ignore the text of Article XI:2(a), interpreting it to *include* requirements that the drafters decided to *exclude*, its suggestion is inconsistent with the principles of interpretation.

16. *Second*, China disagrees with Canada's statement that China "effectively argue[s] that 'temporary' in Article XI:2(a) actually means 'permanently'".[4] Instead, in its first written submission, China stated that "[t]he discipline imposed by the word 'temporarily' is not absolute, but is instead relative" – to be specific, relative to the amount of time required to prevent or relieve a critical shortage of an essential product.[5] This is a question that can only be judged in light of the relevant facts.

17. *Third*, China notes that Korea and Canada misunderstand the purpose to which China puts examples illustrating the Complainants' interpretation of Articles XI:1 and XI:2(a).[6] These examples demonstrate how the Complainants interpret and apply Articles XI:1 and XI:2(a) for *their own* export prohibitions and restrictions, *outside the heat of litigation*. The Complainants have interpreted Articles XI:1 and XI:2(a) to permit, for 30 to 40 years at a time, the maintenance of export prohibitions on products that they deem essential for downstream domestic industries, and for which supply is potentially restricted, by virtue of strong foreign demand, physical exhaustibility, and domestic regulatory limits on access. The Panel should be alert for any opportunistic attempts by the Complainants to argue in these disputes that Articles XI:1 and XI:2(a) should be interpreted differently, when applied to *China's* export restrictions, than when applied to their own, more potent, export *prohibitions*.

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[1] Canada's third party submission, para. 17.
[2] Canada's third party submission, para. 17.
[3] Canada's third party submission, para. 17.
[4] Canada's third party submission, para. 18.
[5] China's first written submission, para. 374.
[6] Korea's third party submission, para. 22; Canada's third party submission, paras. 18 and 19. *See also* China's first written submission, paras. 404 to 429.

18. *Fourth*, China disagrees with Canada's assertion that China relies on Australia's export restriction on merino sheep "as evidence of practice related to the 'temporary' question", under Article XI:2(a).[7] In fact, China's citation to the Australian measure falls in the section of its submission addressing the meaning of the term "essential products",[8] and it is used as context within the meaning of Article 31(2) VCLT. In agreeing that Article XI:2(a) would apply to Australia's export ban, Australia's negotiating partners expressed no concern that the "essential" character of merino sheep derived from the *value of the product to downstream domestic users* (live merino sheep are prized for their economic value in the production of premium wool).

VI. THE AVAILABILITY TO CHINA OF ARTICLE XX OF THE GATT 1994 TO JUSTIFY MEASURES FOUND TO BE INCONSISTENT WITH PARAGRAPH 11.3 OF THE *ACCESSION PROTOCOL*

19. China, like any other State, enjoys the right to regulate. As the Appellate Body in *China – Publications and Audiovisual Products*, this is "an inherent power enjoyed by a Member's government", not a "right bestowed by international treaties such as the *WTO Agreement*". The WTO covered agreements affirm this "inherent power" of each WTO Member, through, among others, Articles XX and XXI of the GATT 1994, Articles XIV and XIV*bis* of the GATS, and the entirety of the *SPS Agreement* and the *TBT Agreement*. These provisions reflect the basic principle that the obligations assumed in relation to trade do not prevent Members from taking measures that promote other fundamental societal interests recognized in the covered agreements. The Preamble to the *WTO Agreement* affirms Members' inherent right to regulate, stating that the WTO "preserve[s] the basic principles and … further[s] the objectives underlying this multilateral trading system".

20. In regulating trade, WTO Members must act in conformity with the provisions of the WTO covered agreements. As the Appellate Body in *China – Publications and Audiovisual Products* has explained, "the *WTO Agreement* and its Annexes … operate to, among other things, discipline the exercise of each Member's inherent power to regulate by requiring WTO Members to comply with the obligations that they have assumed thereunder". To act "in a manner consistent with the WTO Agreement" implies either that a WTO Member's exercise of regulatory powers "[does] not contravene any WTO obligation" or, if it does, that it "be justified under an applicable exception".[9]

21. When a WTO Member exercises the right to regulate through instruments affecting trade in goods, the disciplines found in the GATT 1994 apply, in addition to any relevant disciplines set out in other Annex 1A agreements, as well as any disciplines contained in the Member's accession commitments, which are incorporated into the *WTO Agreement*. It is well-established that the *WTO Agreement* and the other covered agreements form an "inseparable package of rights and disciplines which have to be considered in conjunction".[10]

22. Consistent with China's interpretation, the text of Paragraph 11.3 of the *Accession Protocol* explicitly recognizes that China has not abandoned its "inherent power" to regulate export trade. In particular, Annex 6 authorizes China, upon consultation with other WTO Members, to depart from the export duty commitments assumed in Paragraph 11.3 *if there are* "*exceptional circumstances*". Thus,

[7] Canada's third party submission, para. 20.
[8] China's first written submission, paras. 385 to 387.
[9] Appellate Body Report, *China – Audiovisual Products*, para. 223.
[10] Appellate Body Report, *Argentina – Footwear (EC)*, para. 81; Appellate Body Report, *Brazil – Desiccated Coconut*, pp. 178 and 179; Appellate Body Report, *US – Shrimp (Thailand)/US – Customs Bond Directive*, para. 233; Appellate Body Report, *US – Lamb*, para. 69; Appellate Body Report, *US – Steel Safeguards*, para. 275.

China's export duty commitments are, by their own terms, not inflexible obligations that prohibit regulation to promote interests such as conservation and public health. However, like Paragraph 5.1, the language in Annex 6 is not necessary to secure China's "inherent power" to regulate its export trade. Rather, the language in Annex 6 simply illustrates the drafters' recognition that China's "inherent power" remains. (With respect to Annex 6, China accepts that it has, so far, omitted to consult with other Members regarding the exceptional circumstances justifying the export duties at issue, but it intends to do so.)

23. This interpretation of Paragraph 11.3 is also consistent with Paragraph 170 of the *Working Party Report*, which notes China's commitment that, upon accession, "its laws and regulations relating to all … *taxes levied on imports and exports would be in full conformity with its WTO obligations*".[11] This language is similar to Paragraph 5.1 of the *Accession Protocol*. Such disciplines preserve a balance between allowing the right to regulate trade and subjecting the exercise of that right to obligations that attach to exceptions, such as the requirements set forth in Article XX. In other words, the right to regulate is not unfettered, but is subject to appropriate constraints.

24. China recognizes that, under Paragraph 11.3, it has assumed obligations regarding export duties that have not been assumed by other WTO Members. However, China finds repugnant the argument that it has not only assumed uniquely onerous obligations, but also that it is denied its "inherent power" to take measures in relation to these uniquely onerous obligations to promote other fundamental interests, such as conservation and public health. If this argument were accepted, China would be subject to uniquely onerous obligations and would be deprived, again uniquely, of its "inherent power" to regulate trade. In China's view, such an interpretation fails to respect the balance that is otherwise struck throughout the covered agreements.

[11] *Working Party Report*, Paragraph 170.

ANNEX D-3

EXECUTIVE SUMMARY OF THE CLOSING ORAL STATEMENT OF CHINA AT THE FIRST SUBSTANTIVE MEETING

I. INTRODUCTION

1. In this Closing Statement, China addresses three issues: (1) the Panel's terms of reference, which the Chairman has suggested that the Panel will rule upon shortly; (2) the need for the Panel to rule on the 2010 measures to resolve the dispute; and, (3) the applicability of Article XX of the GATT 1994 to Paragraph 11.3 of China's *Accession Protocol*. Other issues will be developed in China's remaining submissions.

II. TERMS OF REFERENCE

2. China has made a series of arguments regarding the Panel's terms of reference:

- *first*, Section III of the Panel requests does not comply with Article 6.2 of the DSU because the Complainants have not presented the problem clearly, given their failure to connect the narrative paragraphs in Section III with the 37 listed measures and 13 treaty provisions;

- *second*, the European Union has failed to identify China's omission to publish the coke quota as a measure at issue; and,

- *third*, 13 of the 15 measures referenced in the Complainants' first written submissions regarding the alleged MEPs, are not identified in either the Consultations requests, or the Panel request, or both; these 13 measures are, therefore, not part of the terms of reference.

3. On the first issue, China recalls that Section III of the Panel requests provides a series of narrative paragraphs, together with a list of 37 measures and 13 treaty provisions. The narrative paragraphs indicate that subsets of claims, regarding subsets of the 13 treaty provisions, are made with respect to subsets of the 37 measures. However, the Panel requests fail to present the problem clearly, because they do not identify *which specific claims* are made, under *which specific treaty provisions*, with respect to *which specific measures*.[1] The Complainants respond that there is no need for connections to be made between the narrative paragraphs and the 37 measures and 13 treaty provisions, because claims are made under *all* 13 listed treaty provisions with respect to *all* 37 of the listed measures.[2] The Panel's preliminary ruling accepted that the Complainants' explanation of the Panel requests "*seems to contradict*" the terms of those Requests.[3] The Panel took note that the Complainants committed that "*all possible concerns over the undefined scope of their challenge*" would be answered in the Complainants' first written submissions.[4] However, those submissions have simply emphasized continuing and significant concerns regarding the Panel Requests.

[1] *See* China's Comments of 23 April 2010, paras. 48 to 63.
[2] *See* Joint Response of the Co-Complainants of 21 April 2010, paras. 26 to 30.
[3] Panel's Preliminary Ruling of 18 May 2010, para. 36.
[4] Panel's Preliminary Ruling of 18 May 2010, para. 38.

4. China recalls that a first written submission cannot cure *defects* in a panel request, although it may clarify *ambiguities in the wording* of a panel request.[5] In this case, the Panel is not faced with a situation in which a first written submission clarifies ambiguities in the wording of a panel request. Rather, the wording of the Panel requests fails to meet a basic element of Article 6.2 DSU – specifically, the Panel requests do not present the problem clearly, because they make no connections between the narrative paragraphs and the listed measures and treaty provisions. Indeed, far from presenting the problem "clearly", the Panel requests are internally contradictory.

5. The Complainants' first written submissions simply emphasize the deficiencies in the Panel Requests. In particular, their submissions demonstrate that the Complainants do *not* make all claims regarding all measures, as they asserted in a bid to save their Panel requests. As a result, the Complainants' arguments in defense of their Panel requests are contradicted by both the terms of the Panel requests and the submissions. Furthermore, the Complainants' first written submissions do not state which subset of claims is made with respect to which subset of measures. Indeed, in its opening statement, the European Union offered an insight into how China and the Panel should go about identifying which specific measures are subject to which specific claims. The European Union said that the measures at issue could be identified through "the *torture* of a recitation of all the *footnotes* in the European Union's first written submission".[6] It added that "a simple read of the *relevant parts of the Facts section of the submission* shows that the measures at issue in this dispute are clearly identified".[7]

6. Thus, to identify the measures at issue, the European Union asks the Panel to read the *factual portion of its first written submission*. Moreover, the Panel should identify the measures by undertaking the "tortured" process of sifting through the "footnotes". China, in fact, has already said that, to identify which specific measures are subject to which specific claims in Section III, it had resorted to sifting through the "footnotes" in the Complainants' first written submissions to find every "passing reference" to a measure that *might* be at issue.[8] Article 6.2 of the DSU prevents the uncertainty inherent in this "tortured" process. This provision requires a panel to read the *panel request*, and not the footnotes in the first written submission, to identify which measures are subject to particular claims. Neither China nor the Panel is expected to undertake the "tortured" process of sifting through footnotes to comprehend the scope of the dispute. The Complainants have, therefore, failed to comply with the basic requirement in Article 6.2 of the DSU to present the problem clearly in their Panel requests.

7. On the second issue, China can be briefer. The European Union argues that China failed to publish its quota for coke. However, its Panel Request does not identify this omission as a specific measure at issue. The European Union asserts that it identified this measure through a *general statement*, in the first paragraph of Section III, that China "*does not publish certain measures pertaining to requirements, restrictions, or prohibitions on exports*". However, this general assertion

[5] Appellate Body Report, *EC – Bananas III*, paras. 142 and 143; *also* Appellate Body Report, *US – Carbon Steel*, para. 127; Appellate Body Report, *EC – Computer Equipment*, para. 72, footnote 49; Panel Report, *China – Publications and Audiovisual Products*, para. 7.23; Panel Report, *US – Continued Zeroing*, para. 7.63; Panel Report, *Japan – DRAMS (Korea)*, para. 7.9; Panel Report, *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, para. 7.51; Panel Report, *US – Softwood Lumber V*, para. 7.25; Panel Report, *US – Line Pipe*, para. 7.125; Panel Reports, *Canada/US – Continued Suspension*, para. 6.34; Panel Report, *US – Corrosion Resistant Steel Sunset Review*, para. 7.47; Panel Report, *Chile – Price Brand System*, para. 7.150.

[6] European Union's opening statement of 31 August 2010, para. 28.

[7] European Union's opening statement of 31 August 2010, para. 28.

[8] China's first written submission, paras. 22 (including footnote 13), 23, and 25.

regarding "certain measures" relating to a variety of legal instruments is too vague to identify the alleged omission regarding coke as a specific measure.

8. A complainant must identify the measures at issue with sufficient precision to enable the respondent and Panel to ascertain the particular matter that has been referred to adjudication.[9] For example, in the fourth paragraph of Section III, the European Union identified a specific omission at issue by referencing the type of measure not published (*i.e.*, a quota) and the product for which a quota was not published (*i.e.*, zinc). This formulation is sufficient to identify the failure to publish a quota for zinc as a measure.

9. If the *general statement* in the first paragraph of Section III, quoted a moment ago, were sufficient to identify any omission to publish "requirements, restrictions, or prohibitions on exports", there would have been no need for the European Union to identify *specifically* the omission regarding the zinc quota. Indeed, the European Union's decision to identify an omission to publish the zinc quota simply confirms that it has failed to specify a similar omission regarding the coke quota.

10. The third issue that China has raised is the Complainants' failure to include 13 of the 15 alleged MEP measures in their Consultations and/or Panel requests. Today's discussion of that issue confirms that the 13 measures cannot form part of the Panel's terms of reference.

III. THE PANEL SHOULD RULE ON THE 2010 MEASURES TO RESOLVE THE DISPUTE, AND SHOULD NOT RULE ON THE 2009 MEASURES

11. China turns now to the Panel's consideration of the 2009 and 2010 measures. As explained in paragraphs 53 to 70 of China's first written submission, the Complainants' Panel requests identify a number of measures that were withdrawn before the Panel was established, as well as measures that were withdrawn after that date. In some cases, the measures were replaced by new measures, and in some cases they were not. China accepts that the expired measures all form part of the Panel's terms of reference to the extent they were included in both the Panel and Consultation requests. In that event, they may be the subject of findings, although they cannot be the subject of recommendations.

12. Where withdrawn measures have *not* been replaced, China has encouraged the Panel *not* to make findings on the expired measures, because doing so does not help to resolve a dispute that has already been settled by the withdrawal of the measure.[10] This argument applies to: the special export duty on yellow phosphorous; the export duty on bauxite; and, the export quota on fluorspar. In any event, as the Appellate Body has held, the Panel cannot make a recommendation regarding measures that have been withdrawn, because there is nothing further China can do to bring the withdrawn measure into compliance. Where withdrawn measures have been replaced, China is *not* seeking to evade scrutiny of its measures. The Complainants have challenged a series of annual measures, such as annual measures announcing quotas and export duties. In most cases, they included the measures

[9] *See, e.g.*, Appellate Body Report, *EC – Bananas III*, para. 142; Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 120; Appellate Body Report, *US – Carbon Steel*, paras. 125 and 171. On the due process objective of panel requests, *see* Appellate Body Report, *US – Carbon Steel*, para. 126; Appellate Body Report, *US – Continued Zeroing*, para. 161; Appellate Body Report, *EC – Bananas III*, para. 142; Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 108; Appellate Body Report, *EC – Selected Customs Matters*, para. 130; Appellate Body Report, *EC – Chicken Cuts*, para. 155; Appellate Body Report, *EC – Computer Equipment*, para. 70; Appellate Body Report, *Korea – Dairy*, paras. 126 and 127; Appellate Body Report, *Brazil –Desiccated Coconut*, p. 22; Appellate Body Report, *India – Patents (US)*, para. 87; Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 143; Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.28.

[10] China's first written submission, paras. 63 to 67.

that applied in 2009 in the Panel Requests ("2009 measures"), although for export quotas, including on bauxite, the measure that applies in 2010 was adopted before establishment and was also specifically identified by name ("2010 measure").[11] The Complainants also expressly included "replacement" measures in the Panel Requests,[12] and the Panel expressly ruled that "replacement" measures are part of its terms of reference.[13] There is, therefore, no question that the 2010 replacement measures *are* all within the Panel's terms of reference.

13. Although the Panel requests include the replacement measures, sometimes by name, and although the Complainants insisted as recently as the hearing on 23 April 2010 that the replacement measures were included in the terms of reference, they now appear to urge the Panel to refrain from ruling on the 2010 measures. This appears to be nothing more than an attempt to prevent the Panel from ruling on China's defenses, including under Article XX(g) GATT 1994, which involves extraction and production caps adopted in 2010. China submits that, to resolve these disputes – the standard the Complainants have urged the Panel to adopt in deciding on which measures to rule – the Panel must rule on the 2010 measures, which are currently in force, together with the defenses relevant to them. These measures are the source of the dispute today, and the source of the alleged ongoing nullification or impairment of benefits. The Panel would fail to discharge its responsibility to resolve this dispute if it declined to rule on the measures currently applied. It would also fail to resolve the dispute if it failed to address China's assertion that certain of its measures are justified by Article XX(g). Furthermore, the Panel would fail to resolve the dispute if it ruled solely on the 2009 measures, which have been replaced and are, therefore, no longer the source of the dispute. In sum, the prompt resolution of this dispute calls for the Panel to address the 2010 measures, and not the 2009 measures.

14. China wishes to emphasize one further crucial point. If the Panel decides to rule on the 2009 measures, it cannot make recommendations regarding these measures because they have ceased to exist.[14] Without recommendations, there will be no requirement for China to adopt "measures taken to comply". The Complainants will have secured no recommendations requiring China to bring its quotas and export duties on the products at issue into conformity.

15. As a result, the Complainants cannot *elect* to pursue solely the 2009 measures in these proceedings, thereby *evading* China's defenses regarding the 2010 measures, and then pursue *compliance* proceedings regarding the 2010 or other subsequent replacement measures. To permit such a litigation strategy would deprive China of timely consideration of its defenses and – should the need arise – its right to revise the quota and duty measures during an implementation period that would follow original proceedings, but that would *not* follow compliance proceedings that assessed China's defenses for the first time. In China's view, the prompt settlement of disputes must be fair and balanced in its treatment of complainants and respondents at all procedural stages.

16. Accordingly, the Complainants face a choice. If they wish the Panel to decline to examine the current 2010 measures, and instead to examine only the now-replaced 2009 measures, they must

[11] Notice Regarding Announcement of the 2010 Export Quota Amounts for Agricultural and Industrial Products (Ministry of Commerce, Notice (2009) No. 88, October 29, 2009) (Exhibit CHN-8).

[12] *See* final bullet point of list of measures in each Section of *China – Measures Related to the Exportation of Various Raw Materials* – Request for the Establishment of a Panel by the European Communities, WT/DS395/7 (9 November 2009); *China – Measures Related to the Exportation of Various Raw Materials* – Request for the Establishment of a Panel by Mexico, WT/DS398/6, (9 November 2009); *China – Measures Related to the Exportation of Various Raw Materials* – Request for the Establishment of a Panel by the United States, WT/DS394/7 (9 November 2009).

[13] Panel's Preliminary Ruling of 18 May 2010, para. 20.

[14] Appellate Body Report, *US – Certain EC Products*, para. 81.

forego recommendations regarding the 2009 measures, with the inherent consequences that will bring in any implementation proceedings in these disputes.

IV. ARTICLE XX OF THE GATT 1994 APPLIES TO CHINA'S COMMITMENTS UNDER PARAGRAPH 11.3 OF THE *ACCESSION PROTOCOL*

17. The final issue that China will address is the applicability of Article XX of the GATT 1994 to China's commitments under Paragraph 11.3 of the *Accession Protocol*. In its opening statement, China explained that the right to regulate is "an inherent power enjoyed by a Member's government", not a "right bestowed by international treaties such as the *WTO Agreement*".[15] China also noted that this "inherent right" is affirmed throughout the covered agreements, showing it is among the basic principles of the multilateral trading system. The Preamble to the *WTO Agreement* – of which China's *Accession Protocol* forms part – recognizes that the covered agreements "preserve the basic principles" underlying the multilateral trading system.

18. In the case of China's export duties, Paragraph 11.3 and Annex 6 *Accession Protocol*, and Paragraph 170 of the *Working Party Report*, confirm that China may impose export duties that violate its commitments, among others in "exceptional circumstances", provided that China respects the "obligations" that attach to relevant exceptions, such as Article XX of the GATT 1994.[16]

19. Today, the Panel asked what boundaries circumscribe China's "inherent right" to regulate trade. The boundaries circumscribing China's right to regulate trade are the *same* as the boundaries circumscribing other Members' right to regulate trade. Those boundaries are found in the *obligations* that attach to relevant exceptions. For example, just like other WTO Members, China's right to regulate trade in goods for conservation-related reasons is disciplined by the requirements set forth in Article XX(g) and the *chapeau* of Article XX. The significant difference for China is that, as a result of Paragraph 11.3, it bears the burden to establish its adherence to the obligations attached to applicable exceptions, in order to regulate trade through the maintenance of export duties. In sum, the covered agreements do not deprive Members of the right to regulate, but set "boundaries" for, and thereby discipline, the manner in which that right is exercised.

[15] China's Opening Statement of 31 August 2010, para. 67. *See also* Appellate Body Report, *China – Publications and Audiovisual Products*, para. 222. *See also* Panel Report, *Argentina – Hides and Leather*, para. 11.98 ("The government also has a relevant legal interest in the transaction based on the sovereign right to regulation ...").

[16] China's opening statement of 31 August 2010, para. 73.

ANNEX D-4

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF CHINA

I. INTRODUCTION

1. These disputes involve the sovereign right of the China to chart a course, over time, towards sustainable development through the exploitation of a series of natural resources and resource-based products that the Complainants have characterized as "*critical* inputs for the most basic industries of modern society", as "*essential* to" and "*indispensable* for" the production of basic commodities, and as "*necessary* for the manufacturing of a very broad array of goods".

II. THE PANEL SHOULD RULE ON THE 2010 MEASURES TO RESOLVE THE DISPUTES, AND SHOULD NOT RULE ON THE 2009 MEASURES

2. The Complainants have asked the Panel to make findings and recommendations concerning a number of 2009 measures, which were withdrawn before, or since, the Panel's establishment, or replaced by 2010 measures.

3. China emphasizes that ruling on the expired 2009 measures serves no purpose, as they are already withdrawn; in any event, the Panel may not make recommendations regarding those expired measures. Additionally, the prompt, positive resolution of these disputes calls for the Panel to rule on measures currently in force, including the 2010 replacement measures that *prolong* or *adjust* the 2009 measures. It would not constitute a fair and balanced settlement of these disputes, if the Complainants could elect to pursue solely the 2009 measures, thereby evading China's defenses regarding the 2010 measures, based on changes it has made to its regulatory environment concerning its natural resources. Moreover, as noted above, were the Panel to make findings solely on the 2009 measures, it could not make any recommendations, since those measures have ceased to exist. Without recommendations, there will be no requirement for China to adopt "measures taken to comply".

4. Finally, the 2010 measures are within the Panel's terms of reference. The Complainants expressly included "replacement" measures in the Panel requests, and the Panel expressly ruled, in the first part of its preliminary ruling, that "replacement" measures are part of its terms of reference. There is, therefore, no question that the 2010 replacement measures, including measures that prolong and/or adjust the product category of the 2009 measures, are all within the Panel's terms of reference.

III. THE COMPLAINANTS HAVE FAILED TO ESTABLISH THAT THE EXPORT QUOTAS, INCLUDING ON REFRACTORY BAUXITE, ARE INCONSISTENT WITH ARTICLE XI:1 OF THE GATT 1994 AND PARAGRAPHS 162 AND 165 OF THE WORKING PARTY *REPORT*

5. At the outset, China recalls the European Union's failure to identify the measures imposing the export quotas subject to its Article XI:1 claim. In the first part of its preliminary ruling, the Panel found that it can only make recommendations with respect to "specific provisions of specific measures and therefore may need to consider and examine the specific situation of specific challenged instruments as they apply to specific products or group of products". With respect to the European Union claims, the Panel remains unable to make findings "sufficiently precise" to enable the DSB to make recommendations that will allow prompt and effective resolution of these disputes.

6. The Complainants have also failed to demonstrate that Article XI:1 applies to China's export quotas. The Complainants assert that China bears the burden of showing that its measures fall under Article XI:2(a) because Article XI:2(a) contains "defenses" or "exceptions". However, the Appellate Body has clarified that complainants may have to prove a responding Member's non-compliance even with "positive obligations" imposing "conditions", particularly where, as here, there was a reasonable basis, given the Complainants' own arguments concerning the products at issue, to understand that the quotas might not violate Article XI:1, in light of Article XI:2(a).

7. The Parties disagree on the meaning of the phrase "other products essential for the exporting [Member]" in Article XI:2(a). Article XI:2(a) does not *a priori* prescribe or exclude any criterion to determine essentialness. China refers to the ordinary meaning of the term, the *WTO Agreement*'s Preamble, Article XXXVI:5 of the GATT 1994, Paragraph 4 of the *BOP Understanding*, and the drafters' agreement on the application of Article XI:2(a) to Australia's export ban on merino sheep to establish that a product must be essential to the *exporting Member*. China has demonstrated that refractory bauxite is essential because it is an exhaustible and rapidly depleting product with unique chemical and physical characteristics that stand at the base of a value chain collectively constituting 50% of China's GDP, with a host of attendant benefits for social and economic growth and development. The Complainants' critique of the approach used by China's expert must fail, because this approach directly addresses the degree of shortage and the degree of essentialness of refractory bauxite. Moreover, the Complainants themselves rely on similar approaches, in formulating their own trade measures on the same category of product.

8. The Parties further disagree on the meaning of the phrase "critical shortage". Contrary to the Complainants' assertions, the phrase's immediate context confirms that a shortage may be critical even when remediable through an export *restriction*, as opposed to an export *ban*. Moreover, Article XI:2(a) provides that Members can impose export quotas to *prevent* any risk of a critical shortage that they perceive, as a result of their *own risk evaluation and appreciation*. The Complainants, therefore, err in considering that such restrictions can only be imposed to cure a "sudden" "exogenous shock". Factors that may be taken into account in determining the existence of a critical shortage or risk thereof are various, and include limited geological or physical availability, conservation measures that limit extraction and production, the development and use of technology, the absence of available substitutes, local and regional communities' acceptance of production practices (mining for instance), the level of domestic and international demand and the level of access to foreign supply.

9. Article XI:2(a) also requires that export restrictions be "temporarily applied", that is, be limited to the time required to prevent or relieve critical shortages of products essential to the exporting Member. In relation to the measure at issue, China limits its temporal application and reviews the quota on an *annual basi*s.

10. Accordingly, the export quota on refractory bauxite satisfies Article XI:2(a), and therefore falls outside the scope of application of Article XI:1. Measures consistent with Article XI:1 are also consistent with Paragraphs 162 and 165 of the *Working Party Report*.

IV. THE AVAILABILITY OF ARTICLE XX OF THE GATT 1994 IN DEFENSE OF A CLAIM UNDER PARAGRAPH 11.3 OF THE *ACCESSION PROTOCOL*

11. China can resort to Article XX of the GATT 1994 in defense of a claim that it imposes export duties contrary to Paragraph 11.3 of the *Accession Protocol*. The basis for China's right to apply export duties, provided it complies with obligations attaching to the relevant subparagraphs and the *chapeau* of Article XX, is found in the text of the covered agreements, read as a whole. The covered

agreements affirm the inherent right of every WTO Member to regulate trade, which the Appellate Body in *China – Audiovisual Products* described as "an inherent power enjoyed by a Member's government", rather than a "right bestowed by international treaties such as the *WTO Agreement*".

12. The text of Paragraph 11.3 shows that WTO Members, in imposing an obligation on China to forego export duties in certain circumstances, did not exclude the inherent right to regulate. Indeed, as Annex 6 demonstrates, the export duty commitments in Paragraph 11.3 are, by their own terms, not inflexible obligations that prohibit regulation to promote interests such as conservation and public health.

13. Paragraph 170 of the *Working Party Report* also offers important additional support for China's interpretation of the covered agreements. The text of Paragraph 170, which falls under the heading "*Taxes* and Charges Levied on Imports and *Exports*", confirms China's commitment to "ensure that its laws and regulations relating to all fees, charges or taxes levied on imports and exports [are] in full conformity with its WTO obligations, *including* Articles I, III:2 and 4, and XI:1 of the GATT 1994". The heading of this provision demonstrates that it applies to export taxes or duties, such as those at issue. The use of the term "including" makes clear that the list of provisions cited in Paragraph 170 is not exhaustive – it refers to *all* goods-related obligations assumed under the WTO covered agreements. This provision, therefore, confirms the application of *all* commitments assumed under the GATT 1994 to China's laws and regulations relating to export duties, such as the commitment to apply WTO-inconsistent measures for conservation and health objectives only in so far as they are consistent with obligations attaching to the relevant subparagraphs and the *chapeau* of Article XX.

