

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

**AB-2011-5**

***Reports of the Appellate Body***

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**Note:**

The Appellate Body is issuing these Reports in the form of a single document constituting three separate Appellate Body Reports: WT/DS394/AB/R; WT/DS395/AB/R; and WT/DS398/AB/R. The cover page, preliminary pages, Sections I through VIII and the Annexes are common to all three Reports. The page header throughout the document bears three document symbols, WT/DS394/AB/R, WT/DS395/AB/R, and WT/DS398/AB/R, with the following exceptions: Section IX on pages US-145 and US-146, which bears the document symbol for and contains the Appellate Body's findings and conclusions in the Appellate Body Report WT/DS394/AB/R; Section IX on pages EU-145 and EU-146, which bears the document symbol for and contains the Appellate Body's findings and conclusions in the Appellate Body Report WT/DS395/AB/R; and Section IX on pages MEX-145 and MEX-146, which bears the document symbol for and contains the Appellate Body's findings and conclusions in the Appellate Body Report WT/DS398/AB/R.



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CASES CITED IN THESE REPORTS

<b>Short title</b>	<b>Full case title and citation</b>
<i>Argentina – Footwear (EC)</i>	Appellate Body Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515
<i>Argentina – Hides and Leather</i>	Panel Report, <i>Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather</i> , WT/DS155/R and Corr.1, adopted 16 February 2001, DSR 2001:V, 1779
<i>Australia – Apples</i>	Appellate Body Report, <i>Australia – Measures Affecting the Importation of Apples from New Zealand</i> , WT/DS367/AB/R, adopted 17 December 2010
<i>Australia – Apples</i>	Panel Report, <i>Australia – Measures Affecting the Importation of Apples from New Zealand</i> , WT/DS367/R, adopted 17 December 2010, as modified by Appellate Body Report WT/DS367/AB/R
<i>Australia – Salmon</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327
<i>Brazil – Desiccated Coconut</i>	Appellate Body Report, <i>Brazil – Measures Affecting Desiccated Coconut</i> , WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, 167
<i>Brazil – Retreaded Tyres</i>	Panel Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS332/AB/R, DSR 2007:V, 1649
<i>Canada – Aircraft (Article 21.5 – Brazil)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU</i> , WT/DS70/AB/RW, adopted 4 August 2000, DSR 2000:IX, 4299
<i>Canada – Autos</i>	Appellate Body Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, 2985
<i>Canada – Herring and Salmon</i>	GATT Panel Report, <i>Canada – Measures Affecting Exports of Unprocessed Herring and Salmon</i> , L/6268, adopted 22 March 1988, BISD 35S/98
<i>Chile – Price Band System</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3045 (Corr.1, DSR 2006:XII, 5473)
<i>Chile – Price Band System</i>	Panel Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products</i> , WT/DS207/R, adopted 23 October 2002, as modified by Appellate Body Report WT/DS207AB/R, DSR 2002:VIII, 3127

Short title	Full case title and citation
<i>China – Auto Parts</i>	Panel Reports, <i>China – Measures Affecting Imports of Automobile Parts</i> , WT/DS339/R / WT/DS340/R / WT/DS342/R / and Add.1 and Add.2, adopted 12 January 2009, upheld (WT/DS339/R) and as modified (WT/DS340/R / WT/DS342/R) by Appellate Body Reports WT/DS339/AB/R / WT/DS340/AB/R / WT/DS342/AB/R
<i>China – Publications and Audiovisual Products</i>	Appellate Body Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/AB/R, adopted 19 January 2010
<i>China – Raw Materials</i>	Panel Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/R and Corr.1/WT/DS395/R and Corr.1/WT/DS398/R and Corr.1, circulated to WTO Members 5 July 2011 [appeal in progress]
<i>Colombia – Ports of Entry</i>	Panel Report, <i>Colombia – Indicative Prices and Restrictions on Ports of Entry</i> , WT/DS366/R and Corr.1, adopted 20 May 2009
<i>Dominican Republic – Import and Sale of Cigarettes</i>	Panel Report, <i>Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes</i> , WT/DS302/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS302/AB/R, DSR 2005:XV, 7425
<i>EC and certain member States – Large Civil Aircraft</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/AB/R, adopted 1 June 2011
<i>EC – Approval and Marketing of Biotech Products</i>	Panel Report, <i>European Communities – Measures Affecting the Approval and Marketing of Biotech Products</i> , WT/DS291/R, WT/DS292/R, WT/DS293/R, Add.1 to Add.9, and Corr.1, adopted 21 November 2006, DSR 2006:III-VIII, 847
<i>EC – Asbestos</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243
<i>EC – Bananas III</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591
<i>EC – Bananas III</i>	Panel Reports, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas ("EC – Bananas III")</i> , WT/DS27/R/ECU ( <i>Ecuador</i> ) / WT/DS27/R/GTM, WT/DS27/R/HND ( <i>Guatemala and Honduras</i> ) / WT/DS27/R/MEX ( <i>Mexico</i> ) / WT/DS27/R/USA ( <i>US</i> ), adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:II, 695 to DSR 1997:III, 1085

Short title	Full case title and citation
<i>EC – Bananas III (Article 21.5 – Ecuador II)/ EC – Bananas III (Article 21.5 – US)</i>	Appellate Body Reports, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador</i> , WT/DS27/AB/RW2/ECU, adopted 11 December 2008, and Corr.1 / <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008
<i>EC – Fasteners (China)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/AB/R, adopted 28 July 2011
<i>EC – Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
<i>EC – Sardines</i>	Appellate Body Report, <i>European Communities – Trade Description of Sardines</i> , WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3359
<i>EC – Selected Customs Matters</i>	Appellate Body Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, 3791
<i>EC – Trademarks and Geographical Indications</i>	Panel Reports, <i>European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs</i> , WT/DS290/R (Australia) / WT/DS174/R (US), adopted 20 April 2005, DSR 2005:VIII, 3499 to DSR 2005: X, 4603
<i>Guatemala – Cement I</i>	Appellate Body Report, <i>Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico</i> , WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, 3767
<i>India – Patents (US)</i>	Appellate Body Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9
<i>India – Quantitative Restrictions</i>	Panel Report, <i>India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products</i> , WT/DS90/R, adopted 22 September 1999, upheld by Appellate Body Report WT/DS90/AB/R, DSR 1999:V, 1799
<i>Indonesia – Autos</i>	Panel Report, <i>Indonesia – Certain Measures Affecting the Automobile Industry</i> , WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr.1 and 2, adopted 23 July 1998, and Corr. 3 and 4, DSR 1998:VI, 2201
<i>Japan – Alcoholic Beverages II</i>	Appellate Body Report, <i>Japan – Taxes on Alcoholic Beverages</i> , WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97
<i>Japan – Apples</i>	Appellate Body Report, <i>Japan – Measures Affecting the Importation of Apples</i> , WT/DS245/AB/R, adopted 10 December 2003, DSR 2003:IX, 4391

<b>Short title</b>	<b>Full case title and citation</b>
<i>Korea – Alcoholic Beverages</i>	Appellate Body Report, <i>Korea – Taxes on Alcoholic Beverages</i> , WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999, DSR 1999:I, 3
<i>Korea – Dairy</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
<i>Korea – Various Measures on Beef</i>	Appellate Body Report, <i>Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef</i> , WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, DSR 2001:I, 5
<i>Thailand – Cigarettes (Philippines)</i>	Panel Report, <i>Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines</i> , WT/DS371/R, adopted 15 July 2011, as modified by Appellate Body Report WT/DS371/AB/R
<i>Turkey – Rice</i>	Panel Report, <i>Turkey – Measures Affecting the Importation of Rice</i> , WT/DS334/R, adopted 22 October 2007, DSR 2007:VI, 2151
<i>US – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, 3779
<i>US – Certain EC Products</i>	Appellate Body Report, <i>United States – Import Measures on Certain Products from the European Communities</i> , WT/DS165/AB/R, adopted 10 January 2001, DSR 2001:I, 373
<i>US – Certain EC Products</i>	Panel Report, <i>United States – Import Measures on Certain Products from the European Communities</i> , WT/DS165/R and Add.1, adopted 10 January 2001, as modified by Appellate Body Report WT/DS165/AB/R, DSR 2001:II, 413
<i>US – Customs User Fee</i>	GATT Panel Report, <i>United States – Customs User Fee</i> , L/6264, adopted 2 February 1988, BISD 35S/245
<i>US – Continued Zeroing</i>	Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/AB/R, adopted 19 February 2009
<i>US – Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, 5663 (Corr.1, DSR 2006:XII, 5475)
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, 3257

<b>Short title</b>	<b>Full case title and citation</b>
<i>US – Orange Juice (Brazil)</i>	Panel Report, <i>United States – Anti-Dumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil</i> , WT/DS382/R, adopted 17 June 2011
<i>US – Poultry (China)</i>	Panel Report, <i>United States – Certain Measures Affecting Imports of Poultry from China</i> , WT/DS392/R, adopted 25 October 2010
<i>US – Section 301 Trade Act</i>	Panel Report, <i>United States – Sections 301-310 of the Trade Act of 1974</i> , WT/DS152/R, adopted 27 January 2000, DSR 2000:II, 815
<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755
<i>US – Softwood Lumber IV</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, 571
<i>US – Upland Cotton</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, 3
<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, 323
<i>US – Wool Shirts and Blouses</i>	Panel Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/R, adopted 23 May 1997, upheld by Appellate Body Report WT/DS33/AB/R, DSR 1997:I, 343
<i>US – Zeroing (EC) (Article 21.5 – EC)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS294/AB/RW and Corr.1, adopted 11 June 2009
<i>US – Zeroing (Japan) (Article 21.5 – Japan)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan</i> , WT/DS322/AB/RW, adopted 31 August 2009

ABBREVIATIONS USED IN THESE REPORTS

<b>Abbreviation</b>	<b>Definition</b>
<i>2008 Export Licence Administration Measures</i>	Measures for the Administration of Licence for the Export of Goods, Order of the Ministry of Commerce (2008) No. 11, 1 July 2008 (Panel Exhibits CHN-342 and JE-74)
<i>2008 Export Licensing Working Rules</i>	Working Rules on Issuing Export Licences, Ministry of Commerce, Shangpeifa (2008) No. 398, 9 October 2008 (Panel Exhibits CHN-344 and JE-97)
<i>2009 Announcement of Second Bidding Round for Talc and Silicon Carbide</i>	Announcement on the Second Invitation for the Bidding of Select Industrial Product Export Quotas in 2009, Committee for the Invitation for bid for Export Commodity Quotas, 16 September 2009 (Panel Exhibit JE-132)
<i>2009 Export Licensing Catalogue</i>	Notice "2009 Export Licensing Management Commodities List", Ministry of Commerce and General Administration of Customs, Notice (2008) No. 100, 1 January 2009 (Panel Exhibits CHN-6 and JE-22)
<i>2009 Export Quota Amounts</i>	Notice Regarding 2009 Export Quota Amounts for Agricultural and Industrial Products, Ministry of Commerce, Notice (2008) No. 83, 1 January 2009 (Panel Exhibit JE-79)
<i>2009 First Round Bauxite Bidding Procedures</i>	Quotas of Bauxite of 2009, Committee for the Invitation for bid for Export Commodity Quotas, 10 December 2008 (Panel Exhibit JE-94)
<i>2009 First Round Export Quota Bidding Announcement</i>	Announcement of Ministry of Commerce on Matters regarding the First Bidding for Export Quotas of Industrial Products in 2009, Ministry of Commerce, Announcement (2008) No. 85, 30 October 2008 (Panel Exhibits CHN-309 and JE-90)
<i>2009 Graded Export Licensing Entities Catalogue</i>	Announcement of the Ministry of Commerce Issuing the "2009 Graded Licence-Issuing List of Commodities Subject to Export Licence Administration", Ministry of Commerce, Notice (2008) No. 124, 1 January 2009 (Panel Exhibit JE-96)
<i>2009 Second Round Export Quota Bidding Announcement</i>	Announcement of Ministry of Commerce on the Notice for the Second Invitation for the Bidding for Industrial Product Export Quotas in 2009, Ministry of Commerce, Announcement (2009) No. 42, 8 June 2009 (Panel Exhibits CHN-310 and JE-91)
<i>2009 Tariff Implementation Program</i>	Notice Regarding the 2009 Tariff Implementation Program, State Council Tariff Policy Commission, Shuiweihui (2008) No. 40, 1 January 2009 (Panel Exhibit JE-21)
<i>2010 Tariff Implementation Plan</i>	Circular of the State Council Tariff Commission on the 2010 Tariff Implementation Plan, Shui Wei Hui [2009] No. 28, promulgated by the Customs Tariff Commission of the State Council on 8 December 2009 (Panel Exhibit CHN-5)
CCCMC	Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters of the People's Republic of China
China's Accession Protocol	Protocol on the Accession of the People's Republic of China to the WTO, WT/L/432

Abbreviation	Definition
China's Accession Working Party Report	Report of the Working Party on the Accession of China, WT/ACC/CHN/49 and Corr.1
China's request for a preliminary ruling	Communication from China to the Panel: China's request for a preliminary ruling pursuant to Article 6.2 of the DSU, 30 March 2010
Complainants	United States, European Union, and Mexico
Complainants' response to China's request for a preliminary ruling	Joint Communication from the United States, the European Union, and Mexico to the Request for a Preliminary Ruling submitted by China, 21 April 2010
<i>Customs Law</i>	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 (Panel Exhibits CHN-14 and JE-68)
DSB	Dispute Settlement Body
DSU	<i>Understanding on Rules and Procedures Governing the Settlement of Disputes</i>
EU Panel Report	Panel Report, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , complaint by the European Union (WT/DS395/R)
<i>Export Quota Administration Measures</i>	Measures for the Administration of Export Commodities Quotas, Order No. 12, promulgated by MOFTEC (now MOFCOM) on 20 December 2001 (Panel Exhibits CHN-312 and JE-76)
<i>Export Quota Bidding Implementation Rules</i>	Implementation Rules of Export Quota Bidding for Industrial Products, Ministry of Foreign Trade and Economic Cooperation, 8 November 2001 (Panel Exhibits CHN-305 and JE-78)
<i>Export Quota Bidding Measures</i>	Measures of Quota Bidding for Export Commodities, Decree of the Ministry of Foreign Trade and Economic Cooperation No. 11, adopted at the 9th ministerial office meeting of the Ministry of Foreign Trade and Economic Co-operation, 1 January 2002 (Panel Exhibits CHN-304 and JE-77)
GATS	<i>General Agreement on Trade in Services</i>
GATT 1994	<i>General Agreement on Tariffs and Trade 1994</i>
<i>Import Licensing Agreement</i>	<i>Agreement on Import Licensing Procedures</i>
MEP	minimum export price
Mexico Panel Report	Panel Report, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , complaint by Mexico (WT/DS398/R)
MOFCOM	Ministry of Commerce of the People's Republic of China
MOFTEC	Ministry of Trade and Economic Cooperation of the People's Republic of China
Panel	Panel in <i>China – Measures Related to the Exportation of Various Raw Materials</i>

<b>Abbreviation</b>	<b>Definition</b>
Panel's preliminary ruling (first phase)	First phase of the Preliminary Ruling by the Panel dated 7 May 2010, Panel Reports, Annex F-1
Panel's preliminary ruling (second phase)	Second phase of the Preliminary Ruling by the Panel dated 1 October 2010, Panel Reports, Annex F-2
Panel Reports	Panel Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/R/WT/DS395/R/WT/DS398
Raw materials	Certain forms of bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorous, and zinc
<i>Regulation on Import and Export Administration</i>	Regulation of the People's Republic of China on the Administration of the Import and Export of Goods, passed at the forty-sixth executive meeting of the State Council on 31 October 2001, 1 January 2002 (Panel Exhibits CHN-152 and JE-73)
<i>Regulations on Import and Export Duties</i>	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 (Panel Exhibits CHN-13 and JE-67)
<i>SPS Agreement</i>	<i>Agreement on the Application of Sanitary and Phytosanitary Measures</i>
<i>TBT Agreement</i>	<i>Agreement on Technical Barriers to Trade</i>
<i>TRIMS Agreement</i>	<i>Agreement on Trade-Related Investment Measures</i>
<i>TRIPS Agreement</i>	<i>Agreement on Trade-Related Aspects of Intellectual Property Rights</i>
US Panel Report	Panel Report, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , complaint by the United States (WT/DS394/R)
<i>Vienna Convention</i>	<i>Vienna Convention on the Law of Treaties</i> , done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679.
<i>Working Procedures</i>	<i>Working Procedures for Appellate Review</i> , WT/AB/WP/6, 16 August 2010
WTO	World Trade Organization
<i>WTO Agreement</i>	<i>Marrakesh Agreement Establishing the World Trade Organization</i>



WORLD TRADE ORGANIZATION  
APPELLATE BODY

**China – Measures Related to the Exportation of  
Various Raw Materials**

China, *Appellant, Appellee*  
United States, *Other Appellant, Appellee*  
European Union<sup>1</sup>, *Other Appellant, Appellee*  
Mexico, *Other Appellant, Appellee*

Argentina, *Third Participant*  
Brazil, *Third Participant*  
Canada, *Third Participant*  
Chile, *Third Participant*  
Colombia, *Third Participant*  
Ecuador, *Third Participant*  
India, *Third Participant*  
Japan, *Third Participant*  
Korea, *Third Participant*  
Norway, *Third Participant*  
Saudi Arabia, *Third Participant*  
Separate Customs Territory of Taiwan, Penghu,  
Kinmen and Matsu, *Third Participant*  
Turkey, *Third Participant*

AB-2011-5

Present:

Ramírez-Hernández, Presiding Member  
Hillman, Member  
Oshima, Member

**I. Introduction**

1. China and the United States each appeals certain issues of law and legal interpretations developed in the Panel Report, *China – Measures Related to the Exportation of Various Raw Materials, Complaint by the United States* (WT/DS394/R) (the "US Panel Report"); China and the

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<sup>1</sup>This dispute began before the entry into force of the *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community* (done at Lisbon, 13 December 2007) on 1 December 2009. On 29 November 2009, the World Trade Organization (the "WTO") received a Verbal Note (WT/L/779) from the Council of the European Union and the Commission of the European Communities stating that, by virtue of the *Treaty of Lisbon*, as of 1 December 2009, the "European Union" replaces and succeeds the "European Community". On 13 July 2010, the WTO received a second Verbal Note (WT/Let/679) from the Council of the European Union confirming that, with effect from 1 December 2009, the European Union replaced the European Community and assumed all the rights and obligations of the European Community in respect of all Agreements for which the Director-General of the World Trade Organization is the depositary and to which the European Community is a signatory or a contracting party. We understand the reference in the Verbal Notes to the "European Community" to be a reference to the "European Communities". Thus, although the European Communities was a party in the Panel proceedings, it is the European Union that filed a Notice of Appeal in this dispute after the entry into force of the *Treaty of Lisbon*, and we will thus refer to the European Union in this Report in its capacity as appellee and other appellant.

European Union each appeals certain issues of law and legal interpretations developed in the Panel Report, *China – Measures Related to the Exportation of Various Raw Materials, Complaint by the European Union* (WT/DS395/R) (the "EU Panel Report"); and China and Mexico each appeals certain issues of law and legal interpretations developed in the Panel Report, *China – Measures Related to the Exportation of Various Raw Materials, Complaint by Mexico* (WT/DS398/R) (the "Mexico Panel Report") (collectively, the "Panel Reports").<sup>2</sup> The Panel was established to consider complaints by the United States<sup>3</sup>, the European Union<sup>4</sup>, and Mexico<sup>5</sup> (the "complainants") regarding the consistency of certain measures imposed by China on the exportation of certain forms of bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorous, and zinc<sup>6</sup> (the "raw materials") with the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"), the Protocol on the Accession of the People's Republic of China<sup>7</sup> ("China's Accession Protocol"), and the Report of the Working Party on the Accession of China<sup>8</sup> ("China's Accession Working Party Report").

2. Before the Panel, the complainants challenged four types of restraints imposed by China on the exportation of the raw materials: (i) export duties; (ii) export quotas; (iii) export licensing; and (iv) minimum export price requirements.<sup>9</sup> The complainants also challenged certain aspects of China's allocation and administration of export quotas, export licences, and minimum export prices, as well as the alleged non-publication of certain export measures.<sup>10</sup> The complainants alleged that these export restraints were inconsistent with China's commitments under China's Accession Protocol and China's Accession Working Party Report, and with Articles VIII:1(a), VIII:4, X:1, X:3(a), and XI:1 of the GATT 1994.

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<sup>2</sup>WT/DS394/R; WT/DS395/R; WT/DS398/R, 5 July 2011 (collectively, the "Panel Reports"). At its meeting on 21 December 2009, the Dispute Settlement Body (the "DSB") established a single Panel for all three complaints in accordance with Article 9.1 of the DSU (WT/DSB/M/277). Pursuant to a joint request by the United States and Mexico, the Panel issued its findings in the form of a single document containing three separate reports, with common descriptive and analytical sections, but separate conclusions and recommendations for each complaining party, each of which bears only the document symbol for that report. (Panel Reports, paras. 6.74 and 8.1) In our Reports, when referring to more than one of the complainants, we mostly refer to the United States first, then to the European Union, and then to Mexico, in keeping with the chronology of the DS numbers assigned to these disputes.

<sup>3</sup>Request for the Establishment of a Panel by the United States, WT/DS394/7.

<sup>4</sup>Request for the Establishment of a Panel by the European Communities, WT/DS395/7.

<sup>5</sup>Request for the Establishment of a Panel by Mexico, WT/DS398/6.

<sup>6</sup>Further details regarding the products at issues in this dispute are provided in paragraph 2.2 of the Panel Reports.

<sup>7</sup>WT/L/432.

<sup>8</sup>WT/ACC/CHN/49 and Corr. 1.

<sup>9</sup>Panel Reports, para. 2.1.

<sup>10</sup>Panel Reports, para. 2.1.

3. On 30 March 2010, China requested a preliminary ruling by the Panel regarding the consistency of the complainants' panel requests<sup>11</sup> with the requirements of Article 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"). In particular, China alleged that the complainants' panel requests: (i) did not clearly and specifically identify which measures were being challenged and for which raw materials; and (ii) failed to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly, because the measures identified in Section III of each of the panel requests were not plainly connected to the list of treaty provisions that the complainants claimed were being infringed. The Panel issued its preliminary ruling in two phases.<sup>12</sup> With the exception of one claim by the European Union, the Panel found the complainants' panel requests sufficient to comply with Article 6.2 of the DSU.<sup>13</sup>

4. As regards the substantive claims raised by the complainants, the Panel addressed each of the four types of export restraints imposed by China, as well as aspects of the administration and application of certain export measures. The Panel first considered whether the export duties imposed by China on certain forms of bauxite, coke, fluorspar, magnesium, manganese, silicon metal, yellow phosphorous, and zinc were inconsistent with Paragraph 11.3 of China's Accession Protocol. Paragraph 11.3 requires the elimination of all taxes and charges applied to exports, except as specifically provided for in Annex 6 to the Protocol or as applied in conformity with Article VIII of the GATT 1994. The Panel found that, with the exception of yellow phosphorous, none of the raw materials at issue is listed in Annex 6, and thus the materials are not exempt from the requirement to eliminate export duties. With respect to yellow phosphorous, the Panel found that the 50-per cent duty imposed on exports of yellow phosphorous, challenged by the complainants, had been removed prior to the establishment of the Panel, and therefore did not make findings with regard to that duty.<sup>14</sup>

5. In its defence, China contended that the export duties on certain forms of coke, fluorspar, magnesium, manganese, and zinc were justified under Article XX(b) and (g) of the GATT 1994 because these raw materials were exhaustible natural resources, or because the duties were applied in

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<sup>11</sup>See *supra*, footnotes 3-5.

<sup>12</sup>The first phase of the preliminary ruling was issued to the parties on 7 May 2010 and circulated to WTO Members on 18 May 2010 as document WT/DS394/9, WT/DS395/9, WT/DS/396/8 ("Panel's preliminary ruling (first phase)"). The second phase of the preliminary ruling was issued to the parties on 1 October 2010 and, at the request of the United States and Mexico, circulated only to the third parties ("Panel's preliminary ruling (second phase)"). The first and second phases of the preliminary ruling were attached as Annexes F-1 and F-2 to the Panel Reports. (See Panel Reports, paras. 1.12 and 1.13)

<sup>13</sup>Panel Reports, paras. 7.1-7.3.

<sup>14</sup>Panel Reports, sections VII.B.1-VII.B.4.

order to reduce pollution and to protect human health.<sup>15</sup> However, the Panel found that China could not invoke exceptions under Article XX to justify measures found to be inconsistent with Paragraph 11.3 of China's Accession Protocol, because these exceptions apply only to violations of the GATT 1994, unless specifically incorporated into a non-GATT provision or instrument. The Panel found that Paragraph 11.3 of China's Accession Protocol does not contain any language or reference that would allow recourse to Article XX of the GATT 1994 for justifying China's export duties found to be inconsistent with Paragraph 11.3.<sup>16</sup> Even assuming, *arguendo*, that the exceptions under Article XX(b) and (g) were available to China under Paragraph 11.3 of its Accession Protocol, the Panel found that China had failed to satisfy the requirements of those provisions for the raw materials at issue.<sup>17</sup>

6. With regard to export quotas, the Panel found that the quotas imposed on certain forms of bauxite, coke, fluorspar, silicon carbide, and zinc are inconsistent with Article XI:1 of the GATT 1994. In addressing China's defence that the export quota applied to one form of bauxite known as "refractory-grade bauxite"<sup>18</sup> is justified under Article XI:2(a) of the GATT 1994, the Panel found that the export quota had not been "temporarily applied" in order to "prevent or relieve a critical shortage" of refractory-grade bauxite within the meaning of Article XI:2(a).<sup>19</sup> The Panel also found that China had not demonstrated that its export quotas on refractory-grade bauxite, coke, and silicon carbide were justified under Article XX(b) or (g) of the GATT 1994.<sup>20</sup>

7. Next, the Panel addressed certain aspects of China's administration and allocation of its export quotas. The Panel found that the export performance and minimum registered capital requirements imposed by China on the allocation of certain export quotas are inconsistent with China's "trading

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<sup>15</sup>China did not seek to justify under Article XX the export duties imposed on bauxite, other forms of manganese, or silicon metal.

<sup>16</sup>Panel Reports, section VII.B.5.

<sup>17</sup>Panel Reports, sections VII.D.2-VII.D.4.

<sup>18</sup>We note that the complainants and the Panel sometimes referred to this form of bauxite as "high alumina clay". We will refer to this material throughout these Reports as "refractory-grade bauxite".

<sup>19</sup>Panel Reports, section VII.D.1.

<sup>20</sup>Panel Reports, sections VII.D.2-VII.D.4. The Panel found that China had not demonstrated that its export quotas on coke and silicon carbide are necessary within the meaning of Article XX(b) of the GATT 1994. (*Ibid.*, para. 7.615) The Panel also found that China had not demonstrated that its export quota on refractory-grade bauxite relates to the conservation of exhaustible natural resources and was made effective in conjunction with restrictions on domestic production or consumption pursuant to Article XX(g) of the GATT 1994. (*Ibid.*, para. 7.613) China does not appeal these findings by the Panel. We also note that, before the Panel, China did not seek to justify under Article XX the quotas imposed on other forms of bauxite, fluorspar, or zinc.

rights" obligations under its Accession Protocol and Accession Working Party Report.<sup>21</sup> The Panel, however, rejected the claim that China's prior export performance requirement operates to the detriment and exclusion of foreign enterprises.<sup>22</sup> Furthermore, the Panel found that China's allocation of export quotas through the use of an "operation capacity" criterion contained in Article 19 of China's Measures for the Administration of Export Commodities Quotas<sup>23</sup> ("*Export Quota Administration Measures*") is inconsistent with Article X:3(a) of the GATT 1994, because the lack of any definition, guidelines, or standards on how to apply this criterion necessarily results in unreasonable and non-uniform administration.<sup>24</sup> The Panel also found that China has acted inconsistently with Article X:1 of the GATT 1994 because it failed to publish promptly the total amount and procedure for the allocation of export quotas for zinc.<sup>25</sup> The Panel rejected the claim by the United States and Mexico that China's administration of its export quotas through the involvement of China's Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters (the "CCCMC") results in partial or unreasonable administration inconsistent with Article X:3(a) of the GATT 1994.<sup>26</sup> The Panel also rejected the claims by the United States and Mexico that China's allocation of export quotas for certain forms of bauxite, fluorspar, and silicon carbide through a quota-bidding process, based on a "bid-winning price", is inconsistent with Article VIII:1(a) of the GATT 1994 and Paragraph 11.3 of China's Accession Protocol.<sup>27</sup>

8. Regarding China's export licensing system for certain forms of bauxite, coke, fluorspar, manganese, silicon carbide, and zinc, the Panel found that the system is not *per se* inconsistent with China's obligations under Article XI:1 of the GATT 1994.<sup>28</sup> However, the Panel found that China's export licensing authorities had the discretion to request undefined "other" documents or materials from enterprises applying for such licences, and that this creates uncertainty and constitutes an export restriction prohibited under Article XI:1.<sup>29</sup> The Panel declined to make findings on other claims

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<sup>21</sup>Specifically, the Panel found China's prior export performance and minimum registered capital requirements to be inconsistent with Paragraphs 1.2 and 5.1 of China's Accession Protocol, read with Paragraphs 83(a), 83(b), 83(d), 84(a), and 84(b) of China's Accession Working Party Report. (Panel Reports, paras. 7.657-7.670)

<sup>22</sup>The Panel concluded that China's prior export performance requirement is not inconsistent with Paragraph 5.2 of China's Accession Protocol, read with Paragraphs 84(a) and 84(b) of China's Accession Working Party Report. (Panel Reports, paras. 7.671-7.677)

<sup>23</sup>Measures for the Administration of Export Commodities Quotas, Order No. 12, promulgated by MOFTEC (now MOFCOM) on 20 December 2001 (Panel Exhibits CHN-312 and JE-76).

<sup>24</sup>Panel Reports, paras. 7.746 and 7.752.

<sup>25</sup>Panel Reports, para. 7.807.

<sup>26</sup>Panel Reports, paras. 7.787 and 7.796.

<sup>27</sup>Panel Reports, paras. 7.851 and 7.860.

<sup>28</sup>Panel Reports, para. 7.938.

<sup>29</sup>Panel Reports, para. 7.948.

regarding China's export licensing system.<sup>30</sup> In addition, the Panel found that China imposes a requirement to export at a coordinated minimum export price ("MEP") certain forms of bauxite, coke, fluorspar, magnesium, silicon carbide, yellow phosphorous, and zinc that also constitutes a prohibited export restriction under Article XI:1. The Panel also found that, by failing to publish promptly measures through which it administers its MEP requirement, China has acted inconsistently with its obligations under Article X:1 of the GATT 1994.<sup>31</sup> The Panel, however, declined to make a finding on whether China's administration of the MEP requirement alleged to apply to yellow phosphorous is inconsistent with its obligations under Article X:3(a) of the GATT 1994.<sup>32</sup>

9. On 31 August 2011, China notified the Dispute Settlement Body (the "DSB") of its intention to appeal certain issues of law covered in the Panel Reports and certain legal interpretations developed by the Panel, pursuant to Articles 16.4 and 17 of the DSU, and filed a Notice of Appeal<sup>33</sup> and an appellant's submission pursuant to Rules 20 and 21, respectively, of the *Working Procedures for Appellate Review*<sup>34</sup> (the "*Working Procedures*").

10. On 1 September 2011, the United States, the European Union, and Mexico requested the Appellate Body Division hearing these appeals to extend certain time periods for filing submissions. In their joint request, the complainants referred to Rule 16(2) of the *Working Procedures* and the extensive nature of China's appeal. The complainants also indicated that they wished to coordinate their efforts and submissions to the greatest extent possible. On the same day, the Division invited China and the third participants to comment on the complainants' request. Written comments were received from China, Japan, and Saudi Arabia on 2 September 2011.<sup>35</sup> On the same day, the Division informed the participants and third participants that it had decided to extend the deadline for the filing

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<sup>30</sup>The Panel declined to make a finding on whether China's export licensing system for certain forms of bauxite, coke, fluorspar, manganese, silicon carbide, and zinc is inconsistent with Paragraphs 162 and 165 of China's Accession Working Party Report and Paragraph 1.2 of China's Accession Protocol. (Panel Reports, paras. 7.960-7.973) The Panel also declined to make a finding regarding the inconsistency of China's export licensing system for certain forms of bauxite, coke, fluorspar, manganese, silicon carbide, and zinc with Paragraphs 83 and 84 of China's Accession Working Party Report and Paragraphs 1.2 and 5.1 of China's Accession Protocol. (*Ibid.*, paras. 7.974-7.983)

<sup>31</sup>Panel Reports, paras. 7.1088-7.1102.

<sup>32</sup>Panel Reports, paras. 7.1083-7.1087.

<sup>33</sup>WT/DS394/11, WT/DS395/11, WT/DS398/10 (attached as Annex IV to these Reports).

<sup>34</sup>WT/AB/WP/6, 16 August 2010.

<sup>35</sup>China informed the Division that it opposed the complainants' request. China argued, *inter alia*, that the length of its appeal did not justify a departure from the deadlines contained in the *Working Procedures* for the filing of other appellants' or appellees' submissions. Japan and Saudi Arabia indicated that they had no objection to the extension of time-limits requested by the complainants. They asked, however, that additional time also be granted to third participants for the filing of their submissions, in the event that the Division were to decide to grant additional time to the participants. No other third participants submitted comments to the Division.

of any Notice of Other Appeal and other appellant's submission until 6 September 2011; the deadline for the filing of the complainants' appellees' submissions until 22 September 2011; the deadline for the filing of China's appellee's submission until 26 September 2011; and the deadline for the filing of third participants' submissions and notifications until 29 September 2011.

11. On 6 September 2011, the United States, the European Union, and Mexico each notified the DSB of its intention to appeal certain issues of law and certain legal interpretations developed by the Panel in Panel Reports WT/DS394/R, WT/DS395/R, and WT/DS398/R, respectively, pursuant to Articles 16.4 and 17 of the DSU, and filed a Notice of Other Appeal<sup>36</sup> and an other appellant's submission pursuant to Rules 23(1) and (3) and 26(2) of the *Working Procedures*. On 22 September 2011, the United States and Mexico filed a joint appellees' submission<sup>37</sup> and the European Union filed an appellee's submission.<sup>38</sup> On 26 September 2011, China filed an appellee's submission.<sup>39</sup>

12. On 28 September 2011, Colombia filed a third participant's submission.<sup>40</sup> On the same day, Ecuador notified its intention to appear at the oral hearing as a third participant.<sup>41</sup> On 29 September 2011, Brazil, Canada, Japan, Korea, Saudi Arabia, and Turkey each filed a third participant's submission.<sup>42</sup> On the same day, Argentina, Chile, India, and Norway each notified its intention to appear at the oral hearing as a third participant.<sup>43</sup> On 2 November 2011, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu also notified the Secretariat of its intention to appear at the oral hearing as a third participant.<sup>44</sup>

13. On 29 October 2011, the Chair of the Appellate Body informed the Chair of the DSB that, due to the significant size, scope, and timing of this appeal and the demands that it, along with the two other appeals under review, placed on the Appellate Body and translation services, the

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<sup>36</sup>WT/DS394/12; WT/DS395/12; WT/DS398/11 (attached as Annexes V, VI, and VII to these Reports, respectively).

<sup>37</sup>Pursuant to Rules 22, 23(4), and 26(2) of the *Working Procedures*.

<sup>38</sup>Pursuant to Rules 22, 23(4), and 26(2) of the *Working Procedures*.

<sup>39</sup>Pursuant to Rules 22, 23(4), and 26(2) of the *Working Procedures*.

<sup>40</sup>Pursuant to Rules 24(1) and 26(2) of the *Working Procedures*.

<sup>41</sup>Pursuant to Rules 24(2) and 26(2) of the *Working Procedures*.

<sup>42</sup>Pursuant to Rules 24(1) and 26(2) of the *Working Procedures*.

<sup>43</sup>Pursuant to Rules 24(2) and 26(2) of the *Working Procedures*.

<sup>44</sup>On 2 November 2011, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu submitted its delegation list for the oral hearing to the Appellate Body Secretariat and the participants and third participants in this dispute. For the purpose of this appeal, we have interpreted this action as a notification expressing its intention to attend the oral hearing pursuant to Rule 24(4) of the *Working Procedures*.

Appellate Body Report in this appeal would be circulated to WTO Members no later than 31 January 2012.<sup>45</sup>

14. On 1 November 2011, China requested an extension of the time allocated for its opening statement at the oral hearing. On the same day, the Division invited the other participants and the third participants to comment on China's request. Written comments were submitted by the United States, the European Union, and Mexico on 2 November 2011.<sup>46</sup> By letter of 3 November 2011, the Division informed the participants and third participants that it considered the time allocated for opening statements to reflect an appropriate balance in the light of the high number of participants and third participants in the dispute and the time required in order to provide the participants and third participants with a full opportunity to respond to questions that would be posed by the Division at the oral hearing. Consequently, the Division decided not to adjust the amount of time it had allocated to the participants for their opening statements at the oral hearing.

15. The oral hearing in this appeal was held on 7-9 November 2011. The participants and 11 of the third participants—Brazil, Canada, Chile, Colombia, Ecuador, India, Japan, Korea, Norway, Saudi Arabia, and Turkey—made oral statements. The participants and third participants responded to questions posed by the Members of the Appellate Body Division hearing the appeal.

## **II. Arguments of the Participants and the Third Participants**

### *A. Claims of Error by China – Appellant*

#### 1. Article 6.2 of the DSU

16. China requests the Appellate Body to reverse the Panel's finding that Section III of each of the complainants' panel requests, entitled "Additional Restraints Imposed on Exportation", complies with the requirements of Article 6.2 of the DSU, and to find, instead, that Section III of the panel requests does not comply with Article 6.2, with the exception of the complainants' claims regarding the non-publication of export measures concerning zinc.<sup>47</sup> Consequently, China requests the

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<sup>45</sup>WT/DS394/13, WT/DS395/13, WT/DS398/12.

<sup>46</sup>The United States, the European Union, and Mexico opposed China's request for additional time. They submitted that the time allocated to China was greater than in other appeals involving multiple complainants, and was also already proportionally greater than that given to other participants in situations comparable to that of China in this dispute.

<sup>47</sup>China's appellant's submission, para. 5 (referring to Panel's preliminary ruling (second phase), Panel Reports, Annex F-2, para. 77; and Panel Reports, para. 7.3(b)).

Appellate Body to reverse the Panel's findings made pursuant to other claims allegedly contained in Section III of the panel requests.<sup>48</sup>

17. China contends that the Panel correctly concluded that the panel requests set out subsets of claims concerning subsets of measures, rather than raising all claims listed in Section III of the panel requests in relation to all measures listed in that section of the panel requests. However, the panel requests fail to identify which claims were made with respect to which measures. For China, in order to comply with Article 6.2 of the DSU, the complainants were required plainly to connect the 37 listed measures with the 13 listed treaty provisions with sufficient precision to identify the specific combination of measure(s) and claim(s) at issue.

18. China explains that subsequent submissions by the complainants reveal substantial differences between the United States and Mexico, on the one hand, and the European Union, on the other hand, with respect to the specific combination of measures and claims at issue. Therefore, while the panel requests are nearly identical, the "problems" presented in the three panel requests are considerably different, thus giving the misleading impression that the three complainants referred the same matter to the DSB, when in reality the matters are different.

19. Furthermore, China alleges that the Panel found that the panel requests comply with Article 6.2 not on the basis of the panel requests themselves, but, rather, on additional information contained in subsequent submissions by the parties. China submits that this amounts to legal error, because, as found by the Appellate Body in *EC and certain member States – Large Civil Aircraft*, Article 6.2 requires that a panel request, as it existed at the time of filing, comply with Article 6.2, and that a party's submissions during a panel proceeding cannot cure a defect in a panel request.<sup>49</sup> China alleges that the Panel, rather than respecting these findings, instead encouraged the complainants to correct defects in the panel requests in subsequent submissions.<sup>50</sup>

20. China contends that the Panel observed defects in Section III of the panel requests, and points to several features of the Panel's reasoning that, in China's view, demonstrate that the Panel itself recognized that the panel requests did not provide the necessary connection between the 37 listed measures and the 13 listed treaty provisions. First, the Panel did not accept the complainants'

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<sup>48</sup>Referring specifically to the findings in the Panel Reports in paragraphs 7.669, 7.670, 7.678, 7.756, 7.807, 7.958, 7.1082, 7.1102, 7.1103, 8.4(a)-(b), 8.5(b), 8.6(a)-(b), 8.11(a), (c), (e), and (f), 8.12(b), 8.13(a)-(b), 8.18(a)-(b), 8.19(b), and 8.20(a)-(b).

<sup>49</sup>China's appellant's submission, para. 65 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 642).

<sup>50</sup>China's appellant's submission, para. 66.

argument that there was no need to establish any connection between the measures and the claims. Second, in the first phase of its preliminary ruling, the Panel requested the complainants to clarify which of the listed measures were alleged to be inconsistent with which specific WTO obligation. Third, the Panel requested again, after the first Panel meeting with the parties, that the complainants clarify which specific WTO provision(s) each of the measures was allegedly violating. Finally, the Panel pointed to no language in the panel requests that indicated that the complainants had in fact established the connection, but instead relied on the complainants' subsequent submissions as the basis for its finding that the panel requests comply with Article 6.2.

21. China further argues that, although the Panel stated that the complainants' first written submissions provided "sufficient connections" between the measures and the claims at issue, the complainants in fact provided the connections only in their response to Panel Question 2 following the first Panel meeting. The Panel expressly acknowledged this fact when it noted that, in their first written submissions, the complainants failed to "directly address" the connections between the measures and claims at issue.<sup>51</sup> Instead, submits China, all three examples listed by the Panel to illustrate that the complainants had in fact connected the measures and claims at issue are taken from the complainants' response to Panel Question 2 after the first Panel meeting, and not from the panel requests or the first written submissions.

22. Finally, China claims that the Panel frustrated China's due process rights under Article 6.2 of the DSU, in particular, China's right to begin preparing its defence on the basis of the panel requests and its right to have the scope of the dispute unaltered during the course of the proceedings. China argues that, with respect to the claims listed in Section III of the panel requests, it was impossible for China to begin preparing its defence when the panel requests were filed, because the measures implicated by the different narrative paragraphs, and the claims made regarding those measures, could not be identified.

## 2. The Panel's Recommendations

23. On appeal, China seeks review of the Panel's recommendations concerning export duties and export quotas "to the extent that [these] recommendations apply to annual replacement measures" adopted after the establishment of the Panel on 21 December 2009.<sup>52</sup> China argues that the complainants had excluded such measures from the scope of the dispute and hence, by making

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<sup>51</sup>China's appellant's submission, para. 74 (referring to Panel's preliminary ruling (second phase), Panel Reports, Annex F-2, para. 32).

<sup>52</sup>China's appellant's submission, paras. 99 and 136.

recommendations extending to such measures, the Panel acted inconsistently with its obligations under Article 7.1 of the DSU; failed to make an objective assessment of the matter under Article 11 of the DSU; and made recommendations on measures that were not part of the matter before it, inconsistently with Article 19.1 of the DSU.

24. China highlights that, under Article 7.1 of the DSU, a panel must respect the mandate conferred upon it through its terms of reference. This conclusion has been "consistently repeated" by panels and the Appellate Body<sup>53</sup>, and it is well established that "panels 'cannot assume jurisdiction that [they] do not have'."<sup>54</sup> Although, typically, a panel's terms of reference are established by a panel request, a complainant can limit the panel's terms of reference in several ways—for example, by withdrawing a claim regarding a measure or by abandoning a complaint entirely. In the present dispute, the complainants' decision to abandon certain of their claims meant that the Panel could not make recommendations regarding such claims. In China's view, the Panel acted inconsistently with Article 7.1 of the DSU by permitting the complainants to "evade" the consequences of their own decision to withdraw annual replacement measures from the scope of the dispute.<sup>55</sup>

25. China further submits that, by making recommendations regarding annual replacement measures, the Panel failed to make an objective assessment of the matter before it as required under Article 11 of the DSU. When a panel makes recommendations regarding measures that are not a part of the "matter" before it, it confers an "advantage" on the complainant, in that it benefits from recommendations regarding measures that it did not challenge, and places the respondent at a "disadvantage", by subjecting it to implementation obligations regarding measures that were not within the scope of the dispute.<sup>56</sup> China asserts that such an approach lacks the "objectivity" required under Article 11.<sup>57</sup>

26. China further argues that, in making recommendations regarding the "series of measures" with a prospective life extended through annual replacement measures, the Panel acted inconsistently with Article 19.1 of the DSU.<sup>58</sup> In China's view, there is a textual link between a panel's terms of

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<sup>53</sup>China's appellant's submission, para. 137 (referring to Appellate Body Report, *Chile – Price Band System*, para. 168; Appellate Body Report, *India – Patents (US)*, para. 92; Appellate Body Report, *US – Carbon Steel*, paras. 172-174; Panel Report, *US – Continued Zeroing*, para. 7.63; and Appellate Body Report, *US – Gambling*, para. 281).

<sup>54</sup>China's appellant's submission, para. 137 (referring to Appellate Body Report, *India – Patents (US)*, para. 92).

<sup>55</sup>China's appellant's submission, paras. 141-143. (emphasis omitted)

<sup>56</sup>China's appellant's submission, paras. 145 and 146.

<sup>57</sup>China's appellant's submission, para. 146.

<sup>58</sup>China's appellant's submission, para. 153.

reference under Article 7.1, its duty to make an objective assessment under Article 11, and its authority to make recommendations under Article 19.1. Specifically, the measures that may be the subject of recommendations under Article 19.1 are the same measures to which Articles 7.1 and 11 refer, that is, the measures included in the panel's terms of reference. China highlights that the Panel made recommendations regarding a "so-called 'series of measures'", attributing to this concept an "ongoing legal character stretching into the future", despite the fact that the complainants had argued that no recommendations could or should be made regarding annual replacement measures. China also notes that the complainants never argued that the export duty and export quota measures at issue in this dispute have prospective application through annual replacement measures.<sup>59</sup>

27. China also takes issue with the Panel's conclusion that it could make recommendations extending to annual replacement measures in order to "ensure that the dispute settlement system functions efficiently in resolving disputes".<sup>60</sup> Referring to Articles 3.4 and 3.7 of the DSU, the Panel was "concerned" that, if it did not address annual replacement measures, it would not effectively resolve the dispute.<sup>61</sup> However, since the complainants had decided to exclude annual replacement measures from the dispute, there was no dispute to resolve regarding annual replacement measures. Past disputes, including *US – Continued Zeroing*, show that the WTO dispute settlement system is "perfectly effective" in resolving disputes regarding measures with general and prospective application.<sup>62</sup> China asserts that there is a crucial difference between such disputes and the present one, in which the complainants "actively decided to exclude" annual replacement measures from the dispute.<sup>63</sup> Since the complainants were "well aware" that they could pursue a claim against annual replacement measures, but chose not to, the complainants must bear the consequences of their decision.<sup>64</sup>

### 3. Applicability of Article XX of the GATT 1994

28. China alleges various errors in the Panel's analysis and requests the Appellate Body to reverse the Panel's finding that China may not seek to justify export duties found to be inconsistent with Paragraph 11.3 of China's Accession Protocol pursuant to Article XX of the GATT 1994. Specifically, China contends that the Panel erred in determining that there is "no textual basis" in China's Accession Protocol for its right to invoke Article XX in defence of a claim under

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<sup>59</sup>China's appellant's submission, para. 152.

<sup>60</sup>China's appellant's submission, para. 160 (quoting Panel Reports, para. 7.30).

<sup>61</sup>China's appellant's submission, para. 161.

<sup>62</sup>China's appellant's submission, para. 164.

<sup>63</sup>China's appellant's submission, para. 165. (emphasis omitted)

<sup>64</sup>China's appellant's submission, para. 166.

Paragraph 11.3.<sup>65</sup> According to China, the Panel's finding that Paragraph 11.3 excludes recourse to Article XX of the GATT 1994 was based on the Panel's erroneous assumption that the absence of language expressly granting the right to regulate trade in a manner consistent with Article XX means that China and other Members intended to deprive China of that right.

(a) Paragraph 11.3 of China's Accession Protocol

29. China observes that Paragraph 11.3 of its Accession Protocol requires that it eliminate export taxes and charges, unless they are specifically provided for in Annex 6 thereto or applied consistently with Article VIII of the GATT 1994. As such, the obligation under Paragraph 11.3 is first "qualified" by Annex 6 of China's Accession Protocol, which provides a schedule of the maximum export duty rates applicable to 84 products, along with a Note that "sets forth an exception to China's obligations regarding export duties".<sup>66</sup> At the Panel stage, the European Union claimed that China had violated its obligations under Annex 6 "by failing to consult with affected Members prior to the imposition of export duties on particular forms of bauxite, coke, fluorspar, magnesium, manganese, silicon metal and zinc, none of which is among the 84 listed products in Annex 6".<sup>67</sup> China further emphasizes that the Panel ruled in favour of the European Union, concluding that China has acted inconsistently with its obligations under Annex 6 because it failed to consult with other affected WTO Members prior to imposing export duties on these products.<sup>68</sup> Highlighting that none of the products subject to the European Union's claim is included in the Annex 6 schedule, China argues that the European Union's claim and the Panel's ruling necessarily mean that "the exception in Annex 6 permits China to impose export duties on all products, provided there are 'exceptional circumstances', and that China consults with affected Members."<sup>69</sup>

30. China argues that the reference to "exceptional circumstances" in the Note to Annex 6 demonstrates a "substantive overlap" between the scopes of the exceptions set forth in Annex 6 to China's Accession Protocol and Article XX of the GATT 1994, respectively.<sup>70</sup> Although the Note does not prescribe the specific circumstances in which the Annex 6 exception would apply, the ordinary meaning of "exceptional" establishes that these circumstances "must be unusual and

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<sup>65</sup>China's appellant's submission, para. 190.

<sup>66</sup>China's appellant's submission, para. 212.