14. China recalls that the GATT 1994 and the *Accession Protocol*, together with the other covered agreements, form an integral part of the WTO Agreement. They apply together as part of a single treaty instrument, the WTO Agreement – a single undertaking accepted by all WTO Members. Within this single treaty framework, the Appellate Body has noted that the function of exceptions, such as Article XX of the GATT 1994, is, with respect to goods-related obligations, "to permit important state interests – including the protection of human health, as well as the conservation of exhaustible natural resources – to find expression". In other words, the pursuit of non-trade interests may, in certain circumstances, prevail over the pursuit of trade interests. In pursuing non-trade interests, the Appellate Body confirmed that Article XX protects WTO Members' "large measure of autonomy" to regulate. As also confirmed by the Appellate Body, the source of that autonomy is "an inherent power enjoyed by a Member's government", rather than a "right bestowed by international treaties such as the WTO Agreement". Insofar as trade measures are used to give effect to policies enshrined in Article XX, the Appellate Body has confirmed that Members' "autonomy is circumscribed only by the need to respect the requirements of the General Agreement and the other covered agreements".

15. This background is critical to the Panel's consideration of the Complainants' attempt to deprive China, and China alone, of its inherent right to regulate trade, and its autonomy to determine its own environmental, health and conservation policies, within the bounds of Article XX. Against this background, China finds repugnant the suggestion that it has not only assumed uniquely onerous obligations, like the obligation under Paragraph 11.3 regarding export duties on goods, but that it is also denied its "inherent power" and "autonomy" to take measures in relation to those obligations to promote other fundamental interests, such as conservation and public health, where it satisfies the conditions required of such measures. The suggestion that an "inherent power" reserving for all Members the "autonomy" to take measures in relation to these most fundamental of interests can be denied unless expressly re-affirmed in artificially parsed constituent parts of a single undertaking is distinctly contrary to the harmonious interpretation of the covered agreements required by the

Appellate Body. To do so would be to turn inherent rights into acquired rights, autonomy into heteronomy, and the single undertaking into a series of detached agreements. Any such suggestion must fail, in particular where, as here, the text confirms the availability of Article XX as a defense to claims under Paragraph 11.3.

V. THE EXPORT RESTRAINTS APPLIED TO REFRACTORY BAUXITE AND FLUORSPAR ARE JUSTIFIED PURSUANT TO ARTICLE XX(G) OF THE GATT 1994

16. The export duty on fluorspar and the export quota on refractory bauxite are justified pursuant to Article XX(g) of the GATT 1994 because they "relat[e] to the conservation of exhaustible natural resources" and are "made effective in conjunction with restrictions on domestic production or consumption." The Complainants have not addressed China's factual arguments and evidence. Relying on well-established principles of treaty interpretation, China therefore limits its response to the Complainants' interpretive arguments.

17. The phrase "relating to conservation of exhaustible natural resources" must be read in light of the objective of sustainable development, stated in the Preamble to the *WTO Agreement* – an objective the Complainants erroneously discard as interpretively irrelevant. Sustainable development requires that economic development and conservation be aligned through the effective management of scarce resources. In light thereof, the term "conservation" refers to the management of the limited supply of exhaustible natural resources over time. In that sense, the export restraints at issue "relat[e] to conservation" because they are part and parcel of China's measures that manage the limited supply of refractory bauxite and fluorspar, which are exhaustible natural resources.

18. All Parties accept, in principle, the Appellate Body's interpretation of the phrase "made effective in conjunction with domestic restrictions on production or consumption" as meaning that identical treatment of foreign and domestic trade is not required. Nevertheless, the European Union asserts that domestic users cannot permissibly be subject to "less burdens" than foreign users, and foreign users cannot be subject to "more burdens" than domestic users – meaning that identical treatment of domestic and foreign users is required. This position must be rejected because (i) the Appellate Body has recognized that no particular distribution of the burden is required; (ii) Article XXXVI:5 of the GATT 1994 and its *Ad* Note confirm that the burden on domestic and foreign supply need not be identical because developing countries may pursue economic diversification through development of domestic industries to process primary products; and, (iii) consistent with the customary norm of sovereignty over natural resources, Article XX(g) does not oblige a resource-endowed WTO Member to ensure that other user-countries benefit equally or identically from the exploitation of its resources – after all, the *WTO Agreement* is not a commodity-sharing agreement.

19. Finally, the Parties also disagree on the meaning of the *chapeau* to Article XX. China clarifies its earlier argument that applying measures consistently with legitimate objectives recognized in the covered agreements cannot form the basis for an assertion that China's export restraints are a "disguised restriction on international trade". An export restriction that is applied in a manner consistent with the objectives of sustainable development and Article XXXVI:5, and with the customary norm of sovereignty over natural resources, cannot be impermissible under the *chapeau* of Article XX, simply because the Complainants contest the particular share of China's resources that they have been allocated.

VI. THE EXPORT DUTIES AND QUOTAS APPLIED TO THE EPR PRODUCTS', MAGNESIUM METAL SCRAP, MANGANESE METAL SCRAP, AND ZINC SCRAP ARE JUSTIFIED PURSUANT TO ARTICLE XX(B) OF THE GATT 1994

A. COMPLAINANTS HAVE NOT REBUTTED CHINA'S DEMONSTRATION THAT EXPORT MEASURES ON THE EPR PRODUCTS SATISFY THE CRITERIA SET OUT IN ARTICLE XX(B) OF THE GATT 1994

20. The Complainants have yet to rebut China's factual argument and evidence that export duties and quotas on coke, magnesium and manganese metals, silicon carbide, magnesium and manganese metal scrap, and zinc scrap are justified under Article XX(b) of the GATT 1994.

21. *First*, the Complainants improperly argue that China's stated objective is a *post hoc* rationalization. China has provided contemporaneous evidence showing that its export measures on EPR products have always and explicitly been linked to those objectives, long before these disputes. Moreover, China has demonstrated that these measures are not standalone initiatives to curb pollution, but are key components of a comprehensive regulatory framework aimed at reducing pollution and, thereby, reducing risks to human, animal and plant life and health.

22. *Second*, the Complainants' allegation that China's export restrictions on the products at issue "severely distort the conditions of competition in the global marketplace" must also be rejected, because it is based on an assessment of the effect of the measures imposed on the products collectively, and fails to isolate the trade effect of those measures *themselves* from other economic and regulatory factors having a greater impact than China's restrictions on the availability of the products at issue. China also recalls that the trade restrictiveness of its measures is limited. In fact, China's measures are likely to have trade *stimulating* effects in the medium to long term.

23. *Third*, the Complainants have failed to rebut China's showing that its export restrictions make a material contribution to Article XX(b) objectives, making them "necessary" under that provision. China's export restrictions contribute to a decrease in domestic production of the highly polluting products at issue; they constitute a key element of a comprehensive strategy aimed at restructuring China's industry towards sustainable environmental protection. China has provided expert statements showing that production of EPR products, and not their use by downstream industries, is the most polluting process. Moreover, a decrease in availability of EPR products is more likely to impact the *quality* of the finished products than their *quantity*; also, pollution resulting from downstream processes will be counterbalanced by pollution savings *upstream* (less mining, refining, transportation).

24. *Fourth*, none of the alternative measures proposed by the Complainants are available to China because they are all already in place. The Appellate Body in *Brazil – Retreaded Tyres* established that less restrictive alternatives must be reasonably available, must not already be in place, and must permit achievement of the same level of protection. As part of its comprehensive strategy to address risks resulting from production of EPR products, China implements pollution controls in the form of emission standards, energy consumption caps per unit of EPR product, pollutant discharge fees and industry entrance standards and impact assessments. China also requires industry to shift to less environmentally harmful production, through the prohibition of polluting techniques and technologies, the elimination of outdated production capacity, or incentives to use recycling equipment. Finally, China imposes compliance with environmental regulations that control the polluting effect of the production processes.

B. CHINA HAS SUCCESSFULLY DEMONSTRATED THAT ITS EXPORT MEASURES ON MAGNESIUM METAL SCRAP, MANGANESE METAL SCRAP, AND ZINC SCRAP ("METAL SCRAP PRODUCTS") SATISFY THE CRITERIA SET OUT IN ARTICLE XX(B) OF THE GATT 1994

25. China's export duties on metal scrap products are aimed at reducing risks to human, animal and plant life and health and are apt to make a material contribution to China's environmental and public health objectives. Contrary to the Complainants' allegations, pronouncements of the Chinese government on the purpose of export duties on scrap, as well as the overall design of the measures, which evidence a holistic regulatory effort to develop a recycling industry, show that export duties on metal scrap products serve environmental and health goals.

26. Furthermore, China has shown that its export duties on metal scrap products are "apt to" make a material contribution to the objective recognized under subparagraph (b) because, by securing a continuous and reliable flow of supply of metal scrap in China, they are a key element of a comprehensive strategy aimed at developing a recycling industry in China – a strategy that the European Union and the United States themselves previously adopted, through their own export prohibitions and restrictions on metal scrap products. To assess the necessity of China's measures, account should also be taken of their limited trade distorting effect (due to limited supplies in China, which imports the majority of its scrap products), a fact acknowledged by the Complainants.

27. Finally, none of the alternative measures proposed by the Complainants are reasonably available to China, to the extent they are not already in place. China already imposes pollution controls on primary production, and promotes recycling of consumer goods. These measures complement rather than substitute for China's export duties. The Complainants' suggestion that China require producers to shift from primary to secondary production is not a measure reasonably available to China. Given the infancy of China's recycling industry, such a requirement would result in bankruptcies and closures which would impose prohibitive costs on the Chinese economy.

C. CHINA'S MEASURES SATISFY THE REQUIREMENTS OF THE *CHAPEAU* TO ARTICLE XX OF THE GATT 1994

28. The Complainants incorrectly assert that China has failed to demonstrate compliance with the *chapeau* of Article XX, and that the application of export measures results in arbitrary or unjustifiable discrimination where the same conditions prevail. The evidence demonstrates that China has applied its export measures in a good faith attempt to meet its objectives of reducing environmental pollution and therewith the risk to human, animal, and plant life and health. China has thoroughly demonstrated the close and contemporaneous links between its export measures and its environmental policy framework to address pollution caused by the production of EPR products. Additionally, China has shown that the export measures materially contribute to, or are apt to contribute to, reduced pollution from EPR products. Finally, the Complainants fail to acknowledge that the bulk of the burden resulting from China's environmental policies has been shouldered by domestic industries, rather than by foreign importers.

VII. THE ADMINISTRATION OF CHINA'S WTO-CONSISTENT EXPORT QUOTAS

A. THE BID-WINNING PRICE FALLS OUTSIDE THE SCOPE OF THE OBLIGATION IN ARTICLE VIII:1(A) OF THE GATT 1994

29. Mexico and the United States challenge, under Article VIII:1(a) of the GATT 1994, China's use of auctions as a means for quota allocation, but have abandoned their claim under Paragraph 11.3 of the *Accession Protocol*. They have not rebutted China's demonstration that an auction is the most

efficient means of quota allocation, and that WTO law neither *a priori* prescribes nor condones any means of quota allocation. The terms of Article VIII:1(a) cannot be read as prohibiting auctions as a means of quota allocation. The phrase "in connection with [exportation]" may indicate that Article VIII:1(a) applies to a broader category of fees and charges than solely those charged at the exact moment when the good leaves the territory of the exporting Member. However, the sole fact that the use of the phrase "in connection with [exportation]" connotes a broader category of fees and charges than those imposed "on exportation" does not contradict China's interpretation.

30. Apart from the fact that this claim is based on an inapplicable provision of the GATT 1994, China is also surprised by the United States' strong opposition to China's use of auctions, in light of its own support for the use of auctions outside the context of this litigation. For example, the President of the United States has the right to allocate import licenses through auctions; the United States approves of the use of auctions to allocate parts of the export tariff-rate quota for rice destined for the European Union; and, the United States negotiates free trade agreements that confirm that WTO-consistent quota administration may include use of auctions.

B. CLAIMS PERTAINING TO THE ELIGIBILITY OF AN EXPORTER FOR QUOTA ALLOCATION

31. To the extent the Complainants' claims with respect to eligibility criteria that apply to the quotas at issue, whether allocated directly or through bidding, are within the Panel's terms of reference, China notes that the Complainants have failed to address China's rebuttals, except as regards the European Union's additional arguments concerning the alleged "operation capacity" criterion. In response, China notes, *first*, that the "operation capacity" requirement is not applied to any of the export quotas on products at issue in these disputes, because Article 19 of the *Measures for the Administration of Export Commodities Quotas* does not apply to any of the products at issue. *Second*, the European Union has failed to provide any evidence demonstrating that either the alleged absence of a definition of "operation capacity" or the criterion itself inherently leads to administration that is contrary to Article X:3(a) of the GATT 1994. The European Union argues that the WTO-inconsistency arises because China has not *foreclosed* (but rather "allows") administration that *might* ("potentially") be discriminatory. However, asserting that a Member *might* take action that *could potentially* be WTO-inconsistent, depending on the specific but as-yet-unknown character of that action, is not sufficient to establish a violation.

C. CLAIMS PERTAINING TO THE INVOLVEMENT OF THE CCCMC IN THE DIRECT ALLOCATION OF THE QUOTA FOR COKE AND THE ALLOCATION THROUGH BIDDING OF THE QUOTA FOR BAUXITE AND SILICON CARBIDE

32. Mexico and the United States assert that the involvement of CCCMC in the direct allocation of the quota for coke and the allocation through bidding of the quota for bauxite and silicon carbide constitutes partial and unreasonable administration within the meaning of Article X:3(a) of the GATT 1994. China previously rebutted this claim by adducing argument and evidence that: (i) MOFCOM delegates governmental authority in the administrative process leading to quota allocation, whether allocated directly or through bidding, to the *CCCMC Secretariat*, and *not the CCCMC membership*; (ii) solely the CCCMC Secretariat's Minerals & Metals and Bidding Departments play a role in the administrative processes leading to quota allocation, and receive access to any documents submitted by exporters wishing to obtain part of the quota for coke, bauxite, and silicon carbide; (iii) no inherent conflict "averse to the interest of the exporter at issue and foreign buyers" exists, because competing exporters and potential customers *are not granted access to confidential commercial information*; and, (iv) CCCMC members do not play any role, let alone a decision-making role, in the bidding process.

33. Because Mexico and the United States have failed to provide *any* evidence demonstrating that the delegation of certain quota administration tasks to the CCCMC Secretariat has led to, or necessarily leads to, a conflict of interest and WTO-inconsistent administration, China is not obliged, pursuant to Article X:3(a), to adopt "safeguards" to ensure that the CCCMC Secretariat remains impartial and reasonable. Nonetheless, as demonstrated in previous submissions, effective safeguards are in place to ensure that no business confidential information flows from the CCCMC Bidding and Minerals & Metals Departments to its 4,000 members or the general public.

34. Mexico and the United States also erroneously argue that because the "chain of command" extends from the CCCMC Secretariat employees in the Minerals & Metals and Bidding Departments, through several levels of hierarchy, to CCCMC's 4,000 members, the delegation of certain quota administration tasks to the CCCMC Secretariat is irretrievably partial and unreasonable. China submits that the chain of command alleged by Mexico and the United States is based on a false premise, which is that a body that meets once every four years dissolves all distinction between divisions of the CCCMC Secretariat involved in quota administration, and the CCCMC's 4,000 members. China further notes that the chain of command set out by Mexico and the United States lists at least six degrees of separation between the CCCMC Secretariat employees directly involved in quota administration, and the CCCMC membership. Mexico and the United States ask the Panel to *assume*, without *any* evidence, that these multiple degrees of separation are of *no* relevance in preventing the transmission of confidential information from the Secretariat employees to the CCCMC's 4,000 members. In addition to examples of WTO Members' delegation of the exercise of regulatory authority to private industry, offered in previous submissions, China provides additional examples from the United States and Mexico.

D. CLAIM PERTAINING TO CHINA'S ALLEGED FAILURE TO PUBLISH QUOTAS FOR ZINC

35. In previous submissions, China already responded that it did not authorize any quota for zinc, and, accordingly, China has not omitted to publish the total quota amount and the rules governing the allocation of the zinc quota. As a result, the European Union's claim under Article X:1 of the GATT 1994 is without merit.

VIII. CHINA'S EXPORT LICENSE REQUIREMENT

36. At the outset, China notes that Mexico and the United States have abandoned their claims that China's export license requirement is inconsistent with Paragraphs 162 and 165 of the *Working Party Report*, based on their response to the Panel's Question 2, as noted in footnote 77 of the Panel's Preliminary Ruling of 1 October 2010.

A. CHINA'S EXPORT LICENSE REQUIREMENT IS CONSISTENT WITH ARTICLE XI:1 OF THE GATT 1994

37. Under the proper interpretation of Article XI:1, China's export licensing requirement does not restrict exports. Whether labelled "automatic" or "non-automatic", the result under Article XI:1 is the same: an analysis of the relevant measures demonstrates that export licenses for the products at issue shall be granted within three days, upon receipt of a valid and complete set of application documents, a list of which is specified in those measures. The Complainants have failed to establish that China's export licensing requirement imposes a limitation on the quantity of exports, and have therefore failed to demonstrate that export licenses for the products at issue constitute export restrictions within the meaning of Article XI:1.

38. The mere fact that an export is subject to a regulatory "condition" does not mean that the "condition" violates Article XI:1. In the case of licensing requirements, the *Import Licensing Agreement* provides context to identify the dividing line, under Article XI:1, between permissible regulation, and regulation that has a quantitative limiting effect. The very fact that the *Import Licensing Agreement* disciplines licensing, without prohibiting it, underscores that licensing requirements are not *a priori* impermissible regulation. The definition of "licensing" in Article 1.1 *Import Licensing Agreement* offers further relevant context demonstrating that the requirement of valid and complete *documentation* as a condition for receipt of a license does not convert an otherwise valid licensing requirement into a prohibited restriction on the quantity of exports.

39. China further notes that, as a matter of fact, the Complainants confirm that they have no evidence establishing that an export license for the listed products has ever been refused – which corresponds with China's showing, in a statement by MOFCOM's Quota & License Administrative Bureau, that export licenses for the listed products have been granted in all cases, and within three days, upon the submission of a valid and complete set of application documents.

B. THE EUROPEAN UNION'S CLAIM REGARDING THE ALLEGED "VERY BROAD AND UNFETTERED DISCRETION" OF LICENSE-ISSUING AUTHORITIES UNDER ARTICLE XI:1 OF THE GATT 1994

40. Contrary to the European Union's allegation, Chinese license-issuing authorities do not enjoy the discretion to apply an undefined "business qualifications" criterion for export license applicants. Requiring applicants to submit the relevant forms that demonstrate business qualifications enables the licensing-issuing authorities to verify whether the applicant is qualified and registered to do business in China, meaning that it is a legal entity, established and recognized under Chinese law, with the necessary capacity to undertake business activity. The license-issuing authority has no discretion to decide for itself whether a particular applicant that has presented the business qualifications documents lacks business qualifications.

41. Contrary to the European Union's assertion, nor do Chinese license-issuing authorities enjoy the discretion to require an applicant to provide unspecified "other materials" or "documents of approval". Even assuming the European Union had demonstrated any discretion to require an applicant to provide unspecified "other materials" or "approval documents" (*quod non*), it has failed to demonstrate that such discretion has led to, or would necessarily lead to, WTO-inconsistent conduct. The existence of such discretion, on its own, is not WTO-inconsistent.

42. Assuming the European Union asserts that it is the licensing-issuing authorities who allegedly enjoy "very broad and unfettered discretion" to require unspecified "other materials" or "approval documents" from a particular applicant, it confounds alleged discretion of the license-issuing authorities to impose unspecified documentary requirements of a specific applicant for a license, with the discretion of Chinese legislators and MOFCOM, as the entity issuing implementing regulations pursuant to legislative acts, to change the list of export license application documents required of all applicants. Moreover, the European Union has not cited a single example in which an applicant presenting a valid and complete set of application documents has been denied a license for the covered products. Assuming the European Union is challenging the legislative and regulatory discretion to change the list of documents required of all applicants for export licenses, China fails to see how this "discretion" could possibly constitute a limit on the quantity of exports. The "failure" to foreclose the discretion to change domestic law does not constitute a violation of WTO obligations, including Article XI:1.

IX. THE ADMINISTRATION OF CHINA'S EXPORT LICENSE REQUIREMENT

A. THE EUROPEAN UNION'S ARTICLES X:1 AND X:3(A) CLAIMS REGARDING EXPORT LICENSING FALL OUTSIDE THE PANEL'S TERMS OF REFERENCE

43. The European Union claims under Articles X:1 and X:3(a) of the GATT 1994 regarding export license administration are not within the Panel's terms of reference. In Section III of its Panel Request, the European Union included clear claims under those provisions concerning other issues, but not concerning export licenses. For reasons identical to those underlying the Panel's decision, at paragraphs 74 to 77 of its Preliminary Ruling of 1 October 2010, to exclude from its terms of reference the European Union's publication claim regarding the coke quota, the Panel must exclude from its terms of reference the European Union's claims under Articles X:1 and X:3(a) regarding export license administration.

B. ARTICLE X:1 OF THE GATT 1994 DOES NOT OBLIGE CHINA TO PUBLISH REGULATIONS AND ADMINISTRATIVE RULINGS OF GENERAL APPLICATION THAT DO NOT EXIST UNDER CHINESE LAW

44. In response to the European Union's Article XI:1 claims regarding the publication of certain Chinese measures, China previously responded that: (i) the list of documents to be submitted is publicly available in Chapter II of the *Measures for the Administration of Licenses for the Export of Goods*, aptly titled "Documents to be submitted for the application of Export Licenses" (Exhibit CHN-342); (ii) the list of documents to be submitted, for exports of unwrought zinc and manganese, is publicly available in the 2010 *Catalogue of Goods Subject to Export Licensing Administration* (Exhibit CHN-7); (iii) the list of document relied upon to examine "whether the operator has business qualification" is publicly available in Article 6 of the *Working Rules on Issuing Export Licenses Rules* (Exhibit CHN-344); and, (iv) the so-called "documents of approval of the Ministry of Commerce" required to obtain export licenses for exports of unwrought zinc and manganese are published in the 2010 *Catalogue of Goods Subject to Export Licensing Administration*.

C. THE EUROPEAN UNION'S CLAIM UNDER ARTICLE X:3(A) OF THE GATT 1994 LACKS MERIT

45. China has previously objected that the European Union has failed to provide any evidence of the *application* of this alleged "broad discretion", any evidence that such application constituted WTO-inconsistent administration, or any evidence establishing that this "broad discretion" will *necessarily* lead to WTO-inconsistent administration. Moreover, to the extent the European Union considers the requirements for export license applicants to provide documents and furnish evidence of their qualification to do business are in and of themselves non-uniform, partial, and unreasonable, it has not stated a claim concerning the *administration* of China's export licensing regime that is cognizable under Article X:3(a). Additionally, China demonstrated that the European Union has not stated a *prima facie* claim of violation of Article X:3(a), because asserting that a Member *might* take action that *could potentially*, depending on the specific but as-yet-unknown character of that action, violate Article X:3(a), is not sufficient to establish a violation of that provision.

46. The sole new argument made by the European Union is an assertion that "China accepts … that the export license issuing agencies have the discretion to reject applicants that do not posses 'business qualifications'". This is incorrect. China stated that the licensing-issuing authorities may only reject an application that does not include the "business qualification" documents specifically enumerated in Article 6 *Working Rules on Issuing Export License*.

X. CLAIMS RELATING TO CHINA'S ALLEGED MEP REQUIREMENT, AND ITS ADMINISTRATION

47. Following the Panel's Preliminary Ruling of 1 October 2010, the Panel's terms of reference are limited to six MEP-related measures. Out of these six alleged MEP-related measures, two measures have been formally repealed and two other measures have been replaced. As a result, the Panel may not make recommendations regarding these expired measures; and findings with respect to expired measures would serve no purpose.

48. In any event, *none* of the alleged MEP-related measures that is within the Panel's terms of reference imposes an MEP requirement or violates Article XI:1 of the GATT 1994. The Complainants have failed to provide any evidence to demonstrate that China has engaged in export price coordination since May 2008. China also reiterates that when asked by the Panel to substantiate their claims and provide evidence, none of the Complainants adduced any evidence to rebut China's evidence, provided in Exhibits CHN-361, CHN-362, and CHN-363. This failure to submit evidence is explained solely by the fact that China has abandoned export price coordination.

49. Finally, China notes that the *CCCMC Charter* (i) does not concern the administration of a non-existing MEP requirement for yellow phosphorus in a manner that is inconsistent with Article X:3(a) of the GATT 1994; and, (ii) is publicly available, even assuming that it is a measure requiring publication, pursuant to Article X:1 of the GATT 1994.

ANNEX D-5

EXECUTIVE SUMMARY OF THE OPENING ORAL STATEMENT OF CHINA AT THE SECOND SUBSTANTIVE MEETING

I. THE PANEL SHOULD MAKE FINDINGS AND RECOMMENDATIONS ON THE 2010 MEASURES

1. The prompt and effective resolution of these disputes requires findings and recommendations on the 2010 measures, which currently apply. There is no question that the Panel has jurisdiction to make findings and recommendations regarding the 2010 replacement measures, including measures that prolong and/or adjust the product category of the 2009 measures and measures that were expressly listed by name in the Complainants' panel requests. The Panel *can*, but *should not*, make findings on the 2009 measures that were withdrawn and not replaced, and, in any event, the Panel *cannot* make recommendations regarding the 2009 measures that have ceased to exist**.**

2. The European Union also asks the Panel to recommend that China repeal the legal basis to impose measures that China is permitted, in certain circumstances, to impose under the covered agreements. There is *no* basis in the covered agreements, or indeed in common sense, to deny a Member, in advance and under all circumstances, the legal basis for exercising its right to apply quotas and duties consistently with or justified under the covered agreements.

II. CHINA'S REQUEST THAT THE PANEL EXERCISE JUDICIAL ECONOMY WITH RESPECT TO CERTAIN CLAIMS MADE UNDER THE *ACCESSION PROTOCOL* AND THE *WORKING PARTY REPORT*

3. The Complainants challenge the consistency of certain measures on the products at issue, such as export quotas and export license requirements, under the GATT 1994 as well as the *Accession Protocol* and the *Working Party Report*. If these measures are found to be inconsistent with the GATT 1994, China requests that the Panel exercise judicial economy with respect to the claims made under corresponding obligations under the *Accession Protocol* and the *Working Party Report*. Contrary to the European Union's suggestion, there is no textual basis for requiring that a panel demonstrate "exceptional circumstances" before properly exercising judicial economy. Instead, a panel may decline to make a finding on the WTO-inconsistency of a measure with a particular provision, where doing so is unnecessary to assist the DSB in making recommendations and rulings to resolve the dispute.[1]

III. THE EXPORT QUOTA O REFRACTORY BAUXITE IS NOT INCONSISTENT WITH ARTICLE XI OF THE GATT 1994 AND PARAGRAPHS 162 AND 165 OF THE *WORKING PARTY REPORT*

A. THE PROPER INTERPRETATION OF ARTICLE XI:2(A) OF THE GATT 1994

4. The word "essential" should be read in light of the immediate context of the phrase "for the exporting [Member]", such that considering essentialness may involve assessing the quantitative

[1] Appellate Body Report, *US – Zeroing (EC)*, para. 147; Appellate Body Report, *Lamb – Safeguards*, paras. 189 to 195; Panel Report, *Japan – Apples*, para. 8.303; Panel Report, *EC – Sardines*, paras. 7.147 to 7.152; Panel Report, *China – Publication and Audiovisual Products*, paras. 7.378, 7.417, 7.706, 7.1412, and 7.1428.

contribution of the product throughout the particular Member's entire value chain, as well as qualitative criteria capturing the importance of the product for that Member. The broader context of the term "essential", which includes Article XXXVI:5 of the GATT 1994, Paragraph 4 of the *BOP Understanding*, and the drafters' agreement on the application of Article XI:2(a) to Australia's export ban on merino sheep, also supports this interpretation. This interpretation of Article XI:2(a) does not affect the meaning of Article XX(i), because Article XX(i) only applies in very particular circumstances in principle not implicated by Article XI:2(a). That a given set of facts may satisfy the requirements of both Articles XI:2(a) and XX(i) does mean that one or the other provision is deprived of an effective interpretation or rendered redundant.[2]

5. The phrase to "prevent or relieve", read within its immediate context, means that Article XI:2(a) applies to *anticipatory* export prohibitions or restrictions, taken to prevent the occurrence of a critical shortage, and demonstrates that a shortage can be *foreseen*. The use of the verb "to prevent" shows that a Member may find it necessary to take action, based on objective considerations, to address the risk, uncertainty, or fear that a shortage will become critical.

6. Article XI:2(a) also requires that the export restriction be "temporarily applied" in the sense that the permissible duration be defined *in relation to the achievement of a stated goal* – to prevent or relieve a critical shortage. No absolute threshold for the temporal limitation or bounding applies.

7. Additionally, Mexico and the United States consider that export restrictions on exhaustible natural resources are *a priori* excluded from the scope of Article XI:2(a). This line of argument appears to rest entirely on the misguided assumption that the *only* cause of a critical shortage of an exhaustible natural resource is that resource's exhaustibility. The Complainants overlook that a critical shortage of an exhaustible natural resource is likely to be caused by a number of factors, of which exhaustibility is but one.

B. THE EXPORT QUOTA ON REFRACTORY BAUXITE IS NOT INCONSISTENT WITH ARTICLE XI:1 OF THE GATT 1994

8. China has demonstrated that the export quota on refractory bauxite is temporarily applied to prevent or relieve a critical shortage of this essential product. Refractory bauxite, defined according to the physical and chemical characteristics agreed upon by the Parties and their experts, is the product covered by China's arguments under Article XI:2(a). Refractory bauxite is essential to China because, contrary to the Complainants' assertions, it is not readily substitutable, as it features specific technical (physical and chemical) and economic properties. China also demonstrates that it is experiencing a critical shortage of refractory bauxite and risk thereof due to a range of factors, of which limited available reserves is but one. Dr Humphreys' criticality assessment confirms this conclusion. Moreover, data cited by the Complainants and their expert do not establish the alleged increase of China's production or export of refractory materials produced from refractory bauxite, and are based on erroneous assumptions.

IV. THE AVAILABILITY OF ARTICLE XX OF THE GATT 1994 IN DEFENSE OF A CLAIM UNDER PARAGRAPH 11.3 OF THE *ACCESSION PROTOCOL*

9. China can, like any other WTO Member, regulate trade using export duties for legitimate objectives recognized under Article XX of the GATT 1994, provided it complies with obligations attaching to Article XX. Numerous provisions of the covered agreements, including the Preamble to

[2] *See* Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 99; *see also* Appellate Body Report, *US – Zeroing (Japan)*, para. 133.

the *WTO Agreement*, reflect the basic principle that the international trade obligations Members have assumed do not prevent them from taking measures to promote other fundamental societal interests recognized in the covered agreements. The text of the *Accession Protocol* and the *Working Party Report* confirms that this balance is maintained in the WTO obligations that China has assumed. In particular, Paragraph 170 of the *Working Party Report* confirms that China may impose export duties conforming to WTO disciplines.

10. The European Union complains that China's reliance on Article XX is based on "nebulous references to a mingle-mangle of political instruments and statements made outside of the WTO". The European Union makes this complaint in addressing China's argument about the *availability of Article XX*, though China relies on the supposedly "nebulous" "mingle-mangle" of instruments in showing, as a matter of substance, that its measures *conform fully to the disciplines of Articles XI and XX*. In any event, China regrets the European Union's dismissive approach to customary international law, the Preamble to the *WTO Agreement*, and the text of Article XXXVI:5 of the GATT 1994, all of which are relevant means of interpretation recognized under customary principles of treaty interpretation.

11. Finally, WTO Members cannot be presumed to have abandoned their "inherent right" to regulate trade in a manner that promotes conservation and public health. If China had consented to *abandoning* its "*inherent*" right to regulate trade in this way, it would have done so through explicit language in the text of the *Accession Protocol*. The Panel and the Complainants need not fear that China will escape its uniquely onerous obligations regarding export duties if Article XX applies. To the contrary, while other Members can use export duties without justification, China alone must demonstrate that its export duties are applied consistently with the obligations in Article XX.

V. THE EXPORT RESTRAINTS APPLIED TO REFRACTORY BAUXITE AND FLUORSPAR ARE JUSTIFIED PURSUANT TO ARTICLE XX(G) OF THE GATT 1994

A. THE PROPER INTERPRETATION OF ARTICLE XX(G) OF THE GATT 1994

12. The phrase "relating to conservation" in Article XX(g) means that measures must have an objective and discernible connection to the control and management of supply and use of non-renewable natural resources that are exploited commercially. The second element of Article XX(g) requires that the measures be made effective in conjunction with restrictions on domestic consumption or production. The burden put on foreign and domestic consumption need not be identical. The *WTO Agreement* is not a commodity-sharing agreement; reliance on Article XX(g) does not compel the equitable sharing of natural resources subject to conservation measures.

13. When dealing with an export restriction, the requirement in the *chapeau* of Article XX of no "arbitrary or unjustifiable discrimination" means that the respondent cannot discriminate between different importing Members, unless relevant differences exist between the importing Members that justify the differential treatment. In order to avoid a charge of discrimination, China is not compelled to ensure that other WTO Members have an equal or non-discriminatory share of China's natural resources. Regarding the requirement of no "disguised restrictions on international trade", when a measure pursues policy goals that are expressly recognized by the covered agreements, its application does not give rise to any restrictions on trade that can be regarded as an "abuse" of WTO rights.

B. THE APPLICATION OF ARTICLE XX(G) TO THE EXPORT RESTRAINTS ON REFRACTORY BAUXITE AND FLUORSPAR

14. China's export restrictions applied to refractory bauxite and fluorspar relate to conservation because they, together with other measures forming part of China's mineral resources conservation policy, ensure that the limited supplies of these resources are used efficiently over time, by industries that are properly adapted to the available supply, with a view to conserving the resources over time. The combined effect of the export restraints and extraction caps restricts domestic production, and domestic and international consumption, of these resources. Moreover, China has met its burden of proving, on a *prima facie* basis, that these measures are applied consistently with the *chapeau* of Article XX.

VI. THE EXPORT RESTRAINTS APPLIED TO NON-FERROUS METAL SCRAP PRODUCTS AND EPR PRODUCTS ARE JUSTIFIED PURSUANT TO ARTICLE XX(B) OF THE GATT 1994

15. The export restraints' objective to reduce and prevent risks to human, animal, and plant life or health resulting from pollution generated by the production of EPR products is not a *post hoc* rationalization. Numerous Chinese measures establish an *explicit* link between the export tariffs, and the expressed objective. The fact that *one effect* of export restraints on EPR products is to foster the growth of higher-value-added and less polluting downstream industries is unavailing. China has established that the export measures on EPR products make a material contribution today and are apt to make a material contribution in the future. Ample evidence demonstrates that many alternative measures are already in place to curb pollution connected with EPR production.

16. The objective of export restrictions on metal scrap products is to replace *to the maximum amount possible* secondary production for primary metals produciton, because secondary production entails significant environmental and, consequently, health benefits. The export duties, part of a broader comprehensive regulatory recycling framework, ensure that, once liberated and collected, supply of the metal scrap products at issue is available to the nascent Chinese recycling industry.

VII. THE ADMINISTRATION OF CHINA'S WTO-CONSISTENT EXPORT QUOTAS

17. China asks the Panel to reject the claim that the use auctions to allocate quotas is inconsistent with Article VIII:1(a) of the GATT 1994. China reiterates that, in no provision of the covered agreements, have WTO Members agreed to outlaw the use of auctions. To the contrary, WTO Members have agreed in Article XIII:2 of the GATT 1994 that quotas should be allocated in the least trade-distorting manner.

18. The Panel should also reject the European Union's claim under Article X:1 regarding the alleged failure to publish the quotas for zinc ores and concentrates. China has published notice that these products can only be exported if a quota is secured. China has not opened a quota amount and, thus, there are no further general rules that could be published.

19. China further submits that the Complainants err in their interpretation of the legal standard under Article X:3(a). A claim under Article X:3(a) "must be supported by solid evidence", which "should reflect the gravity of the accusations inherent in [the] claims".[3] In the absence of evidence of

[3] Appellate Body Report, *US – OCTG Sunset Reviews*, para. 217.

specific instances of WTO-inconsistent administration, solid evidence must show that the measure "*necessarily leads to*" WTO-inconsistent administration.[4]

20. Mexico and the United States have failed to demonstrate that the CCCMC's involvement in quota administration presents an inherent conflict of interest that necessarily results in partial and unreasonable administration. In any event, China has shown that effective safeguards ensure that no confidential information flows from the Bidding Department and Minerals & Metals Department to the CCCMC's 4,000 members or the general public.

21. The European Union's Article X:3(a) claim that the "operation capacity" criterion under Article 19 of the *Measures for the Administration of Export Commodities Quotas* must also fail, because the criterion is not applied to the products at issue, and because the European Union has provided no evidence of a single instance in which the alleged danger or possibility of WTO-inconsistent administration has materialized. The European Union has also not provided evidence showing that, under Chinese law, this term must be interpreted such that it compels WTO-inconsistent action by Chinese authorities. In those circumstances, China is due the same presumption of good faith performance of its obligations under Article X:3(a) that is accorded to all Members.[5]

22. The claims pertaining to quota eligibility must also be rejected. Given that Paragraph 5.1 of the *Accession Protocol* is without prejudice to China's right to adopt quotas in certain circumstances, it follows necessarily that this provision is also without prejudice to the adoption of rules enabling quota allocation. Whatever the content of such quota allocation rules, China's obligations are without prejudice to these rules. If China were not entitled to adopt quota allocation rules, this would entirely frustrate its right to regulate trade through quotas expressly preserved in Paragraph 5.1.

23. Regarding the European Union's claim under Paragraph 5.2 of the *Accession Protocol*, and Paragraphs 84(a) and 84(b) of the *Working Party Report*, China refers to the list in Exhibit JE-82.

VIII. CHINA'S EXPORT LICENSE REQUIREMENT AND ITS ADMINISTRATION

24. The Complainants allege that the export licenses for coke, bauxite, silicon carbide, zinc, and manganese are not issued automatically, but acknowledge that they have no evidence that an export license for the listed products has ever been refused. This confirms China's showing, based on the explicit text of the relevant Chinese measures, that export licenses for the listed products are granted in all cases, and within three days, upon the submission of a valid and complete set of application documents.

25. The European Union has also failed to establish that China's export license requirement is discretionary and, for this reason, inconsistent with both Articles XI:1 and X:3(a). In any event, the European Union's Article X:3(a) claim falls outside the Panel's terms of reference. Even assuming that the European Union had demonstrated that Chinese license-issuing authorities have discretion to require unspecified "other materials" (*quod non*), it has not explained why the existence of this discretion violates Articles XI:1 or X:3(a). In this dispute, the alleged discretion can be exercised in a WTO-consistent manner; in those circumstances, China is due the same presumption of good faith

[4] Appellate Body Report, *EC – Selected Customs Matters*, paras. 201 and 226; Panel Report, *Argentina – Hides and Leather*, paras. 10.11, 11.100, and 11.101; Panel Report, *Thailand – Cigarettes (Philippines)*, para. 7.906.

[5] Appellate Body Report, *US – OCTG Sunset Reviews*, para. 173; Appellate Body Report, *US – Section 211 Appropriations Act*, para. 259; Appellate Body Report, *Chile – Alcoholic Beverages*, para. 74.

performance of its obligations that is accorded to all Members.[6] The European Union also alleges that China violates Articles XI:1 and X:3(a) by "not remov[ing] permanently" MOFCOM's discretion to amend, for future applicants, the list of goods subject to the export license requirement, or the list of documents required to support an application. The existence of such "discretion" on the part of the legislator or regulator does not contravene China's WTO obligations; again, China is due the presumption of good faith performance of its obligations.

26. Finally, the European Union's claim under Article X:1 regarding the publication of export license measures falls outside the Panel's terms of reference and, in any event, lacks merit, because all of China's general rules concerning export licensing have, as a matter of fact, been published.

IX. CLAIMS RELATING TO CHINA'S ALLEGED MEP REQUIREMENT

27. The Complainants have not formulated any new rebuttal arguments regarding their claims under Articles XI:1, X:1, and X:3(a) regarding an alleged MEP requirement and its administration. Therefore, China refers the Panel to its second written submission, setting out China's arguments regarding the claims made with respect to the six MEP-related measures falling within the Panel's terms of reference.

[6] Appellate Body Report, *US – OCTG Sunset Reviews*, para. 173; Appellate Body Report, *US – Section 211 Appropriations Act*, para. 259; Appellate Body Report, *Chile – Alcoholic Beverages*, para. 74.

ANNEX D-6

EXECUTIVE SUMMARY OF THE CLOSING ORAL STATEMENT OF CHINA AT THE SECOND SUBSTANTIVE MEETING

I. THE PROPER INTERPRETATION OF ARTICLE X OF THE GATT 1994

1. China's first set of remarks concerns the Complainants' misguided approach to the legal standard and evidence required under Article X of the GATT 1994. To begin, China fails to see how a complainant can substantiate a claim of violation without "solid evidence", as the United States argued in its opening statement yesterday with respect to claims under Article X:3(a).[1] In no case is a complainant liberated from the requirement to provide "solid evidence" to establish a claim. This Panel, like all panels, must insist on solid evidence in support of a claim under any provision of the covered agreements.

2. Moreover, as the European Union has noted, a complainant is entitled to bring different types of claims under Article X:3(a). *First*, it may raise a claim concerning instances of application of a measure covered by Article X:1 in a manner that constitutes WTO-inconsistent administration. *Second*, it may challenge "the substantive content of a legal instrument that regulates the administration of a legal instrument of the kind described in Article X:1",[2] or "[t]he features of an administrative process that govern the application of a legal instrument of the kind described in Article X:1".[3] The European Union's Article X:3(a) claims against the "operation capacity" criterion in the context of quota administration, as well as the "very broad and unfettered discretion" allegedly retained by Chinese authorities under certain export license-related measures, are of necessity examples of the second type of challenge – for the simple reason that the European Union has offered *no* evidence concerning any instances in which the "operation capacity" criterion and/or "very broad and unfettered discretion" have been applied.

3. The European Union proposes that, in the case of this second type of Article X:3(a) challenge, it need only show that the "operation capacity" criterion and/or the alleged "very broad and unfettered discretion" "*are likely to cause* the non-uniform application of the legal instrument at issue",[4] or that they raise the "possibility" or "danger" of WTO-inconsistent administration.[5]

4. This in an improper reading of Article X:3(a). As underscored by the Appellate Body in *EC – Selected Customs Matters*, the European Union must instead demonstrate that the "operation capacity" criterion and/or the alleged "very broad and unfettered discretion" will, if applied, "necessarily lead to" WTO-inconsistent administration.[6] In this dispute, the European Union has not established that the "operation capacity" criterion or the alleged "very broad and unfettered discretion" will "necessarily lead to" WTO-inconsistent administration. Instead, because China may apply the "operation capacity" criterion or the alleged "very broad and unfettered discretion" in a

[1] US' opening statement of 22 November 2010, paras. 116 and 117; *see also* Mexico's opening statement of 22 November 2010, para. 2.
[2] Appellate Body Report, *EC – Selected Customs Matters*, para. 200.
[3] Appellate Body Report, *EC – Selected Customs Matters*, para. 225.
[4] EU's opening statement of 22 November 2010, para. 37 (original emphasis).
[5] EU's second written submision, paras. 119 and 120.
[6] Appellate Body Report, *EC – Selected Customs Matters*, paras. 201 and 226.

WTO-consistent manner, China is due the same presumption of good faith performance of its obligations under Article X:3(a) that is accorded all Members.[7]

II. AUCTIONS ARE NOT INCONSISTENT WITH ARTICLE VIII OF THE GATT 1994

5. China now turns to the United States' closing remarks regarding Article VIII of the GATT 1994. The United States argues that the bid-winning price is a fee or charge imposed on or in connection with exportation and, therefore, is inconsistent with Article VIII.

6. The first interpretive question is whether the phrase "on or in connection with exportation" applies to a bid-winning price. In China's view, this phrase refers to fees or charges that have a *sufficiently proximate connection to exportation*, which is not the case for the bid-winning price. Through bidding, potential exporters obtain a right to export. However, at that stage, the bidder has not entered into a contract to export or even decided to export. The bidding process simply confers a right to undertake further steps that may lead to exportation; however, exportation may never occur. The bid-winning price is, therefore, insufficiently proximate to exportation to be imposed "on or in connection with exportation".

7. This is confirmed by China's evidence, which shows that the bid-winning fee does not reduce the volume, or increase the price, of exports.[8] China recalls that the evidence demonstrates that auctions are one of the least trade-distorting means of quota allocation. Auctions are, therefore, consistent with Article XIII:2 of the GATT 1994, which "stipulates a principle regarding the distribution of the tariff quota *in the least trade-distorting manner*".[9] Article VIII cannot be read in a manner that would prevent WTO Members from using one of the least trade-distorting quota allocation methods as it would run counter to Article XIII:2.

8. Moreover, the bid-winning price is also not a "fee or charge" "imposed" by the government. The price reflects the value that a bidder has chosen to attach to the right to export.

III. CHINA'S DEFENSES UNDER ARTICLE XX OF THE GATT 1994

9. China now turns to a few remarks on its defenses under Article XX. The Complainants seem to make an issue of the fact that China does not offer a defense for each export quota and export duty at issue. However, China has avoided bringing frivolous defenses. Instead, China pursues defenses that it considers are warranted by the law and the facts. In an effort to resolve this dispute promptly, China asks the Panel to consider these defenses carefully.

10. In its closing statement, Mexico recognized the right of all WTO Members to adopt environmental policies, but it stressed that these policies must be adjusted as necessary to meet WTO rules, and that WTO rules should not be adjusted to fit domestic policies. China fully agrees. Indeed, in the past decade, China has made very significant efforts to adjust its domestic policies to the needs of WTO rules.

11. In this dispute, although Mexico argues that domestic policy must be adjusted to meet WTO rules, the Complainants nonetheless accuse China of "manipulating" its conservation policy to meet

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[7] Appellate Body Report, *US – OCTG Sunset Reviews*, para. 173; Appellate Body Report, *US – Section 211 Appropriations Act*, para. 259; Appellate Body Report, *Chile – Alcoholic Beverages*, para. 74.

[8] Exhibit CHN-306: Expert Statement by Professor M. Olarreaga on *Export Quota Auctions as Optimal Allocation Mechanisms* (July 2010); *see also* Exhibit CHN-463: USDA, *Economic Analysis of TRQ Administrative Methods* (TB-1893).

[9] Appellate Body Report, *EC – Bananas III (21.5 – US)*, para. 338.

the WTO rules at issue in this dispute.[10] It is true that China's conservation policy continues to evolve. However, the changes in question were not made for purposes of this dispute. China's conservation policy was first introduced in 1986.[11] Like many other countries, it has adjusted its policy progressively, making it more stringent over time. This is not long-term "manipulation", but instead recognition that additional steps need to be taken.

12. On 31 December 2008, and thus before consultations in this dispute, China strengthened its conservation policy by adopting the *Mineral Resources Plan (2008-2015)*, which, *inter alia*, envisaged the imposition of extraction and production caps.[12] The introduction of extraction and production caps was not, therefore, fabricated for these disputes, but was part of a process of enhancing China's conservation policy. The fact that caps were introduced with effect from 1 January 2010 was, therefore, in implementation of a pre-existing policy, and was not fabrication.[13]

13. Contrary to the Complainants' suggestion, these are *not challenged measures* that must form part of the Panel's terms of reference. Instead, they are evidence in assessing China's defenses. The fact that some of these measures post-date the Panel's establishment does not preclude the Panel from taking them into account as evidence. China notes that, in *Brazil – Retreaded Tyres*, for example, the panel relied on evidence that came into existence during the panel proceedings for purposes of an Article XX(b) defense. The Appellate Body rejected the European Union's appeal that this evidence should have been rejected because of its timing. The Appellate Body confirmed that "[i]t is well settled that a panel may consider a piece of evidence that post-dates its establishment".[14]

14. In making its objective assessment, with a view to settling this dispute promptly, the Panel cannot ignore any fact before it, including evidence regarding the extraction and production caps on refractory bauxite and fluorspar.

IV. THE LACK OF TEXTUAL BASIS FOR THE COMPLAINANTS' CLAIMS, UNDER ARTICLE XX(G) OF THE GATT 1994, TO A SHARE OF CHINA'S NATURAL RESOURCES

15. China closes with some remarks on the Complainants' attempts to secure a share of China's natural resources – an issue that lies at the heart of this dispute. In its closing statement, the European Union complained that China wrongly states that the Complainants seek "equitable *access*" to, or an "equitable *share*" of, China's mineral resources. Instead, it says that it seeks "equitable *treatment*" by China.[15] China does not understand what the European Union means by "equitable *treatment*", as opposed to "equitable *access*" or an "equitable *share*".

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[10] US' closing statement of 23 November 2010, para. 19.

[11] *See further* China's first written submission, para. 167.

[12] Exhibit CHN-80: *Notice of the Ministry of Land and Resources on Promulgating and Implementing the National Mineral Resources Plan (2008-2015)*, Section IV (II).

[13] *See* Exhibit CHN-87: *2010 Circular of the General Office of the State Council on Taking Comprehensive Measures to Control the Extraction and Production of Refractory-Grade Bauxite and Fluorspar*; Exhibit CHN-97: *Circular of the Ministry of Land and Resources on Passing Down the 2010 Controlling Quota of Total Extraction Quantity of High-alumina Bauxite Ores and Fluorspar Ores*, Articles I and III(V); Exhibit CHN-98: *Circular on Passing Down the Controlling Quota of the 2010 Total Production Quantity of High-alumina Refractory-Grade Bauxite and Fluorspar*, Article VI. The caps are stated to apply for the entire year and have been so applied.

[14] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 193.

[15] EU's closing statement of 23 November 2010, para. 23.

16. In any event, the European Union has argued that it does seek "equitable access" to China's natural resources. For example, in its second written submission, it stated that "Article XX(j) … affirms the *principle of equitable access that is addressed by the requirement in Article XX(g)* that a measure that relates to conservation must be '*made effective in conjunction with restrictions on domestic production or consumption*'".[16]

17. China has already mentioned earlier today that the United States also asserts an entitlement to access to China's natural resources. It recalls that the Preamble to the *WTO Agreement* refers to:

> " 'the world's resources' – as opposed to a particular Member's resources. The Preamble thus speaks to the shared need of all Members to have access to the trade in those resources."[17]

18. Thus, for the United States, this Preamble transforms each Member's own natural resources into shared resources belonging to all Members under a commodity-sharing agreement. It adds that a resource-endowed Member cannot "leverage its access to natural resources … to the detriment of other Members' access".[18] The United States also said that Article XX(g) raises the "complex question … as to whether the relative amounts [of a natural resource] made available to the domestic and foreign markets corresponded in an even-handed way *to their relative demands*", emphasizing that access is driven by "*demand*".[19]

19. To be clear, China and other WTO Members have not agreed, in acceding to the WTO, to grant the Complainants an equitable share of the natural resources located within their respective territories, much less have they granted the Complainants a share of those resources that is determined by the "demand" of the Complainants' domestic industries.

20. The text of Article XX(g) does not enshrine – to borrow the European Union's word – any "principle" of equitable access to natural resources derived from Article XX(j) or elsewhere. Article XX(j) establishes "the principle that all Members are entitled to an equitable share *of the international supply*" of products. This provision does *not* affirm an alleged principle of "an equitable share *of all supply*", including domestic and international supply – which is what the Complainants seek. Instead, the provision establishes that Members are entitled to "an equitable share" of *the portion of* "*supply*" *made available for* "*international*" *markets*. In this dispute, China offers all WTO Members an equitable and non-discriminatory share of the "*international supply*" of its natural resources.

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[16] EU's second written submission, para. 254 (emphasis added) (original underlining).
[17] US' opening statement of 22 November 2010, para. 70.
[18] US' opening statement of 22 November 2010, para. 72.
[19] US' opening statement of 22 November 2010, para. 93.

ANNEX E

SUBMISSIONS OF THE THIRD PARTIES

ANNEX E-1

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF ARGENTINA

I. INTRODUCTION

1. Argentina has expressed the wish to participate as a third party in these proceedings as this case concerns the interpretation of central provisions of the GATT 1994, in particular in relation to the use of export duties as a trade policy instrument. It also wishes to take a stand opposing the idea that the criteria applicable to this issue can be reinterpreted as a result of specific provisions in accession agreements. To allow more efficient use of the time available, this submission will focus on the use of export duties under WTO rules in the light of Articles I, II, VII, VIII, X and XI of the GATT 1994.

II. LEGAL ARGUMENTS

A. GENERAL PRINCIPLES CONCERNING EXPORT DUTIES

2. Much has been said and written about the nature and practice of export duties in the GATT acquis prior to the Uruguay Round. It should nevertheless be pointed out that Argentina, along with Bangladesh, Brazil, China, Cuba, Ecuador, Guatemala, India, Indonesia, Kenya, Malaysia, Paraguay, the Philippines and South Africa, clarified in document JOB(04)/110 that no mandate was received from the Ministers in Doha to include the issue of export taxes in the negotiating process.

3. In order to understand how most Members interpret the legitimacy of export duties, it should be borne in mind that this instrument does not even feature on the Doha Round agenda. Furthermore, the proposals tabled by Switzerland and Japan for the inclusion of an analysis of such duties after the negotiating groups on both agriculture and NAMA were established were rejected.

4. On the other hand, in document JOB(04)/110, the above-mentioned countries confirmed that export taxes are essential policy instruments and that nine out of ten Members applying these instruments are developing countries, for the following reasons:

- *"First, because export duties constitute an important and reliable source of revenue. It is also an instrument which can easily be invoked and administered;*
- *second, to reduce dependence on the export of commodities which are subject to volatile price fluctuations that have a direct impact on the income and livelihood of farmers and rural population. Also, it helps to promote downstream processing industries in a context of tariff escalation applied by major importing countries; and*
- *third, for food security reasons, to prevent shortages of primary products and to address unfair redistribution of rents in cases of exchange rate distortions".*

B. EXPORT DUTIES AS A MEASURE LEGITIMIZED UNDER WTO RULES

5. It should be noted that, as a general principle, a ban on prohibitions and quantitative restrictions on exports has been imposed within the GATT/WTO legal order, more specifically in Article XI:1 of the GATT 1994, the text of which expressly refers to quantitative restrictions. A *contrario sensu*, Article XI:1 does not establish any specifications with regard to export duties. It can

therefore be concluded that this provision is based on the view that border customs duties (tariffs) are more transparent, predictable and less trade-distorting trade measures than quantitative restrictions on imports or exports. Having regard to the above, the GATT contains Articles which specifically refer to export duties. It follows that the duties applied by developing countries to their exports are expressly permitted under WTO rules. The GATT 1994 Articles which specifically refer to the use of such export tariffs are as follows:

- Article I, which explicitly provides that the MFN principle is applicable to export duties ("*Article I: General Most-Favoured-Nation Treatment. 1. **With respect to customs duties and charges of any kind imposed on or in connection with** importation or **exportation**, or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III*, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties*").

- Article VII, which sets out the general principles governing customs valuation ("*Article VII: Valuation for Customs Purposes. 1. **The contracting parties recognize the validity of the general principles of valuation set forth in the following paragraphs of this Article, and they undertake to give effect to such principles, in respect of all products subject to duties** or other charges* or restrictions on importation and **exportation** based upon or regulated in any manner by value. Moreover, they shall, upon a request by another contracting party review the operation of any of their laws or regulations relating to value for customs purposes in the light of these principles. The CONTRACTING PARTIES may request from contracting parties reports on steps taken by them in pursuance of the provisions of this Article*").

- Article VIII on "Fees and Formalities connected with Importation and Exportation", which specifically excludes export duties from these obligations by stating that: "*1.(a) All fees and charges of whatever character (other than **import and export duties** and other than taxes within the purview of Article III) imposed by contracting parties on or in connection with importation or exportation shall be limited in amount to the approximate cost of services rendered and shall not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes*".

- Paragraph 1 of Article X ("Publication and Administration of Trade Regulations") of the GATT 1994, which states that: "*Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of **duty**, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them*".

- Article XI, which excludes in principle export duties from the obligation referred to in its title "*General Elimination of Quantitative Restrictions" by stating: "No prohibitions or restrictions* ***other than duties****, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the* ***exportation*** *or sale for export of any product destined for the territory of any other contracting party*". An *a contrario* reading of the rule in question supports the inference that export customs duties are legitimized by the text of the multilateral legal rules.

6. The unequivocal legality and legitimacy of export duties in the GATT/WTO acquis is clear from the above transcription of GATT Articles; such duties would otherwise not be repeatedly referred to in the GATT rules. Attention should be drawn in this regard to the fact that no Panel has ever felt the need to clarify this issue.

C. EXPORT DUTIES ARE NOT REQUIRED TO BE BOUND

7. Unlike for import duties, there is no obligation under WTO rules to bind the maximum level of export tariffs in schedules of concessions. Nor are there any restrictions with regard to their method of application, as exist in Article 4.2 of the Agreement on Agriculture for duties on imports of agricultural products.

8. In view of the above, export duties are not bound in schedules of concessions as there is no provision in the GATT 1994 for such binding, nor are there any restrictions concerning the way in which these duties are to be applied.