<sup>67</sup>China's appellant's submission, para. 213 (referring to European Union's first written submission to the Panel, paras. 254, 258, 262, 266, 270, 274, 278, 282, 286, 290, 294, 298, 302, 306, and 310).

<sup>68</sup>China's appellant's submission, para. 214.

<sup>69</sup>China's appellant's submission, para. 215.

<sup>70</sup>China's appellant's submission, para. 216.

special".<sup>71</sup> China asserts that the circumstances provided in the various subparagraphs of Article XX are "exceptional" within the meaning of the Note to Annex 6 because they allow a Member to depart from an "affirmative obligation", and because the circumstances enumerated in Article XX "are both unusual and special".<sup>72</sup> This demonstrates that the obligation to eliminate export duties is "not absolute" and "unqualified", and that China has "retained its inherent right to regulate trade using export duties to promote non-trade interests in 'exceptional circumstances'".<sup>73</sup> China adds that, by allowing China to adopt otherwise WTO-inconsistent export duties in "exceptional circumstances", the Note to Annex 6 demonstrates China's and other WTO Members' shared intent that China may have recourse to the "exceptional circumstances" set out in Article XX to justify export duties. China also argues that the Panel's finding that a "provision-specific" exception in Paragraph 11.3 of China's Accession Protocol precludes the applicability of Article XX is erroneous, because it is not "uncommon" to find provision-specific exceptions coupled with a right of recourse to more general exceptions, as in Article XI:2 of the GATT 1994.<sup>74</sup>

31. China claims that the reference to Article VIII of the GATT 1994 in Paragraph 11.3 of its Accession Protocol confirms the applicability of Article XX of the GATT 1994. China reasons that Paragraph 11.3 requires that export taxes and charges be applied in conformity with the provisions of Article VIII of the GATT 1994. According to China, "[i]f they are not, the measure violates both Paragraph 11.3 and Article VIII."<sup>75</sup> For China, "[i]n the event that a measure violates Article VIII of the GATT 1994, it may, of course, be justified under Article XX of the GATT 1994", such that "[China] is not deprived of its right to justify a measure that violates Article VIII through recourse to Article XX simply because a complainant chooses to bring a claim under Paragraph 11.3" of China's Accession Protocol.<sup>76</sup> In China's view, the fact that Article VIII applies to certain export charges and fees covered by Paragraph 11.3, and not specifically to export duties, does not render the reference to Article VIII irrelevant, as the reference shows that the obligations under Paragraph 11.3 are not absolute and unqualified, and that China did not agree to abandon its right to resort to Article XX.

(b) Context from the *WTO Agreement*

32. China asserts that, by virtue of Paragraph 342 of China's Accession Working Party Report and Paragraph 1.2 of its Accession Protocol, Paragraph 170 of the Accession Working Party Report

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<sup>71</sup>China's appellant's submission, para. 216.

<sup>72</sup>China's appellant's submission, para. 218.

<sup>73</sup>China's appellant's submission, para. 219. (emphasis omitted)

<sup>74</sup>China's appellant's submission, para. 222.

<sup>75</sup>China's appellant's submission, para. 224.

<sup>76</sup>China's appellant's submission, paras. 224 and 225.

and Paragraph 11.3 of China's Accession Protocol are on an "equal legal footing", and are "integral parts" of the same accession agreement, as well as the *WTO Agreement*.<sup>77</sup> In China's view, the fact that the title of the subsection of China's Accession Working Party Report under which Paragraph 170 falls and the title of the provision that includes Paragraph 11.3 of its Accession Protocol are "exactly the same" provides a "powerful textual indication" that the subject matter of Paragraph 11.3 and Paragraph 170 overlap.<sup>78</sup> Since both provisions apply to "'taxes' and 'charges' on 'exports'", the use of identical language suggests that there is a "very considerable overlap" between the measures to which the provisions apply and that they impose "cumulative obligations" with respect to "taxes and charges".<sup>79</sup>

33. Referring to the ordinary meaning of the terms "taxes" and "charges", and the substantive overlap between Paragraph 11.3 and Paragraph 170, China disagrees with the Panel's conclusion that Paragraph 170 does not apply to export duties, whereas Paragraph 11.3 does. In so finding, the Panel erred in relying on Paragraph 155 and Paragraph 156 of China's Accession Working Party Report, which, the Panel found, deal with export duties and do not incorporate Article XX of the GATT 1994. Unlike Paragraph 170, Paragraphs 155 and 156 are not incorporated into China's Accession Protocol and are, therefore, of "secondary importance" in interpreting the scope of China's obligations.<sup>80</sup>

34. China also takes issue with the Panel's reasoning that Paragraph 170 does not apply to export duties because it applies to domestic taxes. China argues that, similar to Paragraph 11.3, Paragraph 170 refers to "'taxes' and 'charges' in relation to 'exports'", and that neither provision refers to "domestic" or "internal" taxes and charges.<sup>81</sup> Although section IV.D of China's Accession Working Party Report, of which Paragraph 170 is a part, deals with "internal policies", the heading of the subsection under which Paragraph 170 falls (IV.D.1.) is "Taxes and Charges Levied on Imports and Exports".<sup>82</sup> Finally, China argues that Paragraph 171, dealing with subsidies contingent on exportation, shows that this subsection "may deal with" export duties.<sup>83</sup>

35. China disagrees with the Panel's finding that Paragraph 170 essentially repeats the commitments existing under certain GATT 1994 rules. The text of Paragraph 170 indicates that its commitments therein extend to all of its "WTO obligations", including, but not limited to, those

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<sup>77</sup>China's appellant's submission, para. 230.

<sup>78</sup>China's appellant's submission, para. 232. (emphasis omitted)

<sup>79</sup>China's appellant's submission, para. 233. (emphasis omitted)

<sup>80</sup>China's appellant's submission, para. 237.

<sup>81</sup>China's appellant's submission, para. 239. (original emphasis)

<sup>82</sup>China's appellant's submission, para. 239. (emphasis omitted)

<sup>83</sup>China's appellant's submission, para. 239.

imposed by the GATT 1994.<sup>84</sup> The phrase "WTO obligations" in Paragraph 170 includes obligations under Paragraph 11.3 of China's Accession Protocol. If export duties are inconsistent with its obligations under Paragraph 11.3, they are also inconsistent with Paragraph 170. Based on this observation, China argues that "any flexibilities that Paragraph 170 affords to China to adopt otherwise WTO-inconsistent export 'taxes' and 'charges' must extend equally to Paragraph 11.3."<sup>85</sup>

36. China highlights that the Panel appeared "to agree that the language in Paragraph 170 permits recourse to Article XX", at least in the context of Paragraphs 11.1 and 11.2 of China's Accession Protocol.<sup>86</sup> Specifically, the Panel's findings that the inclusion of the phrase "shall be in conformity with the GATT 1994" in Paragraphs 11.1 and 11.2, and its "deliberate exclusion" in Paragraph 11.3, "reflected 'agreement'" that Article XX does not apply to Paragraph 11.3, are significant since they "demonstrate the Panel's acceptance" that such language incorporates Article XX.<sup>87</sup> However, in China's view, if such language can incorporate Article XX into Paragraphs 11.1 and 11.2, "the same language" in Paragraph 170 must also be "sufficient" to incorporate Article XX.<sup>88</sup> China asserts that a harmonious interpretation of Paragraph 11.3 and Paragraph 170 "dictates" that, if an export duty is in full conformity with China's obligations under Article XX pursuant to Paragraph 170, it "must also be in full conformity" with China's obligations under Paragraph 11.3.<sup>89</sup>

37. China takes issue with the Panel's reasoning under which "China must eliminate export duties pursuant to Paragraph 11.3, even if these duties serve legitimate public health or conservation goals."<sup>90</sup> China argues that the Panel's approach is contrary to the text, context, and object and purpose of the *WTO Agreement* and "leads to an absurd outcome".<sup>91</sup> Interpreting Paragraph 11.3 of China's Accession Protocol "to mean that China has abandoned the right to impose export duties in a manner consistent with Article XX of the GATT 1994, as the Panel did, is irreconcilable with the fact that", under Article XI:1, China can impose export quotas in a manner consistent with Article XX.<sup>92</sup> China adds that, "[i]f the Panel's interpretation were accepted, China could not impose, for example, an export duty in a manner consistent with Article XX of the GATT 1994, whereas it could justify under Article XX an export quota on the same goods, and with equivalent trade restrictive and welfare

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<sup>84</sup>China's appellant's submission, para. 244.

<sup>85</sup>China's appellant's submission, para. 246.

<sup>86</sup>China's appellant's submission, para. 255. (emphasis omitted)

<sup>87</sup>China's appellant's submission, paras. 256 and 257. (emphasis omitted)

<sup>88</sup>China's appellant's submission, para. 257.

<sup>89</sup>China's appellant's submission, para. 259.

<sup>90</sup>China's appellant's submission, para. 268.

<sup>91</sup>China's appellant's submission, paras. 268 and 269.

<sup>92</sup>China's appellant's submission, para. 269.

effects."<sup>93</sup> Further, the preamble of the *WTO Agreement* confirms that obligations in the covered agreements, such as Paragraph 11.3 of China's Accession Protocol, do not impose absolute prohibitions on the right to regulate trade. China considers that Members are entitled to regulate trade, for example, "through export duties, for the purpose of pursuing the objectives set forth in the Preamble, provided they do so in conformity with the requirements in Article XX of the GATT 1994".<sup>94</sup>

(c) The Inherent Right to Regulate Trade

38. China argues that, "like any other State", it enjoys the right to regulate trade.<sup>95</sup> Referring to the Appellate Body report in *China – Publications and Audiovisual Products*, China asserts that such a right to regulate trade is an "inherent right" vested in States, and "not a 'right bestowed by international treaties such as the *WTO Agreement*'".<sup>96</sup> China further argues that the preamble of the *WTO Agreement* recognizes that the WTO covered agreements, including China's Accession Protocol, "preserve the basic disciplines underlying the multilateral trading system, which includes respect for the inherent right to regulate trade".<sup>97</sup> In acceding to the WTO, Members agree to exercise their inherent right in conformity with disciplines set out in the covered agreements, either by complying with affirmative obligations or with the "obligations attaching to an exception, such as those included in Article XX".<sup>98</sup> China also refers to the texts of the first recital of the preamble of the *Agreement on the Application of Sanitary and Phytosanitary Measures* (the "*SPS Agreement*"), the sixth recital of the preamble of the *Agreement on Technical Barriers to Trade* (the "*TBT Agreement*"), the preamble of the *Agreement on Import Licensing Procedures* (the "*Import Licensing Agreement*"), the fourth recital of the preamble of the *General Agreement on Trade in Services* (the "*GATS*"), and the preamble and Article 8.1 of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (the "*TRIPS Agreement*") to argue that, by acceding to the WTO, Members preserve their right to regulate trade to achieve legitimate objectives.<sup>99</sup>

39. In China's view, the appropriate interpretative question is whether Paragraph 11.3 of China's Accession Protocol explicitly excludes this right and not whether the language explicitly reaffirms this

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<sup>93</sup>China's appellant's submission, para. 269.

<sup>94</sup>China's appellant's submission, para. 270.

<sup>95</sup>China's appellant's submission, para. 275.

<sup>96</sup>China's appellant's submission, para. 275 (quoting Appellate Body Report, *China – Publications and Audiovisual Products*, para. 222; and referring to Panel Report, *Argentina – Hides and Leather*, para. 11.98).

<sup>97</sup>China's appellant's submission, para. 276.

<sup>98</sup>China's appellant's submission, para. 278.

<sup>99</sup>China's appellant's submission, para. 281.

right. China's Accession Protocol and Accession Working Party Report contain no language showing that China "abandon[ed]" its inherent right to regulate trade to promote fundamental non-trade objectives. Instead, its accession commitments "indicate" that it retains this right.<sup>100</sup> China emphasizes that its interpretation of Paragraph 11.3 does not mean that China can evade its WTO obligations, as it still must demonstrate compliance with the "conditions and limitations" of Article XX of the GATT 1994.<sup>101</sup> According to China, the "suggestion" that an "inherent power" can be denied "unless expressly re-affirmed" is contrary to the "harmonious interpretation" of the covered agreements required by the Appellate Body.<sup>102</sup> Moreover, "[a]ny such suggestion turns *inherent* rights into *acquired* rights, autonomy into *heteronomy*, and the *single* undertaking into a series of *detached* agreements".<sup>103</sup> China further alleges that the Panel's interpretation distorts the balance of rights and obligations that were established when China acceded to the WTO.

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

40. China requests the Appellate Body to reverse the Panel's interpretation and application of Article XI:2(a) of the GATT 1994 reached as part of the Panel's finding that China had not demonstrated that its export quota on refractory-grade bauxite is temporarily applied to prevent or relieve a critical shortage.<sup>104</sup> In particular, China alleges that the Panel erred in its interpretation and application of the term "temporarily" and in its interpretation of the term "critical shortages", because it effectively excluded from the scope of the provision export restrictions on non-renewable, exhaustible natural resources. In addition, China alleges that the Panel failed to make an objective assessment of the matter as required by Article 11 of the DSU.

41. First, with respect to the Panel's interpretation of the term "temporarily", China agrees with the Panel's finding that the word "temporarily" "suggest[s] a fixed time-limit for the application of a measure".<sup>105</sup> The Panel, however, subsequently "adjusted" its interpretation of the term "temporarily" to exclude the "long-term" application of export restrictions, by stating that Article XI:2(a) could not be interpreted "to permit the long-term application of ... export restrictions" or to "permit long-term

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<sup>100</sup>China's appellant's submission, para. 286.

<sup>101</sup>China's appellant's submission, para. 288.

<sup>102</sup>China's appellant's submission, para. 291 (referring to Appellate Body Report, *Argentina – Footwear (EC)*, para. 81; Appellate Body Report, *India – Patents (US)*, para. 45; Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 12, DSR 1996:I, 97, at 106; Appellate Body Report, *Korea – Dairy*, para. 81; and Appellate Body Report, *US – Gasoline*, p. 25, DSR 1996:I, 3, at 23).

<sup>103</sup>China's appellant's submission, para. 291. (original emphasis)

<sup>104</sup>In particular, China refers to paragraphs 7.257, 7.258, 7.297-7.302, 7.305, 7.306, 7.346, 7.349, 7.351, 7.354, and 7.355 of the Panel Reports. (China's appellant's submission, paras. 299 and 388)

<sup>105</sup>China's appellant's submission, para. 335 (quoting Panel Reports, para. 7.255).

measures to be imposed".<sup>106</sup> The Panel's approach suggests that Article XI:2(a) imposes an absolute limit on the length of time an export restriction may be imposed. China, however, maintains that the words "to prevent or relieve" in Article XI:2(a) suggest that the term "temporarily" does not mark a "bright line" moment in time after which an export restriction has necessarily been maintained for too long.<sup>107</sup> Instead, whether an export restriction is applied "temporarily" depends on the period of time required to prevent or relieve the critical shortage. China also argues that the Panel erred in finding that Article XI:2(a) and Article XX(g) are mutually exclusive, and contends that this finding was the basis for the Panel's erroneous interpretation of the term "temporarily" in Article XI:2(a). China submits that the two provisions are not mutually exclusive, but apply cumulatively.

42. Second, with regard to the Panel's application of the term "temporarily", China alleges that the Panel failed to take into consideration the fact that China's export restrictions on refractory-grade bauxite are subject to annual review. China faults the Panel for "simply assum[ing]" that China's restriction on exports of refractory-grade bauxite will be maintained indefinitely.<sup>108</sup> China submits that, at the close of each year, the factual circumstances are assessed in the light of the legal standard set forth in Article XI:2(a) to establish whether the export restriction should be maintained.

43. Third, China maintains that the Panel erred in its interpretation of the term "critical shortages" as excluding shortages caused by the "finite" nature or "limited reserve[s]" of a product.<sup>109</sup> China agrees with the Panel's interpretation of the term "critical shortages" as meaning a deficiency in quantity "involving suspense or grave fear", of "decisive importance".<sup>110</sup> China alleges, however, that the Panel erred in excluding from the scope of Article XI:2(a) shortages caused by the limited, finite, or exhaustible nature of the product. China maintains that, had the drafters intended to limit the applicability of Article XI:2(a) to renewable resources, such as "foodstuffs", they would have indicated that by employing the term "other renewable products", instead of "other products", or by explicitly excluding "exhaustible natural resources" from the scope of Article XI:2(a).<sup>111</sup> For China, the Panel's interpretation leads to "absurd" distinctions, because Article XI:2(a) cannot be used to justify export restrictions on exhaustible natural resources, such as bauxite, but it could be used to

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<sup>106</sup>China's appellant's submission, para. 336 (quoting Panel Reports, paras. 7.298 and 7.305; and referring to para. 7.349).

<sup>107</sup>China's appellant's submission, para. 340.

<sup>108</sup>China's appellant's submission, para. 349 (quoting the Panel's statement at paragraph 7.350 of its Reports that there is "every indication that [China's restriction on exports of refractory-grade bauxite] will remain in place until the reserves have been depleted").

<sup>109</sup>China's appellant's submission, para. 356 (quoting Panel Reports, paras. 7.297 and 7.305).

<sup>110</sup>China's appellant's submission, para. 357 (quoting *Oxford English Dictionary Online*, 2nd edn (Oxford University Press, 1989) (Panel Exhibit CHN-189)).

<sup>111</sup>China's appellant's submission, paras. 361 and 362. (emphasis omitted)

justify restrictions concerning natural resources that can be renewed, such as wheat.<sup>112</sup> In China's view, the fact that a product cannot be renewed may exacerbate the consequences of a shortage, thus making it particularly important to impose a restriction that will alleviate the shortage.

44. China alleges that the Panel committed an additional error in its interpretation of "critical shortage" by assuming that there is no possibility for an existing shortage of an exhaustible natural resource ever to cease to exist, and that, therefore, it would never be possible to "relieve or prevent" the shortage through an export restriction applied on a temporary basis.<sup>113</sup> China submits that a shortage of an exhaustible natural resource could cease to exist independently from depletion, for instance, where additional reserves or new extraction methods are discovered, or where substitutes or new technologies replace the product. China adds that, elsewhere in its analysis, the Panel recognized that shortages of exhaustible natural resources are not inevitable, and that advances in reserve detection or extraction techniques could alleviate or eliminate a shortage of an exhaustible natural resource.

45. Finally, China advances two separate claims that the Panel failed to make an objective assessment of the matter pursuant to Article 11 of the DSU. First, the Panel failed to assess properly evidence that China's export restriction on refractory-grade bauxite is annually reviewed and renewed. China submits that evidence relating to China's annual review procedure demonstrates that the export restriction will be maintained only as long as justified to prevent or relieve the critical shortage of refractory-grade bauxite. For China, this evidence shows that the Panel erred in assuming that the restriction "will remain in place until the reserves have been depleted".<sup>114</sup> Second, China asserts that the Panel employed internally inconsistent or incoherent reasoning in stating, on the one hand, that "there is no possibility for an existing shortage [of an exhaustible natural resource] ever to cease to exist" such that "it will not be possible to 'relieve or prevent' it through an export restriction applied on a temporary basis"<sup>115</sup> and acknowledging, on the other hand, that "advances in reserve detection or extraction techniques", or the availability of "additional capacity", could "alleviate or eliminate" a shortage of an exhaustible natural resource, or that "new technology or conditions" might "lessen demand" for the resource.<sup>116</sup>

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<sup>112</sup>China's appellant's submission, para. 363.

<sup>113</sup>China's appellant's submission, para. 366 (quoting Panel Reports, para. 7.297).

<sup>114</sup>China's appellant's submission, para. 355 (quoting Panel Reports, para. 7.350).

<sup>115</sup>China's appellant's submission, para. 373 (referring to Panel Reports, para. 7.297). (emphasis added by China omitted)

<sup>116</sup>China's appellant's submission, para. 373 (referring to Panel Reports, paras. 7.348 and 7.351).

5. Article XX(g) of the GATT 1994

46. China had also contended before the Panel that, even if its quotas on refractory-grade bauxite did not fall within the exception of Article XI:2(a), the quotas could be justified under Article XX(g) of the GATT 1994. However, the Panel found that China had not demonstrated that its quotas met the requirements of Article XX(g). China requests the Appellate Body to find that the Panel erred in interpreting the phrase "made effective in conjunction with" in Article XX(g) of the GATT 1994 to mean that, in order to be justified under Article XX(g), a challenged measure must satisfy two cumulative conditions: first, it must "be applied jointly with" restrictions on domestic production or consumption; and, second, the "purpose" of the challenged measure must be to make effective restrictions on domestic production or consumption.<sup>117</sup> China argues that the second element of the Panel's interpretation is inconsistent with the ordinary meaning of the phrase "made effective in conjunction with". China, however, does not appeal the Panel's ultimate conclusion that China has not demonstrated that its export quota on refractory-grade bauxite is justified pursuant to Article XX(g).

47. China submits that the Appellate Body's interpretation of the term "in conjunction with" in *US – Gasoline* corresponds to the first element of the Panel's interpretation of that phrase, namely that the challenged measures "be applied jointly with" restrictions on domestic production or consumption.<sup>118</sup> However, nothing in the phrase "made effective in conjunction with" suggests that the "purpose" of a challenged measure must be to ensure the effectiveness of domestic restrictions.<sup>119</sup> Instead, China contends that a measure restricting international trade must operate together with restrictions on domestic production or consumption, with both sets of restrictions forming part of a policy relating to the conservation of the resource in question.

6. Prior Export Performance and Minimum Capital Requirements

48. China appeals the Panel's finding that Paragraphs 1.2 and 5.1 of China's Accession Protocol, read in combination with Paragraphs 83(a), 83(b), 83(d), 84(a), and 84(b) of China's Accession Working Party Report, require China to eliminate any examination and approval system for WTO-consistent export quotas operated after 11 December 2004, including prior export performance and minimum registered capital requirements. China alleges various errors in the Panel's analysis.

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<sup>117</sup>China's appellant's submission, para. 390 (quoting Panel Reports, para. 7.397).

<sup>118</sup>China's appellant's submission, paras. 404-406 (referring to Appellate Body Report, *US – Gasoline*, pp. 22-23, DSR 1996:I, 3, at 20-21).

<sup>119</sup>China's appellant's submission, para. 407.

49. Referring to the Appellate Body report in *China – Publications and Audiovisual Products*, China argues that the introductory phrase to Paragraph 5.1 means that China's trading rights obligations cannot "affect, encroach upon, or impair" its right to regulate trade in a WTO-consistent manner.<sup>120</sup> In particular, Paragraph 5.1 entitles it to adopt export quotas that are contrary to Article XI:1 of the GATT 1994, as long as they are justified under an exception such as Article XI:2 or XX of the GATT 1994. Paragraph 5.1 also entitles China to administer export quotas through an examination and approval system, including quota allocating criteria, provided that the system complies with the relevant WTO disciplines. China emphasizes that it "is *not* obliged by its accession commitments to abandon its WTO-consistent regulation of its export trade in order to confer upon traders an unfettered right to export".<sup>121</sup>

50. China further observes "that the authority of WTO Members to use prior export performance as a criterion in allocating import and export quotas is supported by the text of the covered agreements".<sup>122</sup> In particular, Article 3.5(j) of the *Import Licensing Agreement* "not only affirms the right of a Member to take account of prior import performance in allocating import licenses, it expressly *requires* that such performance be considered".<sup>123</sup> Paragraph 130(a)(ii) of China's Accession Working Party Report also explicitly refers to "historical performance" as a criterion for quota allocation.<sup>124</sup> Further, Article XIII:2(d) of the GATT 1994 describes the circumstance in which quotas may be allocated among Members "based upon the proportions, supplied by such Members during a previous representative period, of the total quantity or value of imports of the product".<sup>125</sup> The Appellate Body has stated that this provision allows quota allocation by supplying countries "in accordance with the proportions supplied by those Members during a previous representative period, taking due account of 'special factors'".<sup>126</sup> According to China, Article XIII:2(d), "therefore, also supports the view that past trading performance is a relevant consideration in deciding to whom to allocate shares of a quota".<sup>127</sup>

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<sup>120</sup>China's appellant's submission, para. 441 (quoting Appellate Body Report, *China – Publications and Audiovisual Products*, para. 219).

<sup>121</sup>China's appellant's submission, para. 456. (original emphasis)

<sup>122</sup>China's appellant's submission, para. 463.

<sup>123</sup>China's appellant's submission, para. 464. (original emphasis)

<sup>124</sup>China's appellant's submission, para. 464. Paragraph 130(a)(ii) of China's Accession Working Party Report is included in China's Accession Protocol and is an integral part of the *WTO Agreement* by virtue of Paragraph 342 of China's Accession Working Party Report and Paragraph 1.2 of China's Accession Protocol.

<sup>125</sup>China's appellant's submission, para. 465.

<sup>126</sup>China's appellant's submission, para. 465 (quoting Appellate Body Reports, *EC – Bananas III (Article 21.5 – Ecuador II)/EC – Bananas III (Article 21.5 – US)*, para. 338).

<sup>127</sup>China's appellant's submission, para. 465.

51. In China's view, minimum registered capital and prior export performance requirements serve important purposes, such as, ensuring that exporters are financially sound and have the necessary means to engage in export trade. China recognizes that, in the "ordinary course" of trade, it is required to grant the right to trade to all enterprises; however, "in the exceptional event" that it can maintain an export quota for a particular product, China submits that it may establish quota allocation rules that restrict the right to trade, provided that such rules are not inconsistent with the WTO disciplines applicable to such measures.<sup>128</sup>

52. China further argues that the Panel misinterpreted the text of Paragraph 83(b) of China's Accession Working Party Report in finding that it "directs China to eliminate *any* 'examination and approval system' within three years of accession, including specifically the elimination of minimum registered capital requirements".<sup>129</sup> China reasons that the final sentence of Paragraph 83(b) applies to the particular examination and approval process for Chinese-invested enterprises that is described in the first sentence of Paragraph 83(b), and that the Panel erroneously gave Paragraph 83(b) such a broad scope of application as to prohibit any examination and approval system.

7. China's "Operation Capacity" Criterion and Article X:3(a) of the GATT 1994

53. China requests the Appellate Body to reverse the Panel's findings concerning the inconsistency of Article 19 of China's *Export Quota Administration Measures* and the "operation capacity" criterion for quota allocation with Article X:3(a) of the GATT 1994. China submits that, in reaching these findings, the Panel erred in its interpretation and application of Article X:3(a) of the GATT 1994 and acted inconsistently with Article 11 of the DSU.

54. According to China, the Panel erred in interpreting the term "administer" in Article X:3(a) to mean that WTO-inconsistent administration arises if a measure does not necessarily lead to, but merely poses, a "very real risk of" such administration. For a claim under Article X:3(a) to succeed, the Appellate Body has required that the complainant prove that such legal instruments or the features of such administrative processes "necessarily lead to a lack of uniform, impartial, or reasonable administration".<sup>130</sup> However, under the Panel's standard, a violation would also be found "if the complaining party shows that the features of an administrative process pose a very real risk to the

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<sup>128</sup>China's appellant's submission, para. 468.

<sup>129</sup>China's appellant's submission, para. 469 (quoting Panel Reports, para. 7.655). (emphasis added by China)

<sup>130</sup>China's appellant's submission, para. 639 (referring to Appellate Body Report, *EC – Selected Customs Matters*, paras. 201 and 226; and referring to Panel Report, *Thailand – Cigarettes (Philippines)*, paras. 7.873, 7.909, and 7.929).

interests of the relevant parties".<sup>131</sup> For China, there is a significant difference between the two standards, given that an administrative process that creates a risk to a trader's interests does not "necessarily lead to" WTO-inconsistent administration. China emphasizes that a theoretical risk, possibility, or danger of a WTO Member choosing a WTO-inconsistent course of action that is not mandated by the measure is not sufficient to support a finding that the measure "as such" is inconsistent with Article X:3(a), absent evidence that the measure has been interpreted and applied in a WTO-inconsistent manner. Yet, several of the Panel's statements demonstrate that the Panel "based its findings on the mere risk or possibility that China might administer the 'operation capacity' criterion in a manner that violates Article X:3(a)".<sup>132</sup> China adds that the Panel did not find that the "operation capacity" criterion "necessarily leads to" WTO-inconsistent administration. Nor did it have before it evidence demonstrating the WTO-inconsistent application of the measure. Consequently, there was no basis for the Panel to find that, where Chinese authorities exercise their discretion to interpret and apply the "operation capacity" criterion, they will do so in a manner that is inconsistent with Article X:3(a).

55. China further asserts that the Panel acted inconsistently with Article 11 of the DSU by finding, without a sufficient evidentiary basis, that the "operation capacity" criterion is "as such" inconsistent with Article X:3(a) of the GATT 1994. China points out that the Panel itself found that the term "operation capacity" was "vague" and "undefined", and that the European Union provided no evidence of the WTO-inconsistent application by China of the criterion.<sup>133</sup> Further, the Panel had no other evidence as to the operation of the measure, such as pronouncements of domestic courts on the meaning of such laws, or the opinions of legal experts. China asserts that every WTO Member is entitled to the presumption that its authorities will act in accordance with its WTO obligations. China alleges that the Panel reversed this presumption by assuming that the Chinese authorities would interpret and apply the "operation capacity" requirement in a WTO-inconsistent manner.

8. China's Export Licensing Requirements and Article XI:1 of the GATT 1994

56. China requests the Appellate Body to reverse the Panel's finding that Article 11(7) of China's Measures for the Administration of Licence for the Export of Goods<sup>134</sup> (the "*2008 Export Licence*

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<sup>131</sup>China's appellant's submission, para. 640 (quoting Panel Reports, para. 7.708 (original emphasis omitted)).

<sup>132</sup>China's appellant's submission, para. 669. (emphasis omitted)

<sup>133</sup>China's appellant's submission, para. 680 (quoting Panel Reports, para. 7.710 and footnote 1059 thereto).

<sup>134</sup>Measures for the Administration of Licence for the Export of Goods, Order of the Ministry of Commerce (2008) No. 11, 1 July 2008 (Panel Exhibits CHN-342 and JE-74).

*Administration Measures*"), and Articles 5(5) and 8(4) of China's Working Rules on Issuing Export Licences<sup>135</sup> (the "2008 Export Licensing Working Rules"), as applicable to export licences granted to applicants to export bauxite, coke, fluorspar, manganese, silicon carbide, and zinc, are inconsistent with Article XI:1 of the GATT 1994.<sup>136</sup>

57. China submits that the Panel erred in interpreting the term "restriction" in Article XI:1 of the GATT 1994 to prohibit a measure "as such", based on the theoretical possibility that an export restriction might arise from the interpretation and application of undefined terms in the measure, absent evidence that the measure has been applied in a WTO-inconsistent manner. Referring to the dictionary meaning of the word "restriction", China argues that not all regulation of imports and exports constitutes a "restriction". To China, the use of the term "quantitative restriction" in the title of Article XI suggests that Article XI covers only those restrictions that have a "limiting effect" or impose a "'limiting condition' on the *quantity* of exports".<sup>137</sup> China submits that such a limiting effect on the quantity of exports cannot be assumed from the mere regulation of exports. Rather, a panel must examine the design, structure, and operation of the measure in order to assess whether it does indeed limit the quantity of exports.

58. In the case of licensing requirements, China argues that the *Import Licensing Agreement* provides context to assist in identifying the dividing line between permissible and impermissible regulation under Article XI:1 of the GATT 1994. The fact that the *Import Licensing Agreement* imposes disciplines on licensing, without prohibiting it, underscores that licensing requirements are not *a priori* impermissible. China agrees with the Panel that the determination of whether a documentary requirement constitutes a restriction turns on the "nature" of the document required, and whether that documentary requirement has a limiting effect.<sup>138</sup>

59. China maintains that the object and purpose underlying Article XI:1 is to protect competitive opportunities rather than trade flows, and that panels and the Appellate Body have ensured this protection by permitting a challenge to a measure "as such", independent of its application. China contends that the factual uncertainty surrounding the "expected operation" of a measure does not alter the interpretation of the term "restriction" or the requirement for a complainant to demonstrate that a challenged measure gives rise to a "restriction". Therefore, China argues, a complaining Member

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<sup>135</sup>Working Rules on Issuing Export Licences, Ministry of Commerce, Shangpeifa (2008) No. 398, 9 October 2008 (Panel Exhibits CHN-344 and JE-97).

<sup>136</sup>China's appellant's submission, para. 603 (referring to Panel Reports, paras. 7.921, 7.946, 7.948, 7.958, 8.5(b), 8.8, 8.12(b), 8.15, 8.19(b), and 8.22).

<sup>137</sup>China's appellant's submission, para. 539. (original emphasis)

<sup>138</sup>China's appellant's submission, para. 543 (referring to Panel Reports, para. 7.917).

must establish that the action reasonably foreseen or anticipated under the measure will, at least in defined circumstances, give rise to a limiting effect or condition on the quantity of exports, and that the mere possibility that action to be taken under the measure might be WTO-inconsistent is not enough. China submits that a measure that mandates and, therefore, necessarily leads to WTO-inconsistent conduct is "as such" WTO-inconsistent even if the measure affords an authority the discretion to apply, or not to apply, the measure. China, however, distinguishes such measures from measures with uncertain meaning in domestic law that can always be interpreted and applied in a WTO-consistent manner. The theoretical possibility that the authority could exercise its discretion by choosing a WTO-inconsistent meaning does not render the measure "as such" WTO-inconsistent.

60. Turning to the application of Article XI:1 of the GATT 1994 to Article 11(7) of the *2008 Export Licence Administration Measures* and Articles 5(5) and 8(4) of the *2008 Export Licensing Working Rules*, China maintains that it was not sufficient for the Panel to rely on the theoretical possibility for a Chinese license-issuing authority to exercise "open-ended discretion" by interpreting and applying the measures in such a way as to impose a restriction on exports.<sup>139</sup> In China's view, its authorities could always choose a WTO-consistent course of action by requiring documents that do not entail a "restriction" on exportation. Where an authority enjoys "discretion" to interpret and apply the licensing measures, in all instances, in such a way that the required documents do not have a "limiting effect" or impose a "limiting condition" on exports, the theoretical possibility that an authority might exercise that discretion in a WTO-inconsistent manner does not constitute a "restriction" under Article XI:1, absent evidence that the measure has been applied in a WTO-inconsistent manner.<sup>140</sup>

61. China further submits that the Panel erred under Article 11 of the DSU because it had no evidentiary basis to find that the discretion to request additional documents would constitute a prohibited "restriction" under Article XI:1.<sup>141</sup> In particular, China contends that there is no evidence of any instance in which Chinese authorities "requested the provision of an unspecified document that

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<sup>139</sup>China's appellant's submission, para. 568.

<sup>140</sup>China's appellant's submission, para. 533.

<sup>141</sup>China's appellant's submission, p. 161, heading VIII.D.4. China includes a ground of appeal under Article 11 of the DSU based on the Appellate Body's recognition "that it is often difficult to distinguish clearly between issues that are purely legal or purely factual, or are mixed issues of law and fact", and that "a failure to make a claim under Article 11 of the DSU on an issue that the Appellate Body determines to concern a factual assessment may have serious consequences for the appellant". (China's appellant's submission, p. 161, footnote 676 to heading VIII.D.4. (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 872))

restricted exports".<sup>142</sup> China refers to evidence showing that export licences have always been granted on the production of documents specified in China's licensing measures.

B. *Arguments of the United States and Mexico – Joint Appellees*

1. Article 6.2 of the DSU

62. The United States and Mexico contend that the Panel correctly found that Section III of the complainants' panel requests complies with the requirements of Article 6.2 of the DSU. The United States and Mexico request the Appellate Body to uphold the Panel's finding in the Panel's preliminary ruling (second phase) and in the Panel Reports that Section III of the panel requests comply with Article 6.2 of the DSU, and to uphold all consequent findings of inconsistency.<sup>143</sup>

63. The United States and Mexico disagree with China's contention that the Panel observed defects in Section III of the panel requests. Rather, the fact that the Panel, in the preliminary ruling (first phase), reserved its decision on China's objections under Article 6.2 of the DSU demonstrates that the Panel provisionally considered Section III of the panel requests to be sufficient to comply with Article 6.2. The United States and Mexico find support for their contention in paragraphs 34 and 35 of the Panel's preliminary ruling (first phase); in particular, the Panel's statement that the "narrative paragraphs aim at explaining succinctly how and why some of the challenged measures at issue are inconsistent with some of the WTO principles".<sup>144</sup> Furthermore, the Panel's statement in paragraph 46 of the Panel's preliminary ruling (first phase), where the Panel stated that it "reserves its decision" on China's objections under Article 6.2 of the DSU, supports the proposition that the Panel provisionally accepted that Section III of the panel requests comply with Article 6.2 of the DSU.

64. For the United States and Mexico, the only additional information the Panel needed in order to make a definitive finding under Article 6.2 was to determine, from the parties' first written submissions, whether China had suffered any prejudice in its ability to defend itself. In addition, the United States and Mexico take issue with China's contention that the Panel used the complainants' later submissions to cure defects in Section III of the panel requests. The Panel questions following the first and second Panel meetings requesting the complainants to list all measures and the specific

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<sup>142</sup>China's appellant's submission, para. 597.

<sup>143</sup>In particular, paras. 7.669, 7.670, 7.678, 7.756, 7.807, 7.958, 7.1082, 7.1102, 7.1103, 8.4(a)-(b), 8.5(b), 8.6(a)-(b), 8.11 (a), (c), (e), and (f), 8.12(b), 8.13(a)-(b), 8.18(a)-(b), 8.19(b), and 8.20(a)-(b) of the Panel Reports. (See joint appellees' submission of the United States and Mexico, para. 59)

<sup>144</sup>Joint appellees' submission of the United States and Mexico, para. 45 (quoting Panel's preliminary ruling (first phase), Panel Reports, Annex F-1, para. 35). (emphasis added by the United States and Mexico omitted)

WTO provisions each of the measures allegedly violate were not posed with any specific intentions regarding Section III of the panel requests, but rather in order to clarify what recommendations the complainants were seeking with respect to all the claims at issue in the dispute. Thus, the Panel looked at the tables submitted by the complainants in order to confirm that China had not been prejudiced in the preparation of its defence.

65. The United States and Mexico submit that China mistakenly relies on the Appellate Body's statement in *US – Oil Country Tubular Goods Sunset Reviews* that, in order to "present the problem clearly", a complainant must "plainly connect" the challenged measures with the provisions of the covered agreements claimed to have been infringed.<sup>145</sup> In that dispute, the Appellate Body found that Argentina's panel request satisfied the requirements of Article 6.2, even though the link between the measures and the WTO obligations at issue was far less clear than in the panel requests at issue in the current dispute. The United States and Mexico recall that they had identified before the Panel 37 panel requests from previous disputes that follow the structure of Section III of the panel requests at issue in this dispute, and in none of those cases was the panel request found not to satisfy Article 6.2 of the DSU. This demonstrates that China is advocating a "dramatically new approach to the interpretation of Article 6.2".<sup>146</sup>

66. Finally, the United States and Mexico maintain that the Panel respected the due process requirements contained in Article 6.2 of the DSU. The Panel "took pains to assess whether the argumentation advanced by the [c]omplainants resulted in any prejudice to China's ability to defend itself".<sup>147</sup> Yet, China's argument that the complainants intended to advance "subsets of claims regarding subsets of measures", as well as the argument that the total combination of measures and legal provisions resulted in a large number of possible claims, demonstrate that China was more than "adequately notified", and was in fact "well aware", of the claims the complainants could advance.<sup>148</sup> The United States and Mexico add that Article 6.2 of the DSU does not require that every claim identified in a panel request be advanced.

## 2. The Panel's Recommendations

67. The United States and Mexico emphasize the limited scope of China's appeal, noting that China appeals only the Panel's recommendations "to the extent that [the] recommendation[s] apply to

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<sup>145</sup>Joint appellees' submission of the United States and Mexico, para. 48 (quoting Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162).

<sup>146</sup>Joint appellees' submission of the United States and Mexico, para. 54.

<sup>147</sup>Joint appellees' submission of the United States and Mexico, para. 55.

<sup>148</sup>Joint appellees' submission of the United States and Mexico, para. 57.

annual replacement measures", which China argues are outside the Panel's terms of reference.<sup>149</sup> The Panel did not make recommendations on measures on which it had not made findings, and it did not make a recommendation on annual replacement measures adopted after the establishment of the Panel. Instead, the Panel made findings and recommendations on the series of measures "in force at the date of panel establishment".<sup>150</sup> According to the United States and Mexico, China's appeal could therefore "be dismissed on this basis alone".<sup>151</sup>

68. The United States and Mexico further disagree with China's apparent position that the only way for them to challenge the future life of the export duties and quotas at issue is by challenging China's replacement measures. The United States and Mexico submit, however, that they do not have to challenge and obtain findings and recommendations against "replacement measures" in order for "future" measures to come within the scope of China's implementation obligation once the challenged measures have been found to be WTO-inconsistent.<sup>152</sup> China's approach would "frustrate the aims of the dispute settlement system", as it would create the "moving target situation" against which the Appellate Body has cautioned.<sup>153</sup> If no recommendations could be made in relation to an annual measure once it had been superseded, then trade measures imposed through annually recurring legal instruments could never be successfully challenged in WTO dispute settlement. In the present case, the implication of China's position is that the DSB would be precluded from making any recommendations because the 2010 replacement measures will have ceased to exist before the DSB could adopt the Panel's recommendations and rulings.

69. The United States and Mexico also fault China for confusing the distinction between the basis on which a recommendation is made and the application or effect of the recommendation once it has been made. Contrary to China's assertion, they have not abandoned their right to obtain meaningful recommendations from this dispute settlement proceeding. Instead, the United States and Mexico assert that they have consistently sought recommendations on the measures found to be inconsistent as of the date of Panel establishment.

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<sup>149</sup>Joint appellees' submission of the United States and Mexico, para. 80 (quoting China's appellant's submission, para. 99).

<sup>150</sup>Joint appellees' submission of the United States and Mexico, para. 83 (quoting Panel Reports, para. 7.33(e)).

<sup>151</sup>Joint appellees' submission of the United States and Mexico, para. 83.

<sup>152</sup>Joint appellees' submission of the United States and Mexico, para. 86.

<sup>153</sup>Joint appellees' submission of the United States and Mexico, para. 87.

3. Applicability of Article XX of the GATT 1994

70. The United States and Mexico request the Appellate Body to uphold the Panel's finding that China may not rely upon the exceptions contained in Article XX of the GATT 1994 to justify an inconsistency with its export duty commitments contained in Paragraph 11.3 of China's Accession Protocol. Specifically, the Panel "correctly interpreted and applied" China's Accession Protocol based on the text of Paragraph 11.3 and Article XX and the relevant context, in conformity with a "key principle of treaty interpretation" contained in Article 31(1) of the *Vienna Convention on the Law of Treaties*<sup>154</sup> (the "*Vienna Convention*").<sup>155</sup> Additionally, the Panel properly rejected China's arguments that an inherent right to regulate trade "applies above and beyond the exceptions provided for in Paragraph 11.3".<sup>156</sup>

(a) Paragraph 11.3 of China's Accession Protocol

71. The United States and Mexico request the Appellate Body to uphold the Panel's interpretation of the "plain meaning" of Paragraph 11.3 of China's Accession Protocol.<sup>157</sup> China's argument that the two exceptions in Paragraph 11.3—for Annex 6 to the Protocol, and for taxes and charges applied in conformity with Article VIII of the GATT 1994—"somehow authorize" China to justify its export duties in excess of the maximum levels contained in Annex 6, as well as export duties on products not listed in Annex 6, "misconstrue[s] the relevance" of these two exceptions.<sup>158</sup>

72. Regarding China's argument that reference to "exceptional circumstances" in the Note to Annex 6 to China's Accession Protocol allows China to justify under Article XX of the GATT 1994 export duties found to be inconsistent with Paragraph 11.3 of the Protocol, the United States and Mexico assert that there is "no textual basis" for such a conclusion.<sup>159</sup> The first sentence of the Note makes clear that China committed not to impose export duties on the 84 products listed in Annex 6 above the maximum rates set out therein. The second and third sentences of the Note also impose an additional obligation upon China that, in the event that the applied rate for any of the 84 products listed in Annex 6 is less than the maximum rate, China cannot raise the applied rate except in "exceptional circumstances", and only after consulting with the affected Members. In the light of China's acceptance of this additional obligation, the Note cannot be read as providing a basis for

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<sup>154</sup>Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679.

<sup>155</sup>Joint appellees' submission of the United States and Mexico, para. 96.

<sup>156</sup>Joint appellees' submission of the United States and Mexico, para. 97.

<sup>157</sup>Joint appellees' submission of the United States and Mexico, para. 111.

<sup>158</sup>Joint appellees' submission of the United States and Mexico, para. 111.

<sup>159</sup>Joint appellees' submission of the United States and Mexico, para. 113.

China to impose export duties on the 84 products above the maximum rates specified in Annex 6. The United States and Mexico further reject China's argument that, because of the reference to "exceptional circumstances" in the Note to Annex 6, there is a "substantive overlap" between the Note and Article XX of the GATT 1994.<sup>160</sup> Instead, Annex 6 and Article XX only "overlap" to the extent that each establishes "potential exceptions" to the commitments contained in Annex 6 regarding the applied rates for the 84 products listed, and in the GATT 1994, respectively.<sup>161</sup>

73. The United States and Mexico further submit that the fact that Paragraph 11.3 of China's Accession Protocol expressly refers to Article VIII of the GATT 1994, but leaves out reference to other provisions of the GATT 1994, indicates that WTO Members and China did not intend Article XX to be available as an exception to justify a violation of Paragraph 11.3. They disagree with China's assumption that, if a tax or charge that would otherwise be inconsistent with Article VIII met the conditions of Article XX, then it would be consistent with Article VIII. Instead, they consider that conformity with the conditions of Article XX only means that Article VIII would not "prevent the application" of that measure.<sup>162</sup>

(b) Context from the *WTO Agreement*

74. The United States and Mexico argue that the Panel did not rely solely on the inclusion of the two specific exceptions in Paragraph 11.3 of China's Accession Protocol to reach the conclusion that Article XX of the GATT 1994 is not available in cases of violation of the obligations contained in Paragraph 11.3. Instead, the Panel also considered other provisions of China's Accession Protocol and China's Accession Working Party Report, noting that, unlike Paragraph 11.3, such provisions include general references to the *WTO Agreement* and the GATT 1994.

75. The United States and Mexico further argue that Paragraphs 5.1, 11.1, and 11.2 of China's Accession Protocol, Paragraphs 155 and 156 of China's Accession Working Party Report, and Article XX of the GATT 1994 support the Panel's finding that Article XX is not applicable in cases of findings of inconsistency with the commitments contained in Paragraph 11.3 of China's Accession Protocol. The Panel relied on *China – Publications and Audiovisual Products*, where the Appellate Body interpreted the introductory clause of Paragraph 5.1 of China's Accession Protocol as including a reference to Article XX of the GATT 1994; however, the "specific and circumscribed" language of Paragraph 11.3 is "in sharp contrast" to that of Paragraph 5.1, because it "sets forth

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<sup>160</sup>Joint appellees' submission of the United States and Mexico, para. 114.

<sup>161</sup>Joint appellees' submission of the United States and Mexico, para. 114.

<sup>162</sup>Joint appellees' submission of the United States and Mexico, para. 117.

particular commitments" and the two exceptions to those commitments, and includes no reference to the GATT 1994, or to WTO obligations more generally.<sup>163</sup> The United States and Mexico argue that China's interpretation of Paragraph 11.3 would render the introductory language in Paragraph 5.1 "superfluous" and would therefore be "disfavo[u]red under a key tenet" of the customary rules of treaty interpretation that meaning and effect be given to all the terms of a treaty.<sup>164</sup>

76. According to the United States and Mexico, the Panel was also "appropriately struck" by the difference between the language of Paragraph 11.3 and that of Paragraphs 11.1 and 11.2 of China's Accession Protocol.<sup>165</sup> Whereas Paragraphs 11.1 and 11.2 affirm China's obligation to apply or administer certain measures "in conformity with the GATT 1994", Paragraph 11.3 establishes an obligation with regard to export duties that is absent in the GATT 1994, and sets forth the specific exceptions that apply to that obligation.<sup>166</sup> Similarly, the Panel properly found support for its interpretation of Paragraph 11.3 in Paragraphs 155 and 156 of China's Accession Working Party Report. While the Panel acknowledged that Paragraphs 155 and 156 are not a part of the "explicit commitments" made by China, the Panel also properly viewed these paragraphs as providing relevant context because, in those paragraphs, WTO Members expressed concerns over taxes and charges that China applied to exports, and expressed the view that such taxes and charges should be eliminated unless applied in conformity with Article VIII of the GATT 1994 or Annex 6 of the Draft Protocol.<sup>167</sup>

77. The United States and Mexico recall the Panel's reliance upon the text of Article XX of the GATT 1994 as indicating that the Article XX exceptions relate only to the GATT 1994, and the Panel's observation that Article XX has been incorporated by reference into some other covered agreements. No such reference is contained in Paragraph 11.3 of China's Accession Protocol, and China does not address the meaning of the phrase "this Agreement" in Article XX on appeal. In concluding that Article XX does not apply to violations of the commitments contained in Paragraph 11.3, the Panel correctly interpreted Paragraph 11.3 and the relevant provisions of the

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<sup>163</sup>Joint appellees' submission of the United States and Mexico, para. 121.

<sup>164</sup>Joint appellees' submission of the United States and Mexico, para. 121 (referring to Appellate Body Report, *US – Gasoline*, p. 25, DSR 1996:I, 3, at 23).

<sup>165</sup>Joint appellees' submission of the United States and Mexico, para. 122.

<sup>166</sup>Joint appellees' submission of the United States and Mexico, para. 123 (quoting Panel Reports, para. 7.138).

<sup>167</sup>Joint appellees' submission of the United States and Mexico, para. 124 (referring to Panel Reports, para. 7.145).

GATT 1994, China's Accession Protocol, and China's Accession Working Party Report "in a harmonious manner", giving effect to the text of each provision.<sup>168</sup>

78. Next, the United States and Mexico assert that China's argument that the Panel erred in "failing to conclude" that Paragraph 170 of China's Accession Working Party Report means that the exceptions under Article XX apply to violations of China's export duty commitments under Paragraph 11.3 of its Accession Protocol is "without merit".<sup>169</sup> Paragraph 169 of the Accession Working Party Report shows that some Members were concerned about internal policies, especially those of sub-national governments, imposing discriminatory taxes and other charges that would affect trade in goods. In Paragraph 170, China responded to this concern by confirming that its laws relating to all fees, charges, or taxes levied on imports and exports would be in full conformity with WTO obligations. The United States and Mexico argue that it is "untenable to believe" that Paragraph 170 reflects the negotiators' intent to apply Article XX to Paragraph 11.3 of China's Accession Protocol.<sup>170</sup> They submit that China's arguments ignore the text of Paragraph 11.3, the context supplied by Paragraphs 155, 156, and 159 of China's Accession Working Party Report, and Article XX of the GATT 1994, and "misconstrue"<sup>171</sup> the Panel's analysis of Paragraph 170. The Panel did not "simply conclude" that Paragraph 170 applies to domestic taxes, and not export duties; instead, it correctly found that "Paragraph 170 'does not refer to China's *specific obligations on export duties*'".<sup>172</sup>

79. Finally, in response to China's argument that the Panel failed to interpret Paragraph 11.3 in the light of the preamble of the *WTO Agreement*, the United States and Mexico assert that the preamble does not provide "a textual basis" for concluding that Article XX applies to violations of Paragraph 11.3, nor does it negate the text and context demonstrating that Members intended Article XX not to apply.<sup>173</sup>

(c) The Inherent Right to Regulate Trade

80. According to the United States and Mexico, China's arguments asserting that its inherent right to regulate trade permits recourse to Article XX of the GATT 1994 for violations of Paragraph 11.3 of

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<sup>168</sup>Joint appellees' submission of the United States and Mexico, para. 127.

<sup>169</sup>Joint appellees' submission of the United States and Mexico, para. 128.

<sup>170</sup>Joint appellees' submission of the United States and Mexico, para. 130.

<sup>171</sup>Joint appellees' submission of the United States and Mexico, para. 132.

<sup>172</sup>Joint appellees' submission of the United States and Mexico, para. 132 (quoting Panel Reports, para. 7.141). (emphasis added by the United States and Mexico)

<sup>173</sup>Joint appellees' submission of the United States and Mexico, para. 136.

China's Accession Protocol "are flawed in several respects, and should be rejected".<sup>174</sup> They begin by highlighting that, contrary to China's claims, the Panel "nowhere suggested" that the *WTO Agreement* confers an inherent right to regulate trade, or that Members "abandoned" their right to regulate trade upon "entering" the WTO.<sup>175</sup>

81. The United States and Mexico argue that the Panel's conclusion that China agreed to "specific textual disciplines" on its ability to impose export duties is consistent with the text of Paragraph 11.3 and the "understanding" reflected in previous Appellate Body reports that, by joining the WTO, Members agreed to disciplines on their right to regulate trade, as contained in the covered agreements.<sup>176</sup> The Appellate Body report in *China – Publications and Audiovisual Products* recognized that, because WTO Members have an inherent right to regulate trade, it was necessary to agree on rules that constrain that right. The United States and Mexico also rely on the Appellate Body report in *Japan – Alcoholic Beverages II* to argue that China's obligation to eliminate export duties contained in Paragraph 11.3 of China's Accession Protocol is a "commitment" that conditions the exercise of China's sovereignty in exchange for the benefits it derives as a Member of the WTO.<sup>177</sup>

82. Recalling China's argument that it is entitled to invoke Article XX exceptions for violations of Paragraph 11.3 in the absence of "specific treaty language", the United States and Mexico assert that China's approach would render the introductory clause in Paragraph 5.1, and the language in Paragraphs 11.1 and 11.2, "superfluous".<sup>178</sup> In fact, the Appellate Body's finding in *China – Publications and Audiovisual Products* that Article XX is available for violations of Paragraph 5.1 of China's Accession Protocol was "grounded" in the language of the provision and not a right to regulate trade "in the abstract".<sup>179</sup> The language in Paragraph 11.3 is "in contrast" to the language in the accession documents of other WTO Members with respect to their obligations on export duties.<sup>180</sup> China's "citation" to language in other agreements related to WTO Members' ability to regulate is "similarly unavailing".<sup>181</sup> Specifically, the agreements cited by China do not address the applicability of Article XX exceptions to China's obligations under Paragraph 11.3, nor do they "inform an

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<sup>174</sup>Joint appellees' submission of the United States and Mexico, para. 139.

<sup>175</sup>Joint appellees' submission of the United States and Mexico, para. 140.

<sup>176</sup>Joint appellees' submission of the United States and Mexico, para. 140.

<sup>177</sup>Joint appellees' submission of the United States and Mexico, paras. 143 and 144 (referring to Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 15, DSR 1996:I, 97, at 108).

<sup>178</sup>Joint appellees' submission of the United States and Mexico, para. 145.

<sup>179</sup>Joint appellees' submission of the United States and Mexico, para. 145 (referring to Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 219-228).

<sup>180</sup>Joint appellees' submission of the United States and Mexico, para. 145 (referring to, as example, Report of the Working Party on the Accession of Ukraine to the World Trade Organization, WT/ACC/UKR/152, paras. 512 and 540).

<sup>181</sup>Joint appellees' submission of the United States and Mexico, para. 146.

interpretation" of the text of Paragraph 11.3.<sup>182</sup> The United States and Mexico also highlight the Panel's observation that the *Agreement on Trade-Related Investment Measures* (the "TRIMs Agreement"), the *TBT Agreement*, the *TRIPS Agreement*, the GATS, and the *SPS Agreement* either expressly incorporate the right to invoke Article XX exceptions or include their own exceptions and flexibilities.

83. According to the United States and Mexico, China's insistence that it is not advocating for the right to ignore its WTO commitments because it still must comply with the requirements of Article XX "does not address the relevant issue in this dispute".<sup>183</sup> China's arguments wrongly assume that the exceptions in Article XX are the starting point for an analysis of WTO-consistency. Instead, the United States and Mexico argue that the starting point of the analysis is whether a measure is consistent with a Member's WTO obligations, and if not, whether any applicable exceptions apply. Moreover, China's argument that it is entitled to invoke Article XX in the case of Paragraph 11.3 violations because it is the only WTO Member with export duty commitments "lacks a textual basis".<sup>184</sup> The fact that a WTO Member has undertaken a specific commitment that not all WTO Members have made is not a proper basis for finding that an exception is applicable to that commitment.

84. The United States and Mexico assert that China's right to promote non-trade interests is not "at risk" in this dispute.<sup>185</sup> Paragraph 11.3 does not prevent China from undertaking measures other than export duties to promote legitimate public health or conservation objectives, and China has a number of "tools at its disposal" to pursue these ends.<sup>186</sup> Paragraph 11.3 of China's Accession Protocol, however, contains specific commitments with respect to export duties and provides only two "applicable" exceptions. "Neither an abstract right to regulate trade nor Article XX of the GATT 1994 changes that fact."<sup>187</sup>

#### 4. Article XI:2(a) of the GATT 1994

85. The United States and Mexico request the Appellate Body to uphold the Panel's finding that China had not demonstrated that its export quota on refractory-grade bauxite is "temporarily" applied to prevent or relieve a "critical shortage" within the meaning of Article XI:2(a) of the GATT 1994,

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<sup>182</sup>Joint appellees' submission of the United States and Mexico, para. 146.

<sup>183</sup>Joint appellees' submission of the United States and Mexico, para. 147.

<sup>184</sup>Joint appellees' submission of the United States and Mexico, para. 148.

<sup>185</sup>Joint appellees' submission of the United States and Mexico, para. 149.

<sup>186</sup>Joint appellees' submission of the United States and Mexico, para. 150.

<sup>187</sup>Joint appellees' submission of the United States and Mexico, para. 150.

and to reject China's claim that the Panel failed to conduct an objective assessment of the matter, as required under Article 11 of the DSU.

86. With respect to China's arguments relating to the interpretation of the term "temporarily", the United States and Mexico disagree with China's allegation that the Panel excluded from the scope of Article XI:2(a) any "long-term" application of export restrictions. However, the Panel did not interpret the term "temporarily" so as to impose an "absolute limit" on the time period in which an export restraint may be imposed under Article XI:2(a). In the United States and Mexico's view, the Panel was appropriately sensitive to the contextual relationship between the terms "temporarily applied" and "critical shortages" when it found that Article XI:2(a) cannot be interpreted to permit the long-term application of measures in the nature of China's export restrictions on refractory-grade bauxite.

87. In response to China's allegation that the Panel erred in finding that Articles XI:2(a) and XX(g) of the GATT 1994 are mutually exclusive, the United States and Mexico submit that China misunderstands the Panel's analysis. The Panel did not find that Articles XI:2(a) and XX(g) can never apply to the same measure. Rather, the Panel found that, under China's interpretation of Article XI:2(a), pursuant to which a Member could impose an export restriction for the purpose of addressing limited reserves of a natural resource, Articles XI:2(a) and XX(g) would be duplicative.

88. Regarding China's argument that the Panel erred in its interpretation of the term "critical shortages", the United States and Mexico disagree that the Panel erred in interpreting Article XI:2(a) "to exclude shortages caused, in part, by the exhaustibility of the product subject to the export restriction".<sup>188</sup> They submit that the existence of a limited amount of reserves constitutes only a degree of shortage, and a mere degree of shortage does not constitute a "critical" shortage, which is one rising to the level of a crisis. They also refer to a discussion in the negotiating history of Article XI:2(a), during which, in response to a proposal to omit the word "critical" in Article XI:2(a), the representative from the United Kingdom stated that, "if you take out the word 'critical', almost any product which is essential will be alleged to have a degree of shortage and could be brought within the scope of this paragraph".<sup>189</sup> This suggests that a showing of finite availability is not sufficient to

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<sup>188</sup>Joint appellees' submission of the United States and Mexico, para. 173 (quoting China's appellant's submission, paras. 356, 363, and 367).

<sup>189</sup>Joint appellees' submission of the United States and Mexico, para. 176 (quoting United Nations Economic and Social Council, Second Session of the Preparatory Committee of the United Nations Conference of Trade and Employment, Verbatim Report, Fortieth Meeting of Commission "A" (1) (Articles 25 & 27, 26, 28 & 29), UN document E/PC/T/A/PV/40(1), 15 August 1947 (Panel Exhibit CHN-181), p. 6).

demonstrate a critical shortage. In addition, the United States and Mexico maintain that the Panel properly reasoned that the concept of "temporarily" informs the concept of a "critical shortage".

89. The United States and Mexico disagree with China's contention that the Panel's finding that an export restriction applied to address the exhaustibility of a resource cannot be temporarily applied is contradictory to other findings by the Panel. In their view, irrespective of whether a measure is applied until the remaining reserves of the product are exhausted, or until technological advancements slow the rate of exhaustion, the application of the export restriction is not "temporary", as, in either case, it is not connected to the time period necessary to address the critical shortage, but rather to the depletion of reserves. Additionally, the "hypothetical situation" in which technological advancements may allow for a slower rate of exhaustion does not "negate" the evidence on record showing that China intends to maintain its export quota to guarantee a supply for its domestic industry until the reserves are depleted.<sup>190</sup>

90. As regards China's allegations, first, that the Panel acted inconsistently with Article 11 of the DSU, the United States and Mexico submit that the Panel fully engaged with China's arguments regarding annual review. However, the Panel also had before it evidence that China has imposed an export quota on refractory-grade bauxite since at least 2000, as well as indications that China intended to maintain the restrictions until the exhaustion of the remaining reserves. Therefore, irrespective of China's arguments relating to the annual review of those measures, the Panel's finding that the restriction is not applied "temporarily" is, in the United States and Mexico's view, "well-founded".<sup>191</sup> Second, China alleges that the Panel employed internally inconsistent or incoherent reasoning when it found that an export restriction imposed to address the exhaustibility of a natural resource could not be temporarily applied, because, in China's view, that finding is inconsistent with other Panel findings with respect to technological developments. The United States and Mexico contend that there is no inconsistency in the Panel's finding. Whether a measure is applied until remaining reserves are exhausted or until technological developments slow the rate of exhaustion, the application of the export quota is not temporary. In either case, it is tied not to the time period needed to address a "critical shortage", but rather to the depletion of finite reserves.

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<sup>190</sup>Joint appellees' submission of the United States and Mexico, para. 190 (referring to China's opening statement at second Panel meeting, paras. 143, 144, and 146-148; and Panel Reports, para. 7.344).

<sup>191</sup>Joint appellees' submission of the United States and Mexico, para. 185.

5. Article XX(g) of the GATT 1994

91. The United States and Mexico request the Appellate Body to uphold the Panel's interpretation of the phrase "made effective in conjunction with" in Article XX(g) of the GATT 1994 as requiring that the purpose of a challenged export restriction must be to ensure the effectiveness of restrictions imposed on domestic production or consumption. In their view, the Panel's interpretation is in accordance with the ordinary meaning of the terms in Article XX(g) in their context and in the light of the object and purpose of the GATT 1994. They distinguish from the present case the Appellate Body reports in *US – Gasoline* and *US – Shrimp* on the basis that neither of those cases involved the question of how the operation of the challenged measure should be conjoined with the operation of the domestic restrictions. In *US – Gasoline*, this was because the challenged measure affecting imports was the same measure establishing the restrictions on domestic production or consumption. In *US – Shrimp*, the conjunction of the operation of the challenged measure with the domestic regulation was found to "satisfy easily" the requirement of Article XX(g).<sup>192</sup>

92. According to the United States and Mexico, the only other time a respondent has asserted an Article XX(g) defence where the challenged trade measure was distinct from the restrictions on domestic production or consumption was in the GATT dispute in *Canada – Herring and Salmon*. The United States and Mexico agree with the GATT panel that an export restriction can only be considered to be made effective "in conjunction with" domestic restrictions "if it was primarily aimed at rendering effective these restrictions".<sup>193</sup> In the present case, the Panel appropriately drew on that GATT panel report to conclude that, in order to qualify as a conservation measure justified under Article XX(g), China's export quota must not only be applied jointly with restrictions on domestic production or consumption, but must also ensure the effectiveness of those domestic restrictions.

6. Prior Export Performance and Minimum Capital Requirements

93. The United States and Mexico argue that the Panel correctly found that the imposition of prior export performance and minimum registered capital requirements is inconsistent with China's trading rights commitments under Paragraphs 83 and 84 of China's Accession Working Party Report. First, they assert that Paragraphs 83 and 84 include specific commitments to eliminate China's examination

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<sup>192</sup>Joint appellees' submission of the United States and Mexico, para. 215 (referring to Appellate Body Report, *US – Gasoline*, pp. 3-5, DSR 1996:I, 3, at 4-6; and Appellate Body Report, *US – Shrimp*, paras. 143-145).

<sup>193</sup>Joint appellees' submission of the United States and Mexico, para. 217 (quoting Panel Reports, para. 7.395, in turn quoting GATT Panel Report, *Canada – Herring and Salmon*, para. 4.6 (original emphasis omitted)).

and approval process, including prior export performance and minimum capital requirements that are not found elsewhere in the *WTO Agreement*. Second, China's suggestion that the complainants need to demonstrate the WTO-inconsistency of China's prior export performance and minimum capital requirements under other provisions of the *WTO Agreement* is without merit. The United States and Mexico insist that China has obligations with respect to such requirements pursuant to Paragraph 5.1 of China's Accession Protocol and Paragraphs 83 and 84 of China's Accession Working Party Report, and that the requirements currently imposed with respect to export quota allocation are inconsistent with China's obligations under these provisions.

94. The United States and Mexico also refute China's argument that the *Import Licensing Agreement* and Article XIII of the GATT 1994 contemplate the use of historical performance in allocating quotas. They insist that neither provision can be read as overriding China's trading rights obligations.

95. Finally, the United States and Mexico challenge China's position that China is allowed to maintain a minimum capital requirement for foreign-invested companies. They note that China did not present this argument to the Panel. Paragraphs 83(b), 83(d), 84(a), and 84(b) of China's Accession Working Party Report show that there is no basis for concluding that China is permitted to maintain an examination and approval system that applies only to foreign-invested enterprises; in fact, these provisions provide the opposite.

7. China's Export Licensing Requirements and Article XI:1 of the GATT 1994

96. The United States and Mexico request the Appellate Body to uphold the Panel's finding that Article 11(7) of China's *2008 Export Licence Administration Measures*, and Articles 5(5) and 8(4) of the *2008 Export Licensing Working Rules*, are inconsistent with Article XI:1 of the GATT 1994.<sup>194</sup> The United States and Mexico also request the Appellate Body to reject China's claim that the Panel erred under Article 11 of the DSU by finding that China's measures are inconsistent with Article XI:1 without a sufficient evidentiary basis. The Panel correctly interpreted and applied Article XI:1 of the GATT 1994, and correctly found that the uncertainty and unpredictability inherent in China's export licensing system constitute a restriction under that provision. The United States and Mexico thus reject China's contention that, where an authority enjoys the discretion always to interpret and apply a challenged measure in a WTO-consistent manner, an examination of the design, structure, and

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<sup>194</sup>Joint appellees' submission of the United States and Mexico, para. 255 (referring to Panel Reports, paras. 7.921, 7.946, 7.948, 7.958, 8.5(b), 8.8, 8.12(b), 8.15, 8.19(b), and 8.22).

expected operation of the measure does not permit a panel to conclude that the measure mandates and, if applied, necessarily leads to WTO-inconsistent conduct.

97. The United States and Mexico argue that the Panel's interpretation is consistent with the ordinary meaning of the term "restriction", as interpreted by WTO panels. They refer to a statement by the panel in *Colombia – Ports of Entry* that the term "restrictions" under Article XI:1 is "broad in scope" and "can cover measures that negatively affect competitive opportunities", including "measures that create uncertainties and affect investment plans, restrict market access for imports, or make importation prohibitively costly".<sup>195</sup> For the United States and Mexico, an interpretation of the term "restriction" as including the lack of certainty and predictability arising from a discretionary export licensing system is also supported by the Appellate Body's interpretation in *Chile – Price Band System* of the term "import restrictions" in the context of Article 4 and footnote 1 of the *Agreement on Agriculture*.

98. Moreover, the United States and Mexico argue that China itself recognizes that "[t]he object and purpose underlying Article XI:1 is to protect competitive opportunities for exports, rather than trade flows."<sup>196</sup> This assertion is at odds with China's argument that its export licensing system can be considered inconsistent with Article XI:1 only if it restricts trade flows through the denial of export licences. According to the United States and Mexico, the uncertainty and unpredictability inherent in the discretion of Chinese authorities to require undefined or unspecified documents entails a restriction on competitive opportunities even without the occurrence of actual denials of export licences, and is therefore inconsistent with Article XI:1 of the GATT 1994.

99. The United States and Mexico request the Appellate Body to reject China's claim that the Panel acted inconsistently with Article 11 of the DSU in making findings regarding China's export licensing system without an evidentiary basis. The United States and Mexico argue that, while China alleges that the Panel lacked a sufficient evidentiary basis for its finding, it acknowledges at the same time that "it is not necessary to provide evidence of the application of a measure in support of an *as such* challenge".<sup>197</sup>

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<sup>195</sup>Joint appellees' submission of the United States and Mexico, para. 270 (quoting Panel Report, *Colombia – Ports of Entry*, para. 7.240; and referring to Panel Reports, para. 7.894).

<sup>196</sup>Joint appellees' submission of the United States and Mexico, para. 275 (quoting China's appellant's submission, para. 548).

<sup>197</sup>Joint appellees' submission of the United States and Mexico, para. 281 (quoting China's appellant's submission, para. 596 (original emphasis)).

C. *Arguments of the European Union – Appellee*

1. Article 6.2 of the DSU

100. The European Union requests the Appellate Body to uphold the Panel's findings in paragraph 77 of its preliminary ruling (second phase), and in paragraph 7.3(b) of the Panel Reports, that Section III of the panel requests complies with Article 6.2 of the DSU, and to uphold all of the Panel's consequent findings of inconsistency.<sup>198</sup> The European Union contends that the Panel did not err under Article 6.2 of the DSU by finding that Section III of the panel requests presents the problem clearly.

101. In response to China's contention that the Panel observed defects in Section III of the panel requests, the European Union asserts that the Panel never found that the complainants' panel requests were defective. The European Union submits that, although the Panel observed that the complainants had not directly addressed in their submissions or in their subsequent oral statements the question of whether Section III of the panel requests was consistent with the requirements of Article 6.2 of the DSU, it "was not pointing to a 'defective' Panel Request".<sup>199</sup>

102. The European Union also disagrees with China's contention that the Panel found that the complainants' responses to Panel Question 2 following the second Panel meeting corrected the defects in the panel requests. For the European Union, the replies given by the complainants to Panel Question 2 were merely a summary of the claims that had already been presented in more detail in the complainants' first written submissions.

103. The European Union further contends that its first written submission was sufficiently clear as to which Chinese measures were in violation of which WTO obligations. In the European Union's view, the scope of this dispute was therefore established early on in the proceedings.

104. Furthermore, in response to China's submission that it attaches great importance to the paramount principle that deficiencies in a panel request cannot be cured by a party's subsequent submissions, the European Union argues that this statement would only be relevant if the panel

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<sup>198</sup>In particular, the findings in paragraphs 7.669, 7.670, 7.678, 7.756, 7.807, 7.958, 7.1082, 7.1102, 7.1103, 8.4(a)-(b), 8.5(b), 8.6(a)-(b), 8.11 (a), (b), (e) and (f), 8.12(b), 8.13(a)-(b), 8.18(a)-(b), 8.19(b), and 8.20(a)-(b) of the Panel Reports. (See European Union's appellee's submission, para. 4)

<sup>199</sup>European Union's appellee's submission, para. 15.

requests were in fact "defective", which, according to the European Union is not the case in the present dispute.<sup>200</sup>

105. Finally, in response to China's assertion that the Panel erred by frustrating China's due process rights under Article 6.2 of the DSU, the European Union contends that the fact that China defended, already in its first written submission, all the claims made by the complainants demonstrates that China had the opportunity to prepare exhaustively its defence in the earliest stages of the Panel proceedings. Finally, the European Union also disagrees with China that the Panel had allowed the complainants a "'long à la carte menu' from which they could choose in subsequent submissions ... the 'specific combination of measures and claims'".<sup>201</sup> The European Union asserts that, contrary to what China suggests, the European Union had "no choice at all" as regards the specific combinations of measures and claims at issue.<sup>202</sup>

## 2. The Panel's Recommendations

106. With regard to China's appeal of the Panel's recommendations, the European Union points out that the Panel made recommendations "on the 'series of measures', which comprise the 'relevant framework legislation, the implementing regulation(s), other applicable laws and *the specific measure imposing export duties or export quotas in force at the date of the Panel's establishment*'".<sup>203</sup> The European Union recalls that the Panel was established on 21 December 2009 and, on that date, the 2010 "replacement measures" to which China refers in its appeal were not "*in force*": they entered into force on 1 January 2010.<sup>204</sup> The European Union considers, therefore, that the Panel did not make recommendations that apply to 2010 replacement measures and China's appeal should be rejected "as baseless".<sup>205</sup>

107. Referring to China's concern that the Panel's recommendations may "require China to take action to revise" its "annual replacement measures"<sup>206</sup>, the European Union argues that the Appellate Body is not the "proper forum" to determine actions China should take to comply with its

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<sup>200</sup>European Union's appellee's submission, para. 22.

<sup>201</sup>European Union's appellee's submission, para. 26 (quoting China's appellant's submission, para. 96). (emphasis added by the European Union omitted)

<sup>202</sup>European Union's appellee's submission, para. 27.

<sup>203</sup>European Union's appellee's submission, para. 40 (quoting Panel Reports, para. 7.33(e)). (emphasis added by the European Union)

<sup>204</sup>European Union's appellee's submission, para. 40 (referring to Panel Reports, para. 7.32). (emphasis added by the European Union)

<sup>205</sup>European Union's appellee's submission, para. 41.

<sup>206</sup>European Union's appellee's submission, para. 43 (referring to China's appellant's submission, para. 100).

WTO obligations. Instead, Article 21 of the DSU provides the proper procedure that China should follow in order to identify these actions. For the European Union, this is another reason why China's appeal of the Panel's recommendations should be rejected.

3. Applicability of Article XX of the GATT 1994

108. The European Union requests the Appellate Body to uphold the Panel's findings and conclusions that China cannot invoke the defence of Article XX of the GATT 1994 for violations of the obligations contained in Paragraph 11.3 of China's Accession Protocol. While WTO Members can "incorporate" Article XX of the GATT 1994 into another agreement if they so wish, the legal basis for "applying" Article XX to another agreement would be the "very text of incorporation", and not Article XX itself, as Article XX is limited by its "express terms" to the GATT 1994.<sup>207</sup> The European Union also asserts that the Panel was correct in finding that "China had 'exercised its inherent and sovereign right to regulate trade in negotiating, among other actions, the terms of its accession into the WTO'", and that the inherent right to regulate trade does not permit recourse to Article XX.<sup>208</sup>

(a) Paragraph 11.3 of China's Accession Protocol

109. The European Union disagrees with China's assertion that "the exception to [P]aragraph 11.3 in Annex 6 to China's Accession Protocol establishes a connection with Article XX of the GATT 1994".<sup>209</sup> The "fundamental flaw" with this argument is that it is based on the premise that the use of the term "exceptional circumstances" in the text of the Note to Annex 6 establishes a "substantive overlap" with Article XX, which is entitled "General Exceptions".<sup>210</sup> Specifically, China's argument is flawed because it compares the term "exceptional circumstances" to "exceptions". The European Union notes that there is no "agreed definition or interpretation" of the phrase "exceptional circumstances" in the Note to Annex 6 of China's Accession Protocol, and highlights the fact that the word "exceptional" in the Note to Annex 6 is used as an adjective and not as a noun as in Article XX.<sup>211</sup> Since an "exceptional circumstance" does not have the same meaning as an "exception" within the meaning of Article XX, China's argument takes the word "exceptional" out of context.<sup>212</sup> The European Union faults China for searching "for similar words or phrases in other

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<sup>207</sup>European Union's appellee's submission, para. 54.

<sup>208</sup>European Union's appellee's submission, para. 55 (referring to Panel Reports, paras. 7.155-7.157).

<sup>209</sup>European Union's appellee's submission, paras. 59.

<sup>210</sup>European Union's appellee's submission, para. 62.

<sup>211</sup>European Union's appellee's submission, para. 62.

<sup>212</sup>European Union's appellee's submission, para. 63.

WTO agreements" in order to make them applicable to Paragraph 11.3 of China's Accession Protocol.<sup>213</sup>

110. The European Union further submits that China disregards the Panel's reasoning regarding the "fundamental difference"<sup>214</sup> between Paragraph 11.3 and Paragraph 5.1 of China's Accession Protocol, violations of which the Appellate Body has found can be justified under Article XX. That is, Paragraph 11.3 does not contain the introductory phrase "[w]ithout prejudice to China's rights to regulate trade in a manner consistent with the WTO Agreement" found in Paragraph 5.1.

111. The European Union also rejects China's argument that the reference to Article VIII of the GATT 1994 in Paragraph 11.3 of China's Accession Protocol confirms the "common intent"<sup>215</sup> of WTO Members to make Article XX applicable to Paragraph 11.3 as "pure conjecture".<sup>216</sup> To the contrary, the fact that there is a specific reference to Article VIII, but not to Article XX, indicates a common intent to exclude the applicability of Article XX. The European Union adds that it is "obscure from a systemic point of view" how the "express reference" to Article VIII could include a "tacit reference" to the availability of Article XX of the GATT 1994.<sup>217</sup>

(b) Context from the *WTO Agreement*

112. In response to China's argument that Paragraph 170 of China's Accession Working Party Report justifies recourse to the exceptions contained in Article XX of the GATT 1994, although the European Union agrees that Paragraph 170 is integrated into China's Accession Protocol, it asserts that this fact does not make Article XX applicable to Paragraph 11.3 of China's Accession Protocol. Recalling China's argument that Paragraph 11.3 and Paragraph 170 overlap in terms of their subject matter, the European Union asserts that the Panel correctly identified the differences between Paragraph 170 and Paragraph 11.3. Regarding China's argument that the Panel erred in "assum[ing]" that Paragraph 170 does not apply to export duties because Paragraphs 155 and 156 of China's Accession Working Party Report apply to export duties, the European Union notes that the Panel recognized the importance of Paragraphs 155 and 156 as providing the context for interpreting Paragraph 170 of the Accession Working Party Report.<sup>218</sup> The European Union also highlights that

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<sup>213</sup>European Union's appellee's submission, para. 64.

<sup>214</sup>European Union's appellee's submission, para. 70.

<sup>215</sup>European Union's appellee's submission, para. 75 (referring to China's appellant's submission, para. 226).

<sup>216</sup>European Union's appellee's submission, para. 77.

<sup>217</sup>European Union's appellee's submission, para. 78.

<sup>218</sup>European Union's appellee's submission, para. 85 (referring to Panel Reports, para. 7.145).

the Panel noted that Paragraphs 155 and 156 fall under section C of China's Accession Working Party Report entitled "Export Regulations", whereas Paragraph 170 falls under section D, entitled "Internal Policies Affecting Foreign Trade in Goods".

113. According to the European Union, China's argument that "the Panel appeared to consider that Paragraph 170 imposes obligations solely under the GATT 1994"<sup>219</sup> attempts to "distort" what the Panel had "actually stated"<sup>220</sup>: that Paragraph 11.3 of China's Accession Protocol includes an obligation to eliminate export duties that is not found in the GATT 1994, whereas "Paragraph 170 essentially repeats the commitments existing under certain GATT rules".<sup>221</sup>

114. In response to China's argument that context from the *WTO Agreement* confirms the applicability of Article XX of the GATT 1994 as a justification for inconsistencies with Paragraph 11.3 of China's Accession Protocol, the European Union begins by noting that, under Article 31(1) of the *Vienna Convention*, context can only confirm the ordinary meaning given to the terms of the agreement, and since China has failed to show that the ordinary meaning establishes the applicability of Article XX to Paragraph 11.3, context alone cannot serve as the "constitutive element".<sup>222</sup> The European Union asserts that, although the preamble of the *WTO Agreement* contains elements such as general principles underlying the creation of the WTO, objectives of the multilateral trading system, and common expectations of Members, which may be relevant when assessing Article XX of the GATT 1994, the preamble cannot make Article XX applicable to specific obligations in a WTO legal instrument in the absence of a reference to Article XX in that instrument.

(c) The Inherent Right to Regulate Trade

115. The European Union disagrees with China that the Panel erred in its interpretation of Paragraph 11.3 of China's Accession Protocol by not recognizing China's inherent right to regulate trade. The European Union points out that the Panel recognized that this sovereign and inherent right is held by all WTO Members and reasoned that China had exercised this right when negotiating its accession to the WTO. The European Union agrees with the Panel that the provisions of the covered

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<sup>219</sup>European Union's appellee's submission, para. 87 (quoting China's appellant's submission, para. 242).

<sup>220</sup>European Union's appellee's submission, para. 88.

<sup>221</sup>European Union's appellee's submission, para. 87 (quoting Panel Reports, para. 7.141).

<sup>222</sup>European Union's appellee's submission, para. 97.

agreements and China's Accession Protocol therefore "delineate" China's exercise of its inherent and sovereign right to regulate trade.<sup>223</sup>

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

116. The European Union requests the Appellate Body to reject China's appeal and also to reject China's claims that the Panel failed to conduct an objective assessment of the matter, as required under Article 11 of the DSU. With respect to the Panel's interpretation of the term "temporarily" in Article XI:2(a) of the GATT 1994, China misunderstands the Panel's statements that Article XI:2(a) should not be interpreted to permit the "long-term application of conservation measures", or "long-term measures related to conservation purposes".<sup>224</sup> For the European Union, these statements do not mean that the Panel found that Article XI:2(a) does not cover any "long-term" export restrictions, but rather that Article XI:2(a) does not cover any "long-term *conservation measures*".<sup>225</sup>

117. Further, the European Union takes issue with China's assertion that the annual renewal of China's export restrictions means that the restrictions have a relatively short duration of one year and that their duration is defined in relation to the time required to prevent or relieve the critical shortage. In the European Union's view, the annual renewal of China's measures implies that, at the beginning of each year, China expects that the shortage of refractory-grade bauxite will cease by the end of the year, but at year-end, China realizes that this expectation was incorrect and adapts its expectation that the shortage will cease one year later, and so on, until final depletion of the reserves. For the European Union, this indicates that China's annual renewal of export restrictions does not have any impact on whether the restrictions are applied "temporarily".

118. The European Union also takes issue with China's contention that the Panel found that Article XI:2(a) and Article XX(g) of the GATT 1994 are mutually exclusive. The European Union maintains that the Panel did not make such a finding, but instead used a comparison between the two Articles only to draw additional support for its interpretation. On the basis of that analysis, the Panel rightly concluded that Article XX(g) is confined to conservation measures, while Article XI:2(a) covers "exceptional measures" that address situations of crisis.<sup>226</sup>

119. With respect to the Panel's interpretation of the term "critical shortages", the European Union submits that the Panel found that Article XI:2(a) does not cover all types of critical shortages, but

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<sup>223</sup>European Union's appellee's submission, para. 109.

<sup>224</sup>European Union's appellee's submission, para. 174 (quoting Panel Reports, para. 7.349).

<sup>225</sup>European Union's appellee's submission, para. 175. (original emphasis)

<sup>226</sup>European Union's appellee's submission, para. 165 (quoting Panel Reports, para. 7.301).

deals only with a subset, namely those critical shortages that are "capable of being 'prevented or relieved' through the 'temporary application' of export restrictions".<sup>227</sup> Thus, a "critical shortage" is capable of being prevented or relieved through an export restriction that is "temporarily applied", only if the critical shortage itself is "temporary".

120. The European Union takes issue with China's allegation that the Panel found that "conservation measures" can never fall within the scope of Article XI:2(a) and contends that, rather, the Panel found that China's export quota on refractory-grade bauxite is not covered by Article XI:2(a). The European Union submits that the purpose of the export quota, as acknowledged by China, was not to "prevent" or "relieve" a critical shortage, but to "extend the reserves" for "current and future generations".<sup>228</sup> The limited life span of the reserves of a good, however, is not sufficient for a finding of a "critical shortage" in the sense of Article XI:2(a). In the European Union's view, Article XI:2(a) covers export restrictions that act as a "bridge" until a crisis is resolved and normality returns. In that sense, the gradual depletion of natural resources may well create a shortage in the availability of a good, however, such shortage does not fall within the scope of Article XI:2(a), because it is not "temporary".<sup>229</sup> Absent extraordinary circumstances, such as an unexpected discovery of new reserves, there is no point in time where it could reasonably be expected that the shortage would cease to exist and the availability of the good would return to normal conditions. The European Union submits that "a shortage caused by the limited natural reserves of the good *is the normal condition* for the availability of the good".<sup>230</sup>

121. For the European Union, a shortage caused by the depletion of natural resources is different from the "critical shortage" occurring in situations of crisis. The former can be addressed by conservation measures seeking to extend the duration of the resources. The latter can be addressed by temporary measures seeking to prevent or relieve the effects of a crisis. For the European Union, the text of Article XI:2(a) covers only the latter situation. This does not mean that Article XI:2(a) can never cover goods with a limited reserve. The European Union gives the example of a mining accident, which would cause a severe decrease in the quantity of refractory-grade bauxite in China. The ensuing shortage of the good could fall within the scope of Article XI:2(a) because it would be

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<sup>227</sup>European Union's appellee's submission, para. 135.

<sup>228</sup>European Union's appellee's submission, para. 147.

<sup>229</sup>European Union's appellee's submission, para. 150.

<sup>230</sup>European Union's appellee's submission, para. 150. (original emphasis)

capable of being relieved through measures applied for the time needed to bring the mine back to operation, and the market conditions back to their "'normal', gradually depleting situation".<sup>231</sup>

122. Finally, in response to China's allegation that the Panel erred under Article 11 of the DSU because it failed to assess properly evidence that China's export restrictions are annually reviewed and renewed, the European Union contends that the above considerations relating to China's review and renewal mechanism support the Panel's finding that a withdrawal of the restrictions is not to be expected until the depletion of the reserves, and that this finding was based on accurate findings of fact. The European Union also objects to China's allegation that the Panel found that there was no possibility for an existing shortage of an exhaustible natural resource to cease to exist, and that the Panel thereby acted inconsistently with Article 11 of the DSU. The European Union contends that the Panel did not make such a finding. Instead, the Panel relied on the fact that the restriction had been in place "for at least a decade" and that there was no indication that it would be lifted.

#### 5. Article XX(g) of the GATT 1994

123. The European Union requests the Appellate Body to uphold the Panel's interpretation of the phrase "made effective in conjunction with" in Article XX(g) of the GATT 1994. The European Union takes issue with China's allegation that the Panel found that a restriction on international trade must pursue a dual purpose of conserving a natural resource and of seeking to ensure the effectiveness of domestic restrictions on that resource. For the European Union, the Panel referred only to one and the same purpose, namely the conservation of a natural resource, for both the restriction on international trade and the restrictions on domestic production or consumption.

124. Furthermore, the European Union argues that the word "purpose" in paragraph 7.397 of the Panel Reports closely reflects the language used in paragraph 4.6 of the GATT panel report in *Canada – Herring and Salmon*, which rightly stated that a measure "can only be made [effective] 'in conjunction' with domestic restrictions on production, if it is primarily aimed at rendering effective these restrictions".<sup>232</sup> The European Union further submits that the domestic restrictions on production or consumption must, by their very nature, have the purpose or aim of conserving natural resources. It would be difficult to imagine a situation in which a domestic restriction on the

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<sup>231</sup>European Union's appellee's submission, para. 154.

<sup>232</sup>European Union's appellee's submission, para. 195 (quoting GATT Panel Report, *Canada – Herring and Salmon*, para. 4.6). (emphasis added by the European Union omitted)

production or consumption of a natural resource would have a "purpose" other than conservation of the same natural resource.<sup>233</sup>

6. Prior Export Performance and Minimum Capital Requirements

125. As a preliminary matter, the European Union argues that China's appeal concerning examination and approval systems for WTO-consistent export quotas is "ineffective" since China has not appealed the Panel's finding that the export quotas are inconsistent with the GATT 1994.<sup>234</sup> The European Union, therefore, questions whether the Appellate Body should rule on China's appeal regarding China's prior export performance and minimum capital requirements.<sup>235</sup>

126. In any event, the European Union considers that the Panel correctly found that China's prior export performance and minimum capital requirements imposed on exporters of bauxite, coke, fluorspar, and silicon carbide are inconsistent with China's obligations under Paragraph 5.1 of its Accession Protocol and Paragraphs 83 and 84 of China's Accession Working Party Report. The European Union submits that these provisions require that China: (i) eliminate its system of examination and approval of trading rights; (ii) grant the right to trade to all Chinese enterprises (both Chinese-invested and foreign-invested) and to all foreign enterprises and individuals; and (iii) eliminate the "minimum capital" and the "prior experience" requirements for foreign enterprises, after the end of the phase-in period.<sup>236</sup>

127. The European Union further notes that China seeks to justify the continued use of its prior export performance and minimum capital requirements on the basis of its alleged right to adopt WTO-consistent "quota allocating criteria", its need to "allocate the quota through criteria that restrict the volume of exports to quota volume"<sup>237</sup>, its right to "maintain quota allocation rules"<sup>238</sup>, and its right to "establish quota allocation rules".<sup>239</sup> Yet, China's prior export performance and minimum capital requirements are not "export quota allocation criteria" or part of an "export quota allocation system". Rather, China uses these requirements only at the stage of prior examination and approval. The

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<sup>233</sup>European Union's appellee's submission, para. 201.

<sup>234</sup>European Union's appellee's submission, para. 214.

<sup>235</sup>European Union's appellee's submission, para. 216.

<sup>236</sup>European Union's appellee's submission, para. 224.

<sup>237</sup>European Union's appellee's submission, para. 231 (referring to China's appellant's submission, para. 443).

<sup>238</sup>European Union's appellee's submission, para. 231 (referring to China's appellant's submission, para. 444).

<sup>239</sup>European Union's appellee's submission, para. 231 (referring to China's appellant's submission, para. 568).

European Union considers that this is an additional reason for which this aspect of China's appeal should be dismissed.

128. The European Union further argues that allowing China to treat Chinese-invested enterprises differently from foreign-invested enterprises would be contrary to the general structure of the obligations undertaken by China in Paragraphs 83 and 84 of its Accession Working Party Report.

7. China's "Operation Capacity" Criterion and Article X:3(a) of the GATT 1994

129. The European Union requests the Appellate Body to uphold the Panel's finding that China's allocation of export quotas through the use of the "operation capacity" criterion is inconsistent with Article X:3(a) of the GATT 1994, and to reject China's claim that the Panel acted inconsistently with Article 11 of the DSU. The European Union disagrees with China's contention that, in the light of the absence of evidence demonstrating WTO-inconsistent application, China was entitled to the presumption that it would act in accordance with its WTO obligations. The European Union contends that the Panel found that there are 32 different local departments in China interpreting and applying the "operation capacity" criterion, and that Chinese legislation does not define the notion of "operation capacity" or offer any standard on the basis of which the local departments should assess that criterion. For the European Union, it is therefore difficult to see how China's 32 local departments can always interpret and apply the "operation capacity" criterion in the same way, as a result of their own choice. Rather, the logical conclusion would seem to be that, if the 32 local departments ever interpret and apply this in the same way, this would be sheer coincidence.

130. The European Union also takes issue with China's argument that, where an authority is faced with a domestic measure of uncertain meaning, the theoretical risk that the authority might choose a WTO-inconsistent meaning does not render the measure "as such" WTO-inconsistent. The Panel did not find that the "operation capacity" criterion was "as such" WTO-inconsistent. Rather, it found that China's administration of its direct allocation of export quotas is inconsistent with Article X:3(a).

131. In the European Union's view, China attempts to draw an artificial distinction between types of certainty so as to distinguish the facts of the present case from the facts in *Argentina – Hides and Leather*. Yet, just as the facts in the present case create a "very real risk" of administration inconsistent with Article X:3(a)<sup>240</sup>, the panel in *Argentina – Hides and Leather* found that the risk that information might be improperly used was sufficient to lead to a finding of unreasonable and partial

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<sup>240</sup>European Union's appellee's submission, para. 319.

administration.<sup>241</sup> The European Union argues therefore that the analysis and findings by the panel in *Argentina – Hides and Leather* support the Panel's analysis and findings in this case.

132. The European Union stresses that the Panel correctly found China's administration of its direct allocation of export quotas to be inconsistent with Article X:3(a) on the basis that the "operation capacity" criterion could not be applied "'consistently in the same manner, both over time and in different places' and 'in respect of all traders'"<sup>242</sup>, and that the Panel did not find that the "operation capacity" criterion was *per se* inconsistent.<sup>243</sup> In other words, contrary to what China asserts, the Panel did not find that a theoretical risk that the Chinese authorities may exercise their discretion to adopt a WTO-inconsistent meaning for the term "operation capacity" thereby renders the measure "as such" WTO-inconsistent.<sup>244</sup>

133. The European Union also disagrees with China's assertion that there is no evidence to support the Panel's assessment regarding the likelihood of the risk of inconsistent administration as being "very real".<sup>245</sup> The Panel's findings that the risk is "very real" were supported by the "undisputed fact[]" that there is "no definition, standard or guidelines" for the 32 local departments charged with interpreting and applying the "operation capacity" criterion.<sup>246</sup> The European Union therefore requests that the Appellate Body reject China's assertion that the Panel acted inconsistently with Article 11 of the DSU in its analysis of this issue.

#### 8. China's Export Licensing Requirements and Article XI:1 of the GATT 1994

134. The European Union requests the Appellate Body to uphold the Panel's finding that Article 11(7) of the *2008 Export Licence Administration Measures*, and Articles 5(5) and 8(4) of the *2008 Export Licensing Working Rules* are inconsistent with Article XI:1 of the GATT 1994.<sup>247</sup> The European Union also requests the Appellate Body to reject China's claim that the Panel erred under Article 11 of the DSU by making this finding without a sufficient evidentiary basis. The European Union disagrees with China's argument that allowing export licensing agencies the

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<sup>241</sup>European Union's appellee's submission, para. 318 (referring to Panel Report, *Argentina – Hides and Leather*, para. 11.92).

<sup>242</sup>European Union's appellee's submission, para. 309 (quoting Panel Reports, para. 7.749).

<sup>243</sup>European Union's appellee's submission, para. 309.

<sup>244</sup>European Union's appellee's submission, para. 307.

<sup>245</sup>European Union's appellee's submission, para. 326.

<sup>246</sup>European Union's appellee's submission, para. 327.

<sup>247</sup>European Union's appellee's submission, para. 285.

"discretion" to grant or refuse export licences is not inconsistent with Article XI:1 of the GATT 1994.<sup>248</sup>

135. The European Union takes issue with China's distinction between discretion to apply or not a domestic legal provision that mandates WTO-inconsistent action, and discretion to apply an ambiguous provision in a WTO-consistent manner. The European Union argues that such a distinction makes little difference to individual economic operators and other WTO Members. China's interpretation would contradict the purpose of Article XI:1, which is "to protect traders and create the *predictability* needed to plan future trade".<sup>249</sup> The European Union contends that both types of "discretion" create uncertainty which, in turn, "leads to increased transaction costs and has negative economic impact".<sup>250</sup>

136. The European Union submits that China's position is inconsistent with the interpretation of Article XI:1 of the GATT 1994 given by WTO panels. The discretion accorded to Chinese licensing authorities in this case to require undefined documents resembles the discretion enjoyed by the Indian licensing authorities when granting licences on the basis of unspecified "merits", which the panel in *India – Quantitative Restrictions* found to be inconsistent with Article XI:1.<sup>251</sup>

137. The European Union further disagrees with China's assertion that, where there is an "ambiguous" domestic measure that can always be interpreted and applied in a WTO-consistent manner, it must be presumed that the respondent will abide by its WTO obligations in applying such measure. The "ambiguous" domestic measure could also always be interpreted and applied in a WTO-inconsistent manner. For the European Union, Article XI:1 protects the rights of traders and other WTO Members and "does not create 'presumptions of WTO consistency'" for responding parties.<sup>252</sup>

138. The European Union also rejects China's assertion that the Panel acted inconsistently with Article 11 of the DSU by making findings under Article XI:1 of the GATT 1994 without a sufficient evidentiary basis. Contrary to what China argues, the Panel did not simply presume "that Chinese license-issuing authorities will one day choose to request additional documents of such a nature so as

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<sup>248</sup>European Union's appellee's submission, para. 253 (referring to China's appellant's submission, paras. 569, 580, and 582).

<sup>249</sup>European Union's appellee's submission, para. 260 (referring to Panel Report, *US – Section 301 Trade Act*, para. 7.84). (emphasis added by the European Union)

<sup>250</sup>European Union's appellee's submission, para. 260 (referring to Panel Report, *US – Section 301 Trade Act*, para. 7.84).

<sup>251</sup>European Union's appellee's submission, para. 263 (referring to Panel Reports, para. 7.920).

<sup>252</sup>European Union's appellee's submission, para. 266.

to impose a 'restriction' on export[s]".<sup>253</sup> Instead, based on its understanding of the relevant legal provisions, the Panel found that the very existence of China's authorities' discretion to require undefined and unspecific documents "created uncertainty as to an applicant's ability to obtain an export licence", and was therefore inconsistent with Article XI:1 of the GATT 1994.<sup>254</sup> The European Union argues that the text of China's relevant measures "was the proper 'evidentiary basis'" for the Panel's finding, and that China's assertion that its authorities had never rejected any export license application relating to manganese and zinc was not relevant for the Panel's analysis.<sup>255</sup>

D. *Claims of Error by the United States – Other Appellant*

1. Conditional Appeal regarding the Panel's Recommendations

139. The United States and Mexico assert that the outcome of the Panel's approach to making findings and recommendations in this dispute is consistent with the covered agreements and supported by the record in this dispute. Specifically, the Panel properly concluded that it would make findings and recommendations on the measures operating together (the "series of measures") to impose export duties or export quotas on the raw materials at issue.<sup>256</sup> The United States and Mexico request the Appellate Body to review the Panel's recommendations on the export quota and export duty measures only in the event that, pursuant to China's appeal, the Appellate Body reverses the Panel's recommendations in paragraphs 8.8, 8.15, and 8.22 of the Panel Reports and finds that no recommendation should have been made by the Panel on the "series of measures" as they existed when the Panel was established.

140. The United States and Mexico submit that the complainants challenged a number of export restraints in a "logical way" that reflected the structure of the legal instruments that give effect to the challenged export duties and export quotas.<sup>257</sup> In addition to seeking findings that the measures at issue were inconsistent with WTO rules, the complainants sought recommendations with respect to these measures that would ensure that the export duties and quotas at issue would be within the scope of any future compliance proceedings under Article 21.5 of the DSU. According to the United States

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<sup>253</sup>European Union's appellee's submission, para. 280 (quoting China's appellant's submission, para. 599).

<sup>254</sup>European Union's appellee's submission, para. 281 (quoting Panel Reports, para. 7.948).

<sup>255</sup>European Union's appellee's submission, para. 283. The European Union further contends that China's assertion in this respect was not proved during the Panel proceedings, because the complainants did not have access to the relevant information in order to corroborate or challenge it.

<sup>256</sup>United States' other appellant's submission, para. 38 (referring to Panel Reports, paras. 7.17, 7.33, 7.60-7.68, 7.76, 7.80, 7.83, 7.86, 7.89, 7.94, 7.97, and 7.218-7.224).