9. It should be noted that certain Members which have acceded to the WTO in recent years have been required to undertake, under what are known as "WTO-plus" considerations, obligations in relation to export duties which would be at variance with the above with regard to the legality of this trade policy instrument in the light of the WTO rules applicable to pre-existing Members. This tendency to require that candidates for accession undertake obligations additional to those contained in the General Agreement and/or in the covered Agreements distorts the very nature of the Agreement by denying new Members rights enjoyed by the original Members. To avoid misleading interpretations, the Protocol on the Accession of Ukraine had to clarify that the commitment by this country to reduce its export duties did not constitute a reinterpretation of the GATT 1994, nor affect "*the rights and obligations of other Members in respect of provisions on the application of export duties, that are measures in accordance with GATT 1994*".

III. CONCLUSION

10. In view of the foregoing, Argentina considers that, given that export duties are legitimate trade policy instruments under WTO rules, any attempt to reinterpret the use or application of such duties which undermines or restricts these rules would be not only detrimental to developing countries, but also GATT-inconsistent and incompatible with the objectives of the multilateral trading system.

ANNEX E-2

EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF BRAZIL AT THE FIRST SUBSTANTIVE MEETING

1. Brazil considers that the issues under the Panel's analysis are of significant systemic relevance to the interpretation of key provisions of the GATT 1994 and therefore wishes to contribute with the Panel in its task of objectively assessing the claims brought before it.

2. The first issue Brazil wishes to address in its oral statement regards the interpretation of the requirements of Article XI:2(a) of the GATT 1994, invoked by China in its first written submission as a justification for the imposition of exports quotas on refractory-grade bauxite[1]. Article XI:2(a) contains four requirements that must be met in order for a measure that prohibits or restricts the exportation of "other products" to fall under its discipline: a) the measure must be temporarily applied; b) the measure's objective must be to prevent or relieve a shortage of products in the exporting Member; c) this shortage (or the threat thereof) must be critical and d) the product must be essential to the exporting Member.

3. Regarding the first of these requirements, the definition of the term "temporarily applied" is essential to assess the conformity of measures justified under Article XI:2(a). China argues that a measure applied pursuant to this provision could be in force for very long periods of time, without any foreseeable date of expiry. This interpretation of the term "temporarily", however, does not seem to be accurate, specially when analyzed in the context of the other requirements of Article XI:2(a). The textual meaning of the adjective "temporary", from which the adverb temporarily is derived, seems to imply that a temporary measure must either have a time-limit for its application or address a passing need, whose termination is foreseeable in some point in the future.

4. Even though a measure applied under Article XI:2(a) may not have a pre-established date of expiry, because it may address critical shortages whose moment of termination is uncertain, in order for a measure to "last or be meant to last for a limited time only", it must either have an expiry date (in which case it would clearly "last for a limited time only") or have as its purpose the prevention or the relief of a need whose existence is limited in time (in which case it would be "meant to last for a limited time only"). In this last case, the very design and structure of the measure would indicate that its imposition addresses a need that will, in the foreseeable future, cease to exist.

5. On the other hand, if a measure allegedly taken under Article XI:2(a) addresses a permanent need, i.e., a need that would not cease to exist in the foreseeable future, its design and structure would indicate that it is not "meant to last for a limited time only", since the need (in this case, a "critical shortage") cannot be "prevented" or "relieved". Therefore, a shortage of exhaustible natural resources whose reserves are already known to last for a limited period of time cannot be dealt with by measures "temporarily applied". These measures would apply indefinitely, for the shortage of products could not be overcome in the foreseeable future, but only managed over time.

6. Article XI:2(a) cannot be read as a repetition of Article XX(g). While Article XX(g) disciplines long-term conservational policies, Article XI:2(a) seems to relate to temporary crises of supply. In view of this interpretation of Article XI:2(a), the Panel should ascertain if the Chinese export quota applied on refractory-grade bauxite is intended to deal with a temporary supply crisis, or

[1] *See* China's first written submission, Section C.

if its structure and design indicate that the measure falls into the category of a long-term conservational policy, better fit for justification under Article XX(g) of the GATT 1994.

7. The second issue Brazil wishes to address in its oral statement pertains to the proper interpretation of Article XX(g), evoked by China in its first written submission to justify the exports duties applied to fluorspar[2] and the export quota applied to refractory-grade bauxite[3]. The Appellate Body Report in *US – Shrimp* established a three-tier test to verify if a measure can be provisionally justified under Article XX(g) of the GATT 1994. First, it must be assessed whether the measure is concerned with "exhaustible natural resources". Second, the measure must be "related to" the conservation of the relevant exhaustible natural resources, implying that the existence of a "genuine relationship of ends and means"[4] between the measure and its objectives is required. Third, it must be established whether the measure is "made effective in conjunction with restrictions on domestic production or consumption". In Brazil's view, the last two requirements of this three-tier test are of particular relevance to the present dispute and, therefore, deserve further consideration.

8. Regarding the second aspect of this test, due notice should be given to the fact that both the domestic and the international restrictions must be "related to" the conservation of exhaustible natural resources. In order to be considered as being conjointly made effective, the domestic and the international restrictions should also have a conservational objective. In the *US – Gasoline* dispute, the Appellate Body also concluded that the second part of paragraph (g) of Article XX of the GATT 1994 "is a requirement of *evenhandedness* in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources[5]". The Appellate Body did not elaborate further on the concept of *evenhandedness*, but it did affirm that there was "no textual basis for requiring identical treatment of domestic and imported products.[6]" This requirement might be satisfied with the joint imposition of domestic and international restrictions on production or consumption and trade, aimed at the conservation of exhaustible natural resources, *provided that* both the domestic and the international measures were actually related to the conservation of exhaustible natural resources.

9. The last requirement of Article XX(g) seems to allow for a country to exploit its resources pursuant to its own environmental and developmental policies. Nothing in the WTO Agreements seems to impose the shared use of the world's natural resources as an obligation to Members. Therefore, the right of Members to consider their own developmental needs in the use of their resources is endorsed by WTO law, in a manner consistent with the principle of Permanent Sovereignty over Natural Resources, but without prejudice to the obligation of a Member claiming justification of a measure under Article XX(g) to demonstrate its full compliance with the requirements contained therein, including its chapeau. These requirements ensure that conservational measures adopted pursuant to Article XX(g) relate to a legitimate conservational policy objective; that they do not target exclusively foreign suppliers or consumers; and that they do not constitute a protectionist restriction.

[2] *See* China's first written submission, Section B.
[3] *See* China's first written submission, Section D.
[4] *US – Shrimp* (Appellate Body Report, para. 136)
[5] *US – Gasoline* (Appellate Body Report, page 21)
[6] *US – Gasoline* (Appellate Body Report, page 21)

ANNEX E-3

EXECUTIVE SUMMARY OF WRITTEN SUBMISSION AND ORAL STATEMENT OF CANADA

I. INTRODUCTION

1. Canada is concerned about the issues involved in this case both as an exporter of raw materials whose companies are engaged in raw material extraction throughout the world, and as a producer of products – notably steel and aluminium – that use the raw materials at issue as inputs.

II. EXPORT DUTIES

2. Members are free under the *General Agreement on Tariffs and Trade* ("*GATT*") to impose export duties unless they negotiate away that right in some other Agreement. If a WTO Member does commit in another Agreement not to impose export duties, then any exceptions to that commitment are governed by that other Agreement.

3. China committed itself in paragraph 11.3 of its Accession Protocol to eliminate export duties on all products except those listed in Annex 6 and even for those listed products to limit the amount of export duties to specified amounts. China's commitment under paragraph 11.3 is not subject to the exceptions in the *GATT* (or elsewhere in the *WTO Agreement*) because there is no language explicitly incorporating Article XX of the *GATT* or language similar to the introductory phrase of paragraph 5.1 of the Accession Protocol.

III. NON-FINANCIAL RESTRICTIONS ON EXPORT (QUOTAS, LICENCES AND MINIMUM PRICES)

4. Exports can be limited quantitatively through quotas or by limiting those who are permitted to export through (non-automatic) licensing. China's export quotas on bauxite, coke, fluorspar, silicon carbide and zinc are contrary to Article X:1 of the *GATT*. So is China's related discretionary, non-automatic licensing system, which operates to create additional restrictions independent of the prohibited quotas.

5. Article XI:1 applies to "other measures" that restrict exports. The phrase "other measures" covers minimum export prices because restrictions on exports below certain prices impose economic hardship caused by decreased supplies and increases in prices. Thus, minimum export prices violate Article XI:1 of the *GATT*.

6. China does not satisfy the requirements to defend its measures under Article XI:2(a) of the *GATT*, which permits export restrictions "temporarily applied" to prevent critical shortages. The requirement of temporary application cannot be met through permanent measures that are regularly reviewed. Measures reviewed regularly but imposed indefinitely, as Canada understands the Chinese measures at issues are, are not applied for a fixed time. Further, limited state practice does not meet the requirements of the *Vienna Convention on the Law of Treaties* and is irrelevant for an interpretation of *GATT* Article XI:2(a).

7. Article XX(b) allows a defence to a breach of a provision of the GATT where the measure is "necessary to protect human, animal or plant life or health." The export restrictions do not protect human, animal or plant life or health. The evidence is that China imposes the export restrictions

because it wants to ensure that its producers that use those raw materials as inputs are advantaged. There are alternative measures that could be adopted to more effectively address life and health concerns – from stricter health, safety and environmental legislation, to putting more resources into enforcing existing legislation, to providing greater infrastructure and institutional support to deal with environmental and health concerns created by extractive industries.

8. Article XX(g) allows a defence to a breach of a provision of the *GATT* where the measures are "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption." China has not demonstrated even-handedness in the application of its measures. The export restrictions limit the amount of the raw materials in question that foreign users may access, but reveal no similar restriction on domestic users – to the contrary, the effect of export restrictions is to increase domestic consumption.

9. China's evidence of some limitations on domestic production does not serve to demonstrate even-handedness. The production limitations have been imposed after the export restrictions were put in place. Further, a limitation on production affects both foreign and domestic users and is therefore no evidence of a measure affecting only domestic users that could balance the effect of the export restriction that affects only foreign users.

10. China has not met the requirements of the *chapeau* of Article XX, notably because the export restrictions discriminate between domestic and foreign users of the raw materials in question. Also, the facts show that the effect of the export restrictions is to favour domestic users of the raw materials in question and this is a "disguised restriction" within the meaning of the *chapeau*.

IV. OTHER CHARGES IMPOSED ON OR IN CONNECTION WITH EXPORTATION

11. There are no "holes" that permit a WTO Member to impose charges without constraint except for charges explicitly permitted by the *GATT* (notably export duties). Amounts paid (through a bidding process or otherwise) to obtain the right to export products are either export duties or charges imposed "on or in connection with" exportation covered by *GATT* Article VIII:1(a). China has agreed to limitations on its ability to impose export duties in its Accession Protocol. As a result, whether a bid-winning price is an export duty or falls under *GATT* Article VIII:1(a), it is not consistent with China's WTO obligations.

V. TRANSPARENCY

12. Transparency, predictability and consistency in the application of trade regulations and procedures are essential to the operation of the world trading system. Without open and predictable procedures, traders cannot operate effectively and competitively. Changing or uncertain requirements also make effective business operations impossible. Violations of Article X of the *GATT* should not be treated as subsidiary considerations to other substantive provisions of the *GATT*.

ANNEX E-4

THIRD PARTY SUBMISSION OF CHILE*

1. Mr Chairman, distinguished members of the Panel, the delegation of Chile, as a third party to this dispute, welcomes the opportunity to present its views on some of the elements involved.

2. This dispute calls for the assessment of systemic matters of the utmost importance. The interpretation that is made with respect to the use of export restrictions should tend towards the reaffirmation of principles and obligations that are essential to the multilateral trading system.

3. Chile has noted with concern the increased use of this type of instrument. We agree with the analysis made by both the WTO and the OECD as regards the distorting effects of such measures on international trade. We attach particular importance to the analyses indicating that when differential export duties are applied to goods belonging to the same production chain, this generates subsidies on the final product exported, thereby distorting the competitive terms of international trade. Chile has suffered and continues to suffer from the effects of measures of this kind.

4. Although it would appear that there are no multilateral disciplines regulating export duties, this by no means implies that such measures are being applied with the unrestricted consent of the interested party, as though endowed with legitimacy in all circumstances and hence free from the scrutiny of the multilateral system.

5. The express limitations to the application of export duties contained in China's Accession Protocol constitutes evidence, in our view, that Members intended that such application should be subject to certain restrictions and limitations. There is an implicit recognition that export duties must be subjected to certain rules in order to preserve the rights of WTO Members.

6. As regards export restrictions disciplined by Article XI of the GATT 1994, which also form part of the subject matter of this dispute, we think that a correct interpretation is in order. In particular, it is essential that we reaffirm the general proscription against instituting or maintaining export prohibitions and restrictions and are clear on the coverage of the exception contained in Article XI:2(a).

7. Considering that much of China's defence is based on the exceptions contained in Article XX(b) and (g) of the GATT 1994, my delegation thinks that the Panel should be very cautious in examining the appropriateness of the requirements and standards contained in those subparagraphs as well as in the chapeau of that Article. It is up to China to provide evidence that the adoption of the challenged measures was justified by the corresponding provisions. If we look at the defence based on subparagraph (g), for example, evidence of the application of restrictions on domestic production or consumption in conjunction with restrictions on exports must flow unequivocally from the background information provided by the party invoking that exception.

8. Finally, regarding China's claim that some of the challenged measures are outside the terms of reference of the Panel because they have been repealed, my delegation would like to recall that the Appellate Body, in the second recourse by Ecuador to Article 21.5 of the DSU in the dispute *European Communities - Bananas III*, pointed out that "once a Panel has been established and the terms of reference for the Panel have been set, the Panel has the competence to make findings with

* Original Spanish.

respect to the measures covered by its terms of reference." In this case, owing to the nature of the complaints, and in order to ensure security and predictability, we think that findings should be made with respect to these repealed measures.

Once again, thank you very much for providing us with this opportunity.

ANNEX E-5

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF COLOMBIA

I. INTRODUCTION

1. Colombia is intervening in this case because of its systemic interest in the proper interpretation of several provisions: (*i)* the scope and coverage of China's commitments before the WTO; (*ii)* the legal standard of review and interpretation of Article XI:1; and *(iii)* the interpretation of the exceptions under Article XI: 2(a) and Article XX (g) of the GATT 1994.

II. CHINA'S COMMITMENTS BEFORE THE WTO

2. The complainants claim that export duties and export quotas are inconsistent with China's obligations under *the Protocol on the Accession of the People's Republic of China* ("the Accession Protocol") and *the Report of the Working Party* ("the Working Party Report").

3. In interpreting the legal status of the Accession Protocol and the Working Party Report, the Panel in *China – Auto Parts*[1] stated: "[t]he Accession Protocol is an integral part of the WTO Agreement (…). In turn, paragraph 342 of China's Working Party Report incorporates China's commitments under its Working Party Report, (…) into the Accession Protocol". These measures are enforceable under the dispute settlement procedure of the WTO.

4. First, regarding the export duties measures, the Parties agree that China applies such measures on various raw materials. The complainants have presented their claims in respect of the export duties under the Accession Protocol and the Working Party Report. In response, China claims that such measures are justified under Articles XX (b) and (g) of the GATT 1994.

5. Based on WTO jurisprudence relative to the Panel's order of analysis[2], Colombia considers that the Panel should begin its analysis with the complainant's claims under Paragraph 11.3 of the Accession Protocol with respect to export duties.

6. Pursuant to Paragraph 11.3 of the Accession Protocol, Colombia considers that China may apply export duties, if the following criteria are met: (*i)* that the product is listed in Annex 6; (*ii)* that the applied export duty does not exceed the tariff level established in Annex 6; and (*iii)* if the applied export duty exceeds the tariff level established in Annex 6, such an increase must be due to exceptional circumstances. If after the foregoing analysis, it is concluded that the export duties are inconsistent with WTO law, the Panel should consider China's defense pursuant to Articles XX (b) and (g) of the GATT 1994.

7. Second, concerning the export quota measures, while the complainants argue that export quotas applied by China are inconsistent with China's obligations provided in Paragraphs 162 and 165 of the Working Party Report, China requests to exercise judicial economy. According to the order of analysis mentioned *supra*, the Panel should begin its assessment with China's obligations under Paragraphs 162 y 165 of the Working Party Report.

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[1] Panel Report, *China – Auto Parts*, para. 7.740.
[2] Panel Report, *India – Quantitative Restrictions*, para. 5.124.

8. From the joint reading of Paragraphs 162 y 165 of the Working Party Report, it appears that China committed to the following: (*i)* to only use restrictions when justified under the GATT 1994; and (*ii)* to eliminate all trade restrictions at the moment of its accession to the WTO, unless that such restrictions could be justified on the basis of the WTO Agreement or the Accession Protocol. If it is determined that the application of export quotas does not comply with the parameters mentioned *supra,* the Panel may conclude that this measure is contrary to China's WTO obligations. If that is the case, the Panel should examine China's defense under Articles XI:2(a) and XX(b) and (g) of the GATT 1994.

III. STANDARD OF APPLICATION OF ARTICLE XI: 1 OF GATT 1994

9. According to GATT and WTO jurisprudence, Colombia submits that in order to determine if a particular measure is a *restriction* on imports, exports or sale for export of any product destined for the territory of any other Member, it is necessary to conclude that such measure limits the possibilities that a merchant has in order to undertake its trading enterprises. Thus, the measure would be a restriction if it: creates uncertainties or adversely affects the investment plans of the merchant; creates prohibitive costs for the merchant to engage in its trading activities; or has an effect on the competitive position of the merchant as to limit its possibilities to import or export any good. It is important to clarify that this assessment should be undertaken in light of the facts of the case and not in an abstract manner, since it is only from the analysis of the measure at issue that it could be concluded whether such measure could be deemed a *restriction*.

10. Following the considerations above, Colombia respectfully requests the Panel to take the opportunity to systematize the criteria for the assessment of whether a measure is a *restriction* under Article XI:1 of the GATT 1994, and that for such a task it takes into account certain aspects outlined in this submission.

IV. EXPORT LICENCES

11. The complainants allege that the Chinese export licensing system (ELS) is inconsistent with Article XI: 1 of the GATT. Colombia believes that the Panel should examine whether the measure adopted by China, allegedly "discretional and non automatic" according to the complainants, or "automatic" according to China, represents a restriction under the scope of Article X I: 1. In this context, it is relevant to assess the ELS based on the design of the measure at issue.

12. When analyzing if the ELS imposed by China is automatic, non automatic or discretionary, the Panel shall establish up to which point the proceedings for licensing are clear and unambiguous in its terms, despite the allegation advanced by the complainants that the measures have non defined terms, uncertain legal wording, and is discretionary on its face. In Colombia's opinion, the Panel should assess whether these terms defined by the Chinese regulation, offer an extremely broad interpretation that does not grant predictability for exporters regarding the future action of the system's manager.

13. On the other hand, if the Panel finds that this system is not automatic, it is relevant for Colombia that the Panel clarifies whether the fact of it been non automatic renders this system an export restriction. Colombia deems relevant for the Panel to clarify the implications of a non-automatic and discretionary system in light of the Members' obligations.

V. EXCEPTIONS CLAIMED BY CHINA

14. Pursuant to Article XI:2 (a) and Article XX (g) of the GATT 1994, China holds that the export duties and export quotas measures are consistent with its WTO obligations.

15. In first place, China argues that the export quotas are justified under Article XI:2 (a) of the GATT 1994. This provision establishes that the compliance with the rules of Article XI:1 can be temporarily exempted *inter alia* in order to prevent or relieve critical shortages of either: *(i)* foodstuffs; or *(ii) other products essential* to the exporting Member. As China points out, as of today there has not been any report, under the GATT or the WTO, dealing with the scope and definition of the term *other products essential* to the exporting Member.

16. As with respect to Article XI: 1 of the GATT 1994, Colombia respectfully request the Panel to include in its report an interpretive standard that sheds light upon the scope of application and requirements for a measure to fall under Article XI: 2 (a) of the GATT 1994.

17. With respect to Article XX (g) of the GATT 1994, according to WTO jurisprudence[3], the Panel should: (i) determine if the nine (9) raw materials can be included under the category of "exhaustible natural resources"; (ii) examine the relation that exists between the general structure and design of the measures at issue, and the policy goals sought by China, *i.e.* the conservation of those resources; and (iii) identify if the export restrictions are made effective in conjunction with restrictions on domestic production or consumption.

18. If the Panel finds that the restrictions to the exportations imposed by China fall within the purview of Article XX (g) of the GATT 1994, it should conduct an analysis of those restrictions under the chapeau of Article XX of the GATT 1994. In that sense, as established by the Appellate Body[4], the Panel should examine: (i) if the restrictions to the exportation imposed by China constitute an "arbitrary" measure; (ii) if the restrictions to the exportation imposed by China are a justifiable measure; and (iii) *i*f the restrictions to the exportation impose by China constitute a disguised restriction to international trade.

[3] Appellate Body Report, *US – Shrimp*, paras. 125-145.
[4] Appellate Body Report, *US – Shrimp*, para. 150.

ANNEX E-6

ORAL STATEMENT OF ECUADOR AT THE FIRST SUBSTANTIVE MEETING

1. Ecuador wishes to thank the Panel for giving us the opportunity to present our views and opinions in this third party session. We have both systemic and legal concerns over the result of this Panel.

2. We would like to touch upon briefly over two issues: (1) The interpretation of article XI of GATT 1994 and (2) The general exception contained in paragraph (g) of article XX of GATT 1994.

I. THE INTERPRETATION OF ARTICLE XI OF GATT 1994.-

3. For Ecuador is crystal clear that article XI of GATT 1994 does not forbid the application of any form of export taxes, duties or other charges, and there is no commitment or agreement that force to bind them. As it was pointed out by Argentina in its first third party submission, export taxes are important instruments of developmental policy for an important group of developing countries. In the last "World Trade Report 2010: Trade in Natural Resources", Box 19, pages 127 and 128, the WTO has a very illustrative title for that Box that I quote: "Export taxes as tool to address resource volatility, dominance and tariff escalation problems" end of the quote.

4. It is not our intention to begin a debate on economic policy in a mainly legal procedure as this one, but we would only recall another conclusion of the Report over this issue and I quote: "Three motives justify the use of an export tax in these circumstances. First, it softens the impact of rapidly rising world prices in the domestic market (recall that the impact of an export tax is to lower domestic prices) thus protecting local consumers. Second, it increases government revenue, thus easing fiscal imbalances. Third, it taxes windfall gains of exporters, thus promoting a fairer distribution of income" end of the quote.

5. These brief reflections extracted from the Report on which we totally agree, demonstrates how important export taxes are for some developing countries policies, either as tools to promote infant industries, to manage instability of commodity prices or to reduce the impact of tariff escalation applied by develop countries in detriment of developing countries that heavily depend on unprocessed primary commodities, among others. We are sure that the drafters of article XI.1 took into consideration these factors and therefore kindly request that the Panel reaffirms this conclusion.

II. THE GENERAL EXCEPTION CONTAINED IN PARAGRAPH (G) OF ARTICLE XX OF GATT 1994.

6. Literal (g) of article XX of the GATT 1994 refers to the conservation of exhaustible natural resources. This is a major issue and concern for developing countries like my own and as explained broadly in the third party submission by the Kingdom of Saudi Arabia, that Ecuador fully supports, this exception involves the right of countries to manage their natural resources according to their sovereign present and future developmental requirements, recognized in several International Conventions and Declarations well covered by the Kingdom of Saudi Arabia submission. Ecuador would also like to recall that the Law of the Sea recognises those rights.

7. Regarding the chapeau of article XX, the Panel should find the right balance in interpreting the exception of literal (g) through past precedents of the Appellate Body and the needs of Members

to resort to alternatives that will not endangered their developmental aims, particularly of developing countries.

8. Finally, Ecuador would like to recall that yet once again this dispute involves commitments that certain Members that joined the WTO after the establishment of this organization were force to undertake, as is the case of China and Ecuador. What keeps on surprising us is that those commitments written in our Accession Protocols go beyond the obligations that we have to respect in multilateral and even in plurilateral agreements of the WTO, commitments that the Members who participated in the Uruguay Round have no obligation to comply with.

9. This situation has created an unequal set of obligations for two groups of Members of the WTO. One group that has to comply with their Accession Protocols commitments and the agreements of the WTO and the second one, that has a clear set of obligations only written in the agreements of the WTO and nothing beyond that, while at the same time enjoy a blank check to complain over commitments that they were not oblige to undertake. It's a very unfair situation to describe it in a simple way.

10. We thank again the Members of the Panel for giving us the opportunity to deliver this statement and respectfully request to take into consideration Ecuador's opinions over this dispute.

ANNEX E-7

ORAL STATEMENT OF INDIA AT THE FIRST SUBSTANTIVE MEETING

I. INTRODUCTION

1. Mr Chairman and distinguished members of the panel. At the outset India would like to thank the panel for giving this opportunity to present its views relating to this dispute in the third party session. The issues brought out in the dispute by the complainants are very significant and raise the issues of restrictions on the exports of raw materials. The issues have systemic importance in as much as these raise the questions of availability of raw materials by industries world over in a fair and GATT/WTO compliant manner. India attaches importance to these issues as we are ourselves producers and exporters of basic minerals as well as we have a large and diverse industry base where these important raw materials are used. Therefore, we have significant interest in ensuring a fair play in the global trade of raw materials which must be in accordance with the rules framed under GATT/WTO.

2. China applies export restrictions on the raw materials in the form of (a) export quotas (b) export duties, (c) export licences and (d) minimum export price requirements through various legislations cited by the complainants. The nine industrial raw materials which have been subjected to the various export restraints imposed by China are– bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus and zinc. These are important raw materials or minerals of critical importance to the downstream industries. These restrictions, when imposed in a manner which is either not consistent with the Article VIII, Article X, Article XI and Article XX of GATT or as per China's commitments under the Protocol of Accession, distort competition by increasing global prices and thereby putting to disadvantage the users of such industrial raw materials. Downstream industries in China therefore have access to cheaper materials than their competitors outside China.

A. EXPORT DUTIES

3. China subjects certain raw materials with export duty rates, such as "temporary" export duty rates and/or "special" export duty rates of various magnitude. More specifically China maintains export duty on bauxite, coke, fluorspar, magnesium, manganese, silicon metal and zinc. As per the commitments under Section 11.3, Part I of the Accession Protocol, China is required to eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of the Accession Protocol or applied in conformity with the provisions of Article VIII of the GATT, 1994. These products do not figure in Annex 6 of the Protocol of Accession. Export duties imposed by China on these raw materials cannot be covered under Article VIII of the GATT, 1994 as the financial obligations that China puts on exports are not the kind of fees and charges covered by the said Article.

4. China argues that its export duty with respect to fluorspar is justified under Article XX (g) of the GATT, 1994 and with respect to coke, manganese, magnesium and zinc under Article XX (b) of the GATT, 1994. The general exceptions mentioned under Article XX can be invoked only upon fulfillment of conditions laid down in the chapeau of this Article. The chapeau specifies that such measures are not to be applied in a manner which would, inter-alia, constitute a disguised restrictions on international trade. China has to demonstrate having met this standard in case it claims to maintain the export restrictions under these general exceptions.

B. EXPORT QUOTA

5. China restricts the exportation of various forms of bauxite, coke, fluorspar, silicon carbide and zinc by subjecting the exportation of these materials to export quotas or prohibition. This constitutes a violation of Article XI of GATT, 1994 which provides that no prohibition or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures shall be instituted or maintained on importation or exportation of any product. China justifies its measure in light of Article XI 2(a) and Article XX (g) of the GATT, 1994 in respect of refractory grade bauxite. Article XI 2(a), according to China, excludes the operation of Article XI (1) where export prohibitions or restrictions are temporarily applied to prevent or relieve critical shortage of foodstuffs or other products essential to the exporting party. Article XX (g) of the GATT, 1994 permits restrictions or prohibition for conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption. China has not justified the temporary nature of the measure as well as its application for a limited period.

6. China justifies quota restrictions under Article XX (b) of GATT, 1994 on general exception in respect of rest of the products in question. This Article allows exception from the provisions of GATT, where the measure is necessary to protect human, animal or plant life or health. The measures of China do not appear to address the objective of protecting human, animal or plant life or health.

C. ADMINISTRATION OF QUOTA AND LICENCES

7. China imposes and administers its measures in a manner that is not uniform, impartial, and reasonable. Further, it imposes excessive fees and formalities on exportation, and does not publish certain measures pertaining to requirements, restrictions, or prohibitions on exports. China administers the export quotas imposed on bauxite, coke, fluorspar, silicon carbide, and zinc, through its ministries and other organizations under the State Council as well as chambers of commerce and industry associations, in a manner that restricts exports and is not uniform, impartial and reasonable. In connection with the administration of the quotas for these materials, China imposes restrictions on the right of Chinese enterprises as well as foreign enterprises and individuals to export. Therefore, these measures are not consistent with China's obligation under Article X.3 of GATT.

8. In addition, China restricts the exportation of bauxite, coke, fluorspar, manganese, silicon carbide, and zinc by subjecting these materials to non-automatic licensing. China imposes the non-automatic export licensing for bauxite, coke, fluorspar, silicon carbide, and zinc in connection with the administration of the export quotas, as an additional restraint on the exportation of those materials.