<sup>257</sup>United States' other appellant's submission, para. 41.

and Mexico, the adoption of a recommendation by the DSB was a "critical objective" in achieving a "positive solution to the dispute", in terms of Article 3.7 of the DSU.<sup>258</sup>

141. The United States and Mexico highlight that, during the Panel proceedings, China tried to avoid responsibility for the challenged trade barriers by asking the Panel to "shift the focus" of its review from the measures as they existed at the time of the establishment of the Panel to later points in time.<sup>259</sup> By contrast, the complainants asked the Panel to focus its review on the challenged measures in effect at the time of its establishment, because focusing on the legal situation at a later time would be tantamount to permitting China to "move the target" and "shield important parts of the export restraint regimes" from scrutiny.<sup>260</sup> The United States and Mexico request the Appellate Body to make a recommendation that "clearly is aimed at securing a positive resolution to this ongoing dispute", as only such a resolution would prevent an "endless loop of WTO dispute settlement proceedings".<sup>261</sup>

142. In the event that the Appellate Body finds that no recommendation should have been made by the Panel on the "series of measures" as they existed at the time of Panel establishment, and reverses the Panel's recommendations with respect to the replacement measures, the United States and Mexico assert that the Panel erred under Articles 6.2, 7.1, 11, and 19.1 of the DSU in not making recommendations on the 2009 export duty and export quota measures that were annually recurring and in effect on the date of Panel establishment. The United States and Mexico note that it is "undisputed" that the Panel correctly found that these measures, which were annually recurring and in existence at the time the Panel was established but were subsequently superseded by other legal instruments, were inconsistent with China's obligations under Article XI:1 of the GATT 1994 and Paragraph 11.3 of China's Accession Protocol. However, in the light of Article 19.1 of the DSU and the circumstances of this dispute where recurrence of a violation is likely, the Panel erred in not making a recommendation on the basis of its finding that, on the date the Panel was established, those measures were inconsistent with China's WTO obligations. According to the United States and

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<sup>258</sup>United States' other appellant's submission, para. 42.

<sup>259</sup>United States' other appellant's submission, para. 44 (referring to China's first written submission to the Panel, paras. 63-67; China's second written submission to the Panel, paras. 6-18; and China's opening statement at the second Panel meeting, paras. 3-11).

<sup>260</sup>United States' other appellant's submission, para. 44 (referring to the complainants' joint oral statement at the first Panel meeting, paras. 45 and 51; United States' second written submission to the Panel, paras. 341 and 342; United States' opening statement at the second Panel meeting, paras. 109-111; Mexico's second written submission to the Panel, paras. 346-348; and Mexico's opening statement at the second Panel meeting, paras. 6-9).

<sup>261</sup>United States' other appellant's submission, para. 45.

Mexico, the Panel "misconstrued" its terms of reference and the "relevant point in time" for its analysis of these annually recurring measures.<sup>262</sup>

143. The United States and Mexico seek to distinguish the present case from *US – Certain EC Products*, where the Appellate Body found that the panel had erred in making a recommendation on an expired measure. First, unlike *US – Certain EC Products*, where the measure at issue had ceased to exist prior to the establishment of the panel, in the present dispute, the annual export duty and quota measures were in effect on the date the Panel was established. Second, the measure at issue in *US – Certain EC Products* was not one that was "maintained over time through the annual recurrence of legal instruments"; whereas, in the present dispute, even though the impugned legal instruments have been superseded, these measures nonetheless maintain legal effect through the recurrence of the following year's legal instrument.<sup>263</sup>

144. The United States and Mexico recall that, throughout the Panel proceedings, China introduced, amended, and repealed a number of legal instruments, decreasing the burden of export restraints imposed on bauxite and fluorspar, with a view to justifying the imposition of the export restraints on these products under Article XX of the GATT 1994. This could have effectively prevented the complainants from getting recommendations on the challenged measures found to be inconsistent as of the date the Panel was established. According to the United States and Mexico, a "correct and reasonable interpretation from a systemic point of view" avoids creating a "loophole" in the system whereby complainants could find themselves "taking aim" at "appearing and disappearing targets", and whereby WTO Members could evade a panel's scrutiny by removing measures during panel proceedings and reinstating them in the future without any consequences.<sup>264</sup>

2. Article VIII:1(a) of the GATT 1994 and Paragraph 11.3 of China's Accession Protocol

145. The United States requests the Appellate Body to reverse the Panel's conclusion that China's requirement for enterprises to pay a bid-winning fee in order to export bauxite, fluorspar, and silicon carbide under its export quota regime is not inconsistent with Article VIII:1(a) of the GATT 1994 and Paragraph 11.3 of China's Accession Protocol.

146. First, the United States alleges that the Panel incorrectly found that China's bid-winning fee is not a fee or charge "imposed on or in connection with ... exportation" in the sense of

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<sup>262</sup>United States' other appellant's submission, para. 56.

<sup>263</sup>United States' other appellant's submission, paras. 60 and 61.

<sup>264</sup>United States' other appellant's submission, paras. 70 and 71.

Article VIII:1(a), notwithstanding the fact that payment of the fee is a legal prerequisite for exportation, and is a requirement imposed in relation to the administration of a quantitative restriction. The Panel properly recognized that the phrase "on or in connection with ... exportation" has a "broad temporal view", and explained that Article VIII:1(a) refers to fees or charges that are applied not only "at the moment in time of exportation" but also "in association with exportation".<sup>265</sup> However, the United States contends that the Panel erred by adding an additional test, namely that fees and charges in connection with exportation would "typically" be limited to "specific fees, charges, formalities or requirements, associated with customs-related documentation, certification and inspection, and statistical matters".<sup>266</sup> This is also inconsistent with the context provided by Article VIII:4 of the GATT 1994, because China's bid-winning fee falls within the examples of items (b) "quantitative restrictions" and (c) "licensing" of the list set out in that provision. In addition, the United States argues that the Panel's reliance on the GATT panel report in *US – Customs User Fee* does not support the conclusion that the bid-winning fee is not a fee imposed on or in connection with exportation, because the part of that GATT panel's reasoning cited by the Panel in the present case relates to the meaning of the term "services rendered" and not to the meaning of "on or in connection with ... exportation".

147. Second, the United States alleges that the Panel erred in concluding that Article VIII of the GATT 1994 is not applicable to China's bid-winning fee because it does not relate to any service rendered. The Panel correctly concluded that the bid-winning fee is not related to the approximate cost of a service rendered, but, for the United States, this conclusion weighs in favour of a finding that the fee is inconsistent with Article VIII:1(a), and not of a finding that the fee falls outside the scope of Article VIII altogether. The latter finding would turn Article VIII on its head, allowing a Member to impose any fee at any level, even where there was no service rendered.

148. The United States also takes issue with the Panel's statement that, because bid-winning fees would necessarily be "variable", such fees could not be related to any service rendered.<sup>267</sup> The mere fact of "variability" does not mean that a fee is necessarily disconnected from services rendered. In addition, a finding that a certain type of fee might always be inconsistent with Article VIII:1(a) does not mean that the fee, for that reason alone, falls outside the scope of Article VIII. Instead, in the United States' view, if it does not meet the requirement of being limited to the approximate cost of services rendered, then such a fee is inconsistent with Article VIII:1(a).

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<sup>265</sup>United States' other appellant's submission, para. 19 (quoting Panel Reports, para. 7.823).

<sup>266</sup>United States' other appellant's submission, para. 20 (quoting Panel Reports, para. 7.832).

<sup>267</sup>United States' other appellant's submission, para. 35 (referring to Panel Reports, para. 7.850).

149. Finally, the United States submits that the Panel erred in finding that China's imposition of a bid-winning fee is not inconsistent with Paragraph 11.3 of China's Accession Protocol. The Panel's analysis of the bid-winning fee under Paragraph 11.3 of the Accession Protocol flowed from its Article VIII:1(a) analysis, and was therefore similarly flawed.

E. *Claims of Error by Mexico – Other Appellant*

1. Conditional Appeal regarding the Panel's Recommendations

150. Mexico incorporates by reference into its other appellant's submission the arguments concerning the Panel's recommendations on annual export quota and export duty measures set out in section IV of the United States' other appellant's submission.<sup>268</sup>

2. Involvement of the CCCMC in the Allocation of Export Quotas and Article X:3(a) of the GATT 1994

151. Mexico requests the Appellate Body to reverse the Panel's findings that the involvement of the CCCMC in China's administration of its export quota regime is consistent with Article X:3(a) of the GATT 1994, including the Panel's findings concerning the interpretation and application of Article X:3(a).<sup>269</sup> Mexico contends that the Panel erred in its interpretation of Article X:3(a) by requiring complainants bringing "as such" claims to demonstrate that a challenged measure necessarily leads to partial and/or unreasonable administration. Since Mexico's claims relate to the structure rather than the application of China's quota allocation system, no evidence of actual partial or unreasonable administration was required, nor was it necessary to show that partial or unreasonable application would inevitably result. To require evidence of partiality or unreasonableness would "ignore[] the realities of the social and political context in which the trade association's activities take place".<sup>270</sup>

152. The Panel does not explain the legal basis for its "very real risk" standard, which is not reflected in the text of Article X:3(a).<sup>271</sup> However, since the CCCMC is made up of competitors, regardless of its administrative function, Mexico contends that "it must be assumed that a significant

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<sup>268</sup>Mexico's other appellant's submission, para. 16 (referring to United States' other appellant's submission, section IV).

<sup>269</sup>Mexico's other appellant's submission, para. 61.

<sup>270</sup>Mexico's other appellant's submission, para. 31.

<sup>271</sup>Mexico's other appellant's submission, para. 36.

possibility exists" that the CCCMC's decisions will lack objectivity and "be distorted in some degree", and that applicants' confidential information "may be leaked" to competitors.<sup>272</sup>

153. Mexico suggests that the involvement of the CCCMC in the quota allocation process "lead[s] to an inherent conflict of interest" that "results in partial or unreasonable" administration contrary to Article X:3(a).<sup>273</sup> A risk of inconsistent administration exists whenever a private party "responsible for assisting in the administration ... has commercial interests" adverse to those of the applicants.<sup>274</sup> This risk increases when the private party "exercises discretionary authority over applicants", and becomes even more problematic when the private party "is granted access to the confidential business information" of the applicants.<sup>275</sup>

154. Specifically, in the context of partial administration, Mexico contends that the Panel's finding that the CCCMC played a purely "administrative/clerical function" in the quota administration process is factually incorrect.<sup>276</sup> Even assuming *arguendo* that the CCCMC's role is merely administrative, it may still present a "very real risk" of partial administration.<sup>277</sup> The panel in *Argentina – Hides and Leather* found partial administration where a private party association with conflicting commercial interests played an observatory role in the customs classification process, but was, according to Mexico, not in a position to influence the result of the process. While the Panel in this dispute "purported to agree with [this] approach", it then "effectively disregarded" it by finding that an inherent conflict of interest can be remedied if the party with the adverse interest does not have "influence in the process".<sup>278</sup> Mexico suggests that the fact that China's export quota regime "inherently contains the possibility of disclosure of confidential business data to commercial competitors" means that its administration is unreasonable, even if the confidential information submitted by quota applicants is required and relevant to the CCCMC's task.<sup>279</sup>

155. Finally, Mexico contends that the Panel failed to make an objective assessment of the facts as required by Article 11 of the DSU. Rather than evaluating the evidence on record in its totality, the Panel only considered isolated aspects of China's regime and ignored other evidence regarding the CCCMC's responsibilities. If the Panel had made an objective assessment, it would have found that

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<sup>272</sup>Mexico's other appellant's submission, para. 58.

<sup>273</sup>Mexico's other appellant's submission, para. 39.

<sup>274</sup>Mexico's other appellant's submission, para. 39.

<sup>275</sup>Mexico's other appellant's submission, para. 39.

<sup>276</sup>Mexico's other appellant's submission, para. 43.

<sup>277</sup>Mexico's other appellant's submission, para. 42.

<sup>278</sup>Mexico's other appellant's submission, para. 42 (referring to Panel Reports, para. 7.777).

<sup>279</sup>Mexico's other appellant's submission, para. 46.

the CCCMC's role is not purely administrative, and that the CCCMC has "a significant amount of discretion" regarding which applicants receive export quotas.<sup>280</sup> For example, in the context of the direct quota allocation system for coke, the CCCMC is the "sole administrative division" that "reviews, evaluates, and recommends which applicants qualify for consideration by MOFCOM".<sup>281</sup> In the context of the quota bidding system, the CCCMC not only plays a significant role in the composition of the Bidding Offices, but also "evaluates, verifies, and recommends applicants" with respect to certain raw materials. In addition, while the CCCMC does not make final determinations, its verification of applicants' qualifications for consideration without any "real oversight" has "obvious implications" for the final outcomes.<sup>282</sup> In Mexico's view, had the Panel made an objective assessment of this matter, it would have found that the requirement to provide confidential business information to the CCCMC "created an inherent conflict of interest that result[ed] in a partial and unreasonable administration".<sup>283</sup>

F. *Claims of Error by the European Union – Other Appellant*

1. Conditional Appeal regarding the Panel's Recommendations

156. The European Union submits a conditional appeal in the event the Appellate Body were to accept the relevant ground of appeal raised by China *and* reject the relevant other appeals submitted by the United States and Mexico. In that case, the European Union would argue that the Panel erred when it found that the European Union "requested the Panel not to make findings or recommendations on the legal instruments taking effect on 1 January 2010" and that the European Union "narrowed the Panel's terms of reference during the course of the proceedings".<sup>284</sup> The European Union submits several arguments in support of its assertion.

157. First, the European Union observes that the Panel relied on the European Union's statement that it "agrees with the views expressed by the United States and Mexico in their opening statement".<sup>285</sup> The European Union submits that it "never explicitly or implicitly stated that it withdraws its claims on replacement measures, or that it narrows the Panel's terms of reference".<sup>286</sup>

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<sup>280</sup>Mexico's other appellant's submission, para. 53.

<sup>281</sup>Mexico's other appellant's submission, para. 53. (original emphasis)

<sup>282</sup>Mexico's other appellant's submission, para. 56.

<sup>283</sup>Mexico's other appellant's submission, para. 60.

<sup>284</sup>European Union's other appellant's submission, para. 3 (referring to Panel Reports, paras. 7.21 and 7.22).

<sup>285</sup>European Union's other appellant's submission, para. 21 (referring to Panel Reports, para. 7.21 and footnote 62 thereto).

<sup>286</sup>European Union's other appellant's submission, para. 25.

The European Union argues that "[a] simple statement that a party generally agrees with the views expressed by the other complainants cannot be interpreted as that party's incorporation of the other complainants' claims and arguments into its own case."<sup>287</sup> Therefore, the Panel erred in finding that the European Union requested the Panel to "narrow" its terms of reference.<sup>288</sup>

158. Second, with respect to the Panel's reliance on the European Union's argument that the legal instrument subjecting bauxite to an export duty in 2009 was within the Panel's terms of reference, the European Union alleges that the statement of the European Union to which the Panel refers did not discuss replacement measures at all. Instead, it discussed the way the Panel should treat expired measures that were not replaced, and could not have been the basis for a finding that the European Union had withdrawn its claims on measures that were replaced.

159. Third, with respect to the Panel's reliance on the European Union's inclusion of only one measure that took effect after 1 January 2010 in certain tables provided to the Panel in response to questions, the European Union observes that the Panel asked for the tables in order to assess China's assertion that the European Union's first written submission to the Panel did not specify the challenged legal instruments in sufficient detail. The European Union considers that there was no basis for the Panel to consider, based on these responses, that the European Union was requesting the Panel not to make findings on legal instruments taking effect after 1 January 2010.

160. In the European Union's view, since the Panel erred in excluding "the 'amendments or extensions, replacement measures, renewal measures and implementing measures' that took effect after January 1 2010" from its terms of reference, the Panel acted inconsistently with its obligations under Article 7.1 of the DSU, which obliges panels to respect their terms of reference.<sup>289</sup> According to the European Union, a panel's interpretation of a party's written submissions, oral statements, and replies to questions constitute a part of the panel's assessment of the "matter" before it and thus, the Panel's failure to make an objective assessment in this respect was inconsistent with Article 11 of the DSU. The European Union also argues that, as a result of the Panel's erroneous determination of its terms of reference, and its "consequent failure" to make findings on the consistency of the replacement measures, the Panel failed to recommend that China bring its replacement measures into compliance with the covered agreements, thereby acting inconsistently with Article 19.1 of the DSU.<sup>290</sup> The European Union requests the Appellate Body to complete the Panel's analysis and find

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<sup>287</sup>European Union's other appellant's submission, para. 8.

<sup>288</sup>European Union's other appellant's submission, para. 8.

<sup>289</sup>European Union's other appellant's submission, para. 46.

<sup>290</sup>European Union's other appellant's submission, paras. 46-49.

that the 2010 replacement measures are inconsistent with China's obligations under Article XI of the GATT 1994; and to recommend that China bring the measures into compliance with its WTO obligations.

G. *Arguments of China – Appellee*

1. Conditional Appeals of the United States and Mexico regarding the Panel's Recommendations

161. China recalls that the appeals by the United States and Mexico are conditional upon the Appellate Body upholding China's appeal that the Panel was not entitled to make a recommendation regarding the "series of measures" that extends to replacement measures. China highlights that, in their conditional other appeal, the United States and Mexico requests the Appellate Body to find that the Panel erred in failing to make a recommendation regarding the expired 2009 measures that extends to replacement measures. However, if the Appellate Body finds that the recommendation regarding a "series of measures" cannot extend to replacement measures, as requested by China, then a recommendation regarding the expired 2009 measures cannot extend to the replacement measures either, because they were excluded from the Panel's terms of reference.

162. Regarding the argument by the United States and Mexico that the Appellate Body's findings in *US – Certain EC Products* do not apply to measures that expire after a panel's establishment, China submits that the Appellate Body's finding in that case was not dependent on the measure at issue expiring before a panel's establishment. Rather, the Appellate Body's finding is premised on a "straightforward" view that, if a measure no longer exists, it cannot be modified or withdrawn, and that, therefore, there is no legal basis for a recommendation under Article 19.1 of the DSU, because the DSB cannot "compel" a Member to undertake action that can no longer be undertaken.<sup>291</sup> In support of its argument, China refers to the panel report in *US – Poultry (China)*, where the panel refused to make a recommendation regarding the impugned US measure in that case because the measure had expired after the panel's establishment.

163. China observes that the United States and Mexico distinguish between "legal instruments" and "measures"<sup>292</sup>, and suggests that their conception of a "measure" consists of an "'ongoing conduct' that stretches into the future through 'individual legal instruments'", with the alleged ongoing conduct

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<sup>291</sup>China's appellee's submission, paras. 84 and 85.

<sup>292</sup>China's appellee's submission, para. 89 (referring to United States' other appellant's submission, para. 61; and Mexico's other appellant's submission, paras. 5 and 6). (emphasis added by China omitted)

in this case being the "maintenance" of export duties and quotas on certain products "over time".<sup>293</sup> China notes that the particular arguments put forward by the United States and by Mexico are "highly reminiscent" of the arguments made by Brazil and by the European Union in *US – Orange Juice (Brazil)* and *US – Continued Zeroing*, respectively, but contends that these "analogies are misplaced".<sup>294</sup> Unlike in *US – Continued Zeroing* and *US – Orange Juice (Brazil)*, the complainants did not identify any "'ongoing conduct' measure that 'serves to maintain the imposition of export duties and quotas over time'" in their panel requests.<sup>295</sup>

164. According to China, the evidentiary standard for demonstrating the existence of an "ongoing conduct" measure is high, and requires a "'density' of facts, over time, to demonstrate [its] existence".<sup>296</sup> China asserts that, in the present dispute, the complainants have not even attempted to prove the existence of "'ongoing conduct' through a string of annual measures".<sup>297</sup> China notes that during the Panel proceedings, the United States and Mexico argued that the 2009 and 2010 measures did not form a "continuum of 'ongoing conduct'" that serves to maintain the same export duties and quotas over time, arguing instead that the 2010 measures were "substantively different" and "were irrelevant to the legal question before the Panel".<sup>298</sup> For these reasons, China asserts that the complainants "neither challenged nor proved the existence of a series of annual measures that 'serve to maintain the imposition of export duties and quotas over time'".<sup>299</sup>

165. China disagrees with the argument made by the United States and by Mexico that, if no recommendation were made regarding the replacement measures, there would be no resolution to the dispute, thereby creating a "loophole in the system".<sup>300</sup> According to China, a Member's strategic choices about which acts and omissions it challenges do not create a "loophole"; instead, China highlights that the "responsibility" for a complainant's choices lies "squarely" with the complainant.<sup>301</sup> The "fundamental flaw" in the United States' and Mexico's arguments is that they seek a recommendation that "stretches" to include replacement measures that they themselves expressly

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<sup>293</sup>China's appellee's submission, para. 90. (original emphasis)

<sup>294</sup>China's appellee's submission, paras. 91 and 92.

<sup>295</sup>China's appellee's submission, para. 93.

<sup>296</sup>China's appellee's submission, para. 94 (referring to Panel Report, *US – Orange Juice (Brazil)*, paras. 7.175 and 7.177, in turn referring to Appellate Body Report, *US – Continued Zeroing*, para. 191).

<sup>297</sup>China's appellee's submission, para. 95.

<sup>298</sup>China's appellee's submission, paras. 95-97 (referring to United States' second written submission to the Panel, para. 338; Mexico's second written submission to the Panel, para. 343; and the complainants' joint opening statement at the first Panel meeting, para. 52).

<sup>299</sup>China's appellee's submission, paras. 97 and 98.

<sup>300</sup>China's appellee's submission, paras. 99 and 100.

<sup>301</sup>China's appellee's submission, para. 101.

excluded from the dispute.<sup>302</sup> Finally, China "strongly objects" to the argument that, during the Panel proceedings, it "moved the target" in order to "evade 'responsibility'"<sup>303</sup>; rather, China recognized that the Panel had discretionary authority to make findings regarding the expired 2009 measures and to make findings and recommendations on the 2010 replacement measures.

2. Conditional Appeal of the European Union regarding the Panel's Recommendations

166. China agrees with the European Union that an objective assessment of the parties' arguments forms part of a panel's obligations under Article 11 of the DSU. However, China claims that the Panel did undertake an objective assessment of the European Union's arguments, and requests the Appellate Body to reject the European Union's claims of error. China argues that, even though the Panel did not refer to the complainants' joint opening statement at the first Panel meeting in finding that the European Union had joined the United States and Mexico in withdrawing its claims regarding the replacement measures, the objectivity of the Panel's assessment must be assessed in the light of this joint statement. In response to the European Union's argument that its statement of agreement with the United States' opening statement at the second Panel meeting was only a "simple statement of solidarity"<sup>304</sup>, China argues that, whatever the "subjective intentions" of the European Union, the Panel was required to judge the European Union's statement "'objectively' on the basis of the plain meaning of the words used".<sup>305</sup> According to China, in assessing the European Union's remarks, the Panel took them at "face value" and did not commit any legal error.<sup>306</sup>

167. China also disagrees that the table of measures submitted by the European Union was only for the preparation of the descriptive part of the Panel Reports and that the Panel therefore erred in relying on it for determining its terms of reference. The European Union's responses were used for the purpose for which they were given, that is, "to clarify the rather uncertain scope of the matter before the Panel".<sup>307</sup> China highlights that the European Union gave the same response regarding the 2010 replacement measures in two separate instances and, therefore, the European Union's response was not influenced by the Panel's stated purpose of seeking guidance in drafting the descriptive part of its Reports. China "sees no reason" why responses to questions posed by a panel cannot be used to

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<sup>302</sup>China's appellee's submission, para. 102.

<sup>303</sup>China's appellee's submission, paras. 107 and 108 (referring to China's first written submission to the Panel, paras. 51 and 70).

<sup>304</sup>China's appellee's submission, para. 132 (quoting European Union's other appellant's submission, para. 23).

<sup>305</sup>China's appellee's submission, para. 133. (emphasis omitted)

<sup>306</sup>China's appellee's submission, paras. 131-134.

<sup>307</sup>China's appellee's submission, para. 123.

determine that a complainant has withdrawn its claims as, by definition, a complainant can only "impart" such information after the panel request has been filed.<sup>308</sup> In the light of these arguments, China asserts that the Panel properly concluded from the European Union's submissions "as a whole" that the European Union had withdrawn its claims regarding the 2010 replacement measures.<sup>309</sup>

168. Regarding the European Union's request for the Appellate Body to complete the analysis with respect to Article XI of the GATT 1994, China notes that the Appellate Body has used its authority to complete the analysis "sparingly", "taking care" to ensure that it respects the "institutional limits" placed on its authority.<sup>310</sup> In China's view, the panel is the "trier of facts" and the Appellate Body cannot "seek facts" or make "factual findings".<sup>311</sup> China contends that the European Union has not set out an adequate basis for the Appellate Body to complete the analysis. First, the European Union has not stated which replacement measures it now wishes to be the subject of findings and recommendations. Second, although the European Union requests the Appellate Body to find that certain export duties violate Article XI of the GATT 1994, neither the European Union's panel request, nor the tables submitted by it, include a claim that China's export duties are inconsistent with Article XI. Third, China highlights that the European Union has not advanced any legal argument in support of its request to the Appellate Body to complete the analysis. Moreover, China notes that the European Union has not identified any facts that would be relevant to the Appellate Body's completion of the analysis.

3. Involvement of the CCCMC in the Allocation of Export Quotas and Article X:3(a) of the GATT 1994

169. China requests the Appellate Body to deny Mexico's appeal and uphold the Panel's finding that the involvement of the CCCMC in the administration of China's export quota regime is consistent with Article X:3(a) of the GATT 1994.<sup>312</sup> China contends that Mexico's interpretation of Article X:3(a) is flawed, specifically with respect to the legal standard and the evidence required to meet that standard in the context of "as such" claims. China also contests Mexico's submission that the Panel failed to make an objective assessment of the matter as required by Article 11 of the DSU.

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<sup>308</sup>China's appellee's submission, paras. 128 and 129.

<sup>309</sup>China's appellee's submission, para. 135.

<sup>310</sup>China's appellee's submission, para. 137 (referring to Appellate Body Report, *Australia – Apples*, para. 368; Appellate Body Report, *Australia – Salmon*, paras. 209, 212, 241, and 255; Appellate Body Report, *Canada – Autos*, paras. 133 and 144; Appellate Body Report, *Korea – Dairy*, para. 102; Appellate Body Report, *Korea – Various Measures on Beef*, para. 128; Appellate Body Report, *US – Continued Zeroing*, para. 189; and Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 438).

<sup>311</sup>China's appellee's submission, para. 137.

<sup>312</sup>China's appellee's submission, paras. 13 and 263.

170. China submits that Mexico's proffered legal standard for "as such" claims is erroneous and contrary to the Appellate Body's approach, and should therefore be rejected. Based on an interpretation of the term "administer", and consistent with the requirement that a Member provide "solid evidence"<sup>313</sup> in support of such a claim, the Appellate Body has found that a complainant challenging a measure "as such" under Article X:3(a) must demonstrate that action foreseen or anticipated pursuant to the measure will, at least in defined circumstances, "necessarily lead to" WTO-inconsistent administration.<sup>314</sup> China disagrees with Mexico's assertion that the Panel interpreted Article X:3(a) in the context of its "as such" challenge so as to require a demonstration of specific instances of actual unreasonable or partial administration. Rather, the Panel found that Mexico had failed to show that the CCCMC "*can exercise any discretion*" in such a way as to constitute WTO-inconsistent administration, much less that the challenged measure would necessarily lead to WTO-inconsistent administration.<sup>315</sup> China also rejects Mexico's suggestion that requiring evidence of partiality or unreasonableness "ignores" certain realities.<sup>316</sup> This is not a reason to abandon the interpretation stated by the Appellate Body, namely, that a complainant must provide "solid evidence"<sup>317</sup> showing how and why the features of the measure and the administrative processes challenged "as such" "necessarily lead to" WTO-inconsistent administration.<sup>318</sup>

171. Contrary to Mexico's assertion, the Appellate Body report in *EC – Selected Customs Matters* does not provide any support for Mexico's suggestion that the term "uniform" should be interpreted to require demonstration that a measure challenged "as such" "necessarily leads to" non-uniform administration, while the terms "impartial" and "reasonable" enable a complainant to benefit from an "*assum[ption]* that a significant *possibility* [of partial and unreasonable administration] exists".<sup>319</sup> Indeed, the Appellate Body stated that the "necessarily leads to" standard arises from an interpretation of the term "administer", and applies whether non-uniform, partial, or unreasonable administration is

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<sup>313</sup>China's appellee's submission, para. 190 (referring to Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 217).

<sup>314</sup>China's appellee's submission, para. 190 (referring to Appellate Body Report, *EC – Selected Customs Matters*, paras. 201 and 226).

<sup>315</sup>China's appellee's submission, para. 203 (quoting Panel Reports, para. 7.783). (emphasis added by China)

<sup>316</sup>China's appellee's submission, para. 198 (referring to Mexico's other appellant's submission, para. 31).

<sup>317</sup>China's appellee's submission, para. 199 (referring to Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 217).

<sup>318</sup>China's appellee's submission, para. 199 (referring to Appellate Body Report, *EC – Selected Customs Matters*, para. 226).

<sup>319</sup>China's appellee's submission, para. 196 (referring to Mexico's other appellant's submission, para. 58). (emphasis added by China)

alleged.<sup>320</sup> China also points out that the "erroneous presumption of WTO-inconsistency" implicated by Mexico's proffered standard would be at odds with the requirement that complainants bear the burden of establishing that the administration of a measure is inconsistent with Article X:3(a).<sup>321</sup>

172. China contests Mexico's suggestion that the Panel disregarded the proper interpretation of Article X:3(a) when it found that the involvement of the CCCMC in the quota administration regime was not WTO-inconsistent. Rather, the Panel found that "Mexico had *failed to demonstrate that the defined circumstances it identifies arise* in the present case."<sup>322</sup> Specifically, the Panel distinguished the CCCMC members from the CCCMC Secretariat, and found that the CCCMC Secretariat does not have commercial interests adverse to those of the quota applicants.<sup>323</sup> In addition, Mexico did not establish that the tasks delegated to the CCCMC were more than clerical or administrative, and the Panel correctly found that the CCCMC Secretariat may not exercise significant discretion or judgement in evaluating whether applicants meet the eligibility criteria that are "objectively specified in Chinese law".<sup>324</sup> Moreover, the Panel did not find that the provision of information to the CCCMC Secretariat amounted to providing information to quota applicants' competitors, because the Panel had found that "[a]pplications for export quotas are provided solely to CCCMC's Minerals & Metals Department *and not to the membership of the CCCMC itself*".<sup>325</sup>

173. China emphasizes that, contrary to Mexico's argument, there is no basis on which the Appellate Body can assume that confidential business information submitted by quota applicants to the CCCMC Secretariat will be disclosed to their competitors. In the light of the presumption that China will abide by its WTO obligations, the "possibility" that such confidential information "may be leaked" cannot be assumed.<sup>326</sup> While this presumption can be rebutted, Mexico "failed to provide *any* such evidence".<sup>327</sup> In fact, rather than providing solid evidence demonstrating that a measure challenged "as such" will "necessarily lead to" WTO-inconsistent administration, Mexico conceded that the CCCMC Secretariat's involvement in certain elements of quota administration can be and has

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<sup>320</sup>China's appellee's submission, para. 197 (referring to Appellate Body Report, *EC – Selected Customs Matters*, para. 226).

<sup>321</sup>China's appellee's submission, para. 193.

<sup>322</sup>China's appellee's submission, para. 211. (original emphasis)

<sup>323</sup>China's appellee's submission, para. 212 (referring to Panel Reports, para. 7.774). China highlights the fact that Mexico did not contest this fact during the Panel proceedings (*ibid.*, para. 212) and that Mexico's assertion on appeal that the CCCMC Secretariat has commercial interests adverse to applicants is not supported by a Panel finding (*ibid.*, para. 213).

<sup>324</sup>China's appellee's submission, para. 236.

<sup>325</sup>China's appellee's submission, para. 222 (quoting Panel Reports, para. 7.778). (emphasis added by China)

<sup>326</sup>China's appellee's submission, para. 230.

<sup>327</sup>China's appellee's submission, para. 230. (original emphasis)

been implemented in a WTO-consistent manner, thus confirming that the measures do not "necessarily lead to" unreasonable and partial conduct.

174. With regard to the Panel's assessment of the matter under Article 11 of the DSU, China contends that Mexico has merely demonstrated that the Panel, as the trier of facts, concluded that Mexico failed to establish that the "CCCMC Secretariat '*can* exercise any discretion, partiality or bias in the administration' of export quotas".<sup>328</sup> Recalling the relevant standard under Article 11 of the DSU, China agrees with Mexico's statement that the Panel was obliged "to consider evidence before it in its totality"<sup>329</sup>, but adds that the Appellate Body has also underscored a panel's discretion to give "certain elements of evidence more weight than other elements".<sup>330</sup> Furthermore, to support a claim of violation under Article 11, "a participant must explain why evidence [not explicitly referred to by the panel] is so material to its case that the panel's failure explicitly to address and rely upon the evidence has a bearing on the objectivity of the panel's factual assessment."<sup>331</sup> Mexico failed to identify any evidence demonstrating that the CCCMC Secretariat undertakes its delegated quota administration tasks with "no real oversight"<sup>332</sup>, or that it has significant discretion to affect the award of quotas.

175. China maintains that the Panel found the CCCMC Secretariat's role to be "circumscribed" by Chinese law<sup>333</sup>, and that Mexico had not demonstrated that the CCCMC Secretariat can exercise any discretion. In the context of quotas allocated directly, the Panel found the CCCMC Secretariat's role to be "limited to assisting MOFCOM"<sup>334</sup> in verifying the compliance of applicants with the qualifying criteria "*objectively specified under Chinese law*".<sup>335</sup> It was also on the basis of the same evidence described by Mexico that the Panel found, with respect to quotas allocated through bidding, that the CCCMC Secretariat assists MOFCOM's Bidding Committee, which is the "main authority responsible for organizing the bidding process".<sup>336</sup> Having reflected on all of the evidence concerning the roles of

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<sup>328</sup>China's appellee's submission, paras. 22 and 261 (quoting Panel Reports, para. 7.783). (emphasis added by China)

<sup>329</sup>China's appellee's submission, para. 243 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 441).

<sup>330</sup>China's appellee's submission, para. 244 (quoting Appellate Body Report, *EC – Asbestos*, para. 161).

<sup>331</sup>China's appellee's submission, para. 244 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 442).

<sup>332</sup>China's appellee's submission, para. 246 (quoting Mexico's other appellant's submission, para. 56).

<sup>333</sup>China's appellee's submission, paras. 21 and 251 (referring to Panel Reports, paras. 7.780 and 7.781).

<sup>334</sup>China's appellee's submission, para. 255 (quoting Panel Reports, para. 7.780).

<sup>335</sup>China's appellee's submission, para. 255. (original emphasis)

<sup>336</sup>China's appellee's submission, paras. 251 and 258 (quoting Panel Reports, para. 7.766).

the CCCMC departments in quota administration, the Panel concluded that Mexico had failed to establish "even the 'risk'" of WTO-inconsistent administration.<sup>337</sup>

4. Article VIII:1(a) of the GATT 1994 and Paragraph 11.3 of China's Accession Protocol

176. China requests the Appellate Body to uphold the Panel's finding that the bid-winning price imposed by China does not constitute a fee or charge of whatever character imposed in connection with exportation within the meaning of Article VIII:1(a) of the GATT 1994, and that the bid-winning price is not a charge applied to exports falling within the scope of Paragraph 11.3 of China's Accession Protocol.

177. China maintains that the Panel was correct to conclude, based on the substantive nature of China's bidding procedure, that the bid-winning price does not constitute a fee or charge imposed "on or in connection with ... exportation". In addition, the Panel correctly found that the bid-winning price is not a fee or charge in the sense of Article VIII:1(a), because it is not collected in exchange for a "service rendered". China disagrees with the United States' contention that, if no service is rendered, a fee or charge will be inconsistent with Article VIII:1(a), rather than fall outside the scope of the provision. Instead, Article VIII:1(a) is meant to ensure that, when services are rendered, the amount charged for those services is proportionate to their cost. Where there is no service, however, a fee or charge is not related to any "service rendered", and, therefore, the "mischief addressed by the clause", namely charging an excessive amount for "services rendered", is not present.<sup>338</sup>

178. China also claims that, in order to establish that a fee or charge is inconsistent with Article VIII:1(a), a complainant must demonstrate that the fee or charge is inconsistent with every condition set out in Article VIII:1(a). In China's view, the GATT panel report in *US – Customs User Fee* stands for that proposition.<sup>339</sup> Furthermore, Article VIII:1(a) would have been drafted differently had the drafters intended the provision to constitute a residual prohibition in the sense advanced by the United States. For instance, the provision could have been drafted to say "no fees or charges (other than duties or internal taxes) shall be instituted or maintained on in connection with importation or exportation, unless limited in amount to the approximate cost of a service rendered".<sup>340</sup> China further contends that, even if the bid-winning price were to fall within the scope of Article VIII:1(a),

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<sup>337</sup>China's appellee's submission, para. 260 (quoting Panel Reports, para. 7.783).

<sup>338</sup>China's appellee's submission, para. 302.

<sup>339</sup>China's appellee's submission, para. 307 (referring to GATT Panel Report, *US – Customs User Fee*, para. 69).

<sup>340</sup>China's appellee's submission, para. 303.

the United States did not demonstrate that the bid-winning price "represents an indirect protection or a taxation of exports for fiscal purposes".<sup>341</sup>

179. China notes that quota allocation through auctioning ensures that the most efficient producers are granted the right to export and that this ensures allocation of quotas in the least trade-distorting manner. Finding China's bid-winning price to be inconsistent with Article VIII:1(a) would mean that all quota allocation accomplished through bidding or auctioning by WTO Members would be prohibited.

180. Finally, China submits that the United States did not establish that the bid-winning price is inconsistent with Paragraph 11.3 of China's Accession Protocol. The United States' argument is based solely on the allegation that the Panel's analysis with respect to Paragraph 11.3 flowed from its erroneous analysis of Article VIII:1(a). China maintains that the Panel's finding under Article VIII:1(a) was correct, and that, therefore, the Panel was also correct in finding that the bid-winning price is not inconsistent with Paragraph 11.3 of China's Accession Protocol.

#### H. *Arguments of the Third Participants*

##### 1. Brazil

181. With respect to China's claim that the Panel erred in finding that Section III of the complainants' panel requests complied with Article 6.2 of the DSU, Brazil cautions that an excessively formalistic approach to the interpretation of Article 6.2 could unjustifiably increase the procedural burden on the parties. Brazil submits that the Appellate Body has identified two major objectives of a panel request: a jurisdictional function and a due process function. In situations affecting the proper delimitation of a panel's jurisdiction, corrections or clarifications of an alleged error or imprecision cannot modify the scope of the dispute as expressed in the panel request. Conversely, where defects in the panel request allegedly affect the due process function of the request, subsequent submissions may be taken into consideration by panels and the Appellate Body in the analysis of whether the due process rights of a party have been prejudiced. Therefore, subsequent submissions should not, in Brazil's view, be *a priori* excluded from serving as evidence relevant to that legal determination.

182. Brazil maintains that the Panel correctly interpreted the words "temporarily applied" in Article XI:2(a) of the GATT 1994. A "temporary" measure must either have a time-limit for its

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<sup>341</sup>China's appellee's submission, para. 313.

application, or must address a passing need, the termination of which is foreseeable at some point in the near future. If a measure is applied to address a permanent need, its design and structure would indicate that it is not "temporarily" applied. As such, Brazil notes that a shortage of exhaustible natural resources caused by declining reserves cannot be addressed by measures "temporarily applied". Brazil also highlights that Articles XI:2(a) and XX(g) of the GATT 1994 serve different purposes by means of different requirements. While Article XX(g) disciplines long-term conservation policies, Article XI:2(a) relates to temporary supply crises. Therefore, Brazil contends that measures adopted pursuant to Article XI:2(a) are not intended to deal with permanent needs, because such needs, in any event, could not be addressed by temporary measures.

183. Brazil argues that the Panel read into the phrase "made effective in conjunction with" in Article XX(g) of the GATT 1994 two cumulative requirements, namely, one relating to the joint application of domestic and international restrictions, and the other relating to the effectiveness of domestic restrictions. Brazil quotes from the Appellate Body reports in *US – Gasoline* and *US – Shrimp* in support of the proposition that, in previous disputes, the expression "made effective in conjunction with" has been found to relate only to the joint application of domestic restrictions with measures relating to the conservation of exhaustible natural resources.<sup>342</sup> Brazil contends that, while the GATT panel in *Canada – Herring and Salmon* may have interpreted differently the phrase "made effective in conjunction with", the Spanish and French versions of Article XX(g) confirm that the Appellate Body's interpretation in *US – Gasoline* and *US – Shrimp* was correct. Article XX(g) aims simply at ensuring even-handedness in the application of measures relating to the conservation of exhaustible natural resources.

## 2. Canada

184. Canada submits that the Appellate Body should uphold the Panel's finding that Article XX of the GATT 1994 is not available as a defence for inconsistencies with Paragraph 11.3 of China's Accession Protocol. First, the ordinary meaning of the Note to Annex 6 of China's Accession Protocol "does not support the argument that China may impose export duties on any products at any rate in 'exceptional circumstances'", because the phrase "exceptional circumstances" is used only with respect to increasing the rates applied at the time of China's accession to the maximum levels set out

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<sup>342</sup>Brazil's third participant's submission, para. 26 (quoting Appellate Body Report, *US – Gasoline*, pp. 20-21, DSR 1996:I, 3, at 19-20) and para. 27 (quoting Appellate Body Report, *US – Shrimp*, paras. 143 and 144).

in Annex 6.<sup>343</sup> The Panel, therefore, erred in "acquiescing"<sup>344</sup> to the European Union's argument that China acted inconsistently with Paragraph 11.3 by not consulting with affected Members before imposing export duties on raw materials that are not listed in Annex 6, as there is no right to impose export duties on those products in the first place. Canada argues that the legal effect of the reference in Paragraph 11.3 to Article VIII of the GATT 1994 is to "circumscribe" the application of export charges by China in accordance with Article VIII, and Article XX is not a "necessary extension" of Article VIII such that it may be assumed to be incorporated by reference to Article VIII.<sup>345</sup> Canada also asserts that the Panel was correct in finding that Paragraph 170 of China's Accession Working Party Report repeats China's commitments under GATT rules, and is not related to export duties prohibited under Paragraph 11.3. Relying on the ordinary meaning and context of China's Accession Protocol, Canada does not dispute that Article XX is available to justify inconsistencies with the GATT 1994 obligations set out in Paragraph 170, but contends that there is no suggestion that obligations going beyond the requirements of the GATT 1994, which China undertook pursuant to Paragraph 11.3, are subject to the Article XX exceptions. If the negotiators had intended to incorporate Article XX justifications into Paragraph 11.3, they could have incorporated language similar to that contained in Paragraph 5.1 of China's Accession Protocol.

185. With respect to the words "temporarily applied", Canada disagrees with China's contention that the Panel found that Article XI:2(a) imposes an "absolute limit" on the time period for which export restrictions may be imposed.<sup>346</sup> Rather, the Panel found that the duration of an export restriction must match the time it takes to prevent or relieve a critical shortage, a finding with which Canada agrees. Measures that are reviewed regularly, but imposed indefinitely, as the Panel found China's measures to be, are not applied for a fixed time, and hence fall outside the scope of Article XI:2(a). Canada also disagrees with China's contention that the Panel's interpretation of the phrase "critical shortages" excludes from the scope of Article XI:2(a) export restrictions on non-renewable, exhaustible natural resources. Rather, the Panel's interpretation permits a WTO Member to relieve a critical shortage of an exhaustible natural resource through the temporary application of an export restriction as long as the shortage is caused by a factor other than the resource's inherent exhaustibility. With respect to the relationship between Article XI:2(a) and Article XX(g) of the GATT 1994, Canada argues that the Panel did not find that the two provisions are mutually exclusive,

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<sup>343</sup>Canada's third participant's submission, para. 14.

<sup>344</sup>Canada's third participant's submission, para. 16.

<sup>345</sup>Canada's third participant's submission, para. 18.

<sup>346</sup>Canada's third participant's submission, para. 36 (referring to China's appellant's submission, paras. 337-341).

but rather that the absence in Article XI:2(a) of the safeguards found in the chapeau of Article XX supports the conclusion that restrictions under Article XI:2(a) must be of a limited duration.

186. Canada agrees with the United States that the Panel erred in finding that the bid-winning fee is consistent with Article VIII:1(a) of the GATT 1994 and with Paragraph 11.3 of China's Accession Protocol. For Canada, the Panel rightly found that the bid-winning fee is a "fee" or "charge" within the meaning of Article VIII:1(a). The Panel erred, however, in interpreting the phrase "in connection with" exportation to cover only charges connected with "customs-related activities" and in finding that only charges collected in exchange for a "service rendered" fall within the scope of Article VIII.<sup>347</sup> Instead, the Panel should have adopted the same broad interpretation as the panel in *China – Auto Parts*.<sup>348</sup> Even if the bid-winning fee is not covered by Article VIII:1(a) of the GATT 1994, the charge constitutes an "export duty" prohibited under Paragraph 11.3 of China's Accession Protocol. Paragraph 11.3 specifically addresses what Article VIII:1 does not, namely, export duties, and as such these two provisions "create a tightly woven mesh that catches all charges imposed by the Chinese government in connection with exportation".<sup>349</sup>

### 3. Colombia

187. Colombia submits that the Panel erred by finding that Section III of the complainants' panel requests "present[ed] the problem clearly" in the sense of Article 6.2 of the DSU because the complainants failed to provide sufficient connections between the 37 listed measures and the 13 listed treaty provisions.<sup>350</sup> The Appellate Body has found that a complainant must provide a brief summary of the case, explaining succinctly how or why the measure at issue is inconsistent with a specific WTO obligation. In failing to do so, the complainant renders the due process objective of Article 6.2 ineffective, because neither the responding party nor the third parties would be able to identify with sufficient clarity the claims or problem at issue.

188. Colombia submits that the Appellate Body should confirm the Panel's finding that Article XX of the GATT 1994 may not be invoked as a justification for inconsistencies with Paragraph 11.3 of China's Accession Protocol. Colombia submits that the Panel erred in finding that China has acted inconsistently with Paragraph 11.3 by not consulting with Members before imposing export duties on

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<sup>347</sup>Canada's third participant's submission, para. 57 (quoting Panel Reports, para. 7.838) and para. 58 (quoting Panel Reports, para. 7.844).

<sup>348</sup>See Canada's third participant's submission, para. 57 (referring to Panel Reports, *China – Auto Parts*, paras. 7.177, 7.190, and 7.191).

<sup>349</sup>Canada's third participant's submission, para. 67.

<sup>350</sup>Colombia's third participant's submission, para. 2 and heading I.A.1.

raw materials not listed in Annex 6 to the Protocol, because the obligation to consult relates only to the products listed in Annex 6, none of which were at issue here. With respect to the reference to Article VIII in Paragraph 11.3, Colombia asserts that the "rule-exception relationship" between Article VIII and Article XX of the GATT 1994 shows that the reference to Article VIII incorporates only that provision's conditions and not the availability of the general exceptions to Article XX.<sup>351</sup>

189. Colombia also suggests that irrespective of the applicability of Paragraph 170 of China's Accession Working Party Report to export duties, the requirement that such duties be "in full conformity with [China's] WTO obligations" cannot be understood as allowing recourse to Article XX. In accordance with effective treaty interpretation, the use of the phrase "WTO obligations" in Paragraph 170, as compared to "the WTO Agreement" in Paragraph 5.1 of China's Accession Protocol, indicates that the former excludes exceptions, whereas the latter covers both obligations and exceptions.<sup>352</sup>

190. Colombia contends that the Panel erred in finding that measures relating to exhaustible natural resources fall exclusively within the scope of Article XX(g) and not within Article XI:2(a) of the GATT 1994. The ordinary meaning of the terms of Article XI:2(a), in their context, suggest that the scope of application of the provision is not contingent on whether the product is an exhaustible natural resource or not, as any product is potentially covered by Article XI:2(a). The "ultimate test" is whether the product is essential to the exporting Member or is a "foodstuff" as that term is used in Article XI:2(a).<sup>353</sup> In Colombia's view, a single measure could be justified under several exceptions contained in the GATT 1994, such as Article XI:2(a) and Article XX, so long as they fulfil the particular requirements established in each provision.

191. Colombia submits that the Panel erred in interpreting the phrase "made effective in conjunction with" in Article XX(g) of the GATT 1994 to require that a measure not only be related to the conservation of natural resources, but also ensure the effectiveness of domestic restrictions on that resource. In Colombia's view, the Panel's interpretation is at odds with the interpretation provided by the Appellate Body in *US – Gasoline* and in *US – Shrimp*, which did not require such a "dual purpose".<sup>354</sup>

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<sup>351</sup>Colombia's third participant's submission, para. 22.

<sup>352</sup>Colombia's third participant's submission, paras. 30-35 (referring to Appellate Body Report, *US – Wool Shirts and Blouses*, para. 46; and Appellate Body Report, *China – Publications and Audiovisual Products*, para. 223).

<sup>353</sup>Colombia's third participant's submission, para. 49.

<sup>354</sup>Colombia's third participant's submission, paras. 59 and 60.

192. Regarding China's export licensing system, Colombia disputes China's contention that the "open-ended" discretion" accorded to Chinese licensing authorities is not sufficient to conclude that its export licensing system constitute a "restriction" under Article XI:1 of the GATT 1994.<sup>355</sup> In Colombia's opinion, it is not the open-ended nature (that is, the discretion to choose between a WTO-consistent and a WTO-inconsistent application of the measure) that is at issue. Rather, the Appellate Body should "focus on the economic consequences in a given marketplace so as to evaluate whether economic operators will interpret the discretion as [a] 'restriction'".<sup>356</sup> Although not "*a priori* a 'restriction'"<sup>357</sup>, if such discretion causes "a *reasonable uncertainty* that will discourage exportations", then it constitutes a "restriction" on exports under Article XI:1.<sup>358</sup> This interpretation would be in keeping with the purpose of Article XI, which, as China acknowledges, is "to protect the competitive opportunities for exports".<sup>359</sup>

193. Colombia agrees with China that the Panel erred in interpreting and applying Article X:3(a) of the GATT 1994 with regard to the "operation capacity" requirement for export quota administration. Specifically, in Colombia's view, the Panel erred in interpreting the meaning of "administer" to encompass the complainants' claim and in finding that the complainants challenged "the features of an administrative process".<sup>360</sup>

#### 4. Japan

194. Japan notes that the "security and predictability" of the multilateral trading system, as well as the "prompt settlement" of disputes, will be "endangered" if panels can make recommendations only for measures that have "not cease[d] to exist during panel proceedings", and if the dispute settlement process can be "circumvented" through "rapid-fire substitution" or annual revision of WTO-inconsistent measures.<sup>361</sup> Japan sees the Panel's recommendations on the "series of measures" as aimed at plugging this "loophole".<sup>362</sup> Japan supports the conditional appeals of the United States and Mexico because, in its view, where a challenged measure is removed before the issuance of a

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<sup>355</sup>Colombia's third participant's submission, para. 65.

<sup>356</sup>Colombia's third participant's submission, para. 66.

<sup>357</sup>Colombia's third participant's submission, para. 71.

<sup>358</sup>Colombia's third participant's submission, para. 66. (original emphasis) Colombia substantiates its argument on this point by referring to the interpretation of the term "restrictions" provided in Panel Report, *Brazil – Retreaded Tyres*, para. 7.370, and Panel Report, *Colombia – Ports of Entry*, para. 7.240. (*Ibid.*, para. 68)

<sup>359</sup>Colombia's third participant's submission, para. 68 (referring to China's appellant's submission, para. 548).

<sup>360</sup>Colombia's third participant's submission, para. 77 (quoting Panel Reports, para. 7.709).

<sup>361</sup>Japan's third participant's submission, para. 12.

<sup>362</sup>Japan's third participant's submission, paras. 12 and 13.

panel report and where "factual and/or legal circumstances" suggest that the measure is likely to be renewed, a finding without a recommendation cannot lead to a conclusive settlement of the dispute.<sup>363</sup>

195. Japan submits that the Appellate Body should confirm the Panel's finding that Article XX of the GATT 1994 may not be invoked as a justification for inconsistencies with Paragraph 11.3 of China's Accession Protocol. Japan doubts that the reference to "exceptional circumstances" in the Note to Annex 6 to China's Accession Protocol establishes the applicability of Article XX to Paragraph 11.3, and, even if it did, the possibility for China to impose higher rates in "exceptional circumstances" is meant to apply only with respect to the products listed in Annex 6, which are not at issue in this dispute. Moreover, the reference to Article VIII of the GATT 1994 does not confirm the availability of Article XX. China did not invoke Article VIII for any of the export duties at issue and "there seems to be little question" that the duties in the present dispute are outside the scope of Article VIII.<sup>364</sup> In fact, export duties do not fall within the substantive scope of any provision of the GATT 1994 and, therefore, cannot be inconsistent with the GATT 1994. On this basis, Japan argues that Paragraph 170 of China's Accession Working Party Report cannot be interpreted as permitting recourse to Article XX in cases of inconsistency with Paragraph 11.3 of China's Accession Protocol.

196. Japan also supports the Panel's interpretation of the phrase "made effective in conjunction with" in Article XX(g). Japan contends that the Panel's analysis and interpretation of Article XX(g) is supported by the text and context of the provision, as well as the object and purpose and the structure of the GATT 1994. In particular, Japan asserts that the Panel's reference to the purpose of an export restriction being to render effective domestic restrictions on production or consumption that serve a conservation goal is consistent with the approach that has been taken by the Appellate Body as well as that of the GATT panel in *Canada – Herring and Salmon*. Japan further alleges that China's argument appears to imply that the objective or effect of a trade-restrictive measure should not be relevant to an Article XX(g) analysis, and that this would reverse a consistent line of GATT and WTO case law requiring a substantial relationship between the trade measure and a genuine conservationist goal.

197. Japan further submits that China "effectively glosses over" the difference between limited availability and a "critical shortage" of a resource within the meaning of Article XI:2(a).<sup>365</sup> The Panel correctly established that there is no possibility of an existing shortage of an exhaustible natural

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<sup>363</sup>Japan's third participant's submission, para. 14.

<sup>364</sup>Japan's third participant's submission, para. 30.

<sup>365</sup>Japan's third participant's submission, para. 92 (referring to joint appellees' submission of the United States and Mexico, para. 153).

resource ever to cease to exist, meaning that it will not be possible to "relieve or prevent" it through export restrictions applied on a temporary basis.<sup>366</sup> Furthermore, the phrase "temporarily applied" must be read in the context of "critical shortages". A shortage of an exhaustible natural resource, by its very nature, cannot be restored in the future, and any restrictions imposed to relieve or prevent such shortage can therefore not be of a "temporal" nature.<sup>367</sup> Japan also supports the European Union's argument that the fact that Article XX(g) allows for derogations from GATT obligations under stricter conditions than Article XI:2(a) suggests that the requirements of the latter provision must be given a narrow interpretation in order not to render redundant the provision of the former.<sup>368</sup>

198. Japan contends that the Panel effectively addressed China's argument regarding interpreting Paragraphs 83 and 84 of China's Accession Working Party Report "harmoniously" with Paragraph 5.1 of China's Accession Protocol.<sup>369</sup> That is, the Panel appropriately read Paragraph 5.1 of the Accession Protocol to incorporate, as part of the *WTO Agreement*, the specific commitments China made in Paragraphs 83 and 84 of its Accession Working Party Report.<sup>370</sup> Japan expresses "serious doubts" about China's apparent rationale for applying an export performance condition as a basis for quota allocation<sup>371</sup>, and notes the "significant trade-restrictive effects" of China's export performance requirement, which make it "effectively impossible" for new entrants to obtain quota share.<sup>372</sup> Finally, Japan insists that China cannot have recourse to the quota eligibility or allocation criteria that it expressly committed to eliminate as part of its WTO accession process, and which are significantly more trade-restrictive than necessary.

## 5. Korea

199. Korea observes that the complainants "effectively withdrew" their request to review the 2010 Chinese measures and requested the Panel to confine its review to the 2009 measures.<sup>373</sup> Korea notes the "apparent discrepancy" between the Panel's statement that it would look at the 2009 measures only, and its subsequent references to the review of the "series of measures" acting in concert.<sup>374</sup>

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<sup>366</sup>Japan's third participant's submission, para. 92.

<sup>367</sup>Japan's third participant's submission, para. 94.

<sup>368</sup>See Japan's third participant's submission, para. 98 (referring to European Union's statement, second written submission to the Panel, para. 206, referenced in Panel Reports, para. 7.293).

<sup>369</sup>Japan's third participant's submission, paras. 84 and 85 (referring to Panel Reports, para. 7.665).

<sup>370</sup>Japan's third participant's submission, para. 85 (referring to Panel Reports, para. 7.665).

<sup>371</sup>Japan's third participant's submission, para. 86.

<sup>372</sup>Japan's third participant's submission, para. 87.

<sup>373</sup>Korea's third participant's submission, para. 10.

<sup>374</sup>Korea's third participant's submission, para. 11.

According to Korea, it is not clear whether the "inherent discretion" accorded to a panel permits such a discrepancy.<sup>375</sup> In Korea's view, Article 19 of the DSU requires that only a measure found to be inconsistent with a covered agreement can be the subject of a panel's recommendations; that is, a recommendation should be "in parallel" with the challenged measure, and a panel only has the "discretion" to "suggest" ways of implementing the recommendation.<sup>376</sup> Since the complainants' deliberately chose to forego the "nexus-based" claims, Korea suggests that the Panel may not have been "free to insert" the claim in the subsequent remedy phase of its analysis.<sup>377</sup>

200. Regarding the applicability of Article XX to inconsistencies with Paragraph 11.3 of China's Accession Protocol, Korea agrees with the Panel that, if two legal provisions contain different wording in the same article or treaty, they must be interpreted to have different meanings. However, the "gravity" and importance of an "Article XX defense" suggests that "[m]ore explicit wording" should have been used in this dispute to express the "relinquishment of such an important right".<sup>378</sup> Given the implications for other protocols of accession, China's appeal warrants "careful scrutiny".<sup>379</sup> Nonetheless, in Korea's view, the "difference in tone and nuance" between Paragraph 11.3 and Paragraphs 11.1 and 11.2 of China's Accession Protocol, as well as the context of the other provisions of Paragraph 11, supports the Panel's ultimate conclusion in the present dispute, and should be upheld by the Appellate Body.<sup>380</sup>

201. Korea suggests that the Panel's finding under Articles X:3(a) and XI:1 of the GATT 1994, that "vagueness" in the terms of a law or regulation can result in "as such" inconsistencies, requires careful scrutiny.<sup>381</sup> With regard to the "operation capacity" requirement under Article 19 of the *Export Quota Administration Measures*, for example, the complainants claimed that the vagueness of this term equates to "unlimited discretion in contravention of the GATT 1994".<sup>382</sup> In *EC – Selected Customs Matters*, however, the Appellate Body found that the mere showing of the existence of non-uniform features, for example, is not sufficient to prove an inconsistency with Article X:3(a) of the GATT 1994. Rather, the complainant must show that these features necessarily lead to non-uniform, partial or unreasonable administration. Furthermore, "it seems undeniable" that China's export

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<sup>375</sup>Korea's third participant's submission, para. 11.

<sup>376</sup>Korea's third participant's submission, para. 27.

<sup>377</sup>Korea's third participant's submission, para. 28.

<sup>378</sup>Korea's third participant's submission, para. 32.

<sup>379</sup>Korea's third participant's submission, para. 32.

<sup>380</sup>Korea's third participant's submission, para. 33.

<sup>381</sup>Korea's third participant's submission, p. 13, heading III.C.

<sup>382</sup>Korea's third participant's submission, para. 36 (referring to European Union's first written submission to the Panel, paras. 165, 239-241, 320, and 348; and United States' first written submission to the Panel, paras. 196 and 340).

licensing system includes "vague provisions" and thus accords licence-issuing agencies "a significant degree of discretion", which could result in export restrictions inconsistent with Article XI:1 of the GATT 1994.<sup>383</sup> However, when examining "legislative documents of a Member that contain 'discretionary' language" in the framework of an "as such" complaint, a panel should adopt a "cautious approach" guided by the presumption, identified by the Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews*, "that WTO Members act in good faith in the implementation of their WTO commitments".<sup>384</sup> In the present dispute, Korea argues that "it does not seem to be entirely clear" whether the complainants presented sufficient evidence to overcome that "good faith" presumption.<sup>385</sup>

## 6. Saudi Arabia

202. Saudi Arabia contends that Article XX(g) of the GATT 1994 requires that the challenged measure be applied jointly with domestic restrictions on the production or consumption of an exhaustible natural resource. The Panel, however, erred in finding that, in addition, the "purpose" of the challenged measure must be to ensure the effectiveness of a domestic restriction on production or consumption. Nothing in the text of Article XX(g) suggests such a finding. The Panel appears to have been guided by the GATT panel report in *Canada – Herring and Salmon*, and Saudi Arabia suggests that the Panel did so in error. The Appellate Body report in *US – Gasoline* did not endorse the approach of the GATT panel in *Canada – Herring and Salmon*, and instead found that Article XX(g) imposed only a requirement of "even-handedness".<sup>386</sup> Saudi Arabia points out that, in *US – Gasoline*, Venezuela and Brazil referred the Appellate Body to the relevant part of the GATT panel report in *Canada – Herring and Salmon*, but that, nonetheless, the Appellate Body did not adopt that panel's interpretation. In Saudi Arabia's view, the object and purpose of Article XX(g) will be fulfilled if the restrictions imposed on foreign and domestically produced goods are applied jointly.

203. While taking no position on whether China's export licensing system is inconsistent with Article XI of the GATT 1994, Saudi Arabia welcomes the Panel's finding that "non-automatic" export

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<sup>383</sup>Korea's third participant's submission, para. 39.

<sup>384</sup>Korea's third participant's submission, para. 40 (quoting Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 173).

<sup>385</sup>Korea's third participant's submission, para. 41. Enlarging the scope of its analysis beyond the framework of Article XI:1, Korea also refers to the Appellate Body's statement in *EC – Selected Customs Matters* that: "[i]n order to find that an administrative process has led to non-uniform administration of a measure under Article X:3(a), a panel cannot merely rely on identifying the features of an administrative process that it may view as non-uniform; a panel must go further and undertake an analysis to determine whether those features of the administrative process necessarily lead to non-uniform administration of a legal instrument of the kind described in Article X:1." (*Ibid.*, para. 42 (quoting Appellate Body Report, *EC – Selected Customs Matters*, para. 239 (original emphasis)))

<sup>386</sup>Saudi Arabia's third participant's submission, para. 22.

licensing systems are not inconsistent with this provision unless they create "a restriction or limiting effect on ... exportation".<sup>387</sup> In particular, Saudi Arabia agrees with the Panel's ultimate conclusions that two types of export licensing systems are consistent with Article XI:1: "(i) those in which licences are granted upon application in all cases; and (ii) those which require the applicant to meet a certain objective prerequisite" before being granted a licence.<sup>388</sup> However, the Panel's assertion that, in addition to "quantitative restrictions" Article XI also disciplines "other measures", is "unclear" because it does not specify whether those "other measures" must also restrict export *quantities*, or whether they comprise "all applicable measures" regardless of whether they limit quantities.<sup>389</sup> In Saudi Arabia's opinion, Article XI prohibits only "measures that restrict, and are designed to restrict, export *quantities*".<sup>390</sup>

204. Saudi Arabia reiterates its view, based on the panel report in *China – Publications and Audiovisual Products*, that a licensing system is "discretionary" where the administering authority enjoys "the freedom to choose, based essentially on its own preference, whether or not such [licences] are granted".<sup>391</sup> A system in which export licences "are not 'granted in all cases', but which mandates the authority's application of a 'hard-and-fast rule' that limits the freedom of the administering authority to determine whether to grant a licence", would not be discretionary and would therefore be permissible under Article XI:1 of the GATT 1994.<sup>392</sup>

## 7. Turkey

205. Recalling the text of Paragraph 11.3 of China's Accession Protocol, Turkey notes that it "openly refers" to Annex 6 and Article VIII as exceptions, and suggests that, had it been foreseen that

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<sup>387</sup>Saudi Arabia's third participant's submission, para. 23 (quoting Panel Reports, para. 7.917). Saudi Arabia notes that, although the Panel found that the *Import Licensing Agreement* provided "only limited assistance" in interpreting Article XI of the GATT 1994 and therefore chose not to use the "standard nomenclature" of "automatic", "non-automatic", and "discretionary", these terms help to create "a systematic analytical framework for determining permissible licensing under Article XI". (*Ibid.*, para. 24 (quoting Panel Reports, paras. 7.911 and 7.915))

<sup>388</sup>Saudi Arabia's third participant's submission, para. 24 (referring to Panel Reports, paras. 7.916 and 7.917).

<sup>389</sup>Saudi Arabia's third participant's submission, para. 26 (quoting Panel Reports, paras. 7.912 and 7.913).

<sup>390</sup>Saudi Arabia's third participant's submission, para. 29. (original emphasis)

<sup>391</sup>Saudi Arabia's third participant's submission, para. 35 (quoting Panel Report, *China – Publications and Audiovisual Products*, para. 7.324). See also Panel Report, *Turkey – Rice*, paras. 7.128, 7.133, and 7.134. Based on this interpretation of the term "discretion", Saudi Arabia agrees with the panel's findings in *India – Quantitative Restrictions* that "India's licensing system for goods ... is a discretionary import licensing system, in that licences are not granted in all cases, but rather on unspecified 'merits'". (Saudi Arabia's third participant's submission, para. 36 (quoting Panel Report, *India – Quantitative Restrictions*, para. 5.130))

<sup>392</sup>Saudi Arabia's third participant's submission, para. 37.

the exceptions in Article XX of the GATT 1994 would apply to Paragraph 11.3 of the Protocol, there would have also been an "open referral" to Article XX.<sup>393</sup> Recalling China's argument that a harmonious reading of Paragraph 11.3 of its Accession Protocol and Paragraph 170 of its Accession Working Party Report would justify China's export duties, Turkey notes that the textual differences between Paragraphs 11.3 and 5.1 of China's Accession Protocol may preclude this.

206. Regarding the interpretation of the words "temporarily applied" in Article XI:2(a), Turkey submits that temporarily applied measures are limited to measures that are: (i) applied for a "determined and limited period of time"; (ii) predicted to last until a "certain date"; or (iii) predicted to expire upon "the occurrence of certain events".<sup>394</sup> For Turkey, the temporariness of the application of the measure must be expected from the beginning of the application of the measure, and the amount of time that the measure is intended to stay in place should be "foreseeable".<sup>395</sup> Furthermore, Turkey maintains that there must be a "close link" between the temporary nature of the measure and its objective to relieve or prevent a critical shortage, and that therefore a measure applied under Article XI:2(a) "should be capable" of preventing or relieving the shortage.<sup>396</sup>

### **III. Issues Raised on Appeal**

207. The following issues are raised on appeal by China:

- (a) whether the Panel erred in finding that Section III of the complainants' panel requests complies with the requirement in Article 6.2 of the DSU to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly";
- (b) whether the Panel acted inconsistently with Articles 7.1, 11, and 19.1 of the DSU by recommending that China bring its export duty and export quota measures into conformity with its WTO obligations such that the "series of measures" in force at the date of the Panel's establishment do not operate to bring about a WTO-inconsistent result;
- (c) whether the Panel erred in finding that China may not have recourse to the exceptions contained in Article XX of the GATT 1994 in order to justify a violation of China's export duty commitments contained in Paragraph 11.3 of China's Accession Protocol;

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<sup>393</sup>Turkey's third participant's submission, para. 8.

<sup>394</sup>Turkey's third participant's submission, para. 14.

<sup>395</sup>Turkey's third participant's submission, para. 14.

<sup>396</sup>Turkey's third participant's submission, para. 15.

- (d) whether the Panel erred in its interpretation and application of Article XI:2(a) of the GATT 1994, and in its assessment of the matter under Article 11 of the DSU, when it found that China's export quota on refractory-grade bauxite is not "temporarily applied" to prevent or relieve a "critical shortage";
- (e) whether the Panel erred by interpreting the phrase "made effective in conjunction with" in Article XX(g) of the GATT 1994 to require that the purpose of the export restriction be to ensure the effectiveness of restrictions on domestic production and consumption;
- (f) whether the Panel erred in finding that China acts inconsistently with Paragraphs 1.2 and 5.1 of China's Accession Protocol, read in combination with Paragraphs 83 and 84 of China's Accession Working Party Report, by requiring exporters to comply with prior export performance and minimum registered capital requirements in order to obtain a quota allocation of certain raw materials;
- (g) whether the Panel erred in its interpretation and application of Article X:3(a) of the GATT 1994, and acted inconsistently with its obligations under Article 11 of the DSU, in finding that the administration of the "operation capacity" criterion in Article 19 of China's *Export Quota Administration Measures* is non-uniform and unreasonable; and
- (h) whether the Panel erred in its interpretation and application of Article XI:1 of the GATT 1994, and acted inconsistently with Article 11 of the DSU, in finding that China's export licensing system is inconsistent with China's WTO obligations, because it constitutes a restriction on exportation.

208. The following issues are raised on appeal by the United States:

- (a) if the Appellate Body reverses the Panel's recommendations as requested by China on appeal, then whether the Panel erred, under Articles 6.2, 7.1, 11, and 19.1 of the DSU, in not making recommendations on the 2009 export quota and export duty measures that were annually recurring and in effect at that time; and
- (b) whether the Panel erred in finding that China's imposition of a bid-winning price on the allocation of export quotas on bauxite, fluorspar, and silicon carbide based on the

bid-winning price is not inconsistent with Article VIII:1(a) of the GATT 1994 or Paragraph 11.3 of China's Accession Protocol.

209. The following issue is raised on appeal by the European Union:

- (a) if the Appellate Body reverses the Panel's recommendations as requested by China on appeal, and rejects the relevant other appeals submitted by the United States and Mexico, then whether the Panel erred in finding that the European Union requested the Panel not to make any findings and recommendations on the 2010 "replacement measures" and thereby narrowed the Panel's terms of reference.

210. The following issues are raised on appeal by Mexico:

- (a) if the Appellate Body reverses the Panel's recommendations as requested by China on appeal, then whether the Panel erred, under Articles 6.2, 7.1, 11, and 19.1 of the DSU, in not making recommendations on the 2009 export quota and export duty measures that were annually recurring and in effect at that time; and
- (b) whether the Panel erred in its interpretation and application of Article X:3(a) of the GATT 1994, and acted inconsistently with Article 11 of the DSU, in finding that the participation of China's Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters (the "CCCMC") in China's export quota allocation process is not partial or unreasonable.

#### **IV. The Panel's Terms of Reference**

211. We begin by examining China's appeal of the Panel's finding that Section III of the complainants' panel requests<sup>397</sup>, entitled "Additional Restraints Imposed on Exportation", identifies the measures and claims at issue in a manner sufficient to present the problem clearly, as required under Article 6.2 of the DSU. China requests the Appellate Body to reverse this finding, and to find instead that Section III of the panel requests does not comply with Article 6.2 of the DSU, with the

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<sup>397</sup>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); Request for the Establishment of a Panel by Mexico (WT/DS398/6). The panel requests are attached to these Reports as Annexes I-III, respectively.

exception of the complainants' claims under Article X:1 of the GATT 1994 regarding the non-publication of the total amount and procedure for the allocation of the zinc export quota.<sup>398</sup>

212. Before turning to assess China's claim of error under Article 6.2 of the DSU, we consider it useful to describe briefly how this issue arose before the Panel, as well as the Panel's approach to the issue.

A. *Proceedings before the Panel and the Panel's Findings*

213. On 4 November 2009, the United States, the European Communities, and Mexico filed the panel requests that form the basis of the present dispute. At the request of the complainants, the DSB established a single panel pursuant to Article 9.1 of the DSU at its 21 December 2009 meeting. At this DSB meeting, China informed the DSB of its intention to seek a preliminary ruling on the adequacy of the complainants' panel requests and their consistency with the requirements of Article 6.2 of the DSU.<sup>399</sup> On 31 March 2010, one day after Panel composition, China submitted a request for a preliminary ruling by the Panel.<sup>400</sup> China contended that the panel requests did not comply with the requirements of Article 6.2 of the DSU because they failed to provide "a brief

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<sup>398</sup>See China's appellant's submission, paras. 97 and 98 (referring to Panel Reports, para. 7.3(b); and second phase of the Preliminary Ruling by the Panel dated 1 October 2010, Panel Reports, Annex F-2 (the "Panel's preliminary ruling (second phase)"), para. 77). As a consequence of this reversal, China also requests the Appellate Body to reverse the Panel's findings regarding claims made by the complainants on the basis of Section III of the panel requests, including the findings in paragraphs 7.669, 7.670, 7.678, 7.756, 7.807, 7.958, 7.1082, 7.1102, 7.1103, 8.4(a)-(b), 8.5(b), 8.6(a)-(b), 8.11(a), (c), (e), and (f), 8.12(b), 8.13(a)-(b), 8.18(a)-(b), 8.19(b), and 8.20(a)-(b) of the Panel Reports. (China's appellant's submission, para. 98) Although China includes paragraph 8.11(f) of the Panel Reports in its request for reversal, we note that this finding concerns the failure to publish the total amount and procedure for the allocation of the zinc export quota, which China specifically excludes from its appeal in its appellant's submission.

<sup>399</sup>WT/DSB/M/277, para. 74; see also Panel Reports, para. 1.10. The intervention of the representative of China at the 21 December 2009 regular meeting of the DSB is reflected as follows in the minutes of the meeting:

The representative of China said that ... Section III of the Complainants' Panel Requests, titled "Additional Restraints Imposed on Exportation", described various "complaints", and listed 37 "measures", along with 13 treaty provisions. However, the requests had failed to make any connection between: (1) the "complaints" and the "measures"; (2) the "measures" and the treaty provisions; and, (3) the treaty provisions and the "complaints". As a result, the complainants' requests were "[in]sufficient to present the problem clearly", within the meaning of Article 6.2 of the DSU. In those and other respects, the three complainants had prejudiced China's ability to prepare its defence. Since the complainants wished to proceed with panel establishment, China would seek a preliminary ruling on the requests' consistency with Article 6.2 of the DSU.

<sup>400</sup>Communication from China to the Panel: China's request for a preliminary ruling pursuant to Article 6.2 of the DSU, 30 March 2010 ("China's request for a preliminary ruling"); Panel Reports, para. 1.11.

summary of the legal basis of the complaint sufficient to present the problem clearly".<sup>401</sup> In particular, with respect to Section III of the panel requests, China alleged that the requests failed to "plainly connect": (i) the narrative paragraphs and the 37 listed measures; (ii) the 37 listed measures and the 13 listed treaty provisions; and (iii) the 13 listed treaty provisions and the narrative paragraphs.<sup>402</sup>

214. On 21 April 2010, the complainants submitted a joint response to China's request for a preliminary ruling.<sup>403</sup> In their joint response, the complainants argued that Section III of their panel requests starts by providing a narrative description of the additional restraints on exportation, "identifies the relevant Chinese measures", and indicates that the complainants considered "the identified measures to be inconsistent with the enumerated legal obligations".<sup>404</sup> For the complainants, this was "sufficient to connect the relevant measures with the legal obligations".<sup>405</sup> The complainants did not provide additional information at that stage of the proceedings. The Panel held a meeting with the parties, as well as a separate session with the third parties, on 29 April 2010.<sup>406</sup>

215. The Panel issued a preliminary ruling in two phases<sup>407</sup> responding to China's allegation that Section III of the complainants' panel requests failed to comply with Article 6.2 of the DSU.<sup>408</sup> The first phase of the preliminary ruling was issued to the parties on 7 May 2010 and circulated to WTO Members on 18 May 2010.<sup>409</sup> The Panel stated that "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."<sup>410</sup> Accordingly, the Panel decided to "reserve its decision" on whether Section III of the complainants' panel requests satisfied the requirements of Article 6.2 of the DSU until after it had examined the parties' first written submissions and was "more able to take fully into account China's ability to defend itself".<sup>411</sup> In so doing, the Panel referred to an "undertaking from a representative" of the complainants to the effect that "all possible concerns over the undefined scope of their challenge [would] be answered once

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<sup>401</sup>China's request for a preliminary ruling, paras. 3 and 30.

<sup>402</sup>China's request for a preliminary ruling, para. 50.

<sup>403</sup>Joint Communication from the United States, the European Union, and Mexico to the Request for a Preliminary Ruling submitted by China, 21 April 2010 (the "complainants' response to China's request for a preliminary ruling"); Panel Reports, para. 1.11.

<sup>404</sup>Complainants' response to China's request for a preliminary ruling, para. 30.

<sup>405</sup>Complainants' response to China's request for a preliminary ruling, para. 30.

<sup>406</sup>Panel Reports, para. 1.11.

<sup>407</sup>The first and second phases of the preliminary ruling were attached as Annexes F-1 and F-2 to the Panel Reports. (See Panel Reports, paras. 1.12 and 1.13)

<sup>408</sup>Panel Reports, para. 1.12.

<sup>409</sup>WT/DS394/9, WT/DS395/9, WT/DS398/8.

<sup>410</sup>Panel's preliminary ruling (first phase), para. 37.

<sup>411</sup>Panel's preliminary ruling (first phase), para. 39.

China and the Panel receive[d] the Complainants' first written submissions".<sup>412</sup> The Panel added that it was not saying that "all flaws in a panel request can be cured by a first written submission".<sup>413</sup> The Panel also said that it "expect[ed] that the Complainants [would] 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".<sup>414</sup>

216. On 6 September 2010, following the first Panel meeting, the Panel requested the complainants to list all the measures for which they were seeking recommendations and which WTO provisions each of these measures was alleged to violate.<sup>415</sup> In response, the complainants submitted, on 13 September 2010, a chart setting out, in three columns, the type of "Export Restraint" involved, the respective "Measures, *i.e.*, Legal Instruments" implicated, and the "WTO Provisions Violated" by each measure. Subsequently, on 1 October 2010, the Panel issued the second phase of its preliminary ruling, where it noted that the complainants "did not directly address in their submissions or in their subsequent oral statements" the question of whether Section III of the complainants' panel requests complied with Article 6.2 of the DSU.<sup>416</sup> Nonetheless, the Panel ultimately concluded that "the complainants' first written submission[s] set out sufficient connections between the challenged measures and certain violations attributed to such measures."<sup>417</sup> In reaching this conclusion, the Panel based itself on information contained in the charts filed by the complainants in response to a question posed by the Panel following the first Panel meeting.<sup>418</sup> At the second Panel meeting on 22 November 2010, the United States, in order "[t]o clarify any confusion"<sup>419</sup>, attached to its opening statement a revised chart specifying the measures on which it was seeking a finding by the Panel.<sup>420</sup>

217. The Panel's preliminary ruling was incorporated without changes or additional reasoning into the final Panel Reports.<sup>421</sup> Ultimately, the Panel rejected China's claim that Section III of the complainants' panel requests failed to provide "a brief summary of the legal basis of the complaint

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<sup>412</sup>Panel's preliminary ruling (first phase), para. 38.

<sup>413</sup>Panel's preliminary ruling (first phase), para. 39.

<sup>414</sup>Panel's preliminary ruling (first phase), para. 46.

<sup>415</sup>Panel Question 2 following the first Panel meeting.

<sup>416</sup>Panel's preliminary ruling (second phase), para. 32.

<sup>417</sup>Panel's preliminary ruling (second phase), para. 65.

<sup>418</sup>See Panel's preliminary ruling (second phase), para. 66: "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" after the first Panel meeting.

<sup>419</sup>United States' opening statement at the second Panel meeting, para. 128.

<sup>420</sup>Revised Chart B in response to Panel Question 2 submitted by the United States following the second Panel meeting (Panel Exhibit US-1).

<sup>421</sup>Panel Reports, Annex F; see also paras. 7.1-7.4.

sufficient to present the problem clearly". The Panel concluded that, with the exception of one claim of the European Union, "[t]he 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".<sup>422</sup>

B. *Whether Section III of the Complainants' Panel Requests Complies with the Requirements of Article 6.2 of the DSU*

218. Article 6.2 of the DSU provides, in relevant part:

The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

219. The Appellate Body has explained that Article 6.2 of the DSU serves a pivotal function in WTO dispute settlement and sets out two key requirements that a complainant must satisfy in its panel request, namely, the "identification of the specific measures at issue, and the provision of a brief summary of the legal basis of the complaint (or the claims)".<sup>423</sup> Together, these two elements constitute the "*matter* referred to the DSB", so that, if either of them is not properly identified, the matter would not be within the panel's terms of reference.<sup>424</sup> Fulfilment of these requirements, therefore, is "not a mere formality".<sup>425</sup> As the Appellate Body has noted, a panel request forms the basis for the terms of reference of panels, in accordance with Article 7.1 of the DSU.<sup>426</sup> Moreover, it serves the due process objective of notifying the respondent and third parties of the nature of the complainant's case.<sup>427</sup> The identification of the specific measures at issue and the provision of "a brief summary of the legal basis of the complaint sufficient to present the problem clearly" are therefore central to defining the scope of the dispute to be addressed by the panel.

220. In order to determine whether a panel request is sufficiently precise to comply with Article 6.2 of the DSU, a panel must scrutinize carefully the language used in the panel request.<sup>428</sup>

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<sup>422</sup>Panel Reports, para. 7.3(b).

<sup>423</sup>Appellate Body Report, *US – Carbon Steel*, para. 125. (emphasis omitted)

<sup>424</sup>Appellate Body Report, *US – Carbon Steel*, para. 125. (emphasis added)

<sup>425</sup>Appellate Body Report, *Australia – Apples*, para. 416.

<sup>426</sup>See Appellate Body Report, *Guatemala – Cement I*, paras. 72 and 73; Appellate Body Report, *US – Carbon Steel*, para. 125; Appellate Body Report, *US – Continued Zeroing*, para. 160; and Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 107.

<sup>427</sup>Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 786; see also paras. 639 and 640 (referring to Appellate Body Report, *US – Carbon Steel*, para. 126, in turn referring to Appellate Body Report, *Brazil – Desiccated Coconut*, p. 22, DSR 1997:I, 167, at 186).

<sup>428</sup>See Appellate Body Report, *EC – Fasteners (China)*, para. 562.

This involves a case-by-case analysis. Submissions by a party may be referenced in order to *confirm* the meaning of the *words used* in the panel request; but the content of those submissions "cannot have the effect of curing the failings of a deficient panel request".<sup>429</sup> For example, whether a panel request identifies the "specific measures at issue" may depend on the particular context in which those measures operate and may require examining the extent to which they are capable of being precisely identified.<sup>430</sup> At the same time, whether a panel request challenging a number of measures on the basis of multiple WTO provisions sets out "a brief summary of the legal basis of the complaint sufficient to present the problem clearly" may depend on whether it is sufficiently clear which "problem" is caused by which measure or group of measures. The Appellate Body has explained that, in order "to present the problem clearly", a panel request must "plainly connect the challenged measure(s) with the provision(s) of the covered agreements claimed to have been infringed".<sup>431</sup> Furthermore, to the extent that a provision contains not one single, distinct obligation, but rather multiple obligations, a panel request might need to specify which of the obligations contained in the provision is being challenged.<sup>432</sup> In our view, a defective panel request may impair a panel's ability to perform its adjudicative function within the strict timeframes contemplated in the DSU and, thus, may have implications for the prompt settlement of a dispute in accordance with Article 3.3 of the DSU. A complaining Member should therefore be particularly vigilant in preparing its panel request, especially when numerous measures are challenged under several different treaty provisions.

221. With these considerations in mind, we turn to the panel requests at issue in this dispute. We note that the complainants' panel requests are each structured in three separate sections. Section I, entitled "Export Quotas", challenges the imposition of export quotas on bauxite, coke, fluorspar, silicon carbide, and zinc as inconsistent with Article XI:1 of the GATT 1994 and Paragraphs 162 and 165 of the Report of the Working Party on the Accession of China<sup>433</sup> ("China's Accession Working Party Report"). In Section II, entitled "Export Duties", the complainants claim that China imposes export duties on bauxite, coke, fluorspar, magnesium, manganese, silicon metal, yellow phosphorous, and zinc in violation of its commitments under Paragraph 11.3 of the Protocol on the Accession of the People's Republic of China to the WTO<sup>434</sup> ("China's Accession Protocol"). Whereas

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<sup>429</sup>Appellate Body Report, *EC – Fasteners (China)*, para. 562 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 642; Appellate Body Report, *EC – Bananas III*, para. 143; and Appellate Body Report *US – Carbon Steel*, para. 127).

<sup>430</sup>Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 641.

<sup>431</sup>Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162.

<sup>432</sup>See Appellate Body Report, *Korea – Dairy*, para. 124. See also Appellate Body Report, *EC – Fasteners (China)*, para. 598.

<sup>433</sup>WT/ACC/CHN/49 and Corr.1.

<sup>434</sup>WT/L/432.

Sections I and II each addresses a single form of export restriction, Section III covers a wider set of allegations directed at what is referred to in the title of Section III as "Additional Restraints Imposed on Exportation".

222. The introductory paragraph in Section III states, in broad terms, that "China imposes other restraints on the exportation of the materials, administers its measures in a manner that is not uniform, impartial, and reasonable, imposes excessive fees and formalities on exportation, and does not publish certain measures pertaining to requirements, restrictions, or prohibitions on exports." This paragraph is followed by five separate paragraphs in the case of the United States and Mexico, and six paragraphs in the case of the European Union, setting out different allegations of violation relating to varied situations in which obligations under the WTO agreements might not be satisfied, namely, allegations relating to the administration of export quotas, allocation of export quotas, publication of export quota amounts and application procedures, export licensing requirements, minimum export price requirements, and fees and formalities.

223. Each of these paragraphs briefly describes a number of different allegations of violation relating to different types of restraints. These narrative paragraphs are worded in virtually identical terms in each of the three panel requests. They state:

China administers the export quotas imposed on bauxite, coke, fluorspar, silicon carbide, and zinc discussed in Section I above, 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.

China allocates the export quotas imposed on bauxite, fluorspar, and silicon carbide discussed in Section I above, through a bidding system. China administers the requirements and procedures for this bidding system 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 this bidding system, China also requires foreign-invested enterprises to satisfy certain criteria in order to export these materials that Chinese enterprises need not satisfy. [Further, China requires enterprises to pay a charge in order to export these materials that is excessive and imposes excessive formalities on the exportation of these materials.\*]

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.

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 discussed in Section I, as an additional restraint on the exportation of those materials.

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. Further, through its ministries and other organizations under the State Council as well as chambers of commerce and industry associations, China administers the price requirements in a manner that restricts exports and is not uniform, impartial, and reasonable. China also does not publish certain measures relating to these requirements in a manner that enables governments and traders to become acquainted with them.

[China also imposes excessive fees and formalities in relation to the exportation of the materials.\*\*]

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[\*This sentence is contained in the panel requests of the United States and Mexico only.]

[\*\*This sentence is contained in the panel request of the European Union only.]

224. Following these narrative paragraphs, each of the three panel requests provides an identical bullet point list of 37 legal instruments, introduced by the phrase: "[The complainant] understands that these Chinese measures are reflected in, among others: ..." <sup>435</sup> The legal instruments listed range from entire codes or charters (such as the Foreign Trade Law of the People's Republic of China <sup>436</sup> (China's "*Foreign Trade Law*")) to specific administrative measures (such as the Quotas of Fluorspar

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<sup>435</sup>While the phrase introducing the 37 legal instruments refers to "these Chinese measures" in a manner that might suggest that the complainants regarded the text of the narrative paragraphs as setting forth the measures at issue, the subsequent submissions clarified the meaning of the word "measures" as a synonym for the 37 legal instruments. In fact, in its response to Panel Question 2 following the first Panel meeting, the United States and Mexico referred to them as "Measures, *i.e.*, Legal Instruments" and the European Union as "Measures/Legal instruments".

<sup>436</sup>Foreign Trade Law of the People's Republic of China, adopted at the 8th Session of the Standing Committee of the Tenth National People's Congress on 6 April 2004, 1 July 2004 (Panel Exhibits CHN-151 and JE-72).

Lump (Powder) of 2009<sup>437</sup> ("*2009 First Round Fluorspar Bidding Procedures*"). The complainants' panel requests do not identify specific sections or provisions of any of the listed instruments.

225. The final paragraph of Section III of the panel requests consists of a list of 13 treaty provisions. The United States and Mexico state that they consider that "these measures are inconsistent with Article VIII:1(a) and VIII:4, Article X:1 and X:3(a), and Article XI:1 of the GATT 1994 and paragraphs 2(A)2, 5.1, 5.2 and 8.2 of Part I of the Accession Protocol, as well as China's obligations under the provisions of paragraph 1.2 of Part I of the Accession Protocol, which incorporates commitments in paragraphs 83, 84, 162, and 165 of the Working Party Report."<sup>438</sup> The final paragraph in Section III of the European Union's panel request is textually identical, except that it refers to Article VIII:1 of the GATT 1994 instead of Article VIII:1(a) of the GATT 1994.

226. China does not contest that Section III of the panel requests identifies the challenged measures with sufficient specificity to comply with Article 6.2 of the DSU. Rather, at issue here is whether Section III provides "a brief summary of the legal basis of the complaint sufficient to present the problem clearly". As the Appellate Body found in *EC – Selected Customs Matters*, a brief summary of the legal basis of the complaint as required by Article 6.2 of the DSU should "explain succinctly *how or why* the measure at issue is considered by the complaining Member to be violating the WTO obligation in question".<sup>439</sup> Based on our reading of the complainants' panel requests in the present case, it is not clear which allegations of error pertain to which particular measure or set of measures identified in the panel requests. Furthermore, it is unclear whether each of the listed measures relates to one specific allegation described in the narrative paragraphs, or to several or even all of these allegations, and whether each of the listed measures allegedly violates one specific provision of the covered agreements, or several of them.<sup>440</sup>

227. First, the complainants identify, for instance, China's *Foreign Trade Law* as a measure at issue. Yet from the language of Section III of the panel requests it is impossible to discern which of the several allegations of violation described in the narrative paragraphs is alleged to have been

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<sup>437</sup>Quotas of Fluorspar Lump (Powder) of 2009, Committee for the Invitation for bid for Export Commodity Quotas, 10 December 2008 (Panel Exhibit JE-93).

<sup>438</sup>See, for example, United States' panel request, p. 9.

<sup>439</sup>Appellate Body Report, *EC – Selected Customs Matters*, para. 130.

<sup>440</sup>As noted *supra*, para. 211, China does not argue that the claim regarding the non-publication of the zinc export quota fails to comply with Article 6.2 of the DSU. Moreover, as this claim concerns a failure to publish a measure, we consider that the language in the fourth narrative paragraph of Section III of the panel requests, together with the listing of Article X:1 of the GATT 1994 in Section III, satisfies the requirements of Article 6.2 of the DSU.

caused by the *Foreign Trade Law*, or which provision or provisions of the covered agreements listed in the concluding paragraph are alleged to have been violated by that measure.

228. Second, the WTO provisions listed in Section III contain a wide array of dissimilar obligations.<sup>441</sup> More specifically, the complainants state that they consider that "these measures are inconsistent with Article VIII:1(a)<sup>442</sup> and VIII:4, Article X:1 and X:3(a), and Article XI:1 of the GATT 1994 and paragraphs 2(A)2, 5.1, 5.2 and 8.2 of Part I of the Accession Protocol, as well as China's obligations under the provisions of paragraph 1.2 of Part I of the Accession Protocol, which incorporates commitments in paragraphs 83, 84, 162, and 165 of the Working Party Report." China's obligations under these various provisions are quite diverse and therefore it cannot be discerned what the particular "problem" is under Article 6.2 of the DSU with respect to the legal instruments listed in Section III.

229. Third, the narrative paragraphs describe in a general manner different allegations of error related to different types of restraints, and do not make clear which measures, or which groups of measures acting collectively, are alleged to be inconsistent with which treaty provisions. For example, the second narrative paragraph of the complainants' panel requests states that "China administers the export quotas ... 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" and alleges that, "[i]n 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".<sup>443</sup> This language, when read together with the legal instruments identified in the panel requests and the WTO provisions identified in Section III, groups together disparate problems arising under different treaty provisions.

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<sup>441</sup>See Appellate Body Report, *Korea – Dairy*, para. 124.

<sup>442</sup>We note that, in its panel request, the European Union invokes more broadly Article VIII:1 of the GATT 1994.

<sup>443</sup>The second narrative paragraph of Section III of the complainants' panel requests reads in full as follows:

China administers the export quotas imposed on bauxite, coke, fluorspar, silicon carbide, and zinc discussed in Section I above, 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.

230. As the Appellate Body has explained, a claim must be presented in a manner that presents the problem clearly within the meaning of Article 6.2.<sup>444</sup> We do not consider this to have been the case here, where Section III of the complainants' panel requests refers generically to "Additional Restraints Imposed on Exportation" and raises multiple problems stemming from several different obligations arising under various provisions of the GATT 1994, China's Accession Protocol, and China's Accession Working Party Report. Neither the titles of the measures nor the narrative paragraphs reveal the different groups of measures that are alleged to act collectively to cause each of the various violations, or whether certain of the measures is considered to act alone in causing a violation of one or more of the obligations.

231. Like the Panel, we do not read Section III of the complainants' panel requests as advancing all claims, under all treaty provisions, with respect to all measures. Instead, it appears to us that the complainants were challenging some (groups of) measures as inconsistent with some (groups) of the listed WTO obligations.<sup>445</sup> In the present case, the combination of a wide-ranging list of obligations together with 37 legal instruments ranging from China's *Foreign Trade Law* to specific administrative measures applying to particular products is such that it does not allow the "problem" or "problems" to be discerned clearly from the panel requests. Because the complainants did not, in either the narrative paragraphs or in the final listing of the provisions of the covered agreements alleged to have been violated, provide the basis on which the Panel and China could determine with sufficient clarity what "problem" or "problems" were alleged to have been caused by which measures, they failed to present the legal basis for their complaints with sufficient clarity to comply with Article 6.2 of the DSU.

232. With respect to the consequences of the failure to comply with the requirements of Article 6.2 of the DSU, the participants disagree as to whether the Panel frustrated China's due process rights under that provision. China alleges that, when the panel requests were filed, it was not able to begin preparation of its defence with respect to the claims listed in Section III of the panel requests, "because the measures implicated by the different narrative paragraphs, and the claims made regarding those measures, could not be identified".<sup>446</sup> The European Union responds that China "effectively and exhaustively" defended all the claims made by the complainants in its first written submission to the Panel, and that this demonstrates that China's due process rights were not compromised.<sup>447</sup> Referring to China's statement that the complainants have made "several subsets of

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<sup>444</sup>See Appellate Body Report, *EC – Fasteners (China)*, para. 597.

<sup>445</sup>Panel's preliminary ruling (first phase), para. 36.

<sup>446</sup>China's appellant's submission, para. 85.

<sup>447</sup>European Union's appellee's submission, para. 25.

claims with respect to several subsets of measures affecting several subsets of product categories"<sup>448</sup>, the United States and Mexico argue that China was aware of "both the possible and likely claims that the Co-Complainants could advance against it".<sup>449</sup>

233. The Appellate Body has clarified that due process "is not constitutive of, but rather follows from, the proper establishment of a panel's jurisdiction".<sup>450</sup> We find it troubling therefore that the Panel, having correctly recognized that a deficient panel request cannot be cured by a complaining party's subsequent written submissions, nonetheless decided to "reserve its decision" on whether the panel requests complied with the requirements of Article 6.2 until after it had examined the parties' first written submissions and was "more able to take fully into account China's ability to defend itself".<sup>451</sup> The fact that China may have been able to defend itself does not mean that Section III of the complainants' panel requests in this dispute complied with Article 6.2 of the DSU. In any event, compliance with the due process objective of Article 6.2 cannot be inferred from a respondent's response to arguments and claims found in a complaining party's first written submission. Instead, it is reasonable to expect, in our view, that a rebuttal submission would address arguments contained in the complaining party's first written submission. We also find it troubling that the second phase of the Panel's preliminary ruling came only at an advanced stage in the proceedings, on 1 October 2010.

234. In the light of the failure to provide sufficiently clear linkages between the broad range of obligations contained in Articles VIII:1(a), VIII:4, X:1, X:3(a), and XI:1 of the GATT 1994, Paragraphs 2(A)2, 5.1, 5.2, and 8.2 of Part I of China's Accession Protocol, and Paragraphs 83, 84, 162, and 165 of China's Accession Working Party Report, and the 37 challenged measures, we do not consider that Section III of the complainants' panel requests satisfies the requirement in Article 6.2 of the DSU to provide "a brief summary of the legal basis of the complaint sufficient to present the problem clearly".

235. Consequently, we *find* that the Panel erred under Article 6.2 of the DSU in making findings regarding claims allegedly identified in Section III of the complainants' panel requests. We therefore declare moot and of no legal effect the Panel's findings in paragraphs 8.4(a)-(d), 8.11(a)-(e), and 8.18(a)-(d) in respect of claims concerning export quota administration and allocation; paragraphs 8.5(a)-(b), 8.12(a)-(b), and 8.19(a)-(b) in respect of claims concerning export licensing

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<sup>448</sup>Joint appellees' submission of the United States and Mexico, para. 57 (referring to China's comments on the complainants' joint response to China's request for a preliminary ruling, para. 49).

<sup>449</sup>Joint appellees' submission of the United States and Mexico, para. 57.

<sup>450</sup>Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 640.

<sup>451</sup>Panel's preliminary ruling (first phase), para. 39.

requirements; paragraphs 8.6(a)-(b), 8.13(a)-(b), and 8.20(a)-(b) in respect of claims concerning a minimum export price requirement; and paragraphs 8.4(e) and 8.18(e) of the Panel Reports in respect of claims concerning fees and formalities in connection with exportation. In these circumstances, we have no basis to consider further the arguments raised by China in its appeal and by the complainants in their other appeals regarding these findings.

## **V. The Panel's Recommendations**

236. We now turn to address China's appeal regarding the Panel's recommendations concerning export duties and export quotas.

237. China seeks review of the Panel's recommendations "to the extent that they apply to annual replacement measures" adopted after the establishment of the Panel on 21 December 2009.<sup>452</sup> China argues that the complainants had excluded such measures from the scope of the dispute and, hence, by making recommendations extending to such measures, the Panel acted inconsistently with its obligations under Article 7.1 of the DSU; failed to make an objective assessment of the matter under Article 11 of the DSU; and made recommendations on measures that were not part of the matter, inconsistently with Article 19.1 of the DSU.<sup>453</sup> In response, the United States, the European Union, and Mexico argue that the Panel's recommendations were correctly made in accordance with Articles 7.1, 11, and 19.1 of the DSU on the measures challenged by the complainants as they existed at the time of the Panel's establishment. The United States and Mexico posit that, without such recommendations, "trade measures imposed in part through annually recurring legal instruments could never be successfully challenged through WTO dispute settlement".<sup>454</sup> The European Union adds that "this is not the proper forum to determine the actions China should take in order to bring itself into compliance with its WTO obligations"; rather, China should follow the procedures provided for under Article 21 of the DSU in order to identify the scope of its compliance obligations.<sup>455</sup>

238. The Panel included the following paragraph in the final section of its Reports, setting out its conclusions and recommendations:

Pursuant to Article 19.1 of the DSU, having found that China has acted inconsistently with Articles X:1, X:3(a) and XI:1 of the GATT 1994; Paragraphs 1.2, 5.1 and 11.3 of China's Accession Protocol; and Paragraphs 83 and 84 of China's Working Party Report,

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<sup>452</sup>China's appellant's submission, para. 136.

<sup>453</sup>China's appellant's submission, section III.D.2.

<sup>454</sup>Joint appellees' submission of the United States and Mexico, para. 72.

<sup>455</sup>European Union's appellee's submission, para. 43.

the Panel recommends that the Dispute Settlement Body requests China to bring the existing measures at issue into conformity with its obligations under the GATT 1994, China's Accession Protocol and China's Working Party Report. The Panel makes no recommendation on expired measures, namely the 2009 measures at issue and pre-2009 MEP-related measures. In respect of findings concerning export duties and export quotas, the Panel found that the series of measures operating collectively has resulted in the imposition of export duties or export quotas that are inconsistent with China's WTO obligations. The Panel, therefore, recommends that the Dispute Settlement Body requests China to bring its measures into conformity with its WTO obligations such that the "series of measures" does not operate to bring about a WTO-inconsistent result.<sup>456</sup>

239. Before turning to address China's arguments on appeal, we consider it useful to describe the procedural context in which this issue arose and to outline the multiple steps in the Panel's analysis that led it to make findings and recommendations on a "series of measures".