9. India, therefore, considers that these measures are inconsistent with Article VIII: 1(a) and VIII: 4, X.1 and X.3(a) of GATT, 1994.

II. CONCLUSION

10. India takes this opportunity to request the panel to recommend that China brings its measures in conformity with the provisions of GATT 1994 and its Accession Protocol in accordance with Article 19.1 of the DSU.

ANNEX E-8

EXECUTIVE SUMMARY OF WRITTEN SUBMISSION AND ORAL STATEMENT OF JAPAN

1. **Introduction of the written submission*:*** In the written submission, Japan presents its views on (1) whether Article XX of the GATT can be invoked with respect to violations of paragraph 11.3 of Part I of China's Accession Protocol("*Protocol*"); (2) whether China has demonstrated that Article XX(g) or XX(b)of the GATT would justify any violations of its World Trade Organization ("WTO") obligations; and (3) whether the "total award price" requirement is contrary to Article VIII:1(a) of GATT and/or paragraph 11.3 of Part I of the *Protocol*.

2. **The applicability of Article XX of the GATT to violations of paragraph 11.3 of Part I of Protocol**: Japan considers that Article XX, stating that "nothing in this Agreement shall be construed to prevent the adoption or enforcement", applies to measures which contravene provisions of the GATT. However, as recognized by the Appellate Body, the introductory phrase under paragraph 5.1 of Part I of the *Protocol* authorized recourse to Article XX.[1] Paragraph 11.3 of Part I of the *Protocol* does not contain such language and the working party report does not indicate that export duties may be authorized by recourse to Article XX.[2] Japan strongly doubts that China may rely on Article XX to justify violations of commitments contained in paragraph 11.3 of Part I of the *Protocol*.

3. If the Panel, however, were to find that Article XX is available as a defense to a violation of paragraph 11.3, Japan submits that the Article XX defense put forward by China may not be found justifiable.

4. **Article XX(g) of the GATT:** Article XX(g) requires that the measure must be concerned with "the conservation of exhaustible natural resources", must "relat[e] to" a conservation goal and must have been "made effective in conjunction with restrictions on domestic production or consumption". With respect to "relat[e] to", a measure must exhibit a "substant*ial relationship"* to the conservationist goal pursued.[3] The key element of the "relating to" test is whether the means are "reasonably related to the ends"[4] and *"close and genuine relationship of means and ends*"[5] is required. Regarding the "in conjunction with", it *does* require that at least some "even-handed" domestic production or consumption restrictions be in place.[6] In terms of context, Article XX(g) *as a whole* requires that any trade-restrictive measures be "made effective in conjunction with restrictions on domestic production or consumption" for the purported objectives. As such, "even-handed" domestic measures may not be such as to effectively undermine the purported objectives and it must contribute to such objectives.

5. Concerning the *chapeau*, China, as the party invoking GATT Article XX, bears the burden of proof in demonstrating that the measures are not applied in a manner which would (i) "constitute a

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[1] See Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 223, 228 and 230.

[2] See Report of the Working Party on the Accession of China, WT/ACC/CHN /49 (1 October 2001), paras. 155-156.

[3] Appellate Body Report, *US – Gasoline*, p. 19 (emphasis added).

[4] Appellate Body Report, *US – Shrimp*, paras. 137, 140-141.

[5] Appellate Body Report, *US – Shrimp*, para. 136.

[6] Cf. GATT Panel Report, *US – Tuna I* where the Panel relied, among other things, on the fact "that the United States representative had provided no evidence that domestic consumption of tuna and tuna products had been restricted in the United States". *US – Tuna I*, para. 4.11.

means of arbitrary or unjustifiable discrimination " or (ii) be "a disguised restriction on international trade".[7]

6. In Japan's view, export quota on refractory grade bauxite can be considered as relating to the conservation of products subject to production restrictions *if* the export quota are set at a level equal to domestic production restrictions. Japan is of the view that the Panel has to take a close look at whether there are "even-handed" domestic duties or equivalent measures in place.

7. **Article XX(b) of the GATT:** China invokes Article XX(b)[8] in relation to a violation of Paragraph 11.3 of Part I of the *Protocol* relating to export duties[9] and a violation of Article XI:1 of the GATT in relation to export quota.[10] It is not clear from China's submission whether China restricts the production of these products, but, even if it does, Japan does not believe that China has sufficiently explained why the export quotas and export duties on these products are "necessary" to protect human health.

8. **Sovereignty over natural resources and the WTO:** Japan also notes that China's invocation of the UNGA Resolution on permanent sovereignty over natural resources is irrelevant because the preamble only states that "due regard should be paid to the rights and duties of States under international law".[11] And this resolution is not legally binding. Further, China became a Member of the WTO by its own free choice, it should observe the WTO Agreements in good faith. Lastly, the languages "the optimal use of the world's resources" in the preamble of the Marrakesh Agreement establishing the WTO Agreement imply that the WTO Members have agreed to share their natural resources efficiently among the Members.

9. **The total award price:** The total award price, in Japan's view, is likely inconsistent with paragraph 11.3 of Part I of the *Protocol*. Although the total award price is a charge applied to exports of bauxite, silicon carbide and fluorspar, it is not provided for in Annex 6 of the *Protocol*.[12] It is also not applied in conformity with Article VIII of the GATT, because either (i) Article VIII does not apply to the total award price; or (ii) because the total award price is not limited to the approximate cost of services rendered to *individual exporters*. Therefore, the total award price is inconsistent with paragraph 11.3 of Part I of the *Protocol*.

10. **Introduction of the oral statement *:*** In the oral statement, Japan addresses six topics: (1) the requirement to present the problem clearly; (2) expired measures; (3) Article XI:1 of the GATT; (4) China's GATT Article XI:2 defense; (5) the principle of sovereignty over national resources and Article XX(g) of the GATT; and (6) China's GATT Article XX defenses. Because of the limited spaces allowed for executive summary, Japan does not include its discussion on topics (5) and (6) which were also discussed in its first written submission.

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[7] See *also* Appellate Body Report, *US – Shrimp (Article 21.5- Malaysia)*, para. 118; Appellate Body Report, *US – Shrimp*, para. 150; Appellate Body Report, *US – Gasoline*, pgs. 21-22.

[8] Sub-paragraph (b) provides that, so long as the requirements of the *chapeau* are met, WTO Members can adopt or maintain measures that are "necessary to protect human, animal or plant life or health".

[9] China's first written submission, para. 197.

[10] China's first written submission, para. 528.

[11] See UN GA Resolution 1803(XVII), *Permanent Sovereignty Over Natural Resources* (14 December 1962), Preamble.

[12] Since the types of bauxite, silicon carbide and fluorspar subject to the total award price requirement are not listed in that Annex.

11. **Requirement to present the problem clearly*:*** China claims that the complainants have failed to "plainly connect" the measures and treaty provisions in Section III of their panel requests.[13] The determination of whether a problem is stated clearly, i.e. there is plain connection, must be made with respect to the panel request read "as a whole"[14] thus it is evident that Section III "present the problem[s] clearly".

12. **Expired measures*:*** China requests that the Panel refrain from making findings and recommendations related to some measures because they expired before the Panel proceedings "commenced".[15] Japan notes that the date of establishment of the panel is generally the relevant point in time for determining whether measures may be included within a panel's terms of reference.[16]

13. **Article X1:1 of the GATT*:*** China argues that the Complainants have failed to state *prima facie* claims under Article XI:1 of the GATT with respect to export quotas.[17] In Japan's view, therefore, there can be little doubt that the Complainants need not demonstrate that Article XI:2 does not apply in order to establish a violation of Article XI:1 of the GATT. Rather, it is China which must invoke Article XI:2 as a defense and which also bears the burden of proving that it applies.

14. **China's Article XI:2 defense*:*** Canada has clearly presented five key points to defend a measure under Article XI:2(a) in its submission.[18] Japan agrees with Canada that the Chinese measure does not fulfil the requirement of temporary application. Further, Japan considers it doubtful that the Chinese measure complies with the "critical shortage" requirement as the term "critical" means " [o]f, pertaining to, or constituting a crisis" or "of decisive importance. "[19] Japan requests the Panel to take full account of this consideration when reviewing the Chinese defense.

[13] See China's first written submission, paras. 16 and 29.
[14] See Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 169.
[15] See China's first written submission, Part II.E.3.
[16] See, e.g., Appellate Body Report, *EC – Chicken Classification*, para. 156; Appellate Body Report, *EC – Selected Customs Matters*, para. 184.
[17] China's first written submission, para. 351.
[18] Third party submission of Canada, para.14. While Japan generally agrees with Canada's assessment of the requirements, for the sake of clarity, it would note that a respondent invoking Article XI:2(a) need only demonstrate compliance with the Article XI:2(a). The requirement that the measure at issue be an "export restriction or prohibition" is of course for complainants to establish.
[19] New Shorter Oxford English Dictionary (1993), p. 551.

ANNEX E-9

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF KOREA

I. INTRODUCTION

1. This third party submission is presented by the Government of the Republic of Korea ("Korea") with respect to certain aspects of the first written submissions of the United States, the European Union and Mexico (collectively the "Co-Complainants") dated 1 June 2010 and of the People's Republic of China ("China") dated 4 August 2010, respectively. Korea has systemic interests in the interpretation and application of various provisions of the GATT 1994, the Accession Protocol and the Working Party Report, all of which are extensively discussed in this controversial dispute. Korea appreciates this opportunity to present its views to the Panel.

II. LEGAL ARGUMENTS

A. MERE VAGUENESS OF THE TERMS CONTAINED IN THE PROVISIONS OF LAWS AND REGULATIONS OF A MEMBER DOES NOT NECESSARILY AMOUNT TO THE MEMBER'S "AS SUCH" VIOLATION

2. In this factually intensive dispute, the parties present different accounts and descriptions for key factual situations. In Korea's view, as to some, if not all, of the measures raised in this dispute, the Co-Complainants seem to have presented factual information and legal arguments to substantiate their prima facie claims.

3. In certain instances, however, the Co-Complainants appear to have simply identified situations where vague terms are used in the laws and regulations of the Member complained against. The Co-Complainants then appear to argue that these are sufficient to find "as such" violation on the part of the Member. To the extent these legislative documents contain "discretionary" language, we submit that the Panel's evaluation of the issue should be guided by the "good faith presumption" which is attached to the interpretation of a Member's laws and regulations. In *US – Oil Country Tubular Goods Sunset Reviews*, noting the general "presumption that WTO Members act in good faith in the implementation of their WTO commitments," the Appellate Body stated that this presumption "is particularly apt in the context of measures challenged 'as such.'"[1]

B. THE EXPORT QUOTA MEASURE ADOPTED BY CHINA SEEMS TO BE INCONSISTENT WITH CHINA'S OBLIGATION UNDER THE GATT 1994, THE ACCESSION PROTOCOL AND THE WORKING PARTY REPORT

4. The Chinese legislative framework as outlined by the Co-Complainants seems to prove the existence of an export quota measure within the meaning of Article XI:1 of the GATT 1994. As China's MOFCOM sets the annual quotas for exportation of bauxite, coke, fluorspar, silicon carbide and zinc in accordance with the relevant laws and regulations including Measures for the Administration of Export Quotas and prohibits out-of-quota exportation with the penalty of administrative and criminal sanction, a fair argument could be made that the measure amounts to a

[1] *See United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R (29 Nov. 2004), at para. 173.

quantitative restriction that prohibits or restricts the exportation or sale for export of products as the panel and the Appellate Body determined in *India – Quantitative Restrictions*.[2]

5. Information and materials submitted by the Co-Complainants also indicate that China's imposition of the export quota constitutes violation of relevant provisions of the Accession Protocol and paragraphs of the Working Party Report. The measure particularly implicates Articles 5.1 and 1.2 of the Accession Protocol and paragraphs 84, 162 and 165 of the Working Party Report.

6. In this regard, China seems to take the position that its export quota does not implicate "right to import or export," but rather it is based on its "right to regulate" which is permitted under Article 5.1 of the Accession Protocol. In our view, "right to regulate" may describe the situation where the challenged measure does not restrict export per se but rather attempts to address other legitimate administrative purposes such as evaluating exporting enterprises' demand and capacity beforehand or coordinating amounts and timing of export to avoid the disruption in the relevant domestic markets. China's Measures for the Administration of Export Quotas, however, hardly provides for a mechanism to ensure that the export demand of the applicants, either individually or collectively, is to be ultimately accommodated to the fullest. The measure challenged, therefore, seems to be closer to "right to trade" than "right to regulate" in the spectrum.

C. ASSUMING THE CO-COMPLAINANTS' FACTUAL INFORMATION IS ACCURATE, CHINA'S EXPORT DUTIES SEEM TO BE INCONSISTENT WITH ITS OBLIGATION UNDER THE ACCESSION PROTOCOL

7. The Co-Complainants then claim that China's export duties for certain raw materials are inconsistent with China's obligation under Article 11.3 of the Accession Protocol. Korea notes that in its first written submission China refutes factual information submitted by the Co-Complainants and argues that some measures are no longer in place. Korea believes that in this respect the Panel needs to sort out differences in factual information among the parties and confirm the current status of the challenged measure.

8. Even if factual discrepancies are accounted for, however, the factual information and legal arguments submitted by the Co-Complainants tend to show the violation of the relevant provision of the Accession Protocol. For instance, China states that the export duties are not imposed any more on some of the items challenged in this dispute. But this confirmation, on the other hand, seems to indicate the continued imposition of export duties for other raw materials.

D. TO THE EXTENT CHINA'S EXPORT LICENSING IS IMPLEMENTED AS THE FINAL STEP FOR EXPORT QUOTAS, IT MAY BE INCONSISTENT WITH CHINA'S OBLIGATIONS UNDER RELEVANT PROVISIONS OF GATT 1994, ACCESSION PROTOCOL AND WORKING PARTY REPORT

9. The Co-Complainants also challenge China's export licensing system. The Co-Complainants allege that the export licensing of China "as such" constitutes violation of Article XI:1 of the GATT 1994, Articles 5.1 and 1.2 of the Accession Protocol and paragraphs 84, 162 and 165 of the Working Party Report. Here also, the parties show stark differences in describing factual situations and legislative frameworks in place in China. The key difference here is whether the licensing system is automatic or non-automatic.

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[2] *See India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R, (22 Sept. 1999) (upheld by the Appellate Body in its report, WT/DS90/AB/R), at para. 5.128.)

10. In its first written submission, China refutes the Co-Complainants' claim that the export licensing is non-automatic and discretionary. The specificity and details of China's explanation seem to substantiate its claim that the export licensing is indeed automatic. Regardless of the automaticity, however, there still seems to be a possibility that the export licensing may implicate Article XI:1 of the GATT 1994. China's explanations of the export licensing describe the measure as being closely related to the export quota system and as, in fact, a final step for the administration of export quota. As China acknowledges, in order to obtain export licenses the exporters of the raw materials must submit "quota-granting documents" with other application materials. As all other application materials are the same between quota product exporters and non-quota product exporters, the submission of "quota-granting documents" could be considered to be dispositive in the case of exporters of the raw materials subject to the respective quotas.

11. To the extent the export licensing is administered as a final step for the export quotas for the above-mentioned raw materials, the export licensing could be regarded as a part of the export quota system and thus, the export licensing claim could be collapsed into the export quota claim, which may then implicate violation of Article XI:1 of the GATT 1994 and other relevant provisions in the Accession Protocol and the Working Party Report.

E. A CAREFUL SCRUTINY SHOULD BE CONDUCTED TO DETERMINE IF THE CHALLENGED MEASURES COULD BE JUSTIFIED UNDER ARTICLE XX OF THE GATT 1994

12. Assuming the existence of violation of provisions of the GATT 1994, the Accession Protocol and the Working Party Report, China then presents the claim that its measures are justified under Article XX of the agreement, particularly as a measure necessary to protect human life or health and to conserve exhaustible natural resources.

13. Assuming that China proves these measures are designed to protect human, animal or plant life or health, the remaining key issue is whether they are "necessary" to achieve the objective. Korea submits that the Panel should carefully carry out its analyses, in accordance with the relevant jurisprudence, to confirm that the challenged measures are justified as "necessary" to achieve public health and environmental protection goals.

14. China also claims that the measures at issue are to conserve exhaustible natural resources in accordance with Article XX(g) of the GATT 1994. Even if these raw materials are exhaustible natural resources and the measures are to conserve these resources, it does not seem clear, from China's arguments, whether they are made effective in conjunction with restrictions on domestic production or consumption. This requirement, as China also agrees, is to ensure that the burden of conservation-related measures is evenly distributed between foreign trade and domestic trade. Although the burden does not have to be identical between foreign trade and domestic trade, the Panel may want to examine evidence that the measure imposing Member has conducted analyses to distribute the burden reasonably and proportionally.

ANNEX E-10

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF SAUDI ARABIA

I. INTRODUCTION

1. The Kingdom of Saudi Arabia has joined as a third party in this dispute to provide its views on a number of fundamental issues relating to the proper interpretation of Articles XI and XX of the GATT 1994. These issues are of systemic importance to all WTO Members, particularly developing countries that are pursuing strategies of economic diversification and sustainable development.

II. EXPORT LICENSING AND GATT ARTICLE XI

2. The purpose of GATT Article XI is the general elimination of *quantitative* restrictions. The Article's interpretation must begin with its title, "General Elimination of Quantitative Restrictions", which forms an integral part of it. Any interpretation of Article XI that expands its coverage to all prohibitions or restrictions, whether or not related to import or export *quantities*, would render the Article's title meaningless. This would be inconsistent with basic tenants of treaty interpretation, as adopted in WTO jurisprudence.[1]

3. In assessing whether a measure is an impermissible restriction on exports, a panel should first determine whether it imposes a formal quantitative restriction. If the measure is not a formal quantitative restriction, the panel should then analyze the measure's design, architecture and structure to determine whether it has a restrictive effect, and is designed to have a restrictive effect, on export quantities. Several WTO Panels have adopted this analytical framework.[2]

4. An export restriction that is permitted by Article XI – for example an export duty – may be "made effective" through an export licence. Its function is to implement an underlying measure that is itself permitted by Article XI. Thus, an export licensing system which implements a permitted export restriction will be consistent with GATT Article XI as long as the system itself does not introduce any additional restriction beyond what is necessary to administer the permissible measure.

5. GATT Article XI permits "automatic" export licensing systems because such systems do not impose any restrictions on exports. Based on the *Agreement on Import Licensing Procedures* (ILA), "automatic" export licensing could be defined as "licensing where approval of the application is granted in all cases," and "non-automatic" export licensing could be defined as a broad residual category of licences that are not "automatic", *i.e.*, granted in all cases. Export restrictions that are permitted by GATT Article XI – "duties, taxes or other charges" – must be administered by such "non-automatic" licensing because failure to pay the duty, tax or charge would result in the rejection of a licence application (*i.e.*, the licence would not be "granted in all cases").

6. Given Article XI's express provision for certain export restrictions, non-automatic licensing systems must be allowed to the extent that they have "made effective" such permissible restrictions. Thus, non-automatic export licensing will be WTO-consistent whenever it implements an otherwise

[1] *See* Appellate Body Report, *US – Softwood Lumber IV*, para. 93. *See also* Appellate Body Report, *US – Carbon Steel*, para. 67 *and* Appellate Body Report, *US – Gasoline*, p. 23.

[2] *See* Panel Report, *India – Autos*, paras. 7.266-7.268; *see also* Panel Report, *Colombia – Ports of Entry*, para. 7.252.

permissible export restriction in a form that does not create, and is not designed to create, additional limiting conditions beyond what is necessary to administer the permitted restriction. The second criterion determines whether the non-automatic licensing system is itself an impermissible quantitative restriction, *i.e.*, whether the system imposes, and is designed to impose, additional restrictive conditions beyond those necessary to administer the measure.

7. The Panel report in *India – Quantitative Restrictions* does not support the complainants' conclusion that all non-automatic licensing is inconsistent with GATT Article XI. First, the Panel in that case did not distinguish between "non-automatic" and "discretionary" licensing systems and never explained whether it considered the terms to be the same or different.[3] Moreover, the licensing systems at issue were clearly discretionary. Thus, the Panel's ruling had nothing to do with the broad category of "non-automatic licensing" as that term is meant under the ILA. The Panel should therefore reject the complainants' interpretation of *India – Quantitative Restrictions*.

III. MINIMUM EXPORT PRICES AND GATT ARTICLE XI

8. A minimum export price does not impose a numerical limitation on the quantity of exports, and must therefore be examined on a case-by-case basis to determine whether it functions as, and is designed to function as, a prohibited quantitative restriction. For example, a minimum export price that is equal to or lower than the relevant international price would have no restrictive effect on export quantities. Such a system could not limit export volumes in violation of Article XI. Thus, a standard consistent with the Article's text does not support the complainants' view that a minimum export price is *per se* inconsistent with Article XI.

9. Prior jurisprudence is of limited relevance in assessing the consistency of minimum export prices with Article XI. The GATT Panel ruling in *EEC – Minimum Import Prices*, on which complainants rely, concerned import pricing measures. There is an important legal distinction between minimum import prices and minimum export prices. The former can constitute a type of "other duty or charge" imposed on importation in excess of a Member's tariff bindings under GATT Article II:1(b). The latter does not implicate any schedule of bound concessions, but rather has the effect of "duties, taxes or other charges" on exports that are permitted under Article XI. Thus, arguments that rely on direct analogies between minimum import prices and minimum export prices should be treated with caution. If a minimum export price measure takes the form of a "duty, tax or other charge", it is exempt from the prohibition of Article XI. A ruling to the contrary would impose a limitation on Members' unlimited right to employ export duties, taxes or charges.

IV. GATT ARTICLE XX(G)

10. The Panel's interpretation of Article XX(g) should be guided by three fundamental principles. First, the term "conservation" of exhaustible natural resources in Article XX(g) should be interpreted in a manner that recognizes the fundamental public international law principle that each State enjoys permanent sovereignty over its natural resources (PSNR). The Appellate Body noted in *US – Gasoline* that "the *General Agreement* is not to be read in clinical isolation from public international law."[4] Under public international law, States' sovereignty over their natural resources is part of their territorial sovereignty. PSNR has evolved into an established principle of customary international law, and comprises the rights of States to explore, exploit, and dispose of their natural resources for national development.

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[3] Panel Report, *India – Quantitative Restrictions*, paras. 5.129 and 5.137.

[4] Appellate Body Report, *US – Gasoline*, p. 17 (original emphasis). *See also* Vienna Convention on the Law of Treaties, Art. 31.3(c).

11. Second, Article XX(g) encompasses the regulatory autonomy of each Member to determine for itself how it wishes to conserve its natural resources to meet the development needs of current and future generations. The principle of PSNR includes the sovereign right, recognized by the United Nations, to promote economic and social development through the use of natural resources. This right is supported by UN Resolutions on the concept of "sustainable" development, which involves the exploitation of resources to meet current and future development needs. The objective of "optimal use of the world's resources in accordance with the objective of sustainable development" is also explicitly recognized in the Preamble to the WTO Agreement. As the Appellate Body noted in *US – Shrimp*, "this preambular language reflects the intentions of negotiators of the *WTO Agreement*" and must therefore "add colour, texture and shading to our interpretation of the agreements annexed to the *WTO Agreement*…."[5] Nothing in the WTO Agreements imposes any obligation to share resources.

12. Third, a WTO Member exercising its rights to conserve exhaustible natural resources must also comply with the strict conditions of the chapeau of Article XX. PSNR rights do not permit a WTO Member to apply any conservation measure in a manner which would constitute a means of arbitrary or unjustifiable discrimination, or a disguised restriction on international trade. The chapeau acts as a limiting condition on a Member's right to justify its measures under Article XX, and thus demands a high level of scrutiny – higher than that of provisional justification under the Article's exceptions.[6] The chapeau "serves to ensure that Members' rights to avail themselves of exceptions are exercised in good faith to protect interests considered legitimate under Article XX, not as a means to circumvent one Member's obligations towards other WTO Members."[7] It demands an assessment of both a measure's provisions and its actual application,[8] and is a crucial check on the legitimacy and WTO-consistency of a measure provisionally justified under one of the paragraphs of Article XX.

V. CONCLUSION

13. The parties to this proceeding have raised important systemic issues related to the interpretation of GATT Article XI and the scope of GATT Article XX(g). Saudi Arabia respectfully requests that the Panel consider the Kingdom's comments on these issues.

[5] Appellate Body Report, *US – Shrimp*, para. 153 (original emphasis).

[6] *See* Appellate Body Report, *US – Shrimp*, para. 157; Appellate Body Report, *US – Gasoline*, pp. 22-23.

[7] Appellate Body Report, *Brazil – Retreaded Tyres*, para. 215.

[8] Appellate Body Report, *US – Shrimp*, para. 160. *See also* Appellate Body Report, *Brazil – Retreaded Tyres*, para. 215.

ANNEX E-11

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF TURKEY

I. INTRODUCTION

1. Turkey thanks the Panel for giving the opportunity to present its views in this proceeding. Turkey takes no position what so ever as to the defense and allegations presented by the parties on whether the specific measure at issue is inconsistent to the subject provisions of the WTO Agreements but, would like to contribute, by expressing its legal analysis on the issues of (1) export duties and (2) export quotas.

II. EXPORT DUTIES

2. Although Article XI of GATT 1994 generally prohibits import export restrictions, it allows WTO Members to impose duties on exports. However, in the case of China, as an integral part of the WTO Agreement, commitments in the Accession Protocol and commitments referred to in paragraph 342 of the Working Party Report, should also be taken into consideration.

3. Regarding export duties, according to Paragraph 11.3 of the Accession Protocol "China shall eliminate all taxes and charges applied to exports unless specifically provided for in Annex 6 of this Protocol or applied in conformity with the provisions of Article VIII of the GATT 1994."

4. Therefore, in order to determine whether China shall "eliminate all taxes and charges applied to exports, the Panel should first decide (i) whether the financial obligations that China puts on exports are the kind of fees and charges covered by Article VIII and applied in conformity with the provisions of Article VIII.; and (ii) whether they are specifically provided for in Annex 6 and applied in accordance with the terms and conditions specified for those products in Annex 6. If answers to these two conditions are negative for a product in question and if the measures are not justified by any other WTO Agreements than the taxes and charges on exports should be eliminated.

5. China states in its submission that Article XX of GATT 94 justifies some of its measures. As it is well settled by the WTO jurisprudence, a measure can be justified by Article XX, i) if it falls under one or another of the particular exceptions listed from paragraphs (a) to (j) under Article XX; and ii) if it satisfies the requirements imposed by the opening clauses of Article XX.[1]

6. Without prejudice to its rights to elaborate the specific requirements envisaged in the specific paragraphs and the chapeau of Article XX of the GATT 1994, in this dispute Turkey would like to contribute to the Panel analysis by referring the negotiating history of the chapeau and paragraph g, which it considers, has value in interpreting them.

7. The issue of providing exceptions was discussed during the negotiations of the Charter of the International Trade Organization (ITO) and the General Agreement on Tariffs and Trade (GATT 1947). At the end of the negotiations, the negotiators decided to use. the term "*between countries where the same conditions prevail"* in the chapeau, instead of the term "*foreign countries where the same conditions prevail".*

[1] Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3, (*US – Gasoline*), p.22

8. With regard to the paragraph g of Article XX, during the negotiations a proposal was made in which it was suggested that, export restrictions should be permitted for the preservation of scarce natural resources even if there is no restriction on domestic consumption. [2] In response to that suggestion it was stated that "One of the ways in which export prohibitions could be used ...is for protective purposes. It is possible for a raw material producing country, which wishes to industrialize, to do so behind a protective arrangement which is extremely effective, and that is preventing anybody else getting the raw material to use in his already existing industries"[3] Therefore the proposal was not accepted.[4]

9. In this regard, Turkey is of the view that negotiating history of the GATT XX(g) shed light on coverage of the Article and understanding the aim of the negotiators.

III. EXPORT QUOTAS

10. One of the issues that was suggested by China, with regard to export quotas is that Article XI:1 shall not apply to measures that carry the characteristics specified in Articles XI:2(a)-(c).. In justifying its suggestion China explained that the relation between Article X:1 and XI:2 is similar to those of between Article 27 and 3 of the SCM Agreement and between Article II.(b) and II.2 of GATT 1994.

A. THE RELATION BETWEEN ARTICLE 27 AND 3 OF THE SCM AGREEMENT AND ITS SIMILARITY TO THE RELATION BETWEEN ARTICLE XI:1 AND XI:2 OF GATT 94

11. Turkey considers that the relationship between Article XI:1 and XI:2 is not similar to that of between Articles 27 and 3.1(a) of the SCM Agreement. While Article XI:2 of the GATT 1994 provides an affirmative defence against the obligations brought by Article XI:1, Article 27 of the SCM Agreement introduces positive obligations for developing countries in order to exempt them from the obligations brought by Article 3 of the said Agreement.

12. According to the general interpretation of international law and WTO jurisprudence, the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.[5] In this regard, the party relying on the affirmative defence is obliged to prove the existence of the conditions determined in the so called defence. This is also the case when a party relies on one of the exceptions enclosed in GATT XI:2.