A. *Proceedings before the Panel and the Panel's Findings*

240. Before the Panel, the complainants alleged that China has acted inconsistently with its WTO obligations by imposing export quotas on certain forms of bauxite<sup>457</sup>, coke, fluorspar, silicon carbide, and zinc; and export duties on certain forms of bauxite, coke, fluorspar, magnesium, manganese, silicon metal, and zinc.<sup>458</sup> The Panel found that these export restrictions were not introduced through a single legal instrument, but rather resulted from the application of several measures operating together.<sup>459</sup> For each product, this group of measures, or "series of measures" as the Panel referred to it, consisted of standing framework legislation and implementing regulations, as well as a specific legal instrument or instruments identifying the individual export quotas or export duties imposed on a specific product during a particular timeframe, usually one year.<sup>460</sup> For example, the Panel found that China imposed an export quota on certain forms of bauxite in 2009<sup>461</sup> through China's *Foreign Trade Law*, Regulation of the People's Republic of China on the Administration of the Import and Export of

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<sup>456</sup>Panel Reports, paras. 8.8, 8.15, and 8.22. The Panel made the same recommendation with respect to each of the complainants.

<sup>457</sup>Three forms of bauxite are at issue in this dispute: refractory-grade bauxite (Harmonized System ("HS") number 2508.3000), aluminium ores and concentrates (HS number 2606.0000), and aluminium ash and residues (HS number 2620.4000).

<sup>458</sup>See Panel Reports, paras. 3.2, 3.3, 7.59-7.63, and 7.172-7.201. The export duty on yellow phosphorous was also challenged, but the Panel found that this duty was no longer in effect at the time of the Panel's establishment. (See *infra*, footnote 553)

<sup>459</sup>Panel Reports, paras. 7.68 and 7.218.

<sup>460</sup>Panel Reports, paras. 7.76, 7.80, 7.84, 7.88, 7.92, 7.97, 7.101, and 7.219-223.

<sup>461</sup>See Panel Reports, para. 7.219.

Goods<sup>462</sup> ("*Regulation on Import and Export Administration*"), Measures of Quota Bidding for Export Commodities<sup>463</sup> ("*Export Quota Bidding Measures*"), Measures for the Administration of Licence for the Export of Goods<sup>464</sup> ("*2008 Export Licence Administration Measures*"), Announcement of the Ministry of Commerce Issuing the "2009 Graded Licence-Issuing List of Commodities Subject to Export Licence Administration"<sup>465</sup> ("*2009 Graded Export Licensing Entities Catalogue*"), Working Rules on Issuing Export Licences<sup>466</sup> ("*2008 Export Licensing Working Rules*"), Implementation Rules of Export Quota Bidding for Industrial Products<sup>467</sup> ("*Export Quota Bidding Implementation Rules*"), Notice Regarding 2009 Export Quota Amounts for Agricultural and Industrial Products<sup>468</sup> ("*2009 Export Quota Amounts*"), Announcement on the Second Invitation for the Bidding of Select Industrial Product Export Quotas in 2009<sup>469</sup> ("*2009 Announcement of Second Bidding Round for Talc and Silicon Carbide*"), Notice "2009 Export Licensing Management Commodities List"<sup>470</sup> ("*2009 Export Licensing Catalogue*"), Announcement of Ministry of Commerce on Matters regarding the First Bidding for Export Quotas of Industrial Products in 2009<sup>471</sup> ("*2009 First Round Export Quota Bidding Announcement*"), Announcement of Ministry of Commerce on the Notice for the Second Invitation for the Bidding for Industrial Product Export Quotas in 2009<sup>472</sup> ("*2009 Second Round Export Quota*

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<sup>462</sup>Regulation of the People's Republic of China on the Administration of the Import and Export of Goods, passed at the forty-sixth executive meeting of the State Council on 31 October 2001, 1 January 2002 (Panel Exhibits CHN-152 and JE-73).

<sup>463</sup>Measures of Quota Bidding for Export Commodities, Decree of the Ministry of Foreign Trade and Economic Cooperation No. 11, adopted at the 9th ministerial office meeting of the Ministry of Foreign Trade and Economic Co-operation, 1 January 2002 (Panel Exhibits CHN-304 and JE-77).

<sup>464</sup>Measures for the Administration of Licence for the Export of Goods, Order of the Ministry of Commerce (2008) No. 11, 1 July 2008 (Panel Exhibits CHN-342 and JE-74).

<sup>465</sup>Announcement of the Ministry of Commerce Issuing the "2009 Graded Licence-Issuing List of Commodities Subject to Export Licence Administration", Ministry of Commerce, Notice (2008) No. 124, 1 January 2009 (Panel Exhibit JE-96).

<sup>466</sup>Working Rules on Issuing Export Licences, Ministry of Commerce, Shangpeifa (2008) No. 398, 9 October 2008 (Panel Exhibits CHN-344 and JE-97).

<sup>467</sup>Implementation Rules of Export Quota Bidding for Industrial Products, Ministry of Foreign Trade and Economic Cooperation, 8 November 2001 (Panel Exhibits CHN-305 and JE-78).

<sup>468</sup>Notice Regarding 2009 Export Quota Amounts for Agricultural and Industrial Products, Ministry of Commerce, Notice (2008) No. 83, 1 January 2009 (Panel Exhibit JE-79).

<sup>469</sup>Announcement on the Second Invitation for the Bidding of Select Industrial Product Export Quotas in 2009, Committee for the Invitation for bid for Export Commodity Quotas, 16 September 2009 (Panel Exhibit JE-132).

<sup>470</sup>Notice "2009 Export Licensing Management Commodities List", Ministry of Commerce and General Administration of Customs, Notice (2008) No. 100, 1 January 2009 (Panel Exhibits CHN-6 and JE-22).

<sup>471</sup>Announcement of Ministry of Commerce on Matters regarding the First Bidding for Export Quotas of Industrial Products in 2009, Ministry of Commerce, Announcement (2008) No. 85, 30 October 2008 (Panel Exhibits CHN-309 and JE-90).

<sup>472</sup>Announcement of Ministry of Commerce on the Notice for the Second Invitation for the Bidding for Industrial Product Export Quotas in 2009, Ministry of Commerce, Announcement (2009) No. 42, 8 June 2009 (Panel Exhibits CHN-310 and JE-91).

*Bidding Announcement*"), and Quotas of Bauxite of 2009<sup>473</sup> ("*2009 First Round Bauxite Bidding Procedures*"). Similarly, the Panel found that the export duties imposed in 2009 on the raw materials at issue<sup>474</sup> were imposed through the application of China's Customs Law of the People's Republic of China<sup>475</sup> (China's "*Customs Law*"), the Regulations of the People's Republic of China on Import and Export Duties<sup>476</sup> ("*Regulations on Import and Export Duties*"), and the Notice Regarding the 2009 Tariff Implementation Program<sup>477</sup> ("*2009 Tariff Implementation Program*").

241. In our discussion below, we refer, as did the Panel, to the groups of measures challenged by the complainants as a whole, and in force at the time of the Panel's establishment, as the various "series of measures".<sup>478</sup> More specifically, we use the term "series of measures" to describe, collectively, the entire hierarchy of legal instruments applicable to each product, that is, the framework legislation, the regulations implementing this legislation, and the specific legal instrument or instruments identifying the individual export quotas or duties imposed on the product in 2009. We therefore do not use that term to refer, for example, to any specific legal instrument setting out an export quota amount or an export duty rate taken in isolation.

242. While the framework legislation and implementing regulations remained in effect, certain of the legal instruments setting out an export quota amount or an export duty rate identified by the complainants in their panel requests expired or were replaced during the course of the Panel proceedings.<sup>479</sup> This was the case, for example, for the *2009 Tariff Implementation Program*, which specified export duty rates for seven of the nine raw materials at issue during calendar year 2009. This measure expired at the end of 2009 and was replaced, with effect from 1 January 2010, by the Circular of the State Council Tariff Commission on the 2010 Tariff Implementation Plan<sup>480</sup> ("*2010*

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<sup>473</sup>Quotas of Bauxite of 2009, Committee for the Invitation for bid for Export Commodity Quotas, 10 December 2008 (Panel Exhibit JE-94).

<sup>474</sup>See Panel Reports, paras. 7.76, 7.80, 7.84, 7.88, 7.92, 7.97, and 7.101.

<sup>475</sup>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 (Panel Exhibits CHN-14 and JE-68).

<sup>476</sup>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 (Panel Exhibits CHN-13 and JE-67).

<sup>477</sup>Notice Regarding the 2009 Tariff Implementation Program, State Council Tariff Policy Commission, Shuiweihui (2008) No. 40, 1 January 2009 (Panel Exhibit JE-21).

<sup>478</sup>The term "series of measures" can be used in both the plural, as here, to refer to the various series of measures upon which the Panel made findings and recommendations in this case, or in the singular to apply to the specific series (or group) of measures imposing an export duty or export quota on a single product in 2009.

<sup>479</sup>Panel Reports, para. 7.5.

<sup>480</sup>Circular of the State Council Tariff Commission on the 2010 Tariff Implementation Plan, Shui Wei Hui [2009] No. 28, promulgated by the Customs Tariff Commission of the State Council on 8 December 2009 (Panel Exhibit CHN-5).

*Tariff Implementation Plan*"), which specified export duty rates for the raw materials at issue applicable as of 1 January 2010.<sup>481</sup>

243. The parties disagreed as to whether the Panel should consider the series of measures as it existed in 2010, and including the specific measures setting out export duty rates or quota amounts for each product in 2010, or the series of measures as it existed at the time of the Panel's establishment in 2009, including the 2009 export duty rates and quota amounts.<sup>482</sup> China recognized that the Panel could make findings on 2009 measures specifying export quota and duty levels<sup>483</sup>, but nevertheless argued that it "would serve no purpose" for the Panel to rule on measures that have ceased to exist since they no longer violate WTO obligations or nullify or impair benefits.<sup>484</sup>

244. For their part, the complainants argued that the Panel should make findings on the "legal situation prevailing on the date of the establishment of the Panel".<sup>485</sup> They asserted that the Panel "should not consider the claims as addressing the 2010 measures"<sup>486</sup>, and requested that the Panel not "make any findings and recommendations on any of the 2010 measures invoked by China".<sup>487</sup> The

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<sup>481</sup>In 2009, bauxite and fluorspar had been subject to both export quotas and export duties. As from 1 January 2010, they were subject to only one restraint each, that is, an export quota and an export duty, respectively. (See China's first written submission to the Panel, paras. 63-67; see also United States' other appellant's submission, para. 64)

<sup>482</sup>The Panel appears to have used the terms "replacement measures" and "2010 measures" interchangeably. We note, however, that the United States and Mexico explained to the Panel that:

[t]he reference in the [US][Mexico] panel request to "replacement measures" and "renewal measures" is a reference to legal instruments in existence at the time of the [US][Mexico] panel request but of which the [US][Mexico] may not have been aware, that formally "replaced" or "renewed" a legal instrument listed in the [US][Mexico] panel request but did not change its content or effect. The Panel's terms of reference are therefore not broad enough to include these legal instruments that took effect on January 1, 2010 (the January 1, 2010 Measures).

(United States' second written submission to the Panel, para. 338; Mexico's second written submission to the Panel, para. 342)

In other words, the United States and Mexico used the term "replacement measures" to refer to measures that were in existence at the time of the panel requests. China, on the other hand, characterized the legal instruments through which the export quotas and export duties were imposed as "replacement measures", and argued that the ones that were in effect on the date of Panel establishment (effective during 2009) had "expired" and had been "replaced" by "new" measures on 1 January 2010. China refers to the first category of measures as "2009 measures" and the second as "2010 measures".

<sup>483</sup>Panel Reports, para. 7.6 (referring to China's first written submission to the Panel, para. 52).

<sup>484</sup>Panel Reports, para. 7.6 (referring to China's first written submission to the Panel, paras. 49-51, 56, 62, 64, and 67; China's second written submission to the Panel, section II, entitled "Panel Should Rule on the 2010 Measures To resolve the Disputes, and Should Not Rule on the 2009 Measure" and para. 12, where China states that, "[i]n sum, the prompt and positive resolution of this dispute calls for the Panel to address the 2010 measures, and not the 2009 measures").

<sup>485</sup>Panel Reports, para. 7.7.

<sup>486</sup>Panel Reports, para. 7.7.

<sup>487</sup>Panel Reports, para. 7.22.

complainants considered, however, that "the measures invoked in the context of China's defence under GATT Article XX form part of China's evidence and should be evaluated as evidence, but not as measures *per se*."<sup>488</sup>

245. The Panel observed that the complainants' panel requests refer to "any amendments or extensions; related measures; replacement measures; renewal measures; and implementing measures".<sup>489</sup> As it had done in the first phase of its preliminary ruling<sup>490</sup>, the Panel decided that its terms of reference were broad enough to encompass "amendments or replacement measures of the 2009 measures challenged by the complainants".<sup>491</sup>

246. However, after considering the parties' arguments, the Panel decided to adopt the following approach, which we consider useful to set out in full:

(a) The Panel will make findings on the WTO consistency of original measures included in its terms of reference. In light of the request by the complainants that the Panel not make any findings on any amendments or replacement measures, the Panel will only make findings on 2009 measures and the Panel will not make findings on 2010 measures.

(b) In situations where a 2010 replacement measure appears to correct the WTO inconsistency of the original 2009 measure—in whole or in part (and therefore is considered not to have the same essence, in whole or in part, as the expired measure)—the Panel will decline to make findings or recommendations on the 2010 measure, as it falls outside its terms of reference. However, in order to make a determination on whether the new measure is of the same essence as the expired measure, and hence imbues the expired measure with ongoing effect or prospective application, the Panel will necessarily have to determine (without making a formal finding) whether the WTO inconsistency is no longer present in the new measure.

(c) Nonetheless, with a view to ensuring that annually renewed measures do not evade review by virtue of their annual nature—and relying on the Appellate Body ruling in *US – Continued Zeroing* where the Appellate Body recognized the possibility for a panel to make a ruling on measures that have a "prospective application and a life potentially stretching into the future"—the Panel will make findings with respect to the series of measures comprised of the relevant framework legislation, the implementing regulation(s), other

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<sup>488</sup>Panel Reports, para. 7.7.

<sup>489</sup>Panel Reports, para. 7.15.

<sup>490</sup>Panel's preliminary ruling (first phase), para. 20.

<sup>491</sup>Panel Reports, para. 7.20.

applicable laws and the specific measure imposing export duties or export quotas in force at the date of the Panel's establishment.

(d) With respect to recommendations, generally the Panel will not make recommendations on any original measure or on any measure no longer in existence (or part thereof) on 15 December 2010, unless there is clear evidence that the measure has ongoing effect.

(e) In situations where the claim is based on an annual measure, as is the case with measures imposing export duties and with some of the measures relating to export quotas, the Panel will make recommendations with respect to the series of measures comprised of the relevant framework legislation, the implementing regulation(s), other applicable laws and the specific measure imposing export duties or export quotas in force at the date of the Panel's establishment.<sup>492</sup>

247. We understand the Panel to have set out to make findings on all of the series of measures in effect in 2009, including specific measures setting out export duties and export quotas that had expired during the course of the Panel proceedings. The Panel also clarified that it would not make findings on the specific measures assigning export duty rates and quota levels for 2010 in the light of the request of the complainants not to make findings on such measures. The Panel further specified that it would make findings and recommendations relating to the export quotas and export duties on the basis of "the series of measures comprised of the relevant framework legislation, the implementing regulation(s), other applicable laws and the specific measure imposing export duties or export quotas in force at the date of the Panel's establishment."<sup>493</sup> The Panel added that it would not make recommendations on expired measures, unless there was clear evidence that such measures had ongoing effect. The Panel expressed the view that, because the measures operating to impose export duties and export quotas included measures of an annually recurring nature, its approach would ensure that these measures did not "evade review".<sup>494</sup>

## B. *China's Appeal*

### 1. Arguments on Appeal

248. On appeal, China does not dispute that the complainants had the "option" of pursuing claims against the "future life" of the export duties and quotas at issue by challenging the measures

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<sup>492</sup>Panel Reports, para. 7.33.

<sup>493</sup>Panel Reports, paras. 7.33(c) and 7.33(e).

<sup>494</sup>Panel Reports, para. 7.33(c).

specifying such duty rates and quota levels in 2010.<sup>495</sup> China adds that it even "encouraged" the complainants to do so.<sup>496</sup> However, according to China, the complainants decided to exclude those 2010 measures from the dispute, thereby "breaking the chain of measures subject to dispute settlement".<sup>497</sup> In these circumstances, by making recommendations extending to measures specifying export duty rates and quota amounts for 2010, China claims that the Panel acted inconsistently with its terms of reference under Article 7.1 of the DSU; failed to make an objective assessment of the matter under Article 11 of the DSU; and acted inconsistently with Article 19.1 of the DSU.

249. In response, the United States and Mexico submit that "China has not understood the Panel's recommendations correctly".<sup>498</sup> In particular, they consider that the Panel did not make recommendations on measures on which it had not made findings and did not make recommendations on the basis of measures that were outside of its terms of reference. Instead, the Panel made findings and recommendations on the series of measures "in force at the date of panel establishment".<sup>499</sup> According to the United States and Mexico, China's appeal therefore "may be dismissed on this basis alone".<sup>500</sup> The European Union makes arguments along the same lines, noting that the Panel did not refer explicitly to "2010 'replacement measures'" in its recommendations.<sup>501</sup> The European Union also points out that the Panel did not refer to any such "replacement" measures in its Reports when it identified the measures that composed the "series of measures".<sup>502</sup>

250. China's appeal regarding the Panel's recommendations rests on the proposition that the Panel made recommendations on a "series of measures" that extends into the future and includes the 2010 measures. That is, China faults the Panel for "making recommendations regarding a so-called 'series of measures' with a prospective life extended through annual replacement measures" that were not before the Panel when it made its recommendations.<sup>503</sup> In order to address China's arguments on appeal, we begin by reviewing the nature of the challenge brought by the complainants before the Panel.

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<sup>495</sup>China's appellant's submission, para. 163.

<sup>496</sup>China's appellant's submission, para. 163.

<sup>497</sup>China's appellant's submission, para. 165. (emphasis omitted)

<sup>498</sup>Joint appellees' submission of the United States and Mexico, para. 81.

<sup>499</sup>Joint appellees' submission of the United States and Mexico, para. 83.

<sup>500</sup>Joint appellees' submission of the United States and Mexico, para. 83.

<sup>501</sup>European Union's appellee's submission, para. 39.

<sup>502</sup>European Union's appellee's submission, para. 39.

<sup>503</sup>China's appellant's submission, para. 153.

## 2. Analysis

251. A panel is required, under Article 7 of the DSU, to examine the "matter" referred to the DSB by the complainant in the request for the establishment of a panel, and to make such findings as will assist the DSB in making recommendations. The language in a complainant's panel request is therefore important because "a panel's terms of reference are governed by the request for establishment of a panel".<sup>504</sup> Article 19.1 of the DSU establishes a link between a panel's finding that "a measure is inconsistent with a covered agreement", and its recommendation that the respondent "bring the measure into conformity". The "measures" that may be the subject of recommendations in Article 19.1 are limited to those measures that are included within a panel's terms of reference.

252. In order to identify the object of the complainants' challenge, we begin with the language used by the complainants in their panel requests.<sup>505</sup> With respect to export quotas, the complainants claim in Section I of their panel requests that "China subjects the exportation of bauxite, coke, fluorspar, silicon carbide, and zinc to quantitative restrictions such as quotas." The complainants further contend that these restrictions "are reflected in" 25 legal instruments listed in the panel requests, including China's *Foreign Trade Law*, *Regulation on Import and Export Administration*, *Export Quota Bidding Measures*, *2008 Export Licence Administration Measures*, *2008 Export Licensing Working Rules*, and *Export Quota Bidding Implementation Rules*, which constitute the general legal framework and implementing regulations allowing for the imposition of export quotas, as well as the specific measures that established the export quota amounts and allocation procedures on bauxite, coke, fluorspar, silicon carbide, and zinc for 2009.<sup>506</sup> Similarly, with respect to export duties, the complainants identified in Section II of their panel requests the object of their challenge as export duties "reflected in" 19 specifically identified legal instruments. These include measures setting out the general legal framework for the imposition of export duties—that is, China's *Customs Law* and the *Regulations on Import and Export Duties*—as well as the specific measure that sets out particular export duty rates for 2009 on bauxite, coke, fluorspar, magnesium, manganese, silicon metal, yellow phosphorous, and zinc—that is, the *2009 Tariff Implementation Program*.

253. The complainants did not use the words "series of measures" to describe the object of their challenge. However, as noted above, they did identify the specific measures that, collectively, compose China's legal system for the imposition of export duties and export quotas in their panel

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<sup>504</sup> Appellate Body Report, *US – Carbon Steel*, para. 124.

<sup>505</sup> WT/DS394/7, WT/DS395/7, and WT/DS398/6. See Annexes I-III of these Reports.

<sup>506</sup> Panel Reports, para. 7.17; see also paras. 7.219-7.223.

requests.<sup>507</sup> Moreover, they contended that the imposition of export duties and export quotas on particular products, through the application of those measures, is contrary to China's WTO obligations.<sup>508</sup> The complainants further clarified that the Panel should not consider their claims as addressing measures adopted after the establishment of the Panel, and requested that the Panel not "make any findings and recommendations on any of the 2010 measures invoked by China".<sup>509</sup>

254. As the Panel explained, China's legislative system for the imposition of export duties comprises basic framework legislation, an implementing regulation, and specific "annual measures that set the level of duty for specific products".<sup>510</sup> The Panel added that, with respect to export quotas, there is also a basic framework legislation, an implementing regulation, "a set of regulations applicable to the relevant allocation system—direct allocation or quota bidding—and finally a set of measures (of varying duration, from a few months to a year or indefinite) that determine the level of quotas for specific products".<sup>511</sup> The Panel did not consider that "individually each of those measures would necessarily be WTO-inconsistent"; rather, the Panel said that, "when they operate in concert to result in WTO-inconsistent [export duties or quotas], it is then that they would become *prima facie* WTO-inconsistent".<sup>512</sup> The Panel added that it is only by examining these "measures as they work in concert that the Panel can reach a final determination on the complainants' export duty" and export quota claims.<sup>513</sup> In our view, the Panel correctly described the object of the complainants' challenge. Indeed, the complainants' panel requests and subsequent arguments before the Panel reveal that the complainants brought their claims with respect to all the measures through which export duties and quotas were imposed on particular raw materials at the time of the establishment of the Panel in 2009.

255. Based on the foregoing, we do not consider that the Panel erred in setting out to make recommendations on the "series of measures" imposing export duties or export quotas in force at the date of the Panel's establishment.<sup>514</sup> Moreover, in the light of the Panel's express statement that it would make recommendations on measures "in force at the date of the Panel's establishment", and that it would not make findings on the measures imposing specific export duty rates and quota levels

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<sup>507</sup>See Panel Reports, paras. 7.17 and footnotes 55 and 56 thereto.

<sup>508</sup>Panel Reports, para. 3.2.

<sup>509</sup>Panel Reports, para. 7.22.

<sup>510</sup>Panel Reports, para. 7.17 and footnote 55 thereto. The Panel noted that the complainants' panel requests identify measures comprising China's system for applying export duties. The Panel described this system in further detail in its Reports at paras. 7.59-7.63.

<sup>511</sup>Panel Reports, para. 7.17 and footnote 56 thereto. The Panel noted that the complainants' panel requests identify measures comprising China's system for applying export quotas. The Panel described this system in further detail in Panel Reports, paras. 7.172-7.201.

<sup>512</sup>Panel Reports, paras. 7.68 and 7.224.

<sup>513</sup>See, for example, Panel Reports, para. 7.68.

<sup>514</sup>Panel Reports, para. 7.33(e).

for 2010, we consider that the Panel made no express recommendations regarding measures that were excluded from the Panel's terms of reference by the complainants.

256. The question remains whether the recommendations that the Panel made regarding the series of measures in force in 2009 have consequences for the measures imposing specific export duty rates and quota levels for 2010, or indeed any existing or subsequent measures imposing export duties or quotas on these products.

257. In China's view, because the complainants did not seek findings and recommendations on the specific 2010 measures that replaced the measures imposing export duty rates and quota amounts in effect at the time of the Panel's establishment, no recommendation should have consequences for any 2010 or other "replacement measures". The United States and Mexico respond that they were not required to challenge and obtain findings and recommendations against "replacement measures" in order for "future" measures to fall within the scope of China's implementation obligation if the challenged measures were found to be WTO-inconsistent. China's approach, they submit, "would frustrate the aims of the dispute settlement system"<sup>515</sup> by creating a "moving target", whereby "both Complainants and the Panel would continually have had to recast their arguments and assessment of the legal state of play as it evolved through the proceedings".<sup>516</sup>

258. The United States and Mexico also fault China for confusing the distinction between "the basis on which a recommendation is made" and "the application or effect of the recommendation once it is made".<sup>517</sup> They maintain that "the fact that a recommendation may have a temporal application in the future (in the sense of requiring the Member concerned to ensure that it has complied with the recommendation) does not contradict the fact that it is necessarily made on the basis of a finding whose temporal application is in the past".<sup>518</sup>

259. In alleging that the Panel erred in making recommendations extending to the measures imposing specific export duty rates and quota amounts in 2010, China appears to assume that a finding that is made with respect to a "series of measures" as it existed at the time the Panel was established cannot have consequences for measures adopted in 2010 or thereafter, through the effect of the recommendation made by the Panel or the Appellate Body after adoption by the DSB. We disagree.

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<sup>515</sup>Joint appellees' submission of the United States and Mexico, para. 87.

<sup>516</sup>Joint appellees' submission of the United States and Mexico, para. 73 (referring to Appellate Body Report, *Chile – Price Band System*, para. 144).

<sup>517</sup>Joint appellees' submission of the United States and Mexico, para. 85.

<sup>518</sup>Joint appellees' submission of the United States and Mexico, para. 85.

260. Pursuant to Article 19.1 of the DSU, when a panel concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring its measure into conformity with that agreement. While a finding by a panel concerns a measure as it existed at the time the panel was established, a recommendation is prospective in nature in the sense that it has an effect on, or consequences for, a WTO Member's implementation obligations that arise after the adoption of a panel and/or Appellate Body report by the DSB. As the Appellate Body noted in *US – Continued Zeroing*, "it is not uncommon for remedies sought in WTO dispute settlement to have prospective effect, such as a finding against laws or regulations, as such, or a subsidy programme with regularly recurring payments".<sup>519</sup>

261. At issue in this case are several groups, or series, of measures—that is, the relevant framework legislation, the implementing regulations, and the specific measures in force at the date the Panel was established imposing export duties or quotas on each raw material. As the Panel noted, these groups of measures operate collectively to impose export duties or export quotas on the raw materials at issue. The object of the complainants' challenge was the legal situation prevailing in 2009, that is, the "series of measures" pursuant to which China imposed export quotas and duties on the raw materials at issue at the time the Panel was established. As the Panel found, such measures include China's *Customs Law* and the *Regulations on Import and Export Duties*, which authorize the imposition of export duties; China's *Foreign Trade Law*, which confers the authority to restrict or prohibit the exportation of goods through export quotas and subjects those goods to an export quota administration; as well as the regulations implementing this framework legislation. In addition to these standing measures, each series of measures also includes the specific measures imposing export duty rates or quota amounts in force at a particular time. These latter measures are, as the Panel found, of varying duration. In a particular year, China may, for example, increase or decrease the amount of export duty imposed on a particular product, or it may even eliminate that duty altogether, while the framework legislation and implementing regulations remain in place.<sup>520</sup> Against this background, we do not consider that it was necessary for the complainants to include claims with regard to the specific export duty and quota measures applied in 2010, in addition to those that were in force when the Panel was established in 2009, in order to obtain a recommendation with prospective effect.

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<sup>519</sup> Appellate Body Report, *US – Continued Zeroing*, para. 171.

<sup>520</sup> The Panel found that such a change occurred, for example, with respect to the export duty rate imposed on yellow phosphorous in 2009. (See Panel Reports, paras. 7.69-7.71)

262. In arguing that the complainants "decided" to exclude the "annual replacement measures" from the dispute, thereby "breaking the chain of measures subject to dispute settlement"<sup>521</sup>, China appears to assume that the complainants were initially challenging annually reviewed export duties and export quotas as separate and independent acts, or as a series of such acts, extending into the future. China characterizes such measures as "a chain of annually renewed measures", and submits that the complainants later "narrowed the scope of the dispute to exclude the annual replacement measures".<sup>522</sup> Had the complainants' challenge been lodged against "ongoing conduct", as China alleges, a recommendation would have served the purpose of directing China to discontinue its WTO-inconsistent conduct. However, while the setting of export duty rates and export quotas for a particular year is clearly a distinct action, the complainants' challenge in this case was not to specific annual export duty or quota measures in isolation, or to ongoing conduct consisting of a "chain of annually reviewed measures". Rather, the complainants challenged China's framework legislation, implementing regulations, and the specific measures in force at the date of the Panel's establishment imposing export duties or export quotas on each raw material. As the Panel noted, when these measures "operate in concert to result in WTO-inconsistent [export duties or quotas], it is then that they would become *prima facie* WTO-inconsistent".<sup>523</sup> This being the case, the Panel rightly recommended that China bring its measures into conformity with its WTO obligations, such that the "series of measures" does not operate to bring about a WTO-inconsistent result. The fact that the Panel directed its findings and recommendations at the legal situation prevailing in 2009 does not mean that China has no compliance obligations with respect to the Panel's findings.<sup>524</sup>

263. We note that, in making its recommendations, the Panel was concerned about making recommendations on what it viewed to be "expired" measures.<sup>525</sup> The Panel noted, for example, that previous panels had found that it would not be appropriate to make recommendations on measures

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<sup>521</sup>China's appellant's submission, para. 165. (emphasis omitted)

<sup>522</sup>China's appellant's submission, para. 165.

<sup>523</sup>Panel Reports, paras. 7.68 and 7.224.

<sup>524</sup>As a separate matter, we note that the Panel expressed the view that "the WTO consistency of a measure is necessarily relevant to its 'essence'" in the context of WTO dispute settlement procedures. (Panel Reports, para. 7.17) The Panel added that, "[i]f a new measure appears to be WTO consistent, while the original was not, the new measure takes on a different character in the context of WTO dispute settlement and cannot be said to be of the 'same essence'." (*Ibid.*) We fail to see why the "apparent" consistency, or inconsistency, of a measure would necessarily have a bearing on the issue of whether it would be deemed to be of the "same essence" as the original measure. For example, the fact that one measure imposes a lesser export duty rate than another measure might mean that the former is consistent while the latter is inconsistent with a WTO Member's obligations under Article II of the GATT 1994. It is not clear, however, why this fact, taken alone, would necessarily mean that the two measures are not of the "same essence".

<sup>525</sup>Panel Reports, para. 7.33(b) and (d).

that no longer exist.<sup>526</sup> The DSU does not specifically address whether a WTO panel may or may not make findings and recommendations with respect to a measure that expires or is repealed during the course of the panel proceedings. Panels have made findings on expired measures in some cases and declined to do so in others, depending on the particularities of the disputes before them.<sup>527</sup> In the present dispute, China takes issue with the recommendations made by the Panel, and not with its findings on particular measures. In *US – Upland Cotton*, the Appellate Body drew a distinction between the question of whether a panel can make findings with respect to an expired measure and the question of whether an expired measure is susceptible to a recommendation under Article 19.1 of the DSU:

The Appellate Body in *US – Certain EC Products* confirmed that the 3 March Measure had ceased to exist. It noted that there was an obvious inconsistency between the finding of the panel that "the 3 March Measure is no longer in existence" and the panel's subsequent recommendation that the Dispute Settlement Body (the "DSB") request the United States to bring the 3 March Measure into conformity with its WTO obligations. Thus, the fact that a measure has expired may affect what recommendation a panel may make. It is not, however, dispositive of the preliminary question of whether a panel can address claims in respect of that measure.<sup>528</sup> (footnote omitted)

264. Contrary to the Panel's approach in this dispute, the Appellate Body indicated that the fact that a measure has expired "may affect" what recommendation a panel may make. The Appellate Body did not suggest that a panel was precluded from making a recommendation on such a measure in a particular case. In general, in cases where the measure at issue consists of a law or regulation that has been repealed during the panel proceedings, it would seem there would be no need for a panel to make a recommendation in order to resolve the dispute. The same considerations do not apply, in our view, when a challenge is brought against a group or "series of measures" comprised of basic framework legislation and implementing regulations, which have not expired, and specific measures imposing export duty rates or export quota amounts for particular products on an annual or time-bound basis, as is the case here. The absence of a recommendation in such a case would effectively mean that a finding of inconsistency involving such measures would not result in implementation

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<sup>526</sup>Panel Reports, para. 7.28 (referring to Panel Reports, *EC – Trademarks and Geographic Indications*, para. 7.14; and Panel Report, *US – Poultry (China)*, para. 7.56).

<sup>527</sup>See, for instance, Panel Report, *US – Wool Shirts and Blouses*, para. 6.2; Panel Report, *Indonesia – Autos*, para. 14.9; Panel Report, *Chile – Price Band System*, para. 7.126; Panel Report, *Dominican Republic – Imports and Sale of Cigarettes*, para. 7.344; and Panel Report, *EC – Approval and Marketing of Biotech Products*, paras. 7.1303-7.1312.

<sup>528</sup>Appellate Body Report, *US – Upland Cotton*, para. 271.

obligations for a responding member, and in that sense would merely be declaratory.<sup>529</sup> This cannot be the case.

265. Article 3.7 of the DSU provides that "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute." This is affirmed in Article 3.4 of the DSU, which stipulates that "[r]ecommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements." In our view, in order to "secure a positive solution to the dispute" and to make "sufficiently precise recommendations and rulings so as to allow for prompt compliance"<sup>530</sup>, it was appropriate for the Panel in this case to have recommended that the DSB request China "to bring its measures into conformity with its WTO obligations such that the 'series of measures' does not operate to bring about a WTO-inconsistent result".<sup>531</sup>

### 3. Conclusion

266. We do not consider that the Panel erred in recommending that the DSB request China "to bring its measures into conformity with its WTO obligations such that the 'series of measures' does not operate to bring about a WTO-inconsistent result".<sup>532</sup> Nor do we consider the Panel to have made a recommendation on a matter that was not before it. Accordingly, we do not agree with China that the Panel acted inconsistently with its obligations under Article 7.1 of the DSU. China's claims under Article 11 and Article 19.1 of the DSU are consequential in nature and depend on whether we find that the Panel correctly understood the object of the complainants' challenge, that is, the "matter" on which the Panel was required to make its findings. In the light of our view that the Panel did not make findings on a matter that was not before it, we dismiss these claims by China. In sum, therefore, we *find* that the Panel did not err in recommending, in paragraphs 8.8, 8.15, and 8.22 of the Panel Reports, that China bring its export duty and export quota measures into conformity with its WTO

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<sup>529</sup>In fact, China argued at the oral hearing that, because the complainants brought an "as applied" claim regarding the application of measures in 2009, and because they expressly excluded "replacement measures" from the Panel's terms of reference, all the export duty and quota measures within the Panel's terms of reference have since expired. In China's view, a recommendation cannot be made with respect to an expired measure, nor with respect to a measure that is outside the Panel's terms of reference.

<sup>530</sup>Appellate Body Report, *Australia – Salmon*, para. 223.

<sup>531</sup>Panel Reports, paras. 8.8, 8.15, and 8.22.

<sup>532</sup>Panel Reports, paras. 8.8, 8.15, and 8.22. The Panel made the same recommendation with respect to each of the complainants.

obligations such that the "series of measures" do not operate to bring about a WTO-inconsistent result.<sup>533</sup>

C. *Conditional Other Appeals of the United States, Mexico, and the European Union*

267. In their other appeals, the United States and Mexico refer to the possibility that the Appellate Body might reverse the Panel's recommendations in paragraphs 8.8, 8.15, and 8.22 of the Panel Reports "to the extent that they apply to replacement measures", and find that no recommendation should have been made on the "series of measures" as they existed on the date of Panel establishment.<sup>534</sup> In the event that the Appellate Body were to so find, the United States and Mexico would seek review of the Panel's interpretation and conclusion that it could not make recommendations on the 2009 export quota and export duty measures that were annually recurring and in effect as of the date of Panel establishment.

268. The European Union also submits a conditional appeal in the event the Appellate Body were to accept the relevant ground of appeal raised by China, and also reject the relevant other appeals submitted by the United States and Mexico. In that case, the European Union would argue that the Panel erred in finding that, during the course of the Panel proceedings, the European Union "requested the Panel not to make any findings and recommendations on the legal instruments taking effect on 1 January 2010" and thereby narrowed the Panel's terms of reference.<sup>535</sup>

269. As the condition on which the United States and Mexico's request is premised has not been met, there is no need for us to address the United States' and Mexico's conditional appeal. For the same reason, we do not address the European Union's conditional appeal.

**VI. Applicability of Article XX**

270. In this section, we address China's claim that Article XX of the GATT 1994 is available as a defence to China in relation to export duties found to be inconsistent with China's obligations under Paragraph 11.3 of China's Accession Protocol.

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<sup>533</sup>Panel Reports, paras. 8.8, 8.15, and 8.22. The Panel made the same recommendation with respect to each of the complainants.

<sup>534</sup>United States' other appellant's submission, para. 8; Mexico's other appellant's submission, para. 16.

<sup>535</sup>European Union's other appellant's submission, para. 3 (referring to Panel Reports, paras. 7.21 and 7.22).

A. *The Panel's Findings*

271. The Panel began its interpretation of Paragraph 11.3 of China's Accession Protocol by observing that Paragraph 11.3 "does not include any express reference to Article XX of the GATT 1994, or to provisions of the GATT 1994 more generally".<sup>536</sup> In so doing, the Panel drew a contrast between the text of Paragraph 11.3 and the language contained in Paragraph 5.1 of China's Accession Protocol—"without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement"—which the Appellate Body examined in *China – Publications and Audiovisual Products*.<sup>537</sup> In particular, the Panel noted that Paragraph 11.3 contains only a "specific set of exceptions: those covered by Annex 6 and those covered by GATT Article VIII".<sup>538</sup> For the Panel, the language in Paragraph 11.3, together with the "omission of general references to the WTO Agreement or to the GATT 1994"<sup>539</sup>, suggest that WTO Members did not intend to incorporate the defences available under Article XX into Paragraph 11.3.<sup>540</sup> The Panel also found no support in the provisions of China's Accession Working Party Report for the proposition that China could invoke Article XX of the GATT 1994 to justify violations of Paragraph 11.3 of China's Accession Protocol.

272. Regarding the context provided by the provisions of the other WTO agreements, the Panel noted that there are no general exceptions in the *WTO Agreement*, and that each of the covered agreements provides its own "set of exceptions or flexibilities" applicable to the specific commitments in each agreement.<sup>541</sup> Referring to Article XX of the GATT 1994, the Panel considered that the reference to "this Agreement" *a priori* suggests that the exceptions therein relate only to the GATT 1994.<sup>542</sup> Noting that, in several instances, provisions of Article XX have been incorporated into other WTO agreements by cross-reference, the Panel observed that, since no such language is found in Paragraph 11.3 of China's Accession Protocol, Article XX could not be intended to apply to Paragraph 11.3. Furthermore, whereas the Panel agreed that WTO Members have an "inherent right"

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<sup>536</sup>Panel Reports, para. 7.124.

<sup>537</sup>Paragraph 5.1 of China's Accession Protocol provides:

Without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement, China shall progressively liberalize the availability and scope of the right to trade, so that, within three years after accession, all enterprises in China shall have the right to trade in all goods throughout the customs territory of China, except for those goods listed in Annex 2A which continue to be subject to state trading in accordance with this Protocol.

<sup>538</sup>Panel Reports, para. 7.126.

<sup>539</sup>Panel Reports, para. 7.129.

<sup>540</sup>Panel Reports, paras. 7.126-7.129.

<sup>541</sup>Panel Reports, para. 7.150.

<sup>542</sup>Panel Reports, para. 7.153.

to regulate trade, the Panel considered that China had exercised this right in negotiating and ratifying the *WTO Agreement*, including the terms of its accession to the WTO.<sup>543</sup> On this basis, the Panel concluded that the defences of Article XX of the GATT 1994 are not available to justify violations of the obligations contained in Paragraph 11.3 of China's Accession Protocol.<sup>544</sup>

B. *Arguments on Appeal*

273. China alleges various errors in the Panel's analysis and requests the Appellate Body to reverse the Panel's finding that China may not seek to justify export duties pursuant to Article XX of the GATT 1994 that were found to be inconsistent with its commitment to eliminate export duties under Paragraph 11.3 of its Accession Protocol.<sup>545</sup> China further requests us to find that Article XX is available to China to justify such measures.

274. China contends, in particular, that the Panel erred in determining that there is "no textual basis" in China's Accession Protocol for it to invoke Article XX in defence of a claim under Paragraph 11.3.<sup>546</sup> In China's view, the Panel's finding that Paragraph 11.3 excludes recourse to Article XX of the GATT 1994 was based on the Panel's erroneous assumption that the absence of language expressly granting the right to regulate trade in a manner consistent with Article XX means that China and other Members intended to deprive China of that right. Moreover, China argues that WTO Members have an "inherent right" to regulate trade, "including using export duties to promote non-trade interests".<sup>547</sup>

275. Although China takes issue with the Panel's finding that Article XX is not available to China to justify measures that would otherwise be inconsistent with its commitment to eliminate export duties under Paragraph 11.3 of its Accession Protocol, it does not request the Appellate Body to reverse the Panel's finding that China failed to demonstrate that the export duties at issue in this dispute are justified under Article XX of the GATT 1994.

276. The United States, the European Union, and Mexico support the Panel's finding that Article XX of the GATT 1994 cannot be invoked to justify export duties that are inconsistent with Paragraph 11.3 of China's Accession Protocol. The United States and Mexico recall that, in *China* –

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<sup>543</sup>Panel Reports, para. 7.156.

<sup>544</sup>Panel Reports, para. 7.158.

<sup>545</sup>China's appellant's submission, para. 168 (referring to Panel Reports, paras. 7.158, 7.159, 8.2(b)-(c), 8.9(b)-(c), and 8.16(b)-(c)).

<sup>546</sup>China's appellant's submission, para. 190.

<sup>547</sup>China's appellant's submission, para. 208.

*Publications and Audiovisual Products*, the Appellate Body interpreted the language of Paragraph 5.1 of China's Accession Protocol as including a reference to Article XX. They note, however, that the language of Paragraph 11.3 is "in sharp contrast" to that of Paragraph 5.1, as it is "specific and circumscribed", "sets forth particular commitments", and two exceptions to those commitments. According to the European Union, while WTO Members can "incorporate" Article XX of the GATT 1994 into another WTO agreement if they so "wish", the legal basis for "applying" that provision to another agreement would be the "very text of the incorporation", and not Article XX itself, as Article XX is limited by its "express terms" to the GATT 1994.<sup>548</sup> The European Union also asserts that the Panel was correct in finding that China had exercised its inherent and sovereign right to regulate trade by negotiating the terms of its accession to the WTO such that this inherent right to regulate trade, without more, does not permit recourse to Article XX.

277. Canada, Colombia, Japan, Korea, and Turkey generally agree with the complainants that Article XX of the GATT 1994 cannot be invoked in order to justify a violation of China's export duty commitments contained in Paragraph 11.3 of China's Accession Protocol.<sup>549</sup>

C. *Availability of Article XX to Justify Export Duties that Are Found to Be Inconsistent with Paragraph 11.3 of China's Accession Protocol*

278. Paragraph 1.2 of China's Accession Protocol provides that the Protocol "shall be an integral part" of the *WTO Agreement*. As such, the customary rules of interpretation of public international law, as codified in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*<sup>550</sup> (the "*Vienna Convention*"), are, pursuant to Article 3.2 of the DSU, applicable in this dispute in clarifying the meaning of Paragraph 11.3 of the Protocol.<sup>551</sup> Article 31(1) of the *Vienna Convention* provides that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Therefore, we will begin our analysis with the text of Paragraph 11.3.

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<sup>548</sup>European Union's appellee's submission, para. 54.

<sup>549</sup>See Canada's third participant's submission, paras. 14-24; Colombia's third participant's submission, paras. 11 and 12; and Japan's third participant's submission, paras. 26-30, 34-37, and 39-42. For its part, Korea considers that the "gravity" and importance of an Article XX defence suggests that "[m]ore explicit wording" should have been used to express the "relinquishment" of such an "important right". Nonetheless, in Korea's view, the difference in "tone and nuance" between Paragraph 11.3 and Paragraphs 11.1 and 11.2 of China's Accession Protocol, as well as the context of the other provisions of Section 11, support the Panel's ultimate conclusion in the present disputes and should be upheld by the Appellate Body. (Korea's third participant's submission, paras. 32 and 33)

<sup>550</sup>Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679.

<sup>551</sup>See Appellate Body Report, *US – Gasoline*, p. 17, DSR 1996:I, 3, at 16; and Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 10, DSR 1996:I, 97, at 104.

1. Paragraph 11.3 of China's Accession Protocol

279. Paragraph 11.3 of China's Accession Protocol provides that:

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.

280. By its terms, Paragraph 11.3 of China's Accession Protocol requires China to "eliminate all taxes and charges applied to exports" unless one of the following conditions is satisfied: (i) such taxes and charges are "specifically provided for in Annex 6 of [China's Accession] Protocol"; or (ii) such taxes and charges are "applied in conformity with the provisions of Article VIII of the GATT 1994".

281. As noted, Paragraph 11.3 of China's Accession Protocol refers explicitly to "Annex 6 of this Protocol". Annex 6 of China's Accession Protocol is entitled "Products Subject to Export Duty". It sets out a table listing 84 different products (each identified by an eight-digit Harmonized System ("HS") number and product description), and a maximum export duty rate for each product.<sup>552</sup> Following the table, Annex 6 includes the following text (the "Note to Annex 6"):

China confirmed that the tariff levels in this Annex are maximum levels which will not be exceeded. China confirmed furthermore that it would not increase the presently applied rates, except under exceptional circumstances. If such circumstances occurred, China would consult with affected members prior to increasing applied tariffs with a view to finding a mutually acceptable solution.

282. Except for yellow phosphorus, none of the raw materials at issue in this dispute is listed in Annex 6 of China's Accession Protocol.<sup>553</sup> China argues that the use of the term "exceptional circumstances" in the Note to Annex 6 indicates "a substantive overlap between the scope of the exceptions set forth, respectively, in Annex 6 and Article XX of the GATT 1994".<sup>554</sup> In China's view, "by allowing China to adopt otherwise WTO-inconsistent export duties in 'exceptional circumstances', China and other WTO Members have demonstrated a shared intent that China is permitted to have recourse—whether directly or indirectly—to the 'exceptional circumstances' set forth in Article XX to

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<sup>552</sup>Panel Reports, para. 7.66.

<sup>553</sup>The Panel found that, on 21 December 2009, yellow phosphorous was subject to an export duty of 20 per cent, which did not exceed the maximum rate listed in Annex 6 of China's Accession Protocol. The Panel found, therefore, that the provision of the *2009 Tariff Implementation Program* applicable to yellow phosphorus that was in force at the time of the Panel's establishment was not inconsistent with China's WTO obligations. (See Panel Reports, para. 7.71) This finding by the Panel has not been challenged on appeal.

<sup>554</sup>China's appellant's submission, para. 216.

justify such duties."<sup>555</sup> China suggests that such "exceptional circumstances" can be invoked both to exceed the maximum rates specified in Annex 6 for the 84 products listed in the Annex, and to impose export duties on non-listed products.

283. In response, the United States and Mexico assert that the first sentence of the Note "makes clear" that China committed not to impose export duties on the 84 products listed in Annex 6 above the maximum rates set out therein.<sup>556</sup> In their view, the second and third sentences of the Note also impose a further obligation upon China that, in the event that the applied rate for any of the 84 products listed in Annex 6 is less than the maximum rate, China can raise the applied rate only in "exceptional circumstances", and only after consulting with the affected Members. In the light of this additional obligation, the United States and Mexico consider that the Note to Annex 6 does not provide "any basis" for China to impose export duties on the 84 listed products above the maximum rates specified in Annex 6, or "to impose any export duties at all with respect to the products not listed in Annex 6".<sup>557</sup>

284. Paragraph 11.3 requires China to eliminate taxes and charges applied to exports unless such taxes and charges are "specifically provided for in Annex 6" of China's Accession Protocol. Annex 6 in turn "specifically provides for" maximum export duty levels on 84 listed products. The Note to Annex 6 clarifies that the maximum rates set out in Annex 6 "will not be exceeded" and that China will "not increase the presently applied rates, except under exceptional circumstances". The Note therefore indicates that China may increase the "presently applied rates" on the 84 products listed in Annex 6 to levels that remain within the maximum levels listed in the Annex. We find it difficult to see how this language could be read as indicating that China can have recourse to the provisions of Article XX of the GATT 1994 in order to justify imposition of export duties on products that are *not* listed in Annex 6 or the imposition of export duties on listed products in excess of the maximum levels set forth in Annex 6.

285. We further note that the third sentence of the Note to Annex 6 refers to the "exceptional circumstances" described in the second sentence of that provision, stating that, "[i]f such circumstances occurred, China would consult with affected members prior to increasing applied tariffs with a view to finding a mutually acceptable solution." This language further supports our view that the "exceptional circumstances" referred to in the Note to Annex 6 are ones that, if shown to exist,

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<sup>555</sup>China's appellant's submission, para. 220.

<sup>556</sup>Joint appellees' submission of the United States and Mexico, para. 113.

<sup>557</sup>Joint appellees' submission of the United States and Mexico, para. 113; see also Canada's third participant's submission, paras. 14 and 15.

would allow China to increase applied tariffs up to the maximum tariff levels set out in Annex 6 for the products listed. We therefore see nothing in the Note to Annex 6 suggesting that China could invoke Article XX of the GATT 1994 to justify the imposition of export duties that China had committed to eliminate under Paragraph 11.3 of China's Accession Protocol.<sup>558</sup>

286. China recalls that, before the Panel, the European Union claimed that China violated its obligations under Annex 6 by failing to consult with affected Members prior to the imposition of export duties on particular forms of bauxite, coke, fluorspar, magnesium, manganese, silicon metal, and zinc, none of which are among the 84 products listed in Annex 6.<sup>559</sup> Noting the Panel's finding that China has acted inconsistently with its obligations under Annex 6 because it failed to consult with other affected WTO Members prior to imposing export duties on the raw materials at issue<sup>560</sup>, China argues that, because none of the products subject to the European Union's claim is included in the Annex 6 schedule, the European Union's claim and the Panel's finding necessarily mean that "the exception in Annex 6 permits China to impose export duties on all products, provided that there are 'exceptional circumstances', and that China consults with the affected Members."<sup>561</sup>

287. In our view, the use of the word "furthermore" in the second sentence of the Note to Annex 6 suggests that the obligations contained in the second and third sentences of the Note, including the consultation obligation, are "in addition" to China's obligation under the first sentence not to exceed the maximum tariff levels provided for in Annex 6. We see nothing in the Note to Annex 6 that would allow China to: (i) impose export duties on products not listed in Annex 6; or (ii) increase the applied export duties on the 84 products listed in Annex 6, in a situation where "exceptional circumstances" have not "occurred". We therefore disagree with the Panel to the extent it found that China's failure to consult with other WTO affected Members prior to the imposition of export duties on raw materials not listed in Annex 6 is inconsistent with its obligations under Annex 6.<sup>562</sup> The imposition of these export duties is inconsistent with Paragraph 11.3 of China's Accession Protocol, and because the raw materials at issue are not listed in Annex 6, the consultation requirements contained in the Note to Annex 6 are not applicable.

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<sup>558</sup>Furthermore, as the European Union notes, the Note to Annex 6 resembles to some extent the situation envisaged in Article XXVIII of the GATT 1994 and Article XXI of the GATS (Modification of Schedules), which deal with changes in tariff bindings and changes in the Services Schedules of Specific Commitments. However in these situations, WTO Members are required to "compensate" by offering increased market access in other areas on different tariff lines or service sectors. (European Union's appellee's submission, para. 68)

<sup>559</sup>China's appellant's submission, para. 213.

<sup>560</sup>China's appellant's submission, para. 214 (referring to Panel Reports, para. 7.104).

<sup>561</sup>China's appellant's submission, para. 215.

<sup>562</sup>See Panel Reports, para. 7.104. We note that this finding by the Panel has not been appealed.

288. We turn next to examine the relevance of the reference to Article VIII of the GATT 1994 in Paragraph 11.3 of China's Accession Protocol. Article VIII provides, in relevant part, as follows:

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.

289. China asserts that the reference to Article VIII in Paragraph 11.3 confirms the availability of Article XX of the GATT 1994. China reasons that Paragraph 11.3 of its Accession Protocol "requires" that export taxes and charges be "applied in conformity with the provisions of Article VIII of the GATT 1994".<sup>563</sup> According to China, "[i]f they are not, the measure violates both Paragraph 11.3 and Article VIII."<sup>564</sup> China argues that, "[i]n the event that a measure violates Article VIII of the GATT 1994, it may, of course, be justified under Article XX of the GATT 1994".<sup>565</sup> It follows that "China is not deprived of its right to justify a measure that violates Article VIII through recourse to Article XX simply because a complainant chooses to bring a claim under Paragraph 11.3" of China's Accession Protocol.<sup>566</sup> In China's view, the fact that Article VIII applies to certain export charges and fees covered by Paragraph 11.3, and not to export duties, does not render the reference to Article VIII "irrelevant", as the reference shows that the obligations under Paragraph 11.3 are "not absolute and unqualified", and that China did not agree to abandon its right to resort to Article XX.<sup>567</sup>

290. Although Article VIII covers "[a]ll fees and charges of whatever character imposed by [WTO Members] on or in connection with importation or exportation", it expressly excludes export duties, which are at issue here. In our view, as export duties are outside the scope of Article VIII, the question of conformity or consistency with this Article does not arise. Consequently, the fact that Article XX may be invoked to justify those fees and charges regulated under Article VIII does not mean that it can also be invoked to justify export duties, which are not regulated under Article VIII.

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<sup>563</sup>China's appellant's submission, para. 224.

<sup>564</sup>China's appellant's submission, para. 224.

<sup>565</sup>China's appellant's submission, para. 224.

<sup>566</sup>China's appellant's submission, para. 225.

<sup>567</sup>China's appellant's submission, para. 226.

291. As noted by the Panel, "the language in Paragraph 11.3 expressly refers to Article VIII, but leaves out reference to other provisions of the GATT 1994, such as Article XX."<sup>568</sup> Moreover, there is no language in Paragraph 11.3 similar to that found in Paragraph 5.1 of China's Accession Protocol—"[w]ithout prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement"—which was interpreted by the Appellate Body in *China – Publications and Audiovisual Products*. In our view, this suggests that China may not have recourse to Article XX to justify a breach of its commitment to eliminate export duties under Paragraph 11.3 of China's Accession Protocol.

292. Having examined the text of Paragraph 11.3, we turn to examine the context of that provision.

2. Paragraphs 11.1 and 11.2 of China's Accession Protocol

293. Paragraph 11.1 of China's Accession Protocol provides that "China shall ensure that customs fees or charges applied or administered by national or sub-national authorities, shall be in conformity with the GATT 1994". Paragraph 11.2 further stipulates that "China shall ensure that internal taxes and charges, including value-added taxes, applied or administered by national or sub-national authorities shall be in conformity with the GATT 1994." Both of these provisions contain the obligation to ensure that certain fees, taxes or charges are "in conformity with the GATT 1994". This is not the case for Paragraph 11.3. We also note that Paragraph 11.1 refers to "customs fees and or charges" in general and Paragraph 11.2 refers in turn to "internal taxes and charges", while Paragraph 11.3 refers specifically to the elimination of "taxes and charges applied to exports". Given the references to the GATT 1994 in Paragraphs 11.1 and 11.2, and the differences in the subject matter and nature of the obligations covered by these provisions, we consider that the absence of a reference to the GATT 1994 in Paragraph 11.3 further supports our interpretation that China may not have recourse to Article XX to justify a breach of its commitment to eliminate export duties under Paragraph 11.3. Moreover, as China's obligation to eliminate export duties arises exclusively from China's Accession Protocol, and not from the GATT 1994, we consider it reasonable to assume that, had there been a common intention to provide access to Article XX of the GATT 1994 in this respect, language to that effect would have been included in Paragraph 11.3 or elsewhere in China's Accession Protocol.

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<sup>568</sup>Panel Reports, para. 7.129.

3. China's Arguments concerning Paragraph 170

294. China relies on the wording of Paragraph 170 of China's Accession Working Party Report to support its position that China assumed a "qualified" obligation to eliminate export duties, and is entitled to have recourse to the provisions of Article XX of the GATT 1994 to justify export duties that would otherwise be inconsistent with Paragraph 11.3 of China's Accession Protocol.

295. Paragraph 170 of China's Accession Working Party Report is referenced in Paragraph 342 of China's Accession Working Party Report and is therefore, by virtue of Paragraph 1.2 of China's Accession Protocol, incorporated into the Protocol. Paragraph 170 falls under subsection D of China's Accession Working Party Report, which is entitled "Internal Policies Affecting Foreign Trade in Goods"; subsection D(1) is entitled "Taxes and Charges Levied on Imports and Exports". Paragraph 170 provides in relevant part:

The representative of China confirmed that upon accession, China would ensure that its laws and regulations relating to all fees, charges or taxes levied on imports and exports would be in full conformity with its WTO obligations, including Articles I, III:2 and 4, and XI:1 of the GATT 1994[.]

296. China points to the identical language in the title of the subsection under which Paragraph 170 falls, and that of Section 11 of China's Accession Protocol. Both are entitled "Taxes and Charges Levied on Imports and Exports". China argues that this demonstrates a "*very considerable* overlap" in the scope of measures to which Paragraph 11.3 and Paragraph 170 apply, and that they impose "cumulative obligations" with respect to "*taxes*" and "*charges on exports*".<sup>569</sup> China argues, in essence, that Paragraph 170 of China's Accession Working Party Report and Paragraph 11.3 of China's Accession Protocol both apply to export duties, and that "any flexibilities that Paragraph 170 affords to China to adopt otherwise WTO-inconsistent export 'taxes' and 'charges' must extend equally to Paragraph 11.3".<sup>570</sup>

297. The United States and Mexico consider China's arguments to be "without merit".<sup>571</sup> They submit that Paragraph 169 of China's Accession Working Party Report shows that some Members were concerned about China's internal policies, especially those of sub-national governments imposing discriminatory taxes and other charges that would affect trade in goods, and that China responded to this concern in Paragraph 170 by confirming that its laws relating to all fees, charges, or

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<sup>569</sup>China's appellant's submission, para. 233. (original emphasis)

<sup>570</sup>China's appellant's submission, para. 246.

<sup>571</sup>Joint appellees' submission of the United States and Mexico, para. 128.

taxes levied on imports and exports would be in full conformity with its WTO obligations. The United States and Mexico argue that it is "untenable to believe"<sup>572</sup> that Paragraph 170 reflects the negotiators' intent to apply Article XX of the GATT 1994 to Paragraph 11.3 of China's Accession Protocol, which sets forth a "new commitment with respect to export duties and the exceptions applicable to that commitment".<sup>573</sup> They further point out that it is Paragraph 155 of China's Accession Working Party Report that reflects concerns with respect to export duties, and which refers to the same specific exceptions as Paragraph 11.3 of China's Accession Protocol.<sup>574</sup>

298. We note that China's Accession Working Party Report sets out many of the concerns raised and obligations undertaken by China during its accession process. The various paragraphs contained in China's Accession Working Party Report are organized according to subject matter, such that the section on "Policies Affecting Trade in Goods" is divided into subsections dealing with "Trading Rights", "Import Regulation", "Export Regulations", and "Internal Policies Affecting Trade in Goods". Paragraph 170 of China's Accession Working Party Report falls under subsection D, entitled "Internal Policies Affecting Foreign Trade in Goods". This subsection contains only two paragraphs. Paragraph 169 indicates that some members of China's Accession Working Party "expressed concern about the application of the [value-added tax ("VAT")] and additional charges levied by sub-national governments on imports" and considered "[n]on-discriminatory application of the VAT and other *internal* taxes"<sup>575</sup> to be "essential". The language in the title to subsection D and in Paragraph 169 suggests to us that Paragraph 170 is concerned with "internal policies" affecting "all fees, charges or taxes levied on imports and exports" and sets out China's commitment in response to the concern expressed by WTO Members at the time of China's accession regarding "the application of VAT and additional charges levied by sub-national governments on imports".

299. As we see it, Paragraph 170 of China's Accession Working Party Report is of limited relevance in interpreting Paragraph 11.3 of China's Accession Protocol. In particular, Paragraph 170 does not shed much light on China's commitment to eliminate export duties. Instead, it is Paragraphs 155 and 156 of China's Accession Working Party Report<sup>576</sup>, found in the section entitled "Export Regulations", that deal with China's commitments with respect to the elimination of export

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<sup>572</sup>Joint appellees' submission of the United States and Mexico, para. 130.

<sup>573</sup>Joint appellees' submission of the United States and Mexico, para. 132.

<sup>574</sup>Joint appellees' submission of the United States and Mexico, para. 134 (referring to Panel Reports, para. 7.145).

<sup>575</sup>Emphasis added.

<sup>576</sup>Paragraphs 155 and 156 are not referenced in Paragraph 342 of China's Accession Working Party Report. Nonetheless, we agree with the Panel that they are of interpretative relevance in that they articulate the concerns of WTO Members at the time with respect to China's use of export duties.

duties. The language of Paragraph 155 is very similar to that found in Paragraph 11.3 of China's Accession Protocol, and provides that taxes and charges applied exclusively to exports "should be eliminated unless applied in conformity with GATT Article VIII or listed in Annex 6 to the Draft Protocol". Paragraph 156, in turn, provides: "China noted that the majority of products were free of export duty, although 84 items ... were subject to export duties". As in the case of Paragraph 11.3, Paragraphs 155 and 156 make no reference to the availability of an Article XX defence for the commitments contained therein. This further supports our interpretation that China does not have recourse to Article XX of the GATT 1994 to justify export duties found to be inconsistent with China's obligations under Paragraph 11.3 of China's Accession Protocol.

#### 4. China's Right to Regulate Trade

300. China argues that, "like any other state", it enjoys the right to regulate trade in a manner that promotes conservation and public health.<sup>577</sup> Referring to the Appellate Body report in *China – Publications and Audiovisual Products*, China points out that such a right to regulate trade is an "inherent right", and "not a 'right bestowed by international treaties such as the *WTO Agreement*'".<sup>578</sup> According to China, by acceding to the WTO, Members agree to exercise their inherent right in conformity with disciplines set out in the covered agreements, either by complying with affirmative obligations, or by complying with "the obligations attaching to an exception, such as those included in Article XX" of the GATT 1994.<sup>579</sup> China further emphasizes that China's Accession Protocol and Accession Working Party Report contain no language showing that China "abandon[ed]" its inherent right to regulate trade. Instead, China submits that its accession commitments "indicate" that it retains this right.<sup>580</sup> In China's view, the Panel's interpretation of Paragraph 11.3 "turns *inherent* rights into *acquired* rights"<sup>581</sup> and "distorts the balance of rights and obligations" established when China acceded to the WTO".<sup>582</sup>

301. The United States and Mexico begin by highlighting that, contrary to China's claims, the Panel "nowhere suggested" that WTO Members abandoned their right to regulate trade in entering the WTO.<sup>583</sup> They assert that the Appellate Body report in *China – Publications and Audiovisual*

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<sup>577</sup>China's appellant's submission, para. 275.

<sup>578</sup>China's appellant's submission, para. 275 (quoting Appellate Body Report, *China – Publications and Audiovisual Products*, para. 222).

<sup>579</sup>China's appellant's submission, para. 278.

<sup>580</sup>China's appellant's submission, para. 286.

<sup>581</sup>China's appellant's submission, para. 291. (original emphasis)

<sup>582</sup>China's appellant's submission, para. 274, subheading IV.C.5.d.

<sup>583</sup>Joint appellees' submission of the United States and Mexico, para. 140.

*Products* recognized that, because WTO Members have an inherent right to regulate trade, it was necessary in the context of the WTO agreements to agree on rules that constrain that right.<sup>584</sup> The United States and Mexico also rely upon the Appellate Body report in *Japan – Alcoholic Beverages II* to argue that China's obligation to eliminate export duties contained in Paragraph 11.3 of China's Accession Protocol is a "commitment" that conditions the exercise of China's sovereignty in exchange for the benefits it derives as a Member of the WTO.<sup>585</sup> Referring to China's contention that it is entitled to invoke Article XX exceptions for violations of Paragraph 11.3 of China's Accession Protocol in the absence of "specific treaty language", the United States and Mexico assert that this would render the introductory clause in Paragraph 5.1, and the references to the GATT 1994 in Paragraphs 11.1 and 11.2 of China's Accession Protocol, "superfluous".<sup>586</sup> The United States and Mexico emphasize that the Appellate Body's finding in *China – Publications and Audiovisual Products* that Article XX is available for violations of Paragraph 5.1 of China's Accession Protocol was "grounded" in the language of Paragraph 5.1 and is not a right to regulate trade in the "abstract".<sup>587</sup> The United States and Mexico note that the language in Paragraph 11.3 is in "contrast" to the language in the accession documents of other WTO Members with respect to their obligations on export duties.<sup>588</sup> They further assert that China's right to promote non-trade interests is not "at risk" in this dispute, and that there are a number of ways in which China may pursue such interests.<sup>589</sup> Specifically, they argue that Paragraph 11.3 does not prevent China from adopting measures other than export duties to promote legitimate public health or conservation objectives, and suggest that China has a number of "tools at its disposal" to pursue these ends.<sup>590</sup>

302. The European Union argues that China exercised its inherent right to regulate trade when it completed the accession process and became a Member of the WTO. According to the European Union, the provisions of the covered agreements and China's Accession Protocol in fact "delineate" China's exercise of its inherent and sovereign right to regulate trade.<sup>591</sup> The European Union also highlights the Panel's finding that there is no contradiction between China's

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<sup>584</sup>Joint appellees' submission of the United States and Mexico, para. 142 (referring to Appellate Body Report, *China – Publications and Audiovisual Products*, para. 222).

<sup>585</sup>Joint appellees' submission of the United States and Mexico, paras. 143 and 144 (referring to Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 15, DSR 1996:I, 97, at 108).

<sup>586</sup>Joint appellees' submission of the United States and Mexico, para. 145.

<sup>587</sup>Joint appellees' submission of the United States and Mexico, para. 145 (referring to Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 219-228).

<sup>588</sup>Joint appellees' submission of the United States and Mexico, para. 145 (referring to Report of the Working Party on the Accession of Ukraine, WT/ACC/UKR/152, paras. 240 and 512).

<sup>589</sup>Joint appellees' submission of the United States and Mexico, para. 149.

<sup>590</sup>Joint appellees' submission of the United States and Mexico, para. 150.

<sup>591</sup>European Union's appellee's submission, para. 109.

inherent right to regulate trade and the commitments undertaken by China in its Accession Protocol.<sup>592</sup> The European Union further argues that China's obligation under Paragraph 11.3 of the Accession Protocol should not be viewed in isolation, because it is "only a small part" of the rights and obligations that China "entered into and acquired" through its WTO accession.<sup>593</sup>

303. We note, as did the Panel, that WTO Members have, on occasion, "incorporated, by cross-reference, the provisions of Article XX of the GATT 1994 into other covered agreements".<sup>594</sup> For example, Article 3 of the *Agreement on Trade-Related Investment Measures* (the "TRIMs Agreement") explicitly incorporates the right to invoke the justifications of Article XX of the GATT 1994, stating that "[a]ll exceptions under GATT 1994 shall apply, as appropriate, to the provisions of this Agreement". In the present case, we attach significance to the fact that Paragraph 11.3 of China's Accession Protocol expressly refers to Article VIII of the GATT 1994, but does not contain any reference to other provisions of the GATT 1994, including Article XX.

304. In *China – Publications and Audiovisual Products*, in the context of assessing a claim brought under Paragraph 5.1 of China's Accession Protocol, the Appellate Body found that China could invoke Article XX(a) of the GATT 1994 to justify provisions found to be inconsistent with China's trading rights commitments under its Accession Protocol and Accession Working Party Report. In reaching this finding, the Appellate Body relied on the language contained in the introductory clause of Paragraph 5.1, which states "[w]ithout prejudice to China's right to regulate trade in a manner consistent with the *WTO Agreement*".<sup>595</sup> As noted by the Panel, such language is not found in Paragraph 11.3 of China's Accession Protocol. We therefore do not agree with China to the extent that it suggests that the Appellate Body's findings in *China – Publications and Audiovisual Products* indicate that China may have recourse to Article XX of the GATT 1994 to justify export duties that are inconsistent with Paragraph 11.3.

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<sup>592</sup>European Union's appellee's submission, para. 110 (quoting Panel Reports, para. 7.157).

<sup>593</sup>European Union's appellee's submission, para. 114.

<sup>594</sup>Panel Reports, para. 7.153.

<sup>595</sup>The Appellate Body referred to the question before it as being to assess whether "the introductory clause of paragraph 5.1 allows China to assert a defence under Article XX(a)". (Appellate Body Report, *China – Publications and Audiovisual Products*, para. 215) The Appellate Body characterized China's obligation under Paragraph 5.1 as "a commitment in respect of traders, in the form of a commitment to grant to all enterprises in China the right to import and export goods." (*Ibid.*, para. 226) The Appellate Body added, however, that this commitment is qualified by the introductory clause of Paragraph 5.1. On the basis of the introductory clause to Paragraph 5.1, the Appellate Body found that China's right to regulate trade "may not be impaired by China's obligation to grant the right to trade, provided that China regulates trade 'in a manner consistent with the *WTO Agreement*'. (*Ibid.*, para. 221)

305. China refers to language contained in the preambles of the *WTO Agreement*, the GATT 1994, and the *Agreement on the Application of Sanitary and Phytosanitary Measures* (the "*SPS Agreement*"), *Agreement on Technical Barriers to Trade* (the "*TBT Agreement*"), the *Agreement on Import Licensing Procedures* (the "*Import Licensing Agreement*"), the GATS, and the *Agreement on Trade-Related Aspects of Intellectual Property Rights* (the "*TRIPS Agreement*") to argue that the Panel distorted the balance of rights and obligations established in China's Accession Protocol by assuming that China had "abandon[ed]" its right to impose export duties "to promote fundamental non-trade-related interests, such as conservation and public health."<sup>596</sup>

306. The preamble of the *WTO Agreement* lists various objectives, including "raising standards of living", "seeking both to protect and preserve the environment" and "expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development." The preamble concludes with the resolution "to develop an integrated, more viable and durable multilateral trading system". Based on this language, we understand the *WTO Agreement, as a whole*, to reflect the balance struck by WTO Members between trade and non-trade-related concerns. However, none of the objectives listed above, nor the balance struck between them, provides specific guidance on the question of whether Article XX of the GATT 1994 is applicable to Paragraph 11.3 of China's Accession Protocol. In the light of China's explicit commitment contained in Paragraph 11.3 to eliminate export duties and the lack of any textual reference to Article XX of the GATT 1994 in that provision, we see no basis to find that Article XX of the GATT 1994 is applicable to export duties found to be inconsistent with Paragraph 11.3.

## 5. Conclusion

307. In our analysis above, we have, in accordance with Article 3.2 of the DSU, applied the customary rules of interpretation of public international law as codified in the *Vienna Convention* in a holistic manner to ascertain whether China may have recourse to the provisions of Article XX of the GATT 1994 to justify export duties that are found to be inconsistent with Paragraph 11.3 of China's Accession Protocol. As we have found, a proper interpretation of Paragraph 11.3 of China's Accession Protocol does not make available to China the exceptions under Article XX of the GATT 1994. Consequently, we *find* that the Panel did not err, in paragraph 7.159 of the Panel Reports, in finding that "there is no basis in China's Accession Protocol to allow the application of Article XX of the GATT 1994 to China's obligations in Paragraph 11.3 of the Accession Protocol."

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<sup>596</sup>China's appellant's submission, para. 290; see also para. 274.

We therefore *uphold* the Panel's conclusion, in paragraphs 8.2(b), 8.9(b), and 8.16(b) of the Panel Reports, that China may not seek to justify the application of export duties to certain forms of fluorspar pursuant to Article XX(g) of the GATT 1994 and the Panel's conclusion, in paragraphs 8.2(c), 8.9(c), and 8.16(c) of the Panel Reports, that China may not seek to justify the application of export duties to certain forms of magnesium, manganese and zinc pursuant to Article XX(b) of the GATT 1994.

## **VII. Article XI:2(a) of the GATT 1994**

308. We turn next to China's appeal of the Panel's finding that China had not demonstrated that its export quota on refractory-grade bauxite was "temporarily applied", within the meaning of Article XI:2(a) of the GATT 1994, to either prevent or relieve a "critical shortage".<sup>597</sup> China alleges that the Panel erred in its interpretation and application of Article XI:2(a) of the GATT 1994, and acted inconsistently with Article 11 of the DSU.

### *A. The Panel's Findings and Arguments on Appeal*

309. The Panel found that China's export quota on refractory-grade bauxite is inconsistent with Article XI:1 of the GATT 1994. China argued that this export quota is a restriction temporarily applied to prevent or relieve a critical shortage of an essential product in the sense of Article XI:2(a) of the GATT 1994 and that it therefore does not fall within the scope of Article XI:1's general prohibition of quantitative restrictions. The Panel determined, however, that China had failed to demonstrate that the export quota applied to refractory-grade bauxite is justified pursuant to Article XI:2(a).<sup>598</sup> In reaching this conclusion, the Panel agreed with China that "refractory-grade bauxite is currently 'essential' to China, as that term is used in Article XI:2(a)".<sup>599</sup> The Panel found, however, that China had failed to demonstrate that the export quota was "temporarily applied" within the meaning of Article XI:2(a).<sup>600</sup> The Panel also found that China had failed to demonstrate that there was a "critical shortage" of refractory-grade bauxite in China.<sup>601</sup>

310. With respect to the "temporarily applied" requirement, the Panel found, based on the ordinary meaning of the word "temporarily", that Article XI:2(a) permits measures that are applied for a

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<sup>597</sup>Panel Reports, para. 7.355. China also refers to paragraphs 7.257, 7.258, 7.297-7.302, 7.305, 7.306, 7.346, 7.349, 7.351, and 7.354 of the Panel Reports. (See China's appellant's submission, paras. 299 and 388)

<sup>598</sup>Panel Reports, para. 7.353.

<sup>599</sup>Panel Reports, para. 7.340.

<sup>600</sup>Panel Reports, para. 7.346.

<sup>601</sup>Panel Reports, para. 7.351.

"limited timeframe".<sup>602</sup> The Panel considered Article XX(g) of the GATT 1994 as relevant context, and pointed to "additional protections" in the chapeau of that Article that limit Members' actions.<sup>603</sup> In the Panel's view, the absence of such additional limitations in Article XI:2(a) suggested that a restriction justified under Article XI:2(a) must be of a limited duration, because otherwise Members could resort indistinguishably to either Article XI:2(a) or Article XX(g) to address the problem of an exhaustible natural resource.<sup>604</sup> The Panel added that, "[i]f Article XI:2(a) were interpreted to permit the long-term application of measures in the nature of China's export restrictions on refractory grade bauxite, the import of Article XX(g) would be very much undermined, if not rendered redundant".<sup>605</sup>

311. Turning to the facts of the present case, the Panel observed that China's restriction on exports of refractory-grade bauxite had "already been in place for at least a decade with no indication of when it will be withdrawn and every indication that it will remain in place until the reserves have been depleted".<sup>606</sup> On this basis, the Panel found that China's export quota could not be considered "temporarily applied" to address a critical shortage within the meaning of Article XI:2(a).<sup>607</sup>

312. With regard to the meaning of the phrase "to prevent or relieve critical shortages" in Article XI:2(a), the Panel reviewed dictionary definitions of the terms "to prevent", "to relieve", "shortage", and "critical".<sup>608</sup> The Panel also considered that the requirement that measures be applied "temporarily" contextually informs the notion of "critical shortage". The Panel reasoned that, if there was no possibility for an existing shortage ever to cease to exist, it would not be possible to "relieve or prevent" it through an export restriction applied on a temporary basis. The Panel added that the temporal focus of "critical shortage" as interpreted by the Panel "seems consistent with the notion of 'critical', defined as 'of the nature of, or constituting, a crisis'".<sup>609</sup>

313. In its application of Article XI:2(a) in the present case, the Panel was not persuaded that there was a "critical shortage" of refractory-grade bauxite in China. The Panel expressed the view that, even if it were to accept China's assertion that natural reserves of refractory-grade bauxite would be depleted in 16 years, as contended by China, this would not demonstrate a situation "of decisive

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<sup>602</sup>Panel Reports, para. 7.255; see also para. 7.260.

<sup>603</sup>Panel Reports, para. 7.258.

<sup>604</sup>Panel Reports, paras. 7.256-7.258.

<sup>605</sup>Panel Reports, para. 7.298.

<sup>606</sup>Panel Reports, para. 7.350.

<sup>607</sup>Panel Reports, para. 7.350.

<sup>608</sup>Panel Reports, paras. 7.294-7.296.

<sup>609</sup>Panel Reports, para. 7.297.

importance", or one that is "grave", rising to the level of a "crisis".<sup>610</sup> The Panel concluded therefore that China had not demonstrated the existence of a "critical shortage" of refractory-grade bauxite. Accordingly, the Panel found that China had failed to demonstrate that the export quota applied to refractory-grade bauxite was justified pursuant to Article XI:2(a) of the GATT 1994.<sup>611</sup>

314. On appeal, China claims that the Panel erred in its interpretation and application of Article XI:2(a) of the GATT 1994. In particular, China alleges that the Panel erred in interpreting and applying the term "temporarily" and in interpreting the term "critical shortages" in Article XI:2(a) of the GATT 1994. First, with respect to the Panel's interpretation of the term "temporarily", China asserts that the Panel erred in excluding "long-term" export restrictions from the scope of Article XI:2(a). Second, China alleges that the Panel failed to take into consideration the fact that China's export quota on refractory-grade bauxite is subject to annual review and therefore erred in its application of the term "temporarily" to the facts of this case. Third, China maintains that the Panel erred by interpreting the term "critical shortages" to exclude shortages caused by the "finite" nature or "limited reserve[s]" of a product.<sup>612</sup> Finally, China advances two separate claims that the Panel failed to make an objective assessment of the matter pursuant to Article 11 of the DSU.

315. In response, the United States, the European Union, and Mexico request the Appellate Body to uphold the Panel's finding that China had not demonstrated that its export quota on refractory-grade bauxite is temporarily applied to prevent or relieve a critical shortage within the meaning of Article XI:2(a) of the GATT 1994. The European Union argues that China misunderstands the Panel's statements that Article XI:2(a) should not be interpreted to permit the "long-term application of conservation measures", or "long-term measures related to conservation purposes"<sup>613</sup>, because in making these statements the Panel was focusing on conservation measures and not on export restrictions in general.<sup>614</sup> With respect to China's allegation that the Panel failed to consider that China's export restriction on refractory-grade bauxite is annually renewed, the European Union argues that this does not have an impact on whether the measure is "temporarily" applied, because the measure has effectively been in place for more than ten years.

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<sup>610</sup>Panel Reports, para. 7.351. We note that the United States and Mexico contested the accuracy of China's estimate of a 16-year remaining reserve lifespan for refractory-grade bauxite, and submitted instead that the remaining lifespan was 91 years. (United States' second written submission to the Panel, para. 235; Mexico's second written submission to the Panel, para. 239; Panel Exhibit JE-165, p. 23) The Panel made no finding concerning the remaining lifespan of refractory-grade bauxite, but found that, even assuming China's assertion of a 16-year remaining reserve lifespan was correct, this would not demonstrate a situation of "crisis".

<sup>611</sup>Panel Reports, para. 7.353.

<sup>612</sup>China's appellant's submission, para. 356 (quoting Panel Reports, paras. 7.297 and 7.305).

<sup>613</sup>European Union's appellee's submission, para. 174 (quoting Panel Reports, para. 7.349).

<sup>614</sup>European Union's appellee's submission, para. 175.

316. The United States and Mexico disagree with China's allegation that the Panel excluded from the scope of Article XI:2(a) any "long-term" application of export restrictions. For them, the Panel did not interpret the words "temporarily applied" so as to impose an "absolute limit" on the time period for which an export restraint may be imposed under Article XI:2(a).<sup>615</sup> Furthermore, the United States and Mexico disagree with China that the Panel erred in interpreting Article XI:2(a) "to exclude shortages caused, in part, by the exhaustibility of the product subject to the export restriction".<sup>616</sup> They submit that the Panel correctly interpreted the term "critical shortage", because the existence of a limited amount of reserves constitutes only a degree of shortage, and a mere degree of shortage does not constitute a "critical" shortage, which is one rising to the level of a crisis.<sup>617</sup> The European Union, Mexico, and the United States also request the Appellate Body to reject China's claim that the Panel acted inconsistently with its obligations under Article 11 of the DSU.

317. China's appeal therefore requires us to assess the Panel's interpretation of the terms "temporarily applied" and "critical shortages" in Article XI:2(a) of the GATT 1994, and then to consider whether the Panel properly assessed the export quota imposed on refractory-grade bauxite in the light of those interpretations.

B. *Article XI:2(a) of the GATT 1994*

318. Article XI of the GATT 1994 provides, in relevant part:

*General Elimination of Quantitative Restrictions*

1. 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.

2. The provisions of paragraph 1 of this Article shall not extend to the following:

(a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party[.]

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<sup>615</sup>Joint appellees' submission of the United States and Mexico, paras. 171 and 172.

<sup>616</sup>Joint appellees' submission of the United States and Mexico, para. 173 (quoting China's appellant's submission, para. 356).

<sup>617</sup>Joint appellees' submission of the United States and Mexico, para. 175.

319. Article XI:2 refers to the general obligation to eliminate quantitative restrictions set out in Article XI:1 and stipulates that the provisions of Article XI:1 "shall not extend" to the items listed in Article XI:2. Article XI:2 must therefore be read together with Article XI:1. Both Article XI:1 and Article XI:2(a) of the GATT 1994 refer to "prohibitions or restrictions". The term "prohibition" is defined as a "legal ban on the trade or importation of a specified commodity".<sup>618</sup> The second component of the phrase "[e]xport prohibitions or restrictions" is the noun "restriction", which is defined as "[a] thing which restricts someone or something, a limitation on action, a limiting condition or regulation"<sup>619</sup>, and thus refers generally to something that has a limiting effect.

320. In addition, we note that Article XI of the GATT 1994 is entitled "General Elimination of *Quantitative* Restrictions".<sup>620</sup> The Panel found that this title suggests that Article XI governs the elimination of "quantitative restrictions" generally.<sup>621</sup> We have previously referred to the title of a provision when interpreting the requirements within the provision.<sup>622</sup> In the present case, we consider that the use of the word "quantitative" in the title of the provision informs the interpretation of the words "restriction" and "prohibition" in Article XI:1 and XI:2. It suggests that Article XI of the GATT 1994 covers those prohibitions and restrictions that have a limiting effect on the quantity or amount of a product being imported or exported.

321. Turning to the phrase "[e]xport prohibitions or restrictions" in Article XI:2(a), we note that the words "prohibition" and "restriction" in that subparagraph are both qualified by the word "export". Thus, Article XI:2(a) covers any measure prohibiting or restricting the exportation of certain goods. Accordingly, we understand the words "prohibitions or restrictions" to refer to the same types of measures in both paragraph 1 and subparagraph 2(a), with the difference that subparagraph 2(a) is limited to prohibitions or restrictions on exportation, while paragraph 1 also covers measures relating to importation. We further note that "duties, taxes, or other charges" are excluded from the scope of Article XI:1. Thus, by virtue of the link between Article XI:1 and Article XI:2, the term "restrictions" in Article XI:2(a) also excludes "duties, taxes, or other charges". Hence, if a restriction does not fall within the scope of Article XI:1, then Article XI:2 will also not apply to it.

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<sup>618</sup>*Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 2, p. 2363.

<sup>619</sup>*Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 2, p. 2553.

<sup>620</sup>Emphasis added.

<sup>621</sup>Panel Reports, para. 7.912.

<sup>622</sup>See Appellate Body Report, *US – Softwood Lumber IV*, para. 93; and Appellate Body Report, *US – Carbon Steel*, para. 67.

322. Having examined the meaning of the phrase "[e]xport prohibitions or restrictions", we note that Article XI:2(a) permits such measures to be "temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting Member". We examine the meaning of each of these concepts—"temporarily applied", "to prevent or relieve critical shortages", and "foodstuffs or other products essential"—in turn below.

323. First, we note that the term "temporarily" in Article XI:2(a) of the GATT 1994 is employed as an adverb to qualify the term "applied". The word "temporary" is defined as "[l]asting or meant to last for a limited time only; not permanent; made or arranged to supply a passing need".<sup>623</sup> Thus, when employed in connection with the word "applied", it describes a measure applied for a limited time, a measure taken to bridge a "passing need". As we see it, the definitional element of "supply[ing] a passing need" suggests that Article XI:2(a) refers to measures that are applied in the interim.

324. Turning next to consider the meaning of the term "critical shortage", we note that the noun "shortage" is defined as "[d]eficiency in quantity; an amount lacking"<sup>624</sup> and is qualified by the adjective "critical", which, in turn, is defined as "[o]f, pertaining to, or constituting a crisis; of decisive importance, crucial; involving risk or suspense".<sup>625</sup> The term "crisis" describes "[a] turning-point, a vitally important or decisive stage; a time of trouble, danger or suspense in politics, commerce, etc."<sup>626</sup> Taken together, "critical shortage" thus refers to those deficiencies in quantity that are crucial, that amount to a situation of decisive importance, or that reach a vitally important or decisive stage, or a turning point.

325. We consider that context lends further support to this reading of the term "critical shortage". In particular, the words "general or local short supply" in Article XX(j) of the GATT 1994 provide relevant context for the interpretation of the term "critical shortage" in Article XI:2(a). We note that the term "in short supply" is defined as "available only in limited quantity, scarce".<sup>627</sup> Thus, its meaning is similar to that of a "shortage", which is defined as "[d]eficiency in quantity; an amount

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<sup>623</sup>*Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 2, p. 3204.

<sup>624</sup>*Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 2, p. 2813.

<sup>625</sup>*Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 1, p. 562.

<sup>626</sup>*Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 1, p. 561.

<sup>627</sup>*Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 2, p. 3115.

lacking".<sup>628</sup> Contrary to Article XI:2(a), however, Article XX(j) does not include the word "critical", or another adjective further qualifying the short supply. We must give meaning to this difference in the wording of these provisions. To us, it suggests that the kinds of shortages that fall within Article XI:2(a) are more narrowly circumscribed than those falling within the scope of Article XX(j).

326. For Article XI:2(a) to apply, the shortage, in turn, must relate to "foodstuffs or other products essential to the exporting Member". Foodstuff is defined as "an item of food, a substance used as food".<sup>629</sup> The term "essential" is defined as "[a]bsolutely indispensable or necessary".<sup>630</sup> Accordingly, Article XI:2(a) refers to critical shortages of foodstuffs or otherwise absolutely indispensable or necessary products. By including, in particular, the word "foodstuffs", Article XI:2(a) provides a measure of what might be considered a product "essential to the exporting Member" but it does not limit the scope of other essential products to only foodstuffs.

327. Article XI:2(a) allows Members to apply prohibitions or restrictions temporarily in order to "prevent or relieve" such critical shortages. The word "prevent" is defined as "[p]rovide beforehand against the occurrence of (something); make impracticable or impossible by anticipatory action; stop from happening".<sup>631</sup> The word "relieve" means "[r]aise out of some trouble, difficulty or danger; bring or provide aid or assistance to".<sup>632</sup> We therefore read Article XI:2(a) as providing a basis for measures adopted to alleviate or reduce an existing critical shortage, as well as for preventive or anticipatory measures adopted to pre-empt an imminent critical shortage.

328. Finally, we consider that Article XI:2(a) must be interpreted so as to give meaning to each of the concepts contained in that provision. At the same time, we must take into account that these different concepts impart meaning to each other, and thus define the scope of Article XI:2(a). For example, whether a shortage is "critical" may be informed by how "essential" a particular product is. In addition, the characteristics of the product as well as factors pertaining to a critical situation, may inform the duration for which a measure can be maintained in order to bridge a passing need in conformity with Article XI:2(a). Inherent in the notion of criticality is the expectation of reaching a

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<sup>628</sup>*Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 2, p. 2813.

<sup>629</sup>*Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 1, p. 1008.

<sup>630</sup>*Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 1, p. 865.

<sup>631</sup>*Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 2, p. 2341.

<sup>632</sup>*Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 2, p. 2522.

point in time at which conditions are no longer "critical", such that measures will no longer fulfil the requirement of addressing a critical shortage. Accordingly, an evaluation of whether a particular measure satisfies the requirements of Article XI:2(a) necessarily requires a case-by-case analysis taking into consideration the nexus between the different elements contained in Article XI:2(a).

C. *The Panel's Evaluation of China's Export Quota on Refractory-Grade Bauxite*

329. As noted above, China argues that the Panel erred in finding that China had not demonstrated that its export quota on refractory-grade bauxite was "temporarily applied", within the meaning of Article XI:2(a) of the GATT 1994, to either prevent or relieve a "critical shortage". With respect to the Panel's interpretation of the term "temporarily", China supports the Panel's finding that the word "temporarily" "suggest[s] a fixed time-limit for the application of a measure".<sup>633</sup> China, however, alleges that the Panel subsequently "adjusted" its interpretation of the term "temporarily" to exclude the "long-term" application of export restrictions.<sup>634</sup> China argues that the term "temporarily" does not mark a "bright line"<sup>635</sup> moment in time after which an export restriction has necessarily been maintained for too long. Instead, Article XI:2(a) requires that the duration of a restriction be limited and bound in relation to the achievement of the stated goal. Furthermore, China argues that the Panel erroneously found that Article XI:2(a) and Article XX(g) are mutually exclusive, and that this finding was a significant motivating factor for the Panel's erroneous interpretation of the term "temporarily" in Article XI:2(a). China submits that the two provisions are not mutually exclusive, and instead apply cumulatively.<sup>636</sup>

330. We note that the Panel found that the word "temporarily" suggests "a fixed time-limit for the application of a measure"<sup>637</sup>, and also expressed the view that a "restriction or ban applied under Article XI:2(a) must be of a limited duration and not indefinite".<sup>638</sup> We have set out above our interpretation of the term "temporarily" as employed in Article XI:2(a). In our view, a measure applied "temporarily" in the sense of Article XI:2(a) is a measure applied in the interim, to provide relief in extraordinary conditions in order to bridge a passing need. It must be finite, that is, applied

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<sup>633</sup>China's appellant's submission, para. 335 (quoting Panel Reports, para. 7.255).

<sup>634</sup>China's appellant's submission, para. 336.

<sup>635</sup>China's appellant's submission, para. 340.

<sup>636</sup>China's appellant's submission, para. 375 (referring to Appellate Body Report, *Argentina – Footwear (EC)*, para. 81; Appellate Body Report, *Chile – Price Band System*, para. 186; Appellate Body Report, *EC – Asbestos*, para. 80; Panel Reports, *EC – Bananas III*, para. 7.160; Appellate Body Report, *Korea – Dairy*, para. 74; and Appellate Body Report, *US – Upland Cotton*, para. 549).

<sup>637</sup>Panel Reports, para. 7.255.

<sup>638</sup>Panel Reports, para. 7.258.

for a limited time. Accordingly, we agree with the Panel that a restriction or prohibition in the sense of Article XI:2(a) must be of a limited duration and not indefinite.

331. The Panel further interpreted the term "limited time" to refer to a "fixed time-limit"<sup>639</sup> for the application of the measure. To the extent that the Panel was referring to a time-limit fixed in advance, we disagree that "temporary" must always connote a time-limit fixed in advance. Instead, we consider that Article XI:2(a) describes measures applied for a limited duration, adopted in order to bridge a passing need, irrespective of whether or not the temporal scope of the measure is fixed in advance.

332. China alleges that the Panel erred in reading the term "temporarily" to exclude the "long-term" application of export restrictions. In particular, China refers to the Panel's statements that Article XI:2(a) cannot be interpreted "to permit the long-term application of ... export restrictions", or to "permit long-term measures to be imposed".<sup>640</sup> We consider that the terms "long-term application" and "long-term measures" provide little value in elucidating the meaning of the term "temporary", because what is "long-term" in a given case depends on the facts of the particular case. Moreover, the terms "long-term" and "short-term" describe a different concept than the term "temporary", employed in Article XI:2(a). Viewed in the context of the Panel's entire analysis, it is clear, however, that the Panel used these words to refer back to its earlier interpretation of the term "temporarily applied" as meaning a "restriction or prohibition for a limited time". Because the Panel merely referred to its earlier interpretation of the term "temporarily applied" and did not provide additional reasoning, the Panel cannot be viewed as having "adjusted" its interpretation of the term "temporarily" to exclude the "long-term" application of export restrictions.

333. This brings us to China's allegation that the Panel erroneously found that Article XI:2(a) and Article XX(g) are mutually exclusive, and that this finding was a significant motivating factor for the Panel's erroneous interpretation of the term "temporarily" in Article XI:2(a).<sup>641</sup> As we see it, the Panel considered Article XX(g) as relevant context in its interpretation of Article XI:2(a). It noted that Article XX(g) "incorporates additional protections in its chapeau to ensure that the application of a measure does not result in arbitrary or unjustifiable discrimination or amount to a disguised restriction on international trade".<sup>642</sup> The Panel considered that the existence of these further requirements under

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<sup>639</sup>Panel Reports, para. 7.255.

<sup>640</sup>China's appellant's submission, para. 336 (quoting Panel Reports, paras. 7.298 and 7.305, respectively, and referring to para. 7.349).

<sup>641</sup>China's appellant's submission, para. 374.

<sup>642</sup>Panel Reports, para. 7.258.

Article XX(g) lent support to its interpretation that an exception pursuant to Article XI:2(a) must be of a limited duration and not indefinite, because otherwise Members could resort indistinguishably to either Article XI:2(a) or to Article XX(g). We do not understand the Panel to have found that these two provisions are mutually exclusive. Rather, the Panel sought to confirm the result of its interpretation, and stated that the interpretation proffered by China would be inconsistent with the principle of effective treaty interpretation. We therefore see no merit in China's allegation that the Panel erroneously found that Article XI:2(a) and Article XX(g) are mutually exclusive. Nor do we agree that such a finding was a basis for the Panel's interpretation of the term "temporarily" in Article XI:2(a).

334. In any event, we have some doubts as to the validity of the Panel's concern that, if Article XI:2(a) is not interpreted as confined to measures of limited duration, Members could "resort indistinguishably to either Article XI:2(a) or to Article XX(g) to address the problem of an exhaustible natural resource".<sup>643</sup> Members can resort to Article XX of the GATT 1994 as an exception to justify measures that would otherwise be inconsistent with their GATT obligations. By contrast, Article XI:2 provides that the general elimination of quantitative restrictions *shall not extend to* the items listed under subparagraphs (a) to (c) of that provision. This language seems to indicate that the scope of the obligation not to impose quantitative restrictions itself is limited by Article XI:2(a). Accordingly, where the requirements of Article XI:2(a) are met, there would be no scope for the application of Article XX, because no obligation exists.

335. Turning then to the Panel's application of the term "temporarily applied" in the present case, China alleges that the Panel failed to take into consideration the fact that China's export restrictions on refractory-grade bauxite are subject to annual review. China faults the Panel for "simply assum[ing]" that China's restriction on exports of refractory-grade bauxite will be maintained indefinitely.<sup>644</sup> China submits that, at the close of each year, the factual circumstances are assessed in the light of the legal standard set forth in Article XI:2(a) to establish whether the export restriction should be maintained. We note that China has made parallel claims, under Article XI:2(a), alleging an error of application, and under Article 11 of the DSU, alleging that the Panel failed to make an objective assessment of the facts. We consider China's allegation that the Panel "simply assumed" something to

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<sup>643</sup>Panel Reports, para. 7.257.

<sup>644</sup>China's appellant's submission, para. 349. In support, China also quoted the Panel's statement at paragraph 7.350 of its Reports that there is "every indication that [China's restriction on exports of refractory-grade bauxite] will remain in place until the reserves have been depleted".

be more in the nature of a claim made under Article 11 of the DSU, and therefore address it below at the end of our analysis in this section.

336. China further argues that the Panel erred in its interpretation and application of Article XI:2(a) by presuming that export restrictions "imposed to address a limited reserve of an exhaustible natural resource" cannot be "temporary" and that a shortage of an exhaustible non-renewable resource cannot be "critical".<sup>645</sup> The Panel reasoned that, "if there is no possibility for an existing shortage ever to cease to exist, it will not be possible to 'relieve or prevent' it through an export restriction applied on a temporary basis."<sup>646</sup> The Panel further stated that, "[i]f a measure were imposed to address a limited reserve of an exhaustible natural resource, such measure would be imposed until the point when the resource is fully depleted."<sup>647</sup> The Panel added that "[t]his temporal focus seems consistent with the notion of 'critical', defined as 'of the nature of, or constituting, a crisis'".<sup>648</sup>

337. We do not agree with China that these statements by the Panel indicate that the Panel presumed that a shortage of an exhaustible non-renewable resource cannot be "critical" within the meaning of Article XI:2(a).<sup>649</sup> The Panel noted instead, correctly in our view, that the reach of Article XI:2(a) is not the same as that of Article XX(g), adding that these provisions are "intended to address different situations and thus must mean different things".<sup>650</sup> Articles XI:2(a) and XX(g) have different functions and contain different obligations. Article XI:2(a) addresses measures taken to prevent or relieve "critical shortages" of foodstuffs or other essential products. Article XX(g), on the other hand, addresses measures relating to the conservation of exhaustible natural resources. We do not exclude that a measure falling within the ambit of Article XI:2(a) could relate to the same product as a measure relating to the conservation of an exhaustible natural resource. It would seem that Article XI:2(a) measures could be imposed, for example, if a natural disaster caused a "critical shortage" of an exhaustible natural resource, which, at the same time, constituted a foodstuff or other essential product. Moreover, because the reach of Article XI:2(a) is different from that of Article XX(g), an Article XI:2(a) measure might operate simultaneously with a conservation measure complying with the requirements of Article XX(g).<sup>651</sup>

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<sup>645</sup>China's appellant's submission, paras. 356 and 367 (quoting Panel Reports, 7.297).

<sup>646</sup>Panel Reports, para. 7.297.

<sup>647</sup>Panel Reports, para. 7.297.

<sup>648</sup>Panel Reports, para. 7.297.

<sup>649</sup>China's appellant's submission, paras. 367 (quoting Panel Reports, para. 7.297).

<sup>650</sup>Panel Reports, para. 7.300.

<sup>651</sup>European Union's appellee's submission, para. 166.