13. However, Article 27 of the SCM Agreement provides certain conditions for the beneficiary to benefit from an exemption from the obligations brought by Article 3 of the SCM Agreement, which shall be understood as positive obligations, not affirmative defences. In this regard, if a party claims that these positive conditions are not satisfied by the beneficiary country and thus this country should not benefit from the exemption, than the claiming party, shall be obliged to prove the lack of such conditions. Such as the case in the Appellate Body decision in *Brazil - Aircraft*.[6]

14. For the reasons stated above, in Turkey's view, the relationship between GATT 94 Articles XI:1 and X1:2 is different than that of Articles 27 and 3:1(a) of the SCM Agreement.

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[2] E/PC/T/C.II/QR/PV/1, p.15
[3] E/PC/T/C.II/QR/PV/1, p.20-21
[4] E/PC/T/C.II/59, p.5
[5] Appellate Body Report, *US – Wool Shirts and Blouses*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, 323, p 14
[6] Appellate Body Report, *Brazil – Aircraft*, WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, 1161, para 140-141

B. RELATION BETWEEN ARTICLE II.(B) AND II.2 OF GATT 94 AND OF ITS SIMILARITY TO THE RELATIONSHIP BETWEEN ARTICLE XI.1 AND XI.2 OF GATT 94

15. Turkey considers that the relationship between Articles II.1(b) and II.2 of GATT 94 and *Articles* XI.1 and XI.2 of GATT 94 do indeed provide similarities. Both of them provide affirmative defence against the application of obligations stated in the previous paragraphs. In this regard, the party relying on the affirmative defence is obliged to prove the existence of the conditions determined in the so called affirmative defence Article.

16. However, the Appellate Body reversed the burden of proof obligation in *India-Additional Duties*. According to the Appellate Body's reasoning, a case by case evaluation is needed in order to determine which party carries the burden of proof, within the scope of GATT Article XI:2. In other words, the first thing that the Panel should decide is which party carries the burden of proof. Even if the Panel should decide that the complaining Parties bare the burden of proof, there are certain preconditions that should be fulfilled, such as;

(a) the potential for application of Article XI:2 is to be clear from the face of the challenged measure,

(b) The close relationship between Articles II:1(b) and II:2 exists in Articles XI:1 and XI:2 as well, therefore they are also of closely inter-related character and are required to be read together.

(c) the party complained against must show that the measure does not breach Article XI.1, because of it's justification by Article XI:2.

(d) the nature and content of the rebuttal submission should contain the rebuttal arguments and the evidence thereof, that substantiate the aim of XI.2.

17. Therefore, Turkey considers that the relationship between GATT 94 Articles XI:1 and X1:2 is similar to that of between Article II:1(b) and II:2. However this does not necessarily mean that the same approach should automatically be followed in the case of the application of Articles XI:1 and XI:2

IV. CONCLUSION

18. Turkey appreciates this opportunity to present its views to the Panel.

ANNEX F

PRELIMINARY RULING

ANNEX F-1

FIRST PHASE OF PRELIMINARY RULING

WORLD TRADE ORGANIZATION

WT/DS394/9
WT/DS395/9
WT/DS398/8
18 May 2010

(10-2762)

Original: English

CHINA – MEASURES RELATED TO THE EXPORTATION OF VARIOUS RAW MATERIALS

Communication from the Panel

The Panel has asked the Chairman of the Dispute Settlement Body to circulate to the Members for their information, the following communication dated 7 May 2010 from the Panel to the Parties.

By means of this communication, the Panel hereby responds to China's request for a preliminary ruling dated 30 March 2010, regarding the compliance of the Complainants' panel requests with the requirements of Article 6.2 of the DSU in the above-mentioned disputes.

The Panel has carefully examined the views expressed by all Parties and Third Parties with respect to China's request. The Panel has decided to rule today on some parts of China's request and to reserve its decision on other parts.

In sum, the Panel today rules as follows:

- The Panel finds that its terms of reference are limited to those measures explicitly identified by bullet points in each of the three sections of the Complainants' panel requests.

- Of these measures, the Panel finds that the term "related measures" as referred to in the last bullet point in each of the listed measures, is too broad and undefined a term and therefore falls outside the Panel's terms of reference.

- The Panel decides that its terms of reference are not limited to those products falling under the tariff lines described in footnotes one to nine of the panel requests. The Panel concludes that these tariff lines are only indicative of the broad scope of the challenge.

- The Panel rules that the panel requests include the two corrected tariff lines regarding zinc.

- The Panel finds that the Complainants' claims under paragraph 342 of the Report of the Working Party on the Accession of China fall outside its terms of reference.

- The Panel will not consider the preliminary ruling submitted by the Complainants from a separate, ongoing panel proceeding.

Until it has examined the Complainants' first written submissions and in order to preserve fully China's ability to defend itself, the Panel decides to reserve its decision on:

- Whether the Complainants' panel requests sufficiently identify the measures at issue and the products possibly affected by such measures.

- Whether the Complainants' panel requests provide for a summary of the legal basis of the complaint sufficient to present the problem clearly.

The Panel's detailed analysis of the issues under consideration and rulings with respect to these issues is hereby annexed.

For purposes of transparency and due process, and having consulted the Parties, the Panel intends to send a copy of this communication to all Third Parties in the proceedings and will also request that this communication be circulated to all WTO Members.

ANALYSIS AND RULINGS BY THE PANEL

1. On 30 March 2010, China filed a request before this Panel for a preliminary ruling.[1] China asserted that specific sections of the Complainants' panel requests[2] for the establishment of this Panel (panel requests) are inconsistent with Article 6.2 of the Understanding on the Rules and Procedures Governing the Settlement of Disputes (DSU).[3] The Parties presented preliminary written submissions. China commented on the Complainants' Joint Response to China's preliminary ruling request whereas the Complainants did not comment on China's comments.[4] On 29 April 2010, the Panel held a hearing with the Parties and a separate session with the Third Parties on China's request. On the same date, the Panel sent written questions to the Parties on China's request. The Parties responded to the Panel's questions on 3 May 2010 and submitted comments on 5 May 2010 on each other's responses.

2. Essentially, China argues that the Complainants' panel requests do not comply with the requirements of Article 6.2 of the DSU because they do not identify clearly and specifically enough which measures are challenged and for which specific products. China also argues that the panel requests do not provide a brief summary of the legal basis sufficient to present the problem clearly, as the measures identified in Section III of the panel requests are not plainly connected to the list of provisions that the Complainants consider to be infringed.

3. The Panel recalls that the DSU does not provide for preliminary rulings requests by parties although their occurrence has increased recently, notably in challenging the jurisdiction of panels traditionally based on the Complaining party's panel request.

4. Article 6.2 of the DSU requires, *inter alia*, that a panel request identifies the "specific measures at issue" and provides "a brief summary of the legal basis (...) sufficient to present the problem clearly". The need for precision in the panel requests flows from the two essential purposes of the terms of reference, namely, to define the "scope of the dispute" and to serve the "due process" objective of notifying the parties and third parties of the nature of the complainants' case.[5] Compliance with the requirements of Article 6.2 must be determined on the merits of each case, having considered the panel request as a whole and the parties' first written submission if necessary, and in the light of attendant circumstances.[6]

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[1] China's request for a preliminary ruling pursuant to Article 6.2 of the DSU, 30 March 2010 (China's request).

[2] Request for the Establishment of a Panel by the United States (WT/DS394/7); Request for the Establishment of a Panel by the European Communities (WT/DS395/7) and Request for the Establishment of a Panel by Mexico (WT/DS398/6).

[3] For instance, see China's request, paras. 3 and 30, as well as the Annex of China's request.

[4] See China's request; Response of the United States, European Union, and Mexico to China's request (Joint response on 21 April 2010) and China's Comments on the Joint Response (China's comments) (23 April 2010). The Complainants sent emails on 25 April informing the Panel that they chose not to comment in writing on China's comments. This was an optional procedure in the Panel's timetable for the Preliminary ruling proceedings.

[5] Appellate Body Report on *EC – Chicken Cuts*, para 155 referring to Appellate Body Report on *US – Carbon Steel*, para. 126 (quoting Appellate Body Report on *Brazil – Desiccated Coconut*, DSR 1997:I, 167, at 186 (emphasis omitted); and referring to Appellate Body Report on *EC – Bananas III*, para. 142).

[6] Appellate Body Report on *Korea – Dairy*, paras. 124-127. See also, Appellate Body Report on *US – Carbon Steel*, para. 127

5. The Panel has given due consideration to the Parties' requests and arguments. It has carefully examined the Complainants' panel requests in light of both the letter and the spirit of Article 6.2 of the DSU[7], as they define its jurisdiction and terms of reference. The Panel has also taken into account the need to ensure China's ability to defend itself[8] and its right to be well informed of the Complainants' case, as well as the right of the Complainants to have a prompt resolution of the disputes[9] in accordance with Article 3.3 of the DSU, while keeping in mind that "[t]he procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes."[10]

6. Taking into account all these elements, the Panel issues its preliminary ruling on the following aspects.

THE MEASURES CHALLENGED

7. China claims that in their panel requests the Complainants failed to sufficiently identify the measures they challenge.[11] China's main focus is on the alleged lack of defined products covered by each challenged measure. Before addressing this argument from China, the Panel will discuss two sets of terms used by the Complainants in their panel requests of concern to the Panel itself:[12] the use of "among others" preceding the lists of challenged measures and the reference to "any amendments or extensions; related measures; replacement measures; renewal measures; and implementing measures" to any of the listed measures, as identified in the last bullet point of each of the listed measures in each of the three sections of the Complainants' panel requests.

8. The Panel recalls that within the meaning of Article 6.2 of the DSU, a panel request must specify the measures challenged. The Panel is aware that the obligation to identify the specific measure at issue does not oblige the complainant to set forth the "precise content" of the measure in its panel request. Instead, the Appellate Body found that "although a measure cannot be identified without some indication of its contents, the identification of a measure within the meaning of Article 6.2 needs be framed only with sufficient particularity so as to indicate the nature of the measure and the gist of what is at issue."[13] A measure may thus be identified by its substance or nature[14], so long as what is referred for adjudication by a panel may be discerned from the panel request.[15]

9. As the goal of such requirements is, *inter alia*, to ensure that the defendant is well aware of the scope of the challenge it faces in a dispute, the Panel believes that the defendant in any panel procedure must know clearly which of its measures are challenged. So "as a general rule, the

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[7] Appellate Body on *EC – Bananas III*, para. 142.

[8] Appellate Body Report on *US – Carbon Steel*, para. 127. See also, Appellate Body Report on *Korea – Dairy*, para. 127.

[9] Regardless of the fact that there are three complaints (DS394, DS395 and DS398) which implies three different disputes, the Panel will refer in its subsequent communications to "dispute" when referring to the process of this current Panel.

[10] Appellate Body Report on *US – FSC*, para. 166.

[11] For instance, see China's request, paras. 13-19 and 59-66; and China's comments, paras. 10-32.

[12] The Panel has the right and obligation to address issues even if the parties to the dispute remain silent on those issues. Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, para. 35.

[13] Appellate Body Report on *US – Continued Zeroing*, para. 169.

[14] Panel Report on *Argentina – Footwear (EC)*, para. 8.40. See also, Panel Report on *EC – Approval and Marketing of Biotech Products*, para. 7.47.

[15] Appellate Body Report on *US – Continued Zeroing*, para. 168.

measures included in a panel terms' of reference must be measures that are in existence at the time of the establishment of the panel".[16]

1. "among others"

10. The panel requests contain an introductory paragraph and then three sections. Each section refers to a generic type of measure – export quotas, export duties and additional restraints imposed on exportation. Each section is composed first of narrative paragraphs describing what the complainants' consider generally to be the "problem", second, of a list of challenged legal instruments and finally, of a list of the WTO obligations alleged to have been violated by the listed measures.

11. The Panel is concerned with certain aspects of the three lists of challenged measures. After the narrative paragraph(s) in each of the three sections, the Complainants identify the lists of measures with the following phrase: "...these Chinese measures are reflected in, ***among others***" (emphasis added). This phrase indicates that the measures listed by bullet points in the panel requests are not the only measures allegedly inconsistent with WTO obligations and leaves open the possibility that the Complainants might include additional measures in subsequent submissions.

12. The Panel is of the view that the Complainants cannot be allowed to include additional measures other than those listed and identified by bullet points in the panel requests. Such an "open ended" list would not contribute to the "security and predictability" of the WTO dispute settlement system as required by Article 3.2 of the DSU.

13. For this reason, the Panel considers that only the listed measures explicitly identified by bullet points in the three sections of the Complainants' panel requests fall within the Panel's terms of reference and will thus be examined by the Panel.

2. "as well as any amendments or extensions; related measures; replacement measures; renewal measures; and implementing measures"

14. In response to the Panel's questions during the preliminary ruling hearing, the Complainants suggested that they do not intend to introduce new measures and that the phrase "among others" is intended to cover the same situations as those envisaged by the last bullet point of each of those three lists which reads "as well as any amendments or extensions; related measures; replacement measures; renewal measures; and implementing measures".

15. The Complainants add that the purpose of the "among others" phrase, as well as the last bullet in the list of legal instruments referring to "any amendments or extensions; related measures; replacement measures; renewal measures; and implementing measures" is to make clear that the Chinese legal instruments that the Complainants have been able to identify to date may not be the only ones through which China maintains the measures at issue, and to specifically include such instruments within the Panel's terms of reference.[17]

16. The Panel shares the concern that a respondent should not be allowed to unilaterally modify one or more of the initially challenged measures with a view to avoiding a Panel's jurisdiction. At the same time, measures to be included in the Panel's terms of reference should generally exist at the time of the filing of the panel request. There are nonetheless situations where new governmental actions were considered to be so closely linked to the challenged measure that they were also considered to

[16] Appellate Body Report on *EC – Chicken Cuts*, paras. 156.
[17] Complainants' answer to the Panel's questions after the preliminary ruling hearing, para. 19.

have been captured by the Panel's initial terms of reference. Amendments to challenged legislation that do not change the "essence" of the initial measure bring the amended measure under the initial terms of reference.[18] The same was said when the initial measure expired and was replaced by a new one or when the effect of the new (implementing) measure is the same as the expired one.[19] However, in *EC – Chicken Cuts* two related measures were adopted during the panel process but were considered to be excluded from the terms of reference because, although related to the same matter and having the same effect, they were not amendments to the original measures with the same essence as the original measures.

17. In the Panel's view, undefined "related measures" is too broad a term and does not allow China to know clearly what specific measures are being challenged in the current disputes. For this reason, the Panel believes that the Complainants cannot add to their list of challenged measures a broad scope of "related measures".[20]

18. Therefore, the Panel will not read the last bullet point of each of the three lists of specific measures as referring to any "related measures".

19. With regard to the reference to "implementing measures", it is not clear whether the Complainants refer to domestic implementing measures or whether they seek to include the measures that China may have to implement if the Complainants were to succeed in this current challenge. The Panel reads these terms to refer to actions taken by China to implement existing challenged measures.[21]

20. For this reason, the Panel considers that only the listed measures explicitly identified by bullet points in the three sections of the Complainants' panel requests - as well as any future amendment(s) or extensions, replacement measures, renewal measures and implementing measures, as described above by the Panel - fall within the Panel's terms of reference and will thus be examined by the Panel.

3. Whether the identification of the measures requires the specification of the products concerned

21. China claims that in their panel requests the Complainants failed to sufficiently identify the measures they challenge because the Complainants do not adequately specify which specific products are covered by each challenged measure.[22] In order to properly identify the challenged measures, and since many of the listed measures are laws of general application, China argues that the Complainants should have identified the specific products for each of the measures. In response, the Complainants assert that they have clearly listed the basic products concerned by the dispute.[23] The Complainants argue that the reference to "various forms " of the nine materials mentioned in the introductory paragraph of the panel requests, as well as the descriptive list of tariff lines included through footnotes one to nine, seek to provide examples of the broad scope of their challenge.[24] In turn, China

[18] Appellate Body Report on *Chile – Price Band System*, para. 139.
[19] Appellate Body Report on *US – Upland Cotton* (21.5), para. 270
[20] The Appellate Body noted in a case that the phrase "implementing measures and other related measures" does not identify the specific measures at issue as required in Article 6.2 of the DSU. Appellate Body Report on *EC – Selected Customs Matters*, para. 152, footnote 369.
[21] The Panel will not read this phrase as involving a measure subject to proceedings under Article 21.5 of the DSU.
[22] For instance, see China's request, paras. 13-19 and 59-66; and China's comments, paras. 10-32.
[23] Joint Response, paras. 13-22.
[24] *Ibid.*

seeks to have the scope of the disputes limited to the explicit tariff lines listed in footnotes one to nine regarding each product mentioned in the introductory paragraph of those panel requests.[25]

22. The Panel notes that the Complainants identified in their panel requests nine "materials"[26]: bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus and zinc.[27] The Complainants added a footnote to each of these materials. In each footnote, the Complainants stated that each material "includes but is not limited to" a series of tariff lines.[28] The Panel understands that the introductory paragraph of the Complainants' panel requests serves to describe generally the scope of the Complainants' challenge. In that introductory paragraph, the Complainants state, in a general manner their concerns over export-related restrictions alleged to be imposed by China through measures concerned with those nine materials. Then, in each of the following three sections in their panel requests, the Complainants submit the legal description or framework of their challenge against the specific measures imposing generally "export quotas", "export duties" and "additional restraints imposed on exportation", alleged to be maintained by China on (some of) those nine products. Accordingly, the Panel understands that each of the listed measures identified in each of the three sections of the panel requests will cover one, some or all of the nine materials mentioned in the introductory paragraph of the panel requests.

23. The Panel considers that the Complainants could also have identified for the nine materials at issue, each and every potentially relevant tariff line, or they could have stated that their claims target "all" tariff lines between X,Y or Z HS lines concerned by each of the nine products identified. But the Complainants chose to only announce the broad scope of their challenge and seem to have wanted to provide more specificity only in the following three sections of their panel requests. Indeed, the following three sections of each panel request then list the specific measures covering, one or more of the nine materials listed in the introductory paragraph.

24. In the Panel's view, the introductory paragraph offers a general presentation of the dispute and the more specific elements of the challenge are included in Sections I, II and III of the panel requests. If the first general listing of products mentioned in the introductory paragraph does not fully inform China of the exact scope of the products concerned by the dispute, the measures listed in the following sections - the Chinese legal instruments - are alleged to provide more specificity. In other words, each of these Chinese legal instruments has a specific product application that covers one, some or all of the products listed in the introductory paragraph of the panel request.[29]

25. The Panel, therefore, rejects China's claim that the terms of reference of this Panel are limited to the measures represented by the tariff lines listed in the footnotes to the products mentioned in the introductory paragraph of the Complainants' panel requests.

26. The Panel agrees with China that the claims need to be as clear as possible and as early as possible in the panel process so as to allow China to defend itself fully. The Panel is also aware that pursuant to Article 19 of the DSU, it can ultimately only make recommendations on specific provisions of specific measures and therefore may need to consider and examine the specific situation of specific challenged instruments as they apply to specific products or group of products.

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[25] China's request, paras. 13-19. See also, China's comments, para. 31.

[26] By "materials", the Panel also understands "products".

[27] As noted in para. 29 of China's request, the Complainant's panel requests are nearly identical. Therefore, any reference to the panel requests refer to any of the documents referred to in footnote 2.

[28] See footnotes one to nine of the panel requests.

[29] Appellate Body Report on *EC – Chicken Cuts*, para. 165-66.

27. Even if, as noted above, the Complainants' panel requests could have been more detailed, in that the Complainants could have identified the measures and the materials they referred to[30], the Panel is of the view that when it is requested to assess the clarity of a panel request, with reference to the requirements of Article 6.2 of the DSU, it has to consider the panel request as a whole[31] and as part of an integrated and evolving panel process. The Panel believes that there is a possibility that the parameters of some challenged measures will be clarified by the Complainants' first written submissions. Therefore, in the Panel's view, the overall sufficiency of a panel request and whether the right of the respondent to defend itself adequately was or was not prejudiced, may be better determined in light of the Parties' first written submissions.[32]

28. In that context, the Panel notes in particular the undertaking by a representative of the Complainants that this preliminary procedure is somewhat premature and that all possible concerns over the undefined scope of their challenge will be answered once China and the Panel receive the Complainants' first written submissions.

29. In light of the above, the Panel decides to reserve its decision on this part of China's request and to rule on it at a later stage once it has examined the Parties' first written submissions and is able to take full account of China's ability to defend itself. In that context, the Panel notes that it has provided China with a long period of time to respond to the Complainants' first written submissions. The Panel is not saying that all flaws in a panel request can be cured by a first written submission[33] but rather that after the parties' first written submission, the Panel will be in a better position to determine whether China has suffered any prejudice by the Complainants' panel requests while ensuring that this panel process is not unduly delayed.

4. The specific problem of the typographical error of the HS line regarding the zinc

30. China requested that the Panel exclude from its terms of reference any claims concerning two tariff lines erroneously identified by the Complainants in the context of zinc.[34] As soon as they became aware of this error, the Complainants admitted that these two tariff lines were typographical errors and referred (the Panel and the complainants) to the correct tariff lines.[35] In response to a Panel question and at the request of the Panel, China accepted the correction of these two typographical errors and it made clear that China's understanding of the panel requests includes the "corrected tariff lines".[36]

31. In light of China's response, the Panel will also read the panel requests as including the two corrected tariff lines.

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[30] Appellate Body Report on *EC – Chicken Cuts*, para. 165-66. However, in paragraph 167 of this same ruling, the Appellate Body recognized that under some circumstances it may be necessary to identify the products at issue.

[31] Appellate Body Report on *Korea – Dairy*, paras. 124-127. See also: Appellate Body Report on *US – Carbon Steel*, para. 127.

[32] Appellate Body Report on *US – Carbon Steel*, para. 127.

[33] Appellate Body Report on *EC – Bananas III*, para. 143.

[34] China's request, para. 66 and China's comments, para. 32.

[35] Footnote 15 and para. 18 of the Joint Response. During the hearing for the preliminary ruling request, a representative of the Complainants admitted that they became aware of it in the course of the proceedings.

[36] China's answer to the Panel's questions after the preliminary ruling hearing, paras. 4-5.

THE REQUIREMENT TO PROVIDE A BRIEF SUMMARY OF THE LEGAL BASIS OF THE COMPLAINT SUFFICIENT TO PRESENT THE PROBLEM CLEARLY WITH REGARD TO SECTION III OF THE PANEL REQUESTS

32. China submits that the Section III of the Complainants' panel requests do not provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly, contrary to the requirements of Article 6.2 of the DSU. For China, this is because in Section III there is no clear connection between the listed measures, the list of WTO provisions claimed to be violated and the narrative paragraphs that describe generally how "some" of the listed measures are inconsistent with "some" WTO disciplines.[37] China claims that this lack of clarity is exacerbated by the Complainants' subsequent contradictory argument that "all" 37 listed measures are inconsistent with "all" 13 listed WTO obligations. According to China, such a "double listing" approach is contrary to the requirement of Article 6.2 of the DSU to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.[38]

33. In the Panel's view, whether the mere listing of articles of a particular WTO agreement is sufficient to comply with the requirement to provide a summary of the legal basis of the complaint[39], is to be determined on a case-by-case basis.[40] In some instances, especially if a provision contains multiple obligations within it, a mere listing would not be sufficient to satisfy the obligation in Article 6.2.[41]

34. In that context, the Panel notes in particular that:

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

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

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[37] For instance, see China's request, paras. 48-58.
[38] For instance, see China's comments, paras. 48-63.
[39] Appellate Body Report on *Korea – Diary*, para. 124.
[40] Appellate Body Report on *Korea – Diary*, para. 127.
[41] Appellate Body Report on *Korea – Dairy*, para. 124.
[42] Appellate Body Report on *EC – Selected Customs Matters*, para. 130.

36. The Panel agrees with China that the Complainants' argument that all the listed measures violate all the listed WTO obligations seems to contradict the substance of the narrative paragraphs that some (groups of) measures are inconsistent with some of the listed WTO obligations.

37. However, as noted before, the Panel is aware that WTO panel proceedings are an integrated and evolving process and the sufficiency of a panel request is to be determined by taking into account the Parties' first written submissions in order to assess fully whether the ability of the respondent to defend itself was prejudiced.[43]

38. In that context, the Panel notes, in particular, the undertaking from a representative of the Complainants that this preliminary procedure is somewhat premature and that all possible concerns over the undefined scope of their challenge will be answered once China and the Panel receive the Complainants' first written submissions.

39. In light of the above, the Panel decides to reserve its decision on this part of China's request and to rule on it at a later stage, once it has examined the Parties' first written submissions and is more able to take fully into account China's ability to defend itself. In that context, the Panel notes that it has provided China with an extensive period of time to respond to the Complainants' first written submissions. The Panel has already noted that it is not saying that all flaws in a panel request can be cured by a first written submission[44] but rather that after the parties' first written submission, the Panel will be in a better position to determine whether China has suffered any prejudiced by the Complainants' panel requests while ensuring that this panel process is not unduly delayed.

THE COMPLAINANTS' WITHDRAWAL OF THEIR CLAIMS UNDER PARAGRAPH 342 OF THE REPORT OF THE WORKING PARTY ON THE ACCESSION OF CHINA

40. The Panel notes that the Complainants have informed China and the Panel that they do not intend to pursue any claims regarding China's obligations under paragraph 342 of the Working Party Report on the Accession of China and referred to in Section II of their panel request via Article 1.2 of China's accession Protocol.[45]

41. Therefore, the Panel rules that these specific claims fall outside the Panel's terms of reference.

THE REFERENCE TO A PRELIMINARY RULING FROM ANOTHER PENDING CASE

42. The Complainants submitted in support of their allegations, a copy of a preliminary ruling issued by another panel in an ongoing case. Korea, as the respondent in this other dispute and a Third Party in the present one, requests the Panel to refrain from taking into account in any way this preliminary ruling. China shares Korea's concerns.[46]

43. The Panel notes that this preliminary ruling was not circulated to WTO Members and is not yet an official WTO document within the meaning of the Decision on Derestriction.[47] The Panel notes also that WTO dispute proceedings are generally understood to be confidential unless otherwise determined by panels with the agreement of the parties.

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[43] Appellate Body Report on *US – Carbon Steel*, para. 127.
[44] Appellate Body Report on *EC – Bananas III*, para. 143.
[45] Joint Response, para. 35.
[46] China's answer to the Panel's questions after the preliminary ruling hearing, para. 13.
[47] Procedures for the Circulation and Derestriction of WTO Documents, WT/L/452, adopted on 14 May 2002.

44. In light of this, the Panel will not consider this preliminary ruling issued in another ongoing panel process. The Panel also requests the Parties to omit any further reference to this preliminary ruling or any other document illustrating panel deliberations from pending cases.

CONCLUSION

45. The Panel has decided to issue its preliminary ruling in two stages.[48] In issuing the ruling in this manner, the Panel has kept in mind that according to Article 3.10 of the DSU, the Parties are required to engage in dispute settlement procedures "in good faith in an effort to resolve the dispute".

46. The Panel has ruled on issues which are relevant to its own jurisdiction and that could not be clarified by the parties' first written submission or at any other stage during this panel process. The Panel reserves its decisions on China's request that the Complainants' panel requests do not sufficiently identify the product coverage of each of the listed measure and do not comply with the requirements of Article 6.2 of the DSU. The Panel expects that the Complainants will clarify in their first written submissions which of the listed measures (or group thereof) for which specific products (or group thereof) are inconsistent with which specific WTO obligations among those listed in the last part of Section III of their panel requests. In ruling this way, the Panel wants to ensure that China is able to defend itself appropriately and that this panel process is not unduly delayed.

47. The Panel reserves its decision to develop its reasoning regarding each aspect of its preliminary ruling in a subsequent ruling or in its final report.

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[48] We also note that there is no established jurisprudence nor is there any established practice as to whether a panel needs to rule on the scope of its terms of reference on a preliminary basis, i.e. before the issuance of its Report to the parties. See also Appellate Body Report, *US – Carbon Steel*, para. 123.

ANNEX F-2

SECOND PHASE OF PRELIMINARY RULING

China – Measures Related to the Exportation of Various Raw Materials
WT/DS394, DS395, DS398

Second Phase of the Preliminary Ruling

1. By means of this communication, the Panel hereby informs the parties of its decision on certain matters pertaining to China's request dated 30 March 2010 for a preliminary ruling regarding the consistency of the complainants' Panel requests with Article 6.2 of the Understanding on the Rules and Procedures Governing the Settlement of Disputes (DSU).

2. For purposes of transparency and due process, and having previously consulted the Parties, the Panel intends to send a copy of this communication to all Third Parties in the proceedings and will also request that this communication be circulated to all WTO Members.

3. On 30 March 2010, China filed a request before this Panel for a preliminary ruling. In its request, China asserted that specific sections of the complainants' requests for the establishment of this Panel[1] (Panel requests) are inconsistent with Article 6.2 of the DSU. The parties commented on China's request in subsequent submissions. On 29 April 2010, the Panel then held a hearing with the Parties and a separate session with the third parties on China's request. On the same date, the Panel sent written questions to the Parties regarding China's request. The Parties responded to the Panel's questions on 3 May 2010 and submitted comments on 5 May 2010 on each other's responses.

4. On 7 May 2010, the Panel informed the parties of its intention to rule on China's request in two phases. In this communication,[2] the Panel addressed, in a first phase, those issues that it considered were relevant to the Panel's jurisdiction that could not be clarified by the parties' subsequent first written submissions or at any other stage during this panel process.

5. In this first phase, the Panel recalled that Article 6.2 of the DSU serves to define the "scope of the dispute" as well as "due process" objectives through the requirements that a complainant's Panel request must identify the "specific measures at issue" and provide "a brief summary of the legal basis sufficient to present the problem clearly". The Panel made the following rulings:

- The Panel's terms of reference are limited to those measures explicitly identified by bullet points in each of the three sections of the complainants' Panel requests.

- Of these measures, the term "related measures" referred to in the last bullet point in each of the listed measures is too broad and unspecific a term and therefore falls outside the Panel's terms of reference.

[1] Request for the Establishment of a Panel by the United States (WT/DS394/7); Request for the Establishment of a Panel by the European Communities (WT/DS395/7) and Request for the Establishment of a Panel by Mexico (WT/DS398/6).

[2] WT/DS394/9, WT/DS395/9, WT/DS398/8.

- The Panel's terms of reference are not limited to those products falling under the tariff lines described in footnotes one to nine of the Panel requests; rather, these tariff lines are only indicative of the broad scope of the challenge.

- The Panel requests include the two corrected tariff lines regarding zinc.

- The complainants' claims under paragraph 342 of the Report of the Working Party on the Accession of China fall outside the Panel's terms of reference.

- The Panel will not consider the preliminary ruling submitted by the complainants in a separate, ongoing panel proceeding.

6. In addition to these rulings, the Panel indicated that it would reserve its decision on two remaining issues until after it had received the complainants' first written submissions. These two issues are:

- Whether the complainants' Panel requests sufficiently identify the products concerned by the challenged measures; and

- Whether Section III of the complainants' Panel requests provides a summary of the legal basis of the complaint sufficient to present the problem clearly, in particular whether the complainants established sufficient "connections" between the alleged claims and violations.

7. In deciding to reserve its decision on these two issues, the Panel acknowledged that not all flaws in a Panel request can be cured by a first written submission.[3] However, it noted at the same time that WTO panel proceedings are an integrated and evolving process. The Panel also took note of the statement from a representative of the complainants that any possible concerns over the undefined scope of their challenge would be answered in the complainants' first written submissions. The Panel thus considered it appropriate to assess the sufficiency of the Panel requests by taking into account the parties first written submissions. Having done so, it would be in a position to assess fully whether China had been prejudiced in its ability to defend itself.[4] The Panel also sought to ensure that the Panel process was not unduly delayed.

8. The first phase of the Panel's preliminary ruling was circulated as WTO document WT/DS394/9, 395/9, 398/9.

9. The Panel has received and examined the parties' first written submissions, and has heard the parties' further oral arguments regarding China's preliminary ruling request. The Panel has also considered the parties' answers to the Panel's questions[5] and their respective comments on each other's answers.[6] The Panel turns now to the two remaining issues set out in paragraph 6 above.

[3] Appellate Body Report on *EC – Bananas III*, para. 143.
[4] Appellate Body Report on *US – Carbon Steel*, para. 127.
[5] Reference made in this ruling to responses to questions of the Panel by the parties means those responses provided by the parties on 13 September 2010 to the questions posed by the Panel.
[6] Reference made in this ruling to comments to the responses to questions of the Panel by the parties means those comments provided by the parties on 17 September 2010 to the responses provided by each other to the questions posed by the Panel.

A. WHETHER IN FAILING TO IDENTIFY THE PRODUCTS AT ISSUE THE COMPLAINANTS HAVE THEREFORE FAILED TO PROPERLY IDENTIFY THE CHALLENGED MEASURES

10. In its request for a preliminary ruling, China claimed that the complainants failed in their Panel requests to identify sufficiently the measures they challenge because the complainants' requests do not adequately specify which specific products are covered by each challenged measure.[7] China argued that many of the listed measures are laws of general application, and that the complainants should have identified the specific products at issue for each of the measures set out in the Panel requests. In response, the complainants asserted that they had clearly listed the products concerned by the dispute.[8] The complainants argued that the reference to "various forms" of the nine materials mentioned in the introductory paragraph of the Panel requests, as well as the descriptive list of tariff lines included through footnotes one to nine in the Panel requests, provide examples of the broad scope of their challenge.[9] In turn, China sought to have the scope of the disputes limited to the explicit tariff lines listed in footnotes one to nine regarding each product mentioned in the introductory paragraph of the Panel requests.[10]

11. The Panel noted in the first stage of its preliminary ruling that the introductory paragraph of the complainants' Panel requests offers a general presentation of the dispute, and the more specific elements of the challenge are included in Sections I, II and III of the Panel requests. While recognizing that relying exclusively on the products identified in the first paragraph could lead to confusion as to the precise scope of the claims, the Panel considered that the measures listed in the following sections – certain Chinese legal instruments – could clarify whether some or all of the nine materials were covered. In other words, each of the Chinese legal instruments potentially would have to have a specific product application that covers one, some or all of the products listed in the introductory paragraph of the Panel requests. The Panel clarified that in any case the complainants' claims would not be limited to products covered by the particular tariff lines identified in the complainants' Panel requests. In this context, the Panel reserved its ruling on whether the challenged measures identified sufficiently which products form the basis of each of the claims. The Panel emphasized the need to ensure that China would be able to defend itself adequately.

12. In general, unless the identification of a product at issue defines the specificity of the challenged measure, panel Requests need not specifically identify the products covered by each of the claims. The Appellate Body in *EC – Chicken-Cuts* explained as follows:

> "Article 6.2 of the DSU does not refer to the identification of the products at issue; rather, it refers to the identification of the specific measures at issue. Article 6.2 contemplates that the identification of the products at issue must flow from the specific measures identified in the panel request. Therefore, the identification of the product at issue is generally not a separate and distinct element of a panel's terms of reference; rather, it is a consequence of the scope of application of the specific measures at issue. In other words, it is the *measure* at issue that generally will define the *product* at issue.
>
> At the same time, we acknowledge that the Appellate Body held, in *EC – Computer Equipment*, that, with respect to certain WTO obligations, in order to identify the

[7] *See* China's preliminary ruling request, paras. 13-19 and 59-66; and China's comments, paras. 10-32.
[8] Joint Response of the complainants to China's request for a preliminary ruling, paras. 13-22.
[9] *Ibid.*
[10] China's preliminary ruling request, paras. 13-19. *See* also China's comments on the joint response, para. 31.

> specific measures at issue, it may be necessary also to identify the products at issue.[11],[12]

13. In this dispute, the challenged measures would have to have specific product applications that cover one or several of the products listed in the introductory paragraph of the Panel requests. The Panel recognizes that there may be situations where products should be identified specifically in order to ensure clarity with respect to the measures at issue. Therefore, the Panel reviewed the complainants' Panel requests and first written submissions with this in mind. The Panel acknowledges that the complainants' separate Panel requests might each have provided further detail on which products were at issue with respect to each of the measures. However, the Panel considers that in their first written submissions, as well as in statements made during the first substantive meeting of the Panel with the parties, the complainants brought further precision on which products are concerned with each specific challenged measure, whether in relation to China's Accession Protocol, China's Working Party Report, or the GATT 1994.

14. In Section I of their Panel requests[13], pertaining to export quotas, the complainants explain that they are challenging the imposition of export quotas by China in terms of the legal instruments specified therein (listing 25 legal instruments), and regarding the following five products: bauxite, coke, fluorspar, silicon carbide, and zinc.

15. Furthermore, the United States, Mexico and the European Union confirmed in paragraphs 104, 107, and 70 of their first written submissions, respectively, that the following five products are subject to export quotas: bauxite, coke, fluorspar, silicon carbide, and zinc. From these products, bauxite, fluorspar, and silicon carbide are identified in connection with quotas allocated by bidding (bauxite, fluorspar, and silicon carbide), while coke and zinc are identified in connection with quotas allocated directly. The complainants further identified in their responses to question No. 2 posed by the Panel, the legal instruments in connection with export quotas for which they are seeking recommendations. During the first panel meeting, the complainants also jointly filed Exhibit JE-134 in which they specify the precise raw materials, and the product names in short form, that pertain to their claims relating to export duties and export quotas.[14]

16. In light of the identification of the relevant materials, the Panel considers that China has been able to put forward specific defences with respect to these claims. This is reflected in the fact that China's asserted defences related to the imposition of several of the export quotas at issue. This supports the conclusion that the complainants sufficiently identified the scope of their claim on export quotas. For instance, in Section VI(C) of its first written submission, China argues that Article XI:1 of the GATT 1994 does not apply to export quotas applied to refractory-grade bauxite, by virtue of

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[11] (footnote original) The Appellate Body stated in *EC – Computer Equipment*:

> "We note that Article 6.2 of the DSU does *not* explicitly require that the products to which the 'specific measures at issue' apply be identified. However, with respect to certain WTO obligations, in order to identify 'the specific measures at issue', it may also be necessary to identify the products subject to the measures in dispute."

(Appellate Body Report, *EC – Computer Equipment*, para. 67) (emphasis original).

[12] Appellate Body Report on *EC – Chicken Cuts*, paras. 165-66.

[13] Request for the Establishment of a Panel by the United States (WT/DS394/7); Request for the Establishment of a Panel by the European Communities (WT/DS395/7) and Request for the Establishment of a Panel by Mexico (WT/DS398/6).

[14] The Panel notes that the complainants submitted Exhibit JE-134 to illustrate the precise products for which China has raised an affirmative defense, either under Article XI:2(a) of the GATT 1994 (in the case of refractory grade bauxite), or under Article XX of the GATT 1994 (in the case of refractory grade bauxite, coke and silicon carbide).

Article XI:2(a) of the GATT 1994. Also, in Sections VI(D), and VI(E) of its first written submission, China argues that the export quotas applied to refractory grade bauxite, coke and silicon carbide are justified pursuant to Article XX of the GATT 1994. In addition, China responded to the Panel's questions following the first substantive meeting and commented on the answers provided by the claimants.[15]

17. Therefore, with regard to the export quotas referred to in Section I of the Panel requests, the Panel considers that the complainants in this dispute have sufficiently identified the products at issue to sufficiently identify the challenged measures, consistently with the requirements of Article 6.2 of the DSU.

18. In Section II of the complainants' Panel requests, the complainants claim that China imposes export duties on certain products inconsistently with its commitments under Paragraph 11.3 of China's Accession Protocol. They indicate the measures under challenge and the products concerned with each challenged measure. In this section, the complainants make clear that they are challenging the imposition of export duties by China in terms of the legal instruments specified therein (including19 legal instruments) and regarding the following eight products: bauxite, coke, fluorspar, magnesium, manganese, silicon metal, yellow phosphorous, and zinc.

19. The complainants' first written submissions as well as their responses to question No. 2 posed by the Panel further demonstrate the precise measures for which the complainants are seeking rulings and recommendations from the Panel. These are:

- Customs Law[16];
- Regulations on Import and Export Duties[17]; and
- 2009 Tariff Implementation Program[18].[19]

In their first written submissions, the complainants confirmed that the products identified with these legal instruments are: bauxite, coke, fluorspar, magnesium, manganese, silicon metal, yellow phosphorous, and zinc.[20] In the previously mentioned Exhibit JE-134[21] the complainants also specify

[15] For instance, the Panel asked the parties in question No. 5 to provide a table indicating for the period before 2009 any change over time in the level of export quotas on the products concerned in this dispute. In its response, China submitted as Exhibit CHN-440 a table listing the level of export quotas imposed on the relevant products at issue during the period 2006-2009. Furthermore, in paras. 50 and 51of its comments on the complainants' responses to the same question, China provided clarifications on information provided by the complainants.

[16] The Customs Law of the People's Republic of China (adopted at the 19th Meeting of the Standing Committee of the Sixth National People's Congress on 22 January 1987, amended 8 July 2000).

[17] Regulations of the People's Republic of China on Import and Export Duties (Order of the State Council (2003) No. 392, adopted at the 26th executive meeting of the State Council on 29 October 2003, 1 January 2004).

[18] Notice Regarding the 2009 Tariff Implementation Program (State Council Tariff Policy Commission, shuiweihui (2008) No. 40, 1 January 2009).

[19] The Panel notes that Section II of the complainants' Panel requests listed more than three measures; however, the complainants have narrowed the scope of their claims.

[20] United States' first written submission, paras. 234 and 237; Mexico's first written submission, paras. 237 and 240; European Union's first written submission, paras. 130 and 148.

[21] See footnote 14 above.

the precise raw materials, and the product names in short form, that pertain to their claims relating to export duties.[22]

20. As with claims on export quotas in Section I of the complainants' Panel requests, China also raised a number of defences with respect to the imposition of export duties. In the Panel's view, China's ability to offer a specific response supports the conclusion that the complainants sufficiently identified the scope of these claims to permit China to defend itself. For instance, in paragraphs 84 and 85 of its first written submission, China asserted that it does not impose export duties on bauxite. In paragraphs 86 to 90 of its first written submission, China explained that it does not impose a special export duty on yellow phosphorous in excess of the *ad valorem* rate in Annex 6. In Section V of its first written submission, China argued that export duties applied to exports of fluorspar, coke, magnesium, manganese, and certain forms of zinc are justified pursuant to Article XX of the GATT 1994. Furthermore, China responded to the Panel's questions following the first substantive meeting and commented on the responses provided by the claimants.[23]

21. Therefore, with regard to the export duties referred to in Section II of the Panel requests, the Panel considers that the complainants in this dispute have sufficiently identified the products at issue to sufficiently identify the challenged measures, consistently with the requirements of Article 6.2 of the DSU.

22. In Section III of the complainants' Panel requests, entitled "Additional Restraints Imposed on Exportation", the complainants challenge requirements and procedures in connection with China's quota bidding system; the administration of export quotas; certain requirements related to export licensing; the administration of an alleged minimum export price (MEP) regime; and the alleged failure to publish quota amounts. The parties dispute whether the challenge against the failure to publish quota amounts is properly brought against both zinc and coke. The Panel considers each of these in turn.

23. In respect of their claims concerning allocation of export quotas through a bidding system, the complainants identify bauxite, fluorspar, and silicon carbide in their Panel requests. The complainants confirm these as the relevant products in their first written submissions.[24]

24. In connection with their claims pertaining to the administration of export quotas, the complainants identify bauxite, coke, fluorspar, silicon carbide, and zinc in the introductory paragraph of their Panel requests. In their first written submissions, the complainants restate their challenge against certain aspects relating to the direct quota allocation of zinc and coke, as well as certain aspects of the bidding allocation system in respect of bauxite, fluorspar, and silicon carbide.[25]

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[22] In the case of export duties, the complainants identify coke, fluorspar, magnesium, manganese, and zinc, as the raw materials relevant to their claims.

[23] For instance, the Panel asked the parties in Panel question No. 3 to provide a table indicating for the period before 2009 any change over time in the level of export duties on the products concerned in this dispute. In its response, China submitted as Exhibit CHN-439 a table listing the level of export duties imposed on the relevant products at issue during the period 2006-2009. Furthermore, in paras. 48 and 49 of its comments on the complainants' responses to this question, China highlighted discrepancies between the complainants' and China's information, and submitted a new table as Exhibit CHN-466 to compare the export duty level information provided by the parties.

[24] United States' first written submission, para. 315; European Union's first written submission, para. 104; Mexico's first written submission, para. 318.

[25] United States' first written submission, paras. 292 to 303, 284 to 289; European Union's first written submission, paras. 238 to 245; Mexico's first written submission, paras. 295 to 306.

25. With respect to claims concerning export licensing, the complainants identify bauxite, coke, fluorspar, manganese, silicon carbide, and zinc in their Panel requests, and confirm these products in their first written submissions.[26]

26. In connection with their challenge against China's alleged coordination of MEPs, the complainants did not identify products in their Panel requests, stating only that "China also imposes quantitative restrictions on the exportation of the materials by requiring that prices for the materials meet or exceed a minimum price before they may be exported."[27] However, in their first written submissions, the complainants' identify bauxite, coke, fluorspar, magnesium, manganese, silicon metal, yellow phosphorus, and zinc as relevant to their claims in this context.[28]

27. Finally, in connection with the European Union's challenge regarding the publication of a zinc quota, the European Union's Panel request refers specifically to a failure by China to publish a quota amount for the export of zinc, or to publish the conditions or procedures relevant to making applications to export zinc.

28. In the light of the above, in the Panel's view, the complainants have clarified through their first written submission which products relate to their Section III claims against China's quota bidding system, the administration of export quotas, certain requirements related to export licensing, and the alleged coordination of MEPs. Therefore, for these claims, the Panel considers that the complainants in this dispute have sufficiently identified the products at issue to sufficiently identify the challenged measures, consistently with the requirements of Article 6.2 of the DSU.

29. In sum, for the above reasons, the Panel concludes that the complainants have sufficiently identified the products concerned by each measure in accordance with the requirements of Article 6.2 of the DSU. In the Panel's view, the complainants have clarified in their first written submissions which products are covered by which measures for each of their claims listed in Sections I, II and III of their Panel requests. As discussed above, China has responded to the complainants' claims, both providing arguments on the legal status of various challenged measures and asserting specific defences to certain of the complainants' claims. The defences raised by China are addressed to particular subsets of the concerned raw materials. China has also presented arguments in connection with specific products and has discussed the operation of specific measures listed in the complainants' Panel requests. This confirms that China has been able to understand which products are affected by each claim.

B. WHETHER SECTION III OF THE COMPLAINANTS' PANEL REQUESTS PROVIDE FOR A SUMMARY OF THE LEGAL BASIS OF THE COMPLAINT SUFFICIENT TO PRESENT THE PROBLEM CLEARLY

30. In addition to its challenges under Article 6.2 of the DSU, discussed above and in the first phase of the Panel's preliminary ruling, China also challenges whether Section III of the complainants' Panel requests provide a summary of the legal basis of the complaint sufficient to present the problem clearly as required by Article 6.2 of the DSU. In essence, China argues that the complainants failed to establish sufficient connections between the measures listed in their Panel requests and their

[26] United States' first written submission, para. 185; European Union's first written submission, para. 159; Mexico's first written submission, para. 188.

[27] Request for the Establishment of a Panel by the United States (WT/DS394/7); Request for the Establishment of a Panel by the European Communities (WT/DS395/7) and Request for the Establishment of a Panel by Mexico (WT/DS398/6).

[28] United States' first written submission, para. 349; European Union's first written submission, para. 353; Mexico's first written submission, para. 352.

assertions of violations of various WTO provisions. In its Preliminary ruling request, China specifically challenged the complainants' assertion that *all* the listed measures are inconsistent with *all* of the listed WTO provisions. China submits that the complainants' subsequent written submissions did not rectify the situation. China has also taken particular issue with alleged *new* measures identified in connection with China's alleged coordination of MEPs.

31. In the first phase of its preliminary ruling[29], The Panel acknowledged a potential contradiction between the structure of the complainants' Panel requests and their argumentation that *all* the listed measures violate *all* the listed WTO obligations. However, the Panel took note of the complainants' assertion that any possible concerns over the undefined scope of their challenge would be addressed in the complainants' first written submissions. The Panel therefore decided that it would only be able to deal with the issue of whether Section III of the complainants' Panel requests provide sufficient connection between the listed measures, the list of WTO provisions claimed to be at issue, and the narrative paragraphs that precede the listed measures, after it had reviewed the parties' first written submissions.

32. The Panel received the complainants' first written submissions on 1 June 2010, after it had issued the first phase of its preliminary ruling. The complainants did not directly address in their submissions or in their subsequent oral statements the two matters on which the Panel had reserved its ruling.[30]

33. In its first written submission and at the first substantive meeting of the parties, China asserted that the complainants' first written submissions failed to rectify the legal deficiencies in Section III of the Panel requests and otherwise failed to seek sufficiently precise recommendations and rulings from the DSB with respect to the issues raised in Section III of their Panel requests. In particular, for measures identified in the Panel requests in connection with the MEP-related claims, China argued that the measures had expired and were thus not properly before the Panel. This, it argues, is because the complainants, failed to hold consultations on those measures, which they later identified, or otherwise because the particular challenged measures were not identified in the Panel requests.

34. The Panel will first address the matter of MEP-related measures, and then address whether Section III of the complainants' Panel requests provide for a summary of the legal basis of the complaint sufficient to present the problem clearly.

2. The MEP-related measures included in the Panel's terms of reference

35. As part of its challenge against Section III of the complainants' Panel request, China argued that the complainants have introduced in their first written submissions new MEP-related measures that should not be considered in the Panel's terms of reference. In paragraph 39 of its first written submission, China listed 15 MEP-related measures that the complainants referred to in their submissions. According to China, only two of those measures were included in both the complainants' consultation and panel requests; seven were included in the panel requests but not the consultation requests; two were included only in the consultation requests; and finally four of those measures do not appear in either the consultation or panel requests. For China, only the two measures that appear in both the consultations and Panel requests are properly within the Panels' terms of reference.

[29] Preliminary Ruling, first phase, WT/DS394/9, WT/DS395/9, WT/DS398/8.

[30] In their joint oral statement, the complainants only addressed the issue of whether the Panel should make findings on 2009 measures that may have expired or been repealed.

36. In connection with the first substantive meeting of the parties, the Panel further questioned the parties as to which measures should form the basis of the Panel's recommendations, including for challenges in Section III of the complainants' Panel requests.[31] The Panel also sought from the complainants specific clarification on which measures comprise the complainants' MEP-related claims, and whether the alleged measures referred to by the complainants are listed specifically in the Panel requests, or otherwise constitute amendments, extensions, replacement measures, renewal measures or implementing measures, as referred to in the requests.

37. In response to Panel's enquiry, the complainants (in two charts, one filed jointly by the United States and Mexico, and a second by the European Union) identified a list of measures that they consider to be in the Panel's terms of reference. Notably, the complainants each refer to 21 MEP-related measures, including the 15 measures identified in paragraph 39 of the China's first written submission, as well as six additional measures that do not appear in the chart provided by China.[32]

38. Of the 21 MEP-related measures discussed above, the following 15 measures are listed in paragraph 39 of the China's first written submission:

- Export Price Penalties Regulations[33];
- Measures for Administration of Licensing Entities[34];
- Rules for Coordination of Customs Price Review[35];
- Rules on Price Reviews of Export Products[36];
- Provisional Rules on Export Price Verification[37];
- CCCMC PVC Rules[38];

[31] Question No. 2 posed by the Panel to the complainants.

[32] *See* Annex A for a full list of the short titles of these measures as referred to by the parties. The Panel uses these short titles in its ruling.

[33] Interim Regulations of the Ministry of Foreign Trade and Economic Cooperation on Punishment for Conduct at Exporting at Lower-than-Normal Price (Ministry of Foreign Trade and Economic Cooperation, March 20, 1996), identified by China as item number 1 in the chart presented on para. 39 of its first written submission on 4 August 2010.

[34] Measures for the Administration of the Organs for Issuing the Licenses of Import and Export Commodities (Ministry of Foreign Trade and Economic Cooperation, waijingmaopeiguanhanzi (1999) No. 68, September 21, 1999), identified by China as item number 2 in the chart presented on para. 39 of its first written submission on 4 August 2010.

[35] Rules for Coordination with Respect to Customs Price Review of Export Products (Ministry of Foreign Trade and Economic Cooperation guanzonghanzi No. 21, 1997), identified by China as item number 3 in the chart presented on para. 39 of its first written submission on 4 August 2010.

[36] Notice on the Rules on Price Reviews of Export Products by the Customs (Ministry of Foreign Trade and Economic Cooperation guanzonghanzi No. 21, 1997), identified by China as item number 4 in the chart presented on para. 39 of its first written submission on 4 August 2010.

[37] Provisional Rules on Export Price Verification and Chop for Key Products Subject to Price Review (Ministry of Foreign Trade and Economic Cooperation guanzonghanzi No. 21, 1997), identified by China as item number 5 in the chart presented on para. 39 of its first written submission on 4 August 2010.

[38] Notice Regarding Rules for Contract Declaration for Chemicals-Related Verification and Stamp Products (China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters Petroleum

- Online PVC Instructions[39];
- Decision on the Reform and Improvement of the Trade System[40];
- Various Provisions on the Strengthening of Export Product Coordination and Management[41];
- CCCMC Export Coordination Measures[42];
- CCCMC Bauxite Branch Coordination Measures[43];
- "system of self-discipline"[44];
- Adjustment of the Catalogue of Export Products Subject to Price Review[45];
- Notice Regarding the Trial Administration of 36 Products[46]; and
- Communication[47];

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and Chemicals Products Department, 30 December 2003), identified by China as item number 6 in the chart presented on para. 39 of its first written submission on 4 August 2010.

[39] Online Verification and Certification Operating Steps (China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters), identified by China as item number 7 in the chart presented on para. 39 of its first written submission on 4 August 2010.

[40] Decision of the State Council on Various Questions on the Further Reform and Improvement of the Foreign Trade System (State Council, guofa (1990) No. 70, January 1, 1991), identified by China as item number 8 in the chart presented on para. 39 of its first written submission on 4 August 2010. Complainants did not seek recommendations for this measure in their response to question No. 2 posed by the Panel.

[41] Notice on the Issuance of "Various Provisions on the Strengthening of Export Product Coordination and Management" (Ministry of Foreign Trade Economic Relations and Trade, jinfchufa (1991) No. 52, February 22, 1991), identified by China as item number 9 in the chart presented on para. 39 of its first written submission on 4 August 2010. Complainants did not seek recommendations for this measure in their response to question No. 2 posed by the Panel.

[42] Identified by China as item number 10 in the chart presented on para. 39 of its first written submission on 4 August 2010.

[43] Identified by China as item number 11 in the chart presented on para. 39 of its first written submission on 4 August 2010.

[44] Identified by China as item number 12 in the chart presented on para. 39 of its first written submission on 4 August 2010.

[45] Notice for the Adjustment of the Catalogue of Export Products Subject to Price Review by Customs (Ministry of Foreign Trade and Economic Cooperation and the General Administration of Customs, waijingmaomaofa (2002) No. 187, May 1, 2002), identified by China as item number 13 in the chart presented on para. 39 of its first written submission on 4 August 2010. Complainants did not seek recommendations for this measure in their response to question No. 2 posed by the Panel.

[46] Notice Regarding the Trial Administration of 36 Types of Products such as Citric Acid (Ministry of Commerce and General Administration of Customs, Notice (2003) No. 36, November 29, 2003), identified by China as item number 14 in the chart presented on para. 39 of its first written submission on 4 August 2010. Complainants did not seek recommendations for this measure in their response to question No. 2 posed by the Panel.

[47] Communication (Ministry of Commerce and General Administration of Customs (2008) No. 33, May 26, 2008), identified by China as item number 15 in the chart presented on para. 39 of its first written submission on 4 August 2010. Complainants did not seek recommendations for this measure in their response to question No. 2 posed by the Panel.

39. In addition to these 15 measures, the complainants identified the following six measures among the 21 relevant measures (as discussed in paragraph 37 above):

- Measures for Administration of Trade Social Organizations[48];
- Regulations for Personnel Management of Chambers of Commerce[49];
- 1994 CCCMC Charter[50];
- 2001 CCCMC Charter,[51];
- Bauxite Branch Charter[52]; and
- MOFTEC Circular.[53]

40. In response to question No. 2 from the Panel, the complainants requested findings and recommendations on the following 15 of the 21 measures discussed above, all of which they consider to fall within the Panel's terms of reference: [54]

- Measures for Administration of Trade Social Organizations;
- Regulations for Personnel Management of Chambers of Commerce;
- 1994 CCCMC Charter;
- 2001 CCCMC Charter;
- Export Price Penalties Regulations;
- Measures for Administration of Licensing Entities;

[48] Measures for the Administration Over Foreign Trade and Economic Social Organizations (Ministry of Foreign Trade and Economic Cooperation, 26 February 1991), identified by the complainants as item "a" in Chart A submitted to respond to question no. 1 of the Panel on 13 September 2010.

[49] Notice Regarding Printing and Distribution of Several Regulations for Personnel Management of Chambers of Commerce for Importers and Exporters (Ministry of Foreign Trade and Economic Cooperation, 23 September 1994), identified by the complainants as item "b" in Chart A submitted to respond to question No. 1 of the Panel on 13 September 2010.

[50] Charter of the China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters (1994), identified by the complainants as item "c" in Chart A submitted to respond to question No. 1 of the Panel on 13 September 2010.

[51] Charter of the China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters (2001), identified by the complainants as item "c" in Chart A submitted to respond to question No. 1 of the Panel on 13 September 2010.

[52] Identified by the complainants as item "d" in Chart A submitted to respond to question no. 1 of the Panel on 13 September 2010.