338. As a final matter, we note that China advances two separate claims that the Panel failed to make an objective assessment of the matter pursuant to Article 11 of the DSU. First, China alleges that the Panel failed properly to assess evidence that China's export restriction is annually reviewed and renewed, and that the Panel's failure to consider this evidence has a bearing on the objectivity of the Panel's factual assessment.<sup>652</sup> China submits that evidence relating to China's annual review procedures demonstrates that the export restriction will be maintained only as long as it is justified to prevent or relieve the critical shortage of refractory-grade bauxite. For China, this evidence demonstrates that the Panel erred in assuming that the restriction "will remain in place until the reserves have been depleted".<sup>653</sup>

339. We note that the Panel identified several reasons for finding that China's export restriction is not temporarily applied to prevent or relieve a critical shortage. The Panel observed that China's restriction on exports of refractory-grade bauxite had "already been in place for at least a decade with no indication of when it will be withdrawn and every indication that it will remain in place until the reserves have been depleted".<sup>654</sup> The Panel also referred to evidence of the existence of an export quota submitted by the parties<sup>655</sup>, as well as China's explanation that its "export quota on refractory-grade bauxite forms part of a conservation plan aimed at extending the reserves of refractory-grade bauxite".<sup>656</sup>

340. To us, these elements of the Panel's reasoning indicate that the Panel's finding was not, as China alleges, based on a mere "assumption" that the restriction would remain in effect until depletion of the reserves. Instead, the Panel considered evidence indicating that the measure had been in place for at least a decade and China does not contest the Panel's finding that this was the case. In particular, the Panel noted that "China has had an export quota in place on exports of bauxite classifiable under HS No. 2508.3000 dating back to at least 2000" and found that "China's estimation of a 16-year reserve for bauxite suggests that China intends to maintain its measure in place until the exhaustion of remaining reserves (in keeping with its contention that it needs to restrain consumption), or until new technology or conditions lessen demand for refractory-grade bauxite."<sup>657</sup> In addition, as an indication that the restrictions would remain in place until depletion, the Panel noted

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<sup>652</sup>China's appellant's submission, para. 354.

<sup>653</sup>China's appellant's submission, para. 355 (quoting Panel Reports, para. 7.350).

<sup>654</sup>Panel Reports, para. 7.350.

<sup>655</sup>In particular, footnote 563 to paragraph 7.348 of the Panel Reports demonstrates that the Panel relied on evidence regarding the existence of the export quota.

<sup>656</sup>Panel Reports, para. 7.348 (referring to China's second written submission to the Panel, para. 141).

<sup>657</sup>Panel Reports, para. 7.348.

China's explanation that its export quota on refractory-grade bauxite forms part of a conservation plan aimed at extending the reserves of refractory-grade bauxite.

341. China's argument appears to be directed mainly at the weight the Panel ascribed to evidence indicating that the export restriction is annually reviewed and renewed. The Appellate Body has consistently recognized that panels enjoy a margin of discretion in their assessment of the facts.<sup>658</sup> This margin includes the discretion of a panel to decide which evidence it chooses to utilize in making its findings<sup>659</sup>, and to determine how much weight to attach to the various items of evidence placed before it by the parties.<sup>660</sup> A panel does not err simply because it declines to accord to the evidence the weight that one of the parties believes should be accorded to it.<sup>661</sup> A panel is entitled "to determine that certain elements of evidence should be accorded more weight than other elements—that is the essence of the task of appreciating the evidence".<sup>662</sup> We therefore reject China's claim that the Panel failed to make an objective assessment of the matter as required by Article 11 of the DSU.

342. Next, China asserts that the Panel employed internally inconsistent or incoherent reasoning in stating, on the one hand, that "there is no possibility for an existing shortage [of an exhaustible natural resource] ever to cease to exist" such that "it will not be possible to 'relieve or prevent' it through an export restriction applied on a temporary basis"<sup>663</sup> and acknowledging, on the other hand, that "advances in reserve detection or extraction techniques", or the availability of "additional capacity", could "alleviate or eliminate" a shortage of an exhaustible natural resource<sup>664</sup>, or that "new technology or conditions" might "lessen demand" for the resource.<sup>665</sup>

343. The Appellate Body has previously found that a Panel's reasoning may be so internally inconsistent that it amounts to a breach of Article 11 of the DSU.<sup>666</sup> We do not consider this to be the case here. Contrary to what China suggests, the Panel did not find that "'there is no possibility for an existing shortage [of an exhaustible natural resource] ever to cease to exist', such that 'it will not be

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<sup>658</sup> Appellate Body Report, *EC – Asbestos*, para. 161; Appellate Body Report, *EC – Hormones*, para. 132; Appellate Body Report, *EC – Sardines*, para. 299; Appellate Body Report, *Japan – Apples*, para. 222; Appellate Body Report, *Korea – Dairy*, paras. 137 and 138; Appellate Body Report, *US – Wheat Gluten*, para. 151.

<sup>659</sup> Appellate Body Report, *EC – Hormones*, para. 135.

<sup>660</sup> Appellate Body Report, *Korea – Dairy*, para. 137.

<sup>661</sup> Appellate Body Report, *Australia – Salmon*, para. 267; Appellate Body Report, *Japan – Apples*, para. 221; Appellate Body Report, *Korea – Alcoholic Beverages*, para. 164.

<sup>662</sup> Appellate Body Report, *EC – Asbestos*, para. 161.

<sup>663</sup> China's appellant's submission, para. 373 (referring to Panel Reports, para. 7.297). (emphasis added by China omitted)

<sup>664</sup> China's appellant's submission, para. 373 (quoting Panel Reports, para. 7.351).

<sup>665</sup> China's appellant's submission, para. 373 (referring to Panel Reports, paras. 7.348 and 7.351).

<sup>666</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 894.

possible to 'relieve or prevent' it through an export restriction applied on a temporary basis".<sup>667</sup> Instead, the Panel's statement to which China refers contains a hypothetical. It reads as follows: "*if* there is no possibility for an existing shortage ever to cease to exist, it will not be possible to 'relieve or prevent' it through an export restriction applied on a temporary basis."<sup>668</sup> The Panel did not make such a finding but employed a hypothetical and did not, as China alleges, make two internally inconsistent findings. Therefore, the Panel did not fail to conduct an objective assessment of the matter pursuant to Article 11 of the DSU.

344. For the above reasons, we *uphold* the Panel's conclusion that China did not demonstrate that its export quota on refractory-grade bauxite was "temporarily applied", within the meaning of Article XI:2(a) of the GATT 1994, to either prevent or relieve a "critical shortage"<sup>669</sup>, and we dismiss China's allegation that the Panel acted inconsistently with its duty to conduct an objective assessment of the matter as required by Article 11 of the DSU.

### **VIII. Article XX(g) of the GATT 1994**

345. China alleges that the Panel erred in interpreting the phrase "made effective in conjunction with" in Article XX(g) to mean that restrictions on domestic production or consumption must "be applied jointly with the challenged export restrictions", and that "the purpose of those export restrictions must be to ensure the effectiveness of those domestic restrictions".<sup>670</sup>

#### *A. The Panel's Findings and Arguments on Appeal*

346. The Panel found that China's export quota on refractory-grade bauxite is inconsistent with Article XI:1 of the GATT 1994. China sought to justify this export quota pursuant to Article XX(g) of the GATT 1994, arguing that refractory-grade bauxite is an exhaustible natural resource that is scarce and requires protection.<sup>671</sup>

347. The Panel first addressed the question of whether China's export quota relates to the conservation of refractory-grade bauxite. Based on its review of the evidence and arguments before

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<sup>667</sup>China's appellant's submission, para. 373 (quoting Panel Reports, para. 7.297). (emphasis added by China)

<sup>668</sup>Panel Reports, para. 7.297. (emphasis added)

<sup>669</sup>Panel Reports, para. 7.355. China also refers to paragraphs 7.257, 7.258, 7.297-7.302, 7.305, 7.306, 7.346, 7.349, 7.351, and 7.354 of the Panel Reports. (See China's appellant's submission, paras. 299 and 388)

<sup>670</sup>Panel Reports, para. 7.397.

<sup>671</sup>See Panel Reports, para. 7.356.

it, the Panel found this not to be the case.<sup>672</sup> The Panel nevertheless continued its analysis in order to determine whether the export quota on refractory-grade bauxite was "made effective in conjunction with" restrictions on domestic production or consumption, as required under Article XX(g) of the GATT 1994.

348. The Panel considered that, in order for a measure to be justified under Article XX(g), the measure must satisfy two conditions: (i) it must relate to the conservation of an exhaustible natural resource; and (ii) it must be made effective in conjunction with restrictions on domestic production or consumption. With respect to the first requirement, the Panel stated that the words "relate to ... conservation" have been interpreted by the Appellate Body to require a substantial relationship between the trade measure and conservation, so that the trade measure would be "primarily aimed at" the conservation of exhaustible natural resources.<sup>673</sup> The Panel further noted that the term "conservation" is defined as "the act of preserving and maintaining the existing state of something, in this case 'natural resources' covered by Article XX(g)."<sup>674</sup>

349. With respect to the requirement that conservation measures in the sense of Article XX(g) be "made effective in conjunction with" restrictions on domestic production, the Panel referred to a statement of the GATT panel in *Canada – Herring and Salmon*, that a measure can only be considered to be "made effective in conjunction with" restrictions on domestic production, if it is "primarily aimed at rendering effective these restrictions".<sup>675</sup> The Panel also quoted the Appellate Body's statement in *US – Gasoline* that the phrase "'if such measures are made effective in conjunction with restrictions on domestic products or consumption' is appropriately read as a requirement that the measures concerned impose restrictions, not just in respect of imported [products], but also with respect to domestic [products]."<sup>676</sup> The Panel then found that "restrictions on domestic production or consumption must not only be applied jointly with the challenged export restrictions but, in addition, the purpose of those export restrictions must be to ensure the effectiveness of those domestic restrictions."<sup>677</sup>

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<sup>672</sup>Panel Reports, para. 7.435.

<sup>673</sup>Panel Reports, para. 7.370 (quoting Appellate Body Report, *US – Gasoline*, p. 18, DSR 1996:I, 3, at 17).

<sup>674</sup>Panel Reports, para. 7.372.

<sup>675</sup>Panel Reports, para. 7.395 (quoting GATT Panel Report, *Canada – Herring and Salmon*, para. 4.6). (emphasis added by the Panel omitted)

<sup>676</sup>Panel Reports, para. 7.396 (quoting Appellate Body Report, *US – Gasoline*, p. 20, DSR 1996:I, 3, at 19).

<sup>677</sup>Panel Reports, para. 7.397 (referring to GATT Panel Report, *Canada – Herring and Salmon*, para. 4.6).

350. China alleges that the Panel erred in its interpretation of the phrase "made effective in conjunction with" in Article XX(g) of the GATT 1994. China maintains that the Panel read this phrase to mean that, in order to be justified under Article XX(g), a challenged measure must satisfy two cumulative conditions: first, it must "be applied jointly" with restrictions on domestic production or consumption; and, second, the "purpose" of the challenged measure must be to make effective restrictions on domestic production or consumption. China argues that the first element of this interpretation is consistent with the ordinary meaning of the phrase "made effective in conjunction with", but that the second is not. China requests the Appellate Body to reverse the erroneous second element of the Panel's interpretation.<sup>678</sup> China does not, however, appeal the Panel's ultimate conclusion that China's export quota on refractory-grade bauxite is inconsistent with Article XI of the GATT 1994 and not justified under Article XX(g).<sup>679</sup>

351. China submits that the Appellate Body's interpretation of the term "in conjunction with" in *US – Gasoline* corresponds to the first element of the meaning that the Panel attributed to that term, namely, that the challenged measures "be applied jointly with" restrictions on domestic production or consumption.<sup>680</sup> China submits, however, that nothing in the phrase "made effective in conjunction with" suggests that the "purpose" of a challenged measure must be to ensure the effectiveness of domestic restrictions.<sup>681</sup> In particular, China argues that Article XX(g) does not require that each set of measures must have, as a separate and independent purpose, the goal of ensuring the effectiveness of the other set of measures. For China, it suffices that the challenged measure is related to the conservation of a natural resource, and that it operates together with domestic restrictions on the production or consumption of the same resource.<sup>682</sup>

352. By contrast, the United States and Mexico request the Appellate Body to uphold the Panel's reasoning. They submit that *US – Gasoline* did not involve the particular interpretive question of how the operation of the challenged measure should be conjoined with the operation of domestic restrictions, and that the present case was the first instance since the GATT panel proceeding in *Canada – Herring and Salmon* that a respondent asserted Article XX(g) as a defence where the challenged measure was distinct from the restrictions on domestic production or consumption.<sup>683</sup> Therefore, the United States and Mexico argue that the Panel appropriately drew upon the *Canada –*

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<sup>678</sup>China's appellant's submission, para. 391.

<sup>679</sup>China's appellant's submission, para. 392.

<sup>680</sup>China's appellant's submission, paras. 405 and 406.

<sup>681</sup>China's appellant's submission, para. 407.

<sup>682</sup>China's appellant's submission, para. 411.

<sup>683</sup>The United States and Mexico further submit that the Appellate Body report in *US – Shrimp* also did not involve this question. (Joint appellees' submission of the United States and Mexico, para. 215)

*Herring and Salmon* panel's reasoning.<sup>684</sup> The European Union also supports the Panel's reasoning, arguing that the GATT panel rightly stated that a measure can only be made effective "in conjunction with" domestic restrictions on production if it is primarily aimed at rendering effective these restrictions.

B. *Analysis*

353. Article XX of the GATT 1994 provides, in relevant part:

*General Exceptions*

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

...

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

354. Article XX of the GATT 1994 contemplates a two-tiered analysis of a measure that a Member seeks to justify under that provision.<sup>685</sup> A respondent must first demonstrate that the challenged measure falls within the scope of one of the subparagraphs of Article XX. Where this is the case, a respondent must further establish that the measure at issue satisfies the requirements of the chapeau of Article XX.

355. In order to fall within the ambit of subparagraph (g) of Article XX, a measure must "relat[e] to the conservation of exhaustible natural resources". The term "relat[e] to" is defined as "hav[ing] some connection with, be[ing] connected to".<sup>686</sup> The Appellate Body has found that, for a measure to relate to conservation in the sense of Article XX(g), there must be "a close and genuine relationship of

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<sup>684</sup>Joint appellees' submission of the United States and Mexico, para. 220.

<sup>685</sup>Appellate Body Report, *US – Shrimp*, paras. 118, 119, and 147. See also Appellate Body Report, *US – Gasoline*, p. 22, DSR 1996:I, 3, at 20; and Appellate Body Report, *US – Gambling*, para. 292.

<sup>686</sup>*Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 2, p. 2519.

ends and means".<sup>687</sup> The word "conservation", in turn, means "the preservation of the environment, especially of natural resources".<sup>688</sup>

356. Article XX(g) further requires that conservation measures be "made effective in conjunction with restrictions on domestic production or consumption". The word "effective" as relating to a legal instrument is defined as "in operation at a given time".<sup>689</sup> We consider that the term "made effective", when used in connection with a legal instrument, describes measures brought into operation, adopted, or applied. The Spanish and French equivalents of "made effective"—namely "*se apliquen*" and "*sont appliquées*"—confirm this understanding of "made effective". The term "in conjunction" is defined as "together, jointly, (with)".<sup>690</sup> Accordingly, the trade restriction must operate jointly with the restrictions on domestic production or consumption. Article XX(g) thus permits trade measures relating to the conservation of exhaustible natural resources when such trade measures work together with restrictions on domestic production or consumption, which operate so as to conserve an exhaustible natural resource. By its terms, Article XX(g) does not contain an additional requirement that the conservation measure be primarily aimed at making effective the restrictions on domestic production or consumption.

357. The Appellate Body addressed Article XX(g) in *US – Gasoline*.<sup>691</sup> The Appellate Body noted Venezuela's and Brazil's argument that, to be deemed as "made effective in conjunction with restrictions on domestic production or consumption", a measure must be "primarily aimed at" both conservation of exhaustible natural resources and making effective certain restrictions on domestic production or consumption. The Appellate Body, however, found that:

... "made effective" when used in connection with a measure—a governmental act or regulation—may be seen to refer to such measure being "operative", as "in force", or as having "come into effect." Similarly, the phrase "in conjunction with" may be read quite plainly as "together with" or "jointly with." Taken together, the second clause of Article XX(g) appears to us to refer to governmental measures like the baseline establishment rules being promulgated or brought into effect together with restrictions on domestic production or consumption of natural resources. Put in a slightly different manner, we believe that the clause "if such measures are made

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<sup>687</sup> Appellate Body Report, *US – Shrimp*, para. 136.

<sup>688</sup> *Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 1, p. 496.

<sup>689</sup> *Black's Law Dictionary*, 9th edn, B.A. Garner (ed.) (West Group, 2009), p. 592.

<sup>690</sup> *Shorter Oxford English Dictionary*, 6th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 1, p. 492.

<sup>691</sup> Appellate Body Report, *US – Gasoline*, pp. 19-22, DSR 1996:I, 3, at 18-20.

effective in conjunction with restrictions on domestic production or consumption" is appropriately read as a requirement that the measures concerned impose restrictions, not just in respect of imported gasoline but also with respect to domestic gasoline. The clause is a requirement of even-handedness in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources.<sup>692</sup>

358. Accordingly, in assessing whether the baseline establishment rules at issue in *US – Gasoline* were "made effective in conjunction with" restrictions on domestic production or consumption, the Appellate Body relied on the fact that those rules were promulgated or brought into effect "together with" restrictions on domestic production or consumption of natural resources. However, even though Brazil and Venezuela had presented arguments suggesting that it was necessary that the purpose of the baseline establishment rules be to ensure the effectiveness of restrictions on domestic production, the Appellate Body did *not* consider this to be necessary. In particular, the Appellate Body did not consider that, in order to be justified under Article XX(g), measures "relating to the conservation of exhaustible natural resources" must be primarily aimed at rendering effective restrictions on domestic production or consumption. Instead, the Appellate Body read the terms "in conjunction with", "quite plainly", as "together with" or "jointly with"<sup>693</sup>, and found no additional requirement that the conservation measure be primarily aimed at making effective certain restrictions on domestic production or consumption.

359. As noted above, the Panel in the present case appears to have considered that, in order to prove that a measure is "made effective in conjunction with" restrictions on domestic production or consumption in the sense of Article XX(g), it must be established, first, that the measure is applied jointly with restrictions on domestic production or consumption, and, second, that the purpose of the challenged measure is to make effective restrictions on domestic production or consumption. In particular, the Panel's use of the words "not only ... but, in addition", as well as the reference at the end of the sentence to the GATT panel report in *Canada – Herring and Salmon*, indicate that the Panel did in fact consider that two separate conditions have to be met for a measure to be considered "made effective in conjunction with" in the sense of Article XX(g).

360. As explained above, we see nothing in the text of Article XX(g) to suggest that, in addition to being "made effective in conjunction with restrictions on domestic production or consumption", a trade restriction must be aimed at ensuring the effectiveness of domestic restrictions, as the Panel

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<sup>692</sup> Appellate Body Report, *US – Gasoline*, p. 20, DSR 1996:I, 3, at 19.

<sup>693</sup> Appellate Body Report, *US – Gasoline*, p. 20, DSR 1996:I, 3, at 19.

found. Instead, we have found above that Article XX(g) permits trade measures relating to the conservation of exhaustible natural resources if such trade measures work together with restrictions on domestic production or consumption, which operate so as to conserve an exhaustible natural resource.

361. Based on the foregoing, we *find* that the Panel erred in interpreting the phrase "made effective in conjunction with" in Article XX(g) of the GATT 1994 to require a separate showing that the purpose of the challenged measure must be to make effective restrictions on domestic production or consumption. Accordingly, we *reverse* this interpretation by the Panel in paragraph 7.397 of the Panel Reports.



**IX. Findings and Conclusions in the Appellate Body Report WT/DS394/AB/R**

362. In the appeal of the Panel Report in *China – Measures Related to the Exportation of Various Raw Materials* (complaint by the United States, WT/DS394/R) (the "US Panel Report"), for the reasons set out in this Report, the Appellate Body:

- (a) finds that the Panel erred under Article 6.2 of the DSU in making findings regarding claims allegedly identified in Section III of the United States' panel request; and therefore declares moot and of no legal effect the Panel findings in paragraph 8.4(a)-(d) in respect of claims concerning export quota administration and allocation; in paragraph 8.5(a)-(b) in respect of claims concerning export licensing requirements; in paragraph 8.6(a)-(b) in respect of claims concerning a minimum export price requirement; and in paragraph 8.4(e) of the US Panel Report in respect of claims concerning fees and formalities in connection with exportation.
- (b) finds that the Panel did not err in recommending, in paragraph 8.8 of the US Panel Report, that China bring its measures into conformity with its WTO obligations such that the "series of measures" do not operate to bring about a WTO-inconsistent result;
- (c) finds that the Panel did not err, in paragraph 7.159 of the US Panel Report, in finding that there is no basis in China's Accession Protocol to allow the application of Article XX of the GATT 1994 to China's obligations in Paragraph 11.3 of China's Accession Protocol; and therefore upholds the Panel's conclusion, in paragraph 8.2(b) of the US Panel Report, that China may not seek to justify the application of export duties to certain forms of fluorspar pursuant to Article XX(g) of the GATT 1994 and the Panel's conclusion, in paragraph 8.2(c) of the US Panel Report, that China may not seek to justify the application of export duties to certain forms of magnesium, manganese and zinc pursuant to Article XX(b) of the GATT 1994;
- (d) with respect to Article XI:2(a) of the GATT 1994:
  - (i) upholds the Panel's conclusion, in paragraph 7.355 of the US Panel Report, that China had not demonstrated that its export quota on refractory-grade bauxite was "temporarily applied", within the meaning of Article XI:2(a) of the GATT 1994, to either prevent or relieve a "critical shortage";

- (ii) finds that China has not demonstrated that the Panel acted inconsistently with its duty to conduct an objective assessment of the matter as required by Article 11 of the DSU; and
  
- (e) finds that the Panel erred in interpreting the phrase "made effective in conjunction with", in Article XX(g) of the GATT 1994, to require that the purpose of the export restriction must be to ensure the effectiveness of restrictions on domestic production and consumption, and therefore reverses this interpretation by the Panel in paragraph 7.397 of the US Panel Report.

363. The Appellate Body recommends that the DSB request China to bring its measures, found in this Report and in the US Panel Report, as modified by this Report, to be inconsistent with China's Accession Protocol and the GATT 1994, into conformity with China's obligations thereunder, such that the "series of measures" do not operate to bring about a WTO-inconsistent result.

Signed in the original in Geneva this 10th day of January 2012 by:

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Ricardo Ramírez-Hernández  
Presiding Member

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Jennifer Hillman  
Member

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Shotaro Oshima  
Member

**IX. Findings and Conclusions in the Appellate Body Report WT/DS395/AB/R**

362. In the appeal of the Panel Report in *China – Measures Related to the Exportation of Various Raw Materials* (complaint by the European Union, WT/DS395/R) (the "EU Panel Report"), for the reasons set out in this Report, the Appellate Body:

- (a) finds that the Panel erred under Article 6.2 of the DSU in making findings regarding claims allegedly identified in Section III of the European Union's panel request; and therefore declares moot and of no legal effect the Panel findings in paragraph 8.11(a)-(e) in respect of claims concerning export quota administration and allocation; in paragraph 8.12(a)-(b) in respect of claims concerning export licensing requirements; and in paragraph 8.13(a)-(b) of the EU Panel Report in respect of claims concerning a minimum export price requirement;
- (b) finds that the Panel did not err in recommending, in paragraph 8.15 of the EU Panel Report, that China bring its measures into conformity with its WTO obligations such that the "series of measures" do not operate to bring about a WTO-inconsistent result;
- (c) finds that the Panel did not err, in paragraph 7.159 of the EU Panel Report, in finding that there is no basis in China's Accession Protocol to allow the application of Article XX of the GATT 1994 to China's obligations in Paragraph 11.3 of China's Accession Protocol; and therefore upholds the Panel's conclusion, in paragraph 8.9(b) of the EU Panel Report, that China may not seek to justify the application of export duties to certain forms of fluorspar pursuant to Article XX(g) of the GATT 1994 and the Panel's conclusion, in paragraph 8.9(c) of the EU Panel Report, that China may not seek to justify the application of export duties to certain forms of magnesium, manganese and zinc pursuant to Article XX(b) of the GATT 1994;
- (d) with respect to Article XI:2(a) of the GATT 1994:
  - (i) upholds the Panel's conclusion, in paragraph 7.355 of the EU Panel Report, that China had not demonstrated that its export quota on refractory-grade bauxite was "temporarily applied", within the meaning of Article XI:2(a) of the GATT 1994, to either prevent or relieve a "critical shortage";

- (ii) finds that China has not demonstrated that the Panel acted inconsistently with its duty to conduct an objective assessment of the matter as required by Article 11 of the DSU; and
- (e) finds that the Panel erred in interpreting the phrase "made effective in conjunction with", in Article XX(g) of the GATT 1994, to require that the purpose of the export restriction must be to ensure the effectiveness of restrictions on domestic production and consumption, and therefore reverses this interpretation by the Panel in paragraph 7.397 of the EU Panel Report.

363. The Appellate Body recommends that the DSB request China to bring its measures, found in this Report and in the EU Panel Report, as modified by this Report, to be inconsistent with China's Accession Protocol and the GATT 1994, into conformity with China's obligations thereunder, such that the "series of measures" do not operate to bring about a WTO-inconsistent result.

Signed in the original in Geneva this 10th day of January 2012 by:

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Ricardo Ramírez-Hernández  
Presiding Member

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Jennifer Hillman  
Member

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Shotaro Oshima  
Member

**IX. Findings and Conclusions in the Appellate Body Report WT/DS398/AB/R**

362. In the appeal of the Panel Report in *China – Measures Related to the Exportation of Various Raw Materials* (complaint by Mexico, WT/DS398/R) (the "Mexico Panel Report"), for the reasons set out in this Report, the Appellate Body:

- (a) finds that the Panel erred under Article 6.2 of the DSU in making findings regarding claims allegedly identified in Section III of Mexico's panel request; and therefore declares moot and of no legal effect the Panel findings in paragraph 8.18(a)-(d) in respect of claims concerning export quota administration and allocation; in paragraph 8.19(a)-(b) in respect of claims concerning export licensing requirements; in paragraph 8.20(a)-(b) in respect of claims concerning a minimum export price requirement; and in paragraph 8.18(e) of the Mexico Panel Report in respect of claims concerning fees and formalities in connection with exportation;
- (b) finds that the Panel did not err in recommending, in paragraph 8.22 of the Mexico Panel Report, that China bring its measures into conformity with its WTO obligations such that the "series of measures" do not operate to bring about a WTO-inconsistent result;
- (c) finds that the Panel did not err, in paragraph 7.159 of the Mexico Panel Report, in finding that there is no basis in China's Accession Protocol to allow the application of Article XX of the GATT 1994 to China's obligations in Paragraph 11.3 of China's Accession Protocol; and therefore upholds the Panel's conclusion, in paragraph 8.16(b) of the Mexico Panel Report, that China may not seek to justify the application of export duties to certain forms of fluorspar pursuant to Article XX(g) of the GATT 1994 and the Panel's conclusion, in paragraph 8.16(c) of the Mexico Panel Report, that China may not seek to justify the application of export duties to certain forms of magnesium, manganese and zinc pursuant to Article XX(b) of the GATT 1994;
- (d) with respect to Article XI:2(a) of the GATT 1994:
  - (i) upholds the Panel's conclusion, in paragraph 7.355 of the Mexico Panel Report, that China had not demonstrated that its export quota on refractory-grade bauxite was "temporarily applied", within the meaning of Article XI:2(a) of the GATT 1994, to either prevent or relieve a "critical shortage";

- (ii) finds that China has not demonstrated that the Panel acted inconsistently with its duty to conduct an objective assessment of the matter as required by Article 11 of the DSU; and
- (e) finds that the Panel erred in interpreting the phrase "made effective in conjunction with", in Article XX(g) of the GATT 1994, to require that the purpose of the export restriction must be to ensure the effectiveness of restrictions on domestic production and consumption, and therefore reverses this interpretation by the Panel in paragraph 7.397 of the Mexico Panel Report.

363. The Appellate Body recommends that the DSB request China to bring its measures, found in this Report and in the Mexico Panel Report, as modified by this Report, to be inconsistent with China's Accession Protocol and the GATT 1994, into conformity with China's obligations thereunder, such that the "series of measures" do not operate to bring about a WTO-inconsistent result.

Signed in the original in Geneva this 10th day of January 2012 by:

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Ricardo Ramírez-Hernández  
Presiding Member

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Jennifer Hillman  
Member

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Shotaro Oshima  
Member

ANNEX I

**WORLD TRADE  
ORGANIZATION**

**WT/DS394/7**  
9 November 2009

(09-5564)

Original: English

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

Request for the Establishment of a Panel by the United States

The following communication, dated 4 November 2009, from the delegation of the United States to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 23 June 2009, the United States requested consultations with the Government of the People's Republic of China ("China") pursuant to Articles 1 and 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Article XXII of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") with respect to China's restraints on the exportation from China of various forms of bauxite<sup>1</sup>, coke<sup>2</sup>, fluorspar<sup>3</sup>, magnesium<sup>4</sup>, manganese<sup>5</sup>,

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<sup>1</sup> Bauxite includes but is not limited to items falling under the following ten-digit Chinese Commodity Codes, as listed in Attachment 1 of Notice "2009 Export Licensing Management Commodities List" (Ministry of Commerce and General Administration of Customs, Notice (2008) No. 100, January 1, 2009) ("2009 Export Licensing List") and/or the following eight-digit HS numbers as listed in Table 7 of Notice Regarding the 2009 Tariff Implementation Program (State Council Tariff Policy Commission, shuiweihui (2008) No. 40, January 1, 2009) ("2009 Export Duty List"): 2508300000/25083000, 2606000000/26060000, 26204000.

<sup>2</sup> Coke includes but is not limited to items falling under the following ten-digit Chinese Commodity Codes as listed in the 2009 Export Licensing List and/or the eight-digit HS numbers as listed in the 2009 Export Duty List: 2704001000/27040010.

<sup>3</sup> Fluorspar includes but is not limited to items falling under the following ten-digit Chinese Commodity Codes as listed in the 2009 Export Licensing List and/or the eight-digit HS numbers as listed in the 2009 Export Duty List: 2529210000/25292100, 2529220000/25292200.

<sup>4</sup> Magnesium includes but is not limited to items falling under the following ten-digit Chinese Commodity Codes as listed in the 2009 Export Licensing List and/or the eight-digit HS numbers as listed in the 2009 Export Duty List: 81041100, 81041900, 81042000.

<sup>5</sup> Manganese includes but is not limited to items falling under the following ten-digit Chinese Commodity Codes as listed in the 2009 Export Licensing List and/or the eight-digit HS numbers as listed in the 2009 Export Duty List: 26020000, 8111001010/81110010, 8111001090/81110010.

silicon carbide<sup>6</sup>, silicon metal<sup>7</sup>, yellow phosphorus<sup>8</sup>, and zinc<sup>9</sup> (the "materials"). The United States held consultations with China on 31 July 2009, and 1-2 September 2009. Those consultations unfortunately did not resolve the dispute.

## I. Export Quotas

China subjects the exportation of bauxite, coke, fluorspar, silicon carbide, and zinc to quantitative restrictions such as quotas.

The United States understands that these Chinese measures are reflected in, among others:

- Foreign Trade Law of the People's Republic of China (adopted at the 8<sup>th</sup> Session of the Standing Committee of the Tenth National People's Congress on April 6, 2004, promulgated on July 1, 2004)
- Regulation of the People's Republic of China on the Administration of the Import and Export of Goods (passed at the forty-sixth executive meeting of the State Council on October 31, 2001, January 1, 2002)
- Measures for the Administration of License for the Export of Goods (Order of the Ministry of Commerce (2008) No. 11, July 1, 2008)
- Measures for the Administration of Export Commodities Quotas (Order of the Ministry of Foreign Trade and Economic Cooperation No. 12, adopted on December 20, 2001, January 1, 2002)
- Measures of Quota Bidding for Export Commodities (Decree of the Ministry of Foreign Trade and Economic Cooperation No. 11, adopted on December 20, 2001, January 1, 2002)
- Measures for the Administration of the Organs for Issuing the Licenses of Import and Export Commodities (Ministry of Foreign Trade and Economic Cooperation, wajingmaopeiguanhanzi (1999) No. 68, September 21, 1999)
- Implementation Rules of Export Quota Bidding for Industrial Products (Ministry of Foreign Trade and Economic Cooperation, November 8, 2001)

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<sup>6</sup> Silicon carbide includes but is not limited to items falling under the following ten-digit Chinese Commodity Codes as listed in the 2009 Export Licensing List and/or the eight-digit HS numbers as listed in the 2009 Export Duty List: 2849200000, 3824909910.

<sup>7</sup> Silicon metal includes but is not limited to items falling under the following ten-digit Chinese Commodity Codes as listed in the 2009 Export Licensing List and/or the eight-digit HS numbers as listed in the 2009 Export Duty List: 28046900.

<sup>8</sup> Yellow phosphorus includes but is not limited to items falling under the following ten-digit Chinese Commodity Codes as listed in the 2009 Export Licensing List and/or the eight-digit HS numbers as listed in the 2009 Export Duty List: 28047010.

<sup>9</sup> Zinc includes but is not limited to items falling under the following ten-digit Chinese Commodity Codes as listed in the 2009 Export Licensing List and/or the eight-digit HS numbers as listed in the 2009 Export Duty List: 2608000001/26080000, 2608000090/26080000, 79011111000/790111100, 7901119000/79011190, 7901120000/79011200, 7901200000/79012000, 79020000, 26201100, 26201900.

- Working Rules on Issuing Export Licenses (Ministry of Commerce, shangpeifa (2008) No. 398, October 9, 2008)
- Rules on the Administration of Import and Export License Certificates (Ministry of Foreign Trade and Economic Cooperation, wajjingmaopeizi (1999) No. 87, December 6, 1999)
- Notice Regarding 2009 Export Quota Amounts for Agricultural and Industrial Products (Ministry of Commerce, Notice (2008) No. 83, January 1, 2009)
- Notice Regarding Passing Down the 2009 First Batch Regular Trade Coke Export Quota (Ministry of Commerce, shangmaohan (2008) No. 140, January 1, 2009)
- 2009 Coke Export Quota Declaration Conditions and Declaration Procedures (Ministry of Commerce, Notice (2008) No. 76, October 13, 2008)
- Notice "2009 Export Licensing Management Commodities List" (Ministry of Commerce and General Administration of Customs, Notice (2008) No. 100, January 1, 2009)
- Announcement of the Ministry of Commerce Issuing the "2009 Graded License-Issuing List of Commodities Subject to Export License Administration" (Ministry of Commerce, Notice (2008) No. 124, January 1, 2009)
- Announcement Regarding Printing "Working Rules on Issuing Export Licenses" (Ministry of Commerce, shangpeifa (2008) No. 398, October 9, 2008)
- Announcement of Ministry of Commerce on Matters regarding the First Bidding for Export Quotas of Industrial Products in 2009 (Ministry of Commerce, Announcement (2008) No. 85, October 30, 2008)
- Announcement of Ministry of Commerce on the Notice for the Second Invitation for the Bidding for Industrial Product Export Quotas in 2009 (Ministry of Commerce, Announcement (2009) No. 42, June 9, 2009)
- Circular of the Ministry of Foreign Trade and Economic Cooperation on Distribution of the "Implementation Rules of Export Quota Bidding for Industrial Products" (Ministry of Foreign Trade and Economic Cooperation, issued on November 8, 2001)
- Quotas of Fluorspar Lump (Powder) of 2009 (Committee for the Invitation for bid for Export Commodity Quotas, December 11, 2008)
- Quotas of Bauxite of 2009 (Committee for the Invitation for bid for Export Commodity Quotas, December 10, 2008)
- Quotas of Silicon Carbide of 2009 (Committee for the Invitation for bid for Export Commodity Quotas, December 11, 2008)

- Announcement on the Second Invitation for the Bidding of Select Industrial Product Export Quotas in 2009 (Committee for the Invitation for bid for Export Commodity Quotas, September 16, 2009)
- Quotas of Silicon Carbide of 2009, Second Round (Committee for the Invitation for bid for Export Commodity Quotas, September 16, 2009)
- Notice Regarding Passing Down the 2009 Second Batch Regular Trade Coke and Rare Earth Export Quota (Ministry of Commerce, shangzihan (2009) No. 73, September 8, 2009)
- Notice Regarding Announcement of the 2010 Export Quota Amounts for Agricultural and Industrial Products (Ministry of Commerce, Notice (2009) No. 88, October 29, 2009)
- as well as any amendments or extensions; related measures; replacement measures; renewal measures; and implementing measures.

The United States considers that these measures are inconsistent with Article XI:1 of the GATT 1994 as well as China's obligations under the provisions of paragraph 1.2 of Part I of the *Protocol on the Accession of the People's Republic of China* (WT/L/432) ("Accession Protocol"), which incorporates commitments in paragraphs 162 and 165 of the *Working Party Report on the Accession of China* (WT/MIN(01)/3) ("Working Party Report").

## II. Export Duties

China subjects the materials to export duties.

China imposes export duty rates, "temporary" export duty rates, and/or "special" export duty rates of various magnitudes on bauxite, coke, fluorspar, magnesium, manganese, silicon metal, yellow phosphorus, and zinc. These export duties are imposed either on materials that are not listed in Annex 6 of the Accession Protocol, or on materials that are listed in Annex 6 of the Accession Protocol, but at rates that exceed the maximum rates designated in Annex 6.

In addition, as discussed in Section III below, China allocates the quotas<sup>10</sup> imposed on the exportation of bauxite, fluorspar, and silicon carbide through a bidding system. In connection with the administration of this bidding system, China requires enterprises to pay a charge in order to export these materials. However, bauxite, fluorspar, and silicon carbide are not listed in Annex 6 of the Accession Protocol.

The United States understands that these Chinese measures are reflected in, among others:

- Customs Law of the People's Republic of China (adopted at the 19<sup>th</sup> Meeting of the Standing Committee of the Sixth National People's Congress on January 22, 1987, amended July 8, 2000)

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<sup>10</sup> Discussed in Section I above.

- Regulations of the People's Republic of China on Import and Export Duties (Order of the State Council (2003) No. 392, adopted at the 26<sup>th</sup> executive meeting of the State Council on October 29, 2003, January 1, 2004)
- Notice Regarding the 2009 Tariff Implementation Program (State Council Tariff Policy Commission, shuiweihui (2008) No. 40, January 1, 2009)
- Foreign Trade Law of the People's Republic of China (adopted at the 8<sup>th</sup> Session of the Standing Committee of the Tenth National People's Congress on April 6, 2004, promulgated on July 1, 2004)
- Regulation of the People's Republic of China on the Administration of the Import and Export of Goods (passed at the forty-sixth executive meeting of the State Council on October 31, 2001, January 1, 2002)
- Measures for the Administration of License for the Export of Goods (Order of the Ministry of Commerce (2008) No. 11, July 1, 2008)
- Measures of Quota Bidding for Export Commodities (Decree of the Ministry of Foreign Trade and Economic Cooperation No. 11, adopted on December 20, 2001, January 1, 2002)
- Implementation Rules of Export Quota Bidding for Industrial Products (Ministry of Foreign Trade and Economic Cooperation, November 8, 2001)
- Notice Regarding 2009 Export Quota Amounts for Agricultural and Industrial Products (Ministry of Commerce, Notice (2008) No. 83, January 1, 2009)
- Notice "2009 Export Licensing Management Commodities List" (Ministry of Commerce and General Administration of Customs, Notice (2008) No. 100, January 1, 2009)
- Announcement of Ministry of Commerce on Matters regarding the First Bidding for Export Quotas of Industrial Products in 2009 (Ministry of Commerce, Announcement (2008) No. 85, October 30, 2008)
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- Circular of the Ministry of Foreign Trade and Economic Cooperation on Distribution of the "Implementation Rules of Export Quota Bidding for Industrial Products" (Ministry of Foreign Trade and Economic Cooperation, issued on November 8, 2001)
- Quotas of Fluorspar Lump (Powder) of 2009 (Committee for the Invitation for bid for Export Commodity Quotas, December 11, 2008)
- Quotas of Bauxite of 2009 (Committee for the Invitation for bid for Export Commodity Quotas, December 10, 2008)

- Quotas of Silicon Carbide of 2009 (Committee for the Invitation for bid for Export Commodity Quotas, December 11, 2008)
- Announcement on the Second Invitation for the Bidding of Select Industrial Product Export Quotas in 2009 (Committee for the Invitation for bid for Export Commodity Quotas, September 16, 2009)
- Quotas of Silicon Carbide of 2009, Second Round (Committee for the Invitation for bid for Export Commodity Quotas, September 16, 2009)
- Notice Regarding Announcement of the 2010 Export Quota Amounts for Agricultural and Industrial Products (Ministry of Commerce, Notice (2009) No. 88, October 29, 2009)
- as well as any amendments or extensions; related measures; replacement measures; renewal measures; and implementing measures.

The United States considers that these measures are inconsistent with paragraph 11.3 of Part I of the Accession Protocol, as well as China's obligations under the provisions of paragraph 1.2 of Part I of the Accession Protocol, which incorporates commitments referred to in paragraph 342 of the Working Party Report.

### **III. Additional Restraints Imposed on Exportation**

In addition to the export quotas and export duties discussed in Sections I and II above, China imposes other restraints on the exportation of the materials, administers its measures in a manner that is not uniform, impartial, and reasonable, 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 discussed in Section I above, 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.

China allocates the export quotas imposed on bauxite, fluorspar, and silicon carbide discussed in Section I above, through a bidding system. China administers the requirements and procedures for this bidding system 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 this bidding system, China also requires foreign-invested enterprises to satisfy certain criteria in order to export these materials that Chinese enterprises need not satisfy. Further, China requires enterprises to pay a charge in order to export these materials that is excessive and imposes excessive formalities on the exportation of these materials.

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.

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 discussed in Section I, as an additional restraint on the exportation of those materials.

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. Further, through its ministries and other organizations under the State Council as well as chambers of commerce and industry associations, China administers the price requirements in a manner that restricts exports and is not uniform, impartial, and reasonable. China also does not publish certain measures relating to these requirements in a manner that enables governments and traders to become acquainted with them.

The United States understands that these Chinese measures are reflected in, among others:

- Foreign Trade Law of the People's Republic of China (adopted at the 8<sup>th</sup> Session of the Standing Committee of the Tenth National People's Congress on April 6, 2004, promulgated on July 1, 2004)
- Regulation of the People's Republic of China on the Administration of the Import and Export of Goods (passed at the forty-sixth executive meeting of the State Council on October 31, 2001, January 1, 2002)
- Measures for the Administration of License for the Export of Goods (Order of the Ministry of Commerce (2008) No. 11, July 1, 2008)
- Measures for the Administration of Export Commodities Quotas (Order of the Ministry of Foreign Trade and Economic Cooperation No. 12, adopted on December 20, 2001, January 1, 2002)
- Measures of Quota Bidding for Export Commodities (Decree of the Ministry of Foreign Trade and Economic Cooperation No. 11, adopted on December 20, 2001, January 1, 2002)
- 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)
- Working Rules on Issuing Export Licenses (Ministry of Commerce, shangpeifa (2008) No. 398, October 9, 2008)
- Rules on the Administration of Import and Export License Certificates (Ministry of Foreign Trade and Economic Cooperation, waijingmaopeizi (1999) No. 87, December 6, 1999)
- Implementation Rules of Export Quota Bidding for Industrial Products (Ministry of Foreign Trade and Economic Cooperation, November 8, 2001)

- Notice Regarding 2009 Export Quota Amounts for Agricultural and Industrial Products (Ministry of Commerce, Notice (2008) No. 83, January 1, 2009)
- Notice Regarding Passing Down the 2009 First Batch Regular Trade Coke Export Quota (Ministry of Commerce, shangmaohan (2008) No. 140, January 1, 2009)
- 2009 Coke Export Quota Declaration Conditions and Declaration Procedures (Ministry of Commerce, Notice (2008) No. 76, October 13, 2008)
- Notice "2009 Export Licensing Management Commodities List" (Ministry of Commerce and General Administration of Customs, Notice (2008) No. 100, January 1, 2009)
- Announcement of the Ministry of Commerce Issuing the "2009 Graded License-Issuing List of Commodities Subject to Export License Administration" (Ministry of Commerce, Notice (2008) No. 124, January 1, 2009)
- Announcement Regarding Printing "Working Rules on Issuing Export Licenses" (Ministry of Commerce, shangpeifa (2008) No. 398, October 9, 2008)
- Announcement of Ministry of Commerce on Matters regarding the First Bidding for Export Quotas of Industrial Products in 2009 (Ministry of Commerce, Announcement (2008) No. 85, October 30, 2008)
- Announcement of Ministry of Commerce on the Notice for the Second Invitation for the Bidding for Industrial Product Export Quotas in 2009 (Ministry of Commerce, Announcement (2009) No. 42, June 9, 2009)
- Circular of the Ministry of Foreign Trade and Economic Cooperation on Distribution of the "Implementation Rules of Export Quota Bidding for Industrial Products" (Ministry of Foreign Trade and Economic Cooperation, issued on November 8, 2001)
- Quotas of Fluorspar Lump (Powder) of 2009 (Committee for the Invitation for bid for Export Commodity Quotas, December 11, 2008)
- Quotas of Bauxite of 2009 (Committee for the Invitation for bid for Export Commodity Quotas, December 10, 2008)
- Quotas of Silicon Carbide of 2009 (Committee for the Invitation for bid for Export Commodity Quotas, December 11, 2008)
- Announcement on the Second Invitation for the Bidding of Select Industrial Product Export Quotas in 2009 (Committee for the Invitation for bid for Export Commodity Quotas, September 16, 2009)
- Quotas of Silicon Carbide of 2009, Second Round (Committee for the Invitation for Bid for Export Commodity Quotas, September 16, 2009)

- Notice Regarding Passing Down the 2009 Second Batch Regular Trade Coke and Rare Earth Export Quota (Ministry of Commerce, ShangZiHan (2009) No. 73, September 8, 2009)
- Notice Regarding Announcement of the 2010 Export Quota Amounts for Agricultural and Industrial Products (Ministry of Commerce, Notice (2009) No. 88, October 29, 2009)
- Charter of the China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters
- Charter of the China Coking Industry Association
- Measures for the Administration over Foreign Trade and Economic Social Organizations (Ministry of Foreign Trade and Economic Cooperation, February 26, 1991)
- 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, September 23, 1994)
- 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)
- 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, December 30, 2003)
- Online Verification and Certification Operating Steps (China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters)
- Rules for Coordination with Respect to Customs Price Review of Export Products, (Ministry of Foreign Trade and Economic Cooperation guanzonghanzi No. 21, 1997)
- Notice of the Rules on Price Reviews of Export Products by the Customs, (Ministry of Foreign Trade and Economic Cooperation guanzonghanzi No. 21, 1997)
- Notice on the Issuance of "Various Provisions on the Strengthening of Export Product Coordination and Management" (Ministry of Foreign Economic Relations and Trade, jinchufa (1991) No. 52, February 22, 1991)
- "Various Provisions on the Strengthening of Export Product Coordination and Management" (Ministry of Foreign Economic Relations and Trade, jinchufa (1991) No. 52, February 22, 1991)
- 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)

- as well as any amendments or extensions; related measures; replacement measures; renewal measures; and implementing measures.

The United States considers that these measures are inconsistent with Article VIII:1(a) and VIII:4, Article X:1 and X:3(a), and Article XI:1 of the GATT 1994 and paragraphs 2(A)2, 5.1, 5.2 and 8.2 of Part I of the Accession Protocol, as well as China's obligations under the provisions of paragraph 1.2 of Part I of the Accession Protocol, which incorporates commitments in paragraphs 83, 84, 162, and 165 of the Working Party Report.

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Accordingly, the United States respectfully requests that, pursuant to Article 6 of the DSU, the Dispute Settlement Body establish a panel to examine this matter, with the standard terms of reference as set out in Article 7.1 of the DSU.

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ANNEX II

**WORLD TRADE  
ORGANIZATION**

**WT/DS395/7**  
9 November 2009

(09-5567)

Original: English

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

Request for the Establishment of a Panel by the European Communities

The following communication, dated 4 November 2009, from the delegation of the European Communities to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 23 June 2009, the European Communities requested consultations with the Government of the People's Republic of China ("China") pursuant to Articles 1 and 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Article XXII of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") with respect to China's restraints on the exportation from China of various forms of bauxite<sup>1</sup>, coke<sup>2</sup>, fluorspar<sup>3</sup>, magnesium<sup>4</sup>, manganese<sup>5</sup>,

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<sup>1</sup> Bauxite includes but is not limited to items falling under the following ten-digit Chinese Commodity Codes, as listed in Attachment 1 of Notice "2009 Export Licensing Management Commodities List" (Ministry of Commerce and General Administration of Customs, Notice (2008) No. 100, January 1, 2009) ("2009 Export Licensing List") and/or the following eight-digit HS numbers as listed in Table 7 of Notice Regarding the 2009 Tariff Implementation Program (State Council Tariff Policy Commission, shuiweihui (2008) No. 40, January 1, 2009) ("2009 Export Duty List"): 2508300000/25083000, 2606000000/26060000, 26204000.

<sup>2</sup> Coke includes but is not limited to items falling under the following ten-digit Chinese Commodity Codes as listed in the 2009 Export Licensing List and/or the eight-digit HS numbers as listed in the 2009 Export Duty List: 2704001000/27040010.

<sup>3</sup> Fluorspar includes but is not limited to items falling under the following ten-digit Chinese Commodity Codes as listed in the 2009 Export Licensing List and/or the eight-digit HS numbers as listed in the 2009 Export Duty List: 2529210000/25292100, 2529220000/25292200.

<sup>4</sup> Magnesium includes but is not limited to items falling under the following ten-digit Chinese Commodity Codes as listed in the 2009 Export Licensing List and/or the eight-digit HS numbers as listed in the 2009 Export Duty List: 81041100, 81041900, 81042000.

<sup>5</sup> Manganese includes but is not limited to items falling under the following ten-digit Chinese Commodity Codes as listed in the 2009 Export Licensing List and/or the eight-digit HS numbers as listed in the 2009 Export Duty List: 26020000, 8111001010/81110010, 8111001090/81110010.

silicon carbide<sup>6</sup>, silicon metal<sup>7</sup>, yellow phosphorus<sup>8</sup>, and zinc<sup>9</sup> (the "materials"). The European Communities held consultations with China on July 31, 2009, and September 1-2, 2009. Those consultations unfortunately did not resolve the dispute.

## I. Export Quotas

China subjects the exportation of bauxite, coke, fluorspar, silicon carbide, and zinc to quantitative restrictions such as quotas.

The European Communities understands that these Chinese