[53] MOFTEC Circular on Strengthening the Job in the Coordination of Export Commodities (1998), identified by the complainants as item "e" in Chart A submitted to respond to question No. 1 of the Panel on 13 September 2010.

[54] The complainants are not asking for recommendations and findings on six of the 21 measures referred to collectively by the parties.

- Rules for Coordination of Customs Price Review;
- Rules on Price Reviews of Export Products; and
- Provisional Rules on Export Price Verification;
- CCCMC PVC Rules;
- Online PVC Instructions;
- CCCMC Export Coordination Measures;
- CCCMC Bauxite Branch Coordination Measures;
- Bauxite Branch Charter; and
- "system of self-discipline".

41. Of the 15 measures listed in paragraph 40 of this ruling, the complainants submit that six measures appear in both the consultation and Panel requests, and are within the Panel's terms of reference. These six measures are:

- Measures for Administration of Trade Social Organizations;
- Regulations for Personnel Management of Chambers of Commerce;
- 1994 CCCMC Charter;
- 2001 CCCMC Charter;
- Export Price Penalties Regulations; and
- Measures for Administration of Licensing Entities.

42. The complainants argue that the remaining nine measures of the 15 measures listed in paragraph 40 for which they seek recommendations are within the Panel terms of reference because they are "implementing" measures.[55] The complainants concede that certain of these nine measures appear in the complainants' consultations requests but not the Panel requests; others appear in the Panel requests but not the consultations requests; and finally, certain measures do not appear in either of the requests. [56] In their responses to Panel question No. 1, the complainants specified which are those nine "implementing" measures, and further indicated which are the measures that they implement. These are:

- Rules for Coordination of Customs Price Review;

[55] In their responses to question No.1 from the Panel, the complainants actually allege that there are 11 implementing measures. The parties have recognized that two of these measures – the 1994 CCCMC Charter, and the 2001 CCCMC Charter – appear in both the consultations and Panel requests, and are not argued to fall outside the Panel's terms of reference. See para. 35 above.

[56] See complainants' response to Panel question No. 1.

- Rules on Price Reviews of Export Products;
- Provisional Rules on Export Price Verification;
- CCCMC PVC Rules;
- Online PVC Instructions;
- CCCMC Export Coordination Measures;
- CCCMC Bauxite Branch Coordination Measures,
- Bauxite Branch Charter; and
- "system of self-discipline".

43. The complainants have not to date explained in their responses or otherwise how any of these measures "implement" other measures.

44. China responded that those measures identified by the complainants as "implementing" measures should not be in the Panel's terms of reference. China contended that the complainants failed to meet their burden to explain how any of these measures implement other measures. For China, the set of additional measures referred to by the complainants are not new governmental actions, nor have the complainants demonstrated that these measures have the same "essence" or "effect" as those measures originally included in the Panel requests. Therefore, they cannot properly be considered as "implementing" measures within the Panel's terms of reference. [57]

45. The Panel considers it appropriate to address whether the complainants' Panel requests respect Article 6.2 of the DSU, both in light of China's request and with a view to confirming its competence to rule on the measures at issue.[58] The Panel will address each of the measures discussed above.

46. To begin, the Panel recalls the findings of the Appellate Body that a panel request must identify the measures with sufficient clarity to indicate the nature of the measure and the gist of what is at issue.[59] The Appellate Body has indicated that the obligation to afford due process is "inherent in the WTO dispute settlement system"[60] and is "fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings".[61] It concluded that:

> "[T]he protection of due process is an essential feature of a rules-based system of adjudication, such as that established under the DSU. Due process protection

[57] China's response to Panel question No. 1; China's comments on complainants' responses to Panel question No. 1. The complainants request the Panel not to consider these new arguments raised by China in its Panel's preliminary ruling because these issues were not raised by China at the outset of its preliminary ruling request and were not addressed by the parties in the context of their preliminary ruling request.

[58] Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36.

[59] Preliminary Ruling, first phase, para. 8, referring to Appellate Body Report on *US – Continued Zeroing*, paras. 168-169.

[60] Appellate Body Report on *Chile – Price Band System*, para. 176. See also Appellate Body Report on *Mexico – Corn Syrup (Article 21.5 – US)*, para. 107 .

[61] Appellate Body Report on *Thailand – H-Beams*, para. 88.

> guarantees that the proceedings are conducted with fairness and impartiality, and that one party is not unfairly disadvantaged with respect to other parties in a dispute."[62]

This includes requiring that the respondent be afforded an adequate opportunity to respond to claims, arguments, or evidence presented by the complainants.[63]

47. In the first phase of its preliminary ruling, the Panel recognized that its terms of reference are generally limited to measures that have been identified in the complainants' Panel requests. The Panel also recognized, however, that there may be situations where a new governmental measure or action that may not have existed at the time of the Panel request may nevertheless be so closely linked to the challenged measures that it falls within the Panel's terms of reference. Such measure could potentially include an amendment or extension, related measure, replacement measure, renewal measure, or implementing measure.[64] Such measure, however, must not change the "essence" of the initial measure that was properly identified in the Panel request.[65] The Panel also recalls that it has ruled that the scope of the Panel's terms of reference in this dispute would not extend to broad and undefined "related measures".[66]

48. In the Panel's view, those six measures that appear in both the consultations and Panel requests are clearly within the Panel's terms of reference. To recall from paragraph 40 above, these are:

- Measures for Administration of Trade Social Organizations;
- Regulations for Personnel Management of Chambers of Commerce;
- 1994 CCCMC Charter;
- 2001 CCCMC Charter;
- Export Price Penalties Regulations; and
- Measures for Administration of Licensing Entities.

49. However, the complainants have not demonstrated that the nine remaining MEP-related "implementing" measures (see paragraph 42 above) for which they seek recommendations implement other measures identified in the complainants' Panel requests.[67] Of these 9 implementing measures, the complainants indicated that five of them appear in the Panel requests but not the consultations requests. These are:

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[62] Appellate Body Report on *US – Continued Suspension*, para. 433.

[63] Appellate Body Report on *US – Continued Suspension*, para. 433; Appellate Body Report on *US – Gambling*, paras. 269-273; Appellate Body Report on *Canada – Wheat Exports and Grain Imports*, para. 177; Appellate Body Report on *Mexico – Corn Syrup* (Article 21.5 – US), para. 47; Appellate Body Report on *Australia – Salmon*, paras. 272 and 278; and Appellate Body Report on *Brazil – Desiccated Coconut*, p. 22.

[64] Preliminary Ruling, first phase, para. 16. The Panel noted in that phase of its ruling that the term "implementing measures" refers to actions taken by China to implement existing challenged measures.

[65] Preliminary Ruling, first phase, para. 16, referring to Appellate Body Report on *Chile – Price Band System*, para. 139, and Appellate Body Report on *US – Upland Cotton (Article 21.5 – Brazil)*, para. 270.

[66] Preliminary Ruling, first phase, paras. 17 and 18.

[67] These include measures that were identified in both the Panel and consultations requests as well as measures that only appear in the Panel requests. These do not include measures that appear solely in the consultations requests.

- Rules for Coordination of Customs Price Review;
- Rules on Price Reviews of Export Products;
- Provisional Rules on Export Price Verification;
- CCCMC PVC Rules; and
- Online PVC Instructions.

50. The complainants further indicated that the remaining four alleged "implementing" measures do not appear in the consultations or Panel requests. These are:

- CCCMC Export Coordination Measures;
- CCCMC Bauxite Branch Coordination Measures;
- Bauxite Branch Charter; and
- "system of self-discipline".

51. For those measures listed in paragraph 49 that are alleged to be "implementing" measures and that were in Panel requests, the complainants did not seek to explain the "essence" of these measures or their link to any measures included in the consultation requests.[68] The complainants merely assert in response to question No. 1 from the Panel that all nine measures are implementing measures. The complainants did not explain why the measures listed in paragraph 50 above were not in their consultation or Panel requests, nor how they can be considered implementing measures.

52. The complainants' late reference to these nine MEP-related measures (that either appear in the Panel request but not the consultations request, or that do not appear in the consultations or Panel requests) and their failure to argue or demonstrate that these measures either maintain the essence of the measures they are alleged to implement leads the Panel to find that the complainants have failed to comply with the requirements of Article 6.2 of the DSU, with respect to these nine measures.[69] As a result of this delayed identification of these nine measures, China was not given appropriate notice of all aspects of the claims against it. It did not know the case it had to meet and thus was not afforded opportunity to respond. Even if the complainants were eventually to address how such measures "implement" the original measures, this would not cure a failure to meet the obligations of Article 6.2 of the DSU. The time for proper notice has passed. Later explanation would only afford China a late and limited opportunity to respond. China signalled early on the complainants' failure to properly

[68] Panels and the Appellate Body have addressed requirements for including measures in a panel's terms of reference that were not included in a consultations request. Requirements include addressing whether a measure has the "same essence" and "effect" as a measure in the consultations request. *See* Panel Report, *Dominican Republic– Import and Sale of Cigarettes*, para. 7.21; Appellate Body Report on *US – Certain EC Products*, paras. 74- 77. *See* also Appellate Body Report on *US- Continued Zeroing*, para. 230; Panel Report on *US – Continued Zeroing*, paras. 7.26 and 7.27.

[69] The Panel recalls its statement from the first phase of its preliminary ruling that measures to be included in the Panel's terms of reference should generally exist at the time of the filing of the panel request, except in cases where new governmental actions were considered to be so closely linked to the challenged measures that they may be also considered to fall within the Panel's terms of reference. The Panel also recalled that such measures must not change the "essence" of the measures originally challenged. *See* Panel ruling, first phase, para. 16; referring to Appellate Body Report on *Chile – Price Band System*, para. 139.

identify these measures. Nevertheless, no explanation was provided by the complainants as to why these new measures were not included in the requests. All that the Panel has before it is a chart with the descriptor "implementing" for these nine measures.

53. The Panel notes specially the complainants' failure to explain how the alleged implementing measures implement measures – some of which China claims are expired measures. Implementing measures normally would not derive authority from measures whose legal authority has expired. The complainants have not indicated that any of the additional alleged "implementing" measures are new or were put in place after the Panel requests were submitted. In the interests of due process and good faith, it was incumbent upon the complainants to provide explanations about the measures they consider fall within the Panel's terms of reference.

54. In the Panel's view, the complainants would have had to provide more arguments and evidence in their opening written and oral submissions, or in responses to the Panel's questions, to have met the obligations of Article 6.2 of the DSU. Although more argumentation might have been possible in later submissions, additional evidence supporting material on the issue of the Panel's terms of reference with respect to implementing measures would have been too late at the rebuttal phase.[70]

55. The Panel does not have enough evidence at this stage to persuade it that the measures could operate to implement the measures mentioned in the requests, and it cannot permit the complainants to submit new evidence at this stage. Nor can it seek to make the complainants case for them through posing more questions. Neither the respondent nor the Panel should on their own have to determine what specific MEP-related measures are under challenge, and therefore what measures define the terms of reference.

56. In reaching this conclusion, the Panel does not mean to imply that a panel request must always include extensive detail about alleged implementing measures. The Appellate Body has previously explained that adequate notice to a respondent is not determined by examining one part of the panel request in isolation, but rather by considering the request as a whole, and in the light of attendant circumstances.[71] Moreover, the Appellate Body has explained that the different claims in the request for establishment must be read in their context.[72]

57. For the reasons above, the Panel rules that the following six measures are within its terms of reference:

- Measures for Administration of Trade Social Organizations;
- Regulations for Personnel Management of Chambers of Commerce;
- 1994 CCCMC Charter;
- 2001 CCCMC Charter;
- Export Price Penalties Regulations; and
- Measures for Administration of Licensing Entities.

[70] Appellate Body Report on *Argentina – Textiles*, para. 79
[71] Appellate Body Report on *US – Carbon Steel*, para. 127.
[72] Panel Report on *Mexico – Anti-dumping Measures on Rice*, para. 7.31 (*original footnote omitted*).

The Panel considers that only these above MEP-related measures fall within its terms of reference and hence, it will only address these measures in this ongoing dispute.

58. The Panel is aware that China has raised further objections with respect to the complainants' MEP-related claims. The Panel will address these additional matters in its Panel report. Having ruled on the specific measures relevant to the complainants' claims of MEP-related claims, the Panel will now address whether Section III of the complainants' Panel requests fail to present the problem clearly by failing to provide sufficient connections between the listed measures and the listed claims of violations.

3. Whether Section III of the complainants' Panel requests fail to present the problem clearly by failing to provide sufficient connections between the listed measures and the listed claims of violations

59. Having addressed specific questions pertaining to the relevant measures at issue for the complainants MEP-related claims, the Panel will next address China's broader assertion that Section III of the complainants' Panel requests fail to present the problem clearly in accordance with paragraph 6.2 of the DSU.

60. For China, Section III does not provide a clear connection between the listed measures, the list of provisions claimed to be violated, and the narrative paragraphs that describe generally how "some" of the listed measures are inconsistent with "some" WTO disciplines.

61. In response to a question No. 2 from the Panel, the parties identified those measures for which the Panel should provide recommendations in its final report.[73] As explained above,[74] the complainants (in two charts, one filed jointly by the United States and Mexico, and a second by the European Union) listed those measures that they consider relevant for all of their claims made in connection with Sections I, II and III of their Panel requests.

62. China asserts that the variation between the table presented by the United States and that by the European Union underscores that the complainants have not sufficiently identified which subset of claims is made under which subset of the 13 treaty provisions, with respect to which subset of the 37 measures that appear in Section III of the Panel requests. China argues that the complainants describe the subject matter of their claims differently, including what China alleges are different issues regarding the administration of export quotas and allocation conditions, and quota bid-winning fees.

63. The Panel recalls its view that the matter of whether the mere listing of provisions of a particular WTO agreement is sufficient to comply with the requirement to provide a summary of the legal basis of the complaint must be determined on a case-by-case basis.[75]

64. The Panel observes that Section III, in various respects, includes claims against:

(a) China's administration of its quota system;

(b) China's export licensing system;

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[73] Question No. 2 posed by the Panel to the complainants.

[74] *See* para. 37.

[75] Preliminary Ruling, first phase, para. 33, referring to Appellate Body Report on *Korea – Dairy*, para. 127.

(c) China's coordination of MEPs and failure to publish such prices; and

(d) China's failure to publish certain quota amounts.

65. For the reasons set forth below, the Panel considers that the complainants' first written submission set out sufficient connections between the challenged measures and certain violations attributed to such measures. The Panel would note, preliminarily, its view that differences in the scope of the claims (including in the narrative paragraphs) as presented by the United States, Mexico and the European Union do not necessarily affect the proper identification of measures by each of the complainants.

66. The Panel agrees with China that, contrary to their assertions, the complainants did not advance *all* claims, under *all* treaty provisions, with respect to *all* measures. Indeed, the complainants clarified the connection of the measures at hand with the specific claims in their responses to question No. 2 posed by the Panel. This may be illustrated through various examples referred to below.

67. First, with regard to the administration of China's export quota system, the United States and Mexico identified the instrument entitled "Regulation of the People's Republic of China on the Administration of Import and Export of Goods" as one of the legal instruments related to the administration of the export quota system. The United States and Mexico identified the inconsistency of this measure with Article X:3 (a) of the GATT 1994.

68. Second, with regard to the export licensing system, the complainants identified the instrument entitled "Export License Measures"[76] as one of the legal instruments related to the imposition of the administration of China's quota system. The United States and Mexico claimed the inconsistency of the measure with Article XI:1 of the GATT 1994,[77] while the European Union claimed that the measure is inconsistent with Article XI:1 of the GATT 1994, paragraph 1.2 of China's Accession Protocol, and paragraphs 83 and 84, and 162 and 165 of the Working Party Report.

69. Third, with regard to the MEP-related claims, the complainants identified the instrument entitled "Measures for Administration of Trade Social Organization"[78] as one of the related legal instruments. The complainants contended that this measure and others are inconsistent with Article XI:1 as well as Article X:1 and X:3 of the GATT 1994.

70. The Panel also considers that the fact China raised specific defences against a number of claims under Section III of the Panel requests supports its view that the complainants have met their burden to present the problem clearly. For instance, in Section VII of its first written submission, China reserved arguments about the consistency of its administration of its quota system with its obligations under the WTO. China asserted in Section VIII(B) of its first written submission that the administration of its export licensing system is consistent with Article XI:1 of the GATT 1994. Finally, in connection with certain MEP-related measures, China submitted that it no longer coordinates minimum export prices. In addition, China takes this stance in connection with assertions

[76] Measures for the Administration of License for the Export of Goods (Order of the Ministry of Commerce (2008) No. 11, July 1, 2008).

[77] Although the United States and Mexico in their first written submissions, alleged that China's export licensing is inconsistent with paragraph 1.2 of China's Accession Protocol and paragraphs 162 and 165 of China's working party report, the United States and Mexico did not request the Panel to make recommendations on these claims in their responses to Panel question No. 2. The Panel is therefore unclear whether the United States and Mexico intend to proceed with these additional claims of violation.

[78] "Measures for the Administration over Foreign Trade and Economic Social Organization "(Ministry of Foreign Trade and Economic Cooperation, 26 February 1991).

that China failed to publish measures pertaining to such coordination, or that it administers such coordination in a manner that is not impartial, reasonable and uniform.

71. Finally, the Panel will address claims by the European Union that China failed to publish certain quota amounts. As with its other claims on Section III of the Panel requests, China asserted generally that the European Union did not provide sufficient connections between the listed measures and these claims. In addition, China argued that the European Union may only proceed with its publication claims concerning the zinc quota, and not the coke quota, due to a failure to give notice of a claim against the coke quota in its Panel request. In the latter respect, China argues that, in paragraph 4 of Section III of its Panel request, the European Union states only that, "China does not publish the amount for the export quota for *zinc* or any conditions or procedures for applying entities to qualify to export *zinc*" (emphasis added)." It notes no mention of a quota on "coke".

72. The European Union responded that it properly set forth both claims against zinc and coke in its Panel request. Specifically, the European Union refers to the first paragraph of Section III of its Panel Request which reads "China ... does not publish certain measures pertaining to the requirements, restrictions or prohibitions on exports". The European Union claims that this language demonstrates that the European Union raised a claim of non-publication of measures and that the specific mention of zinc in the fourth paragraph of the Panel Request was for illustrative purposes only.[79]

73. The Panel observes that under Article 6.2 of the DSU, a complainant must "identify the *specific* measures at issue". The Panel explained above that there is no general requirement in Article 6.2 of the DSU to identify the products at issue in a complainants' Panel request, and that different claims in the request for establishment must be read in their context.[80]

74. Given the specific language of the European Union's Panel request, the Panel is of the view that the European Union has brought its publication claims concerning quotas only with respect to zinc, and not coke. The Panel finds nothing in the narrative description or elsewhere in Section III to support the assertion that the reference to zinc in paragraph 4 of that section was for illustrative purposes only. Indeed, the language in its request suggests the contrary. For instance, the European Union did not incorporate phrases like "such as", "for example", or "*inter alia*". Moreover, each of the other narrative paragraphs in Section III of the European Union's Panel request (with the exception of paragraph 4) contain a precise list of products subject to other claims of violation. This implies that paragraph 4 was in the same vein and should not be read differently.

75. The inclusion of the reference to the zinc quota in the Panel request is an indication to the Panel that the European Union was aware of, as well as capable of identifying the measures which had not been published. The European Union could have been clearer, and instead it left China unsure as to the nature of the case against it. The European Union could have referenced the coke quota in the relevant paragraph of Section III of its Panel request, thereby ensuring that it fell within the Panel's terms of reference. Considering the omission of the coke quota from the text of the Panel request as a whole, it was reasonable for China to infer that the exclusion of the coke quota from Section III of the panel request was deliberate.[81]

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[79] European Union's opening oral statement, para. 24.

[80] Panel Report on *Mexico – Anti-Dumping Measures on Rice*, para. 7.31 (*original footnote omitted*).

[81] The panel on *China – Audiovisual Services* referred to the general legal canon of construction *expressio unius est exclusio alterius* in assessing the decision by the complainant to exclude a particular provision from the text of its panel request. That panel noted that the canon of construction holds that to express

76. In light of the particular approach taken by the European Union, whereby it referred specifically to the zinc quota and listed precise products in other paragraphs the Panel concludes that the European Union failed to identify China's alleged omission to publish the coke quota as a specific measure at issue in its Panel request, in accordance with the requirements set out in Article 6.2 of the DSU. The Panel therefore considers that the publication claim concerning the zinc quota is within its terms of reference; but that related to the coke quota is not.

77. For the foregoing reasons, the Panel considers that the complainants have provided sufficient connections between the listed claims and violations in Section III for certain of their claims, but not others. Specifically, the Panel rules that the complainants have made connections between the measures and claims sufficient to meet the requirements of Article 6.2 of the DSU for the following: in respect of (i) claims concerning China's administration of its quota system; (ii) claims concerning China's export licensing system; (iii) China's coordination of MEPs and the failure to publish such prices; and (iv) China's alleged failure to publish quota amounts for zinc. For these claims, the Panel considers that China has not been prejudiced in its ability to defend itself. Accordingly, the Panel will consider those listed measures and related claims within its terms of reference. However, the Panel agrees with China that that the European Communities has not set forth a publication claim concerning quota amounts of coke for the reasons provided above. Accordingly, the Panel finds this allegation to fall outside its terms of reference.

C. CONCLUSIONS

78. The Panel recalls its earlier decision to issue its preliminary ruling in two stages. In issuing this second phase of its ruling, the Panel hereby completes its preliminary ruling. The Panel determines in this ruling through its assessment of the complainants' first written submissions and oral statements, and responses to questions posed by the Panel, that Sections I, II and III of the Panel requests sufficiently identify the products concerned by the challenged measures. In addition, although the complainants' panel Requests could have been clearer, for the most part, the complainants' Panel requests, as clarified by their first submissions, provide sufficient connection between the measures listed in Section III and the listed claims of violations, with the exception of the European Union's publication claim concerning coke quotas. The Panel also determined that its terms of reference with respect to claims relating to China's alleged coordination of MEPs are limited to assessing the WTO compatibility of the following measures:

- Measures for the Administration Over Foreign Trade and Economic Social Organizations (Ministry of Foreign Trade and Economic Cooperation, 26 February 1991);[82]
- Notice Regarding Printing and Distribution of Several Regulations for Personnel Management of Chambers of Commerce for Importers and Exporters (Ministry of Foreign Trade and Economic Cooperation, 23 September 1994);[83]

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or include one thing implies the exclusion of the other or of the alternative (see Panel Report on *China – Audiovisual Services*, para. 7.60, referring to Black's Law Dictionary, 8th ed., B.A. Garner (ed) (West Group 2004), p. 620); also Ian Brownlie, Principles of Public International Law, 6th ed. (2003) p. 602, 604. The Panel finds this principle relevant to its assessment of the European Union's failure to reference the coke quota in its Panel request in this dispute.

[82] Identified by the complainants as item "a" in Chart A submitted in response to Panel question No. 1. In this ruling, this measure is referred to as "Measures for Administration of Trade Social Organizations".

[83] Identified by the complainants as item "b" in Chart A submitted in response to Panel question No. 1. In this ruling, this measure is referred to as "Regulations for Personnel Management of Chambers of Commerce".

- Charter of the China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters (1994);[84]
- Charter of the China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters (2001);[85]
- Interim Regulations of the Ministry of foreign Trade and Economic Cooperation on Punishment for Conduct at Exporting at Lower-than-Normal-Price (Ministry of Foreign Trade and Economic Cooperation 20 March 1996);[86] and
- Measures for the Administration of the Organs for Issuing the Licenses of Import and Export Commodities (Ministry of Foreign Trade and Economic Cooperation, waijingmaopeiguanhanzi (1999) No. 68, September 21, 1999).[87]

The Panel will therefore limit its assessment to whether these six measures violate either Article X:1 or X:3(a), or Article XI:1 of the GATT 1994.

79. The Panel is aware that China has raised further objections with respect to the Panel's terms of reference. The Panel notes that its preliminary ruling does not exhaust all matters raised by China with respect to the Panel's terms of reference. In particular, the Panel has not dealt with the claim of China that certain of the challenged measures have now expired. The Panel will address these additional claims in its Panel report.

80. The Panel reserves its decision to develop its reasoning regarding each aspect of its preliminary ruling in a subsequent ruling or in its final report.

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[84] Charter of the China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters (1994), identified by the complainants as item "c" in Chart A submitted in response to Panel question No. 1. In this ruling, this measure is referred to as "1994 CCCMC Charter".

[85] Charter of the China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters (2001), identified by the complainants as item "c" in Chart A submitted in response to Panel question No. 1. In this ruling, this measure is referred to as "2001 CCCMC Charter".

[86] Identified by China as item number 1 in the chart presented on para. 39 of its first written submission on 4 August 2010. In this ruling, this measure is referred to as "Export Price Penalties Regulations".

[87] Identified by China as item number 2 in the chart presented on para. 39 of its first written submission on 4 August 2010. In this ruling, this measure is referred to as "Measures for Administration of Licensing Entities".

Annex A

Table of legal instruments referred to in this ruling

Short Titles	Complete Names
Customs Law	Customs Law of the People's Republic of China (adopted at the 19th Meeting of the Standing Committee of the Sixth National People's Congress on 22 January 1987, amended 8 July 2000)
Regulations on Import and Export Duties	Regulations of the People's Republic of China on Import and Export Duties (Order of the State Council (2003) No. 392, adopted at the 26th executive meeting of the State Council on 29 October 2003, 1 January 2004)
2009 Tariff Implementation Program	Notice Regarding the 2009 Tariff Implementation Program (State Council Tariff Policy Commission, shuiweihui (2008) No. 40, 1 January 2009)
Export Price Penalties Regulations	Interim Regulations of the Ministry of Foreign Trade and Economic Cooperation on Punishment for Conduct at Exporting at Lower-than-Normal Price (Ministry of Foreign Trade and Economic Cooperation, March 20, 1996)
Measures for Administration of Licensing Entities	Measures for the Administration of the Organs for Issuing the Licenses of Import and Export Commodities (Ministry of Foreign Trade and Economic Cooperation, waijingmaopeiguanhanzi (1999) No. 68, September 21, 1999)
Rules for Coordination of Customs Price Review	Rules for Coordination with Respect to Customs Price Review of Export Products (Ministry of Foreign Trade and Economic Cooperation guanzonghanzi No. 21, 1997)
Rules on Price Reviews of Export Products	Notice on the Rules on Price Reviews of Export Products by the Customs (Ministry of Foreign Trade and Economic Cooperation guanzonghanzi No. 21, 1997)
Provisional Rules on Export Price Verification	Provisional Rules on Export Price Verification and Chop for Key Products Subject to Price Review (Ministry of Foreign Trade and Economic Cooperation guanzonghanzi No. 21, 1997)
CCCMC PVC Rules	Notice Regarding Rules for Contract Declaration for Chemicals-Related Verification and Stamp Products (China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters Petroleum and Chemicals Products Department, 30 December 2003)
Online PVC Instructions	Online Verification and Certification Operating Steps (China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters)
Decision on the Reform and Improvement of the Trade System	Decision of the State Council on Various Questions on the Further Reform and Improvement of the Foreign Trade System (State Council, guofa (1990) No. 70, January 1, 1991)
Various Provisions on the Strengthening of Export Product Coordination and Management	Notice on the Issuance of "Various Provisions on the Strengthening of Export Product Coordination and Management" (Ministry of Foreign Trade Economic Relations and Trade, jinfchufa (1991) No. 52, February 22, 1991)
CCCMC Export Coordination Measures	CCCMC Export Coordination Measures

Short Titles	Complete Names
CCCMC Bauxite Branch Coordination Measures	CCCMC Bauxite Branch Coordination Measures
"system of self-discipline"	"system of self-discipline"
Adjustment of the Catalogue of Export Products Subject to Price Review	Notice for the Adjustment of the Catalogue of Export Products Subject to Price Review by Customs (Ministry of Foreign Trade and Economic Cooperation and the General Administration of Customs, waijingmaomaofa (2002) No. 187, May 1, 2002)
Notice Regarding the Trial Administration of 36 Products	Notice Regarding the Trial Administration of 36 Types of Products such as Citric Acid (Ministry of Commerce and General Administration of Customs, Notice (2003) No. 36, November 29, 2003)
Communication	Communication (Ministry of Commerce and General Administration of Customs (2008) No. 33, May 26, 2008)
Measures for Administration of Trade Social Organizations	Measures for the Administration Over Foreign Trade and Economic Social Organizations (Ministry of Foreign Trade and Economic Cooperation, 26 February 1991)
Regulations for Personnel Management of Chambers of Commerce	Notice Regarding Printing and Distribution of Several Regulations for Personnel Management of Chambers of Commerce for Importers and Exporters (Ministry of Foreign Trade and Economic Cooperation, 23 September 1994)
1994 CCCMC Charter	Charter of the China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters (1994)
2001 CCCMC Charter	Charter of the China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters (2001)
Bauxite Branch Charter	Bauxite Branch Charter
MOFTEC Circular.	MOFTEC Circular on Strengthening the Job in the Coordination of Export Commodities (1998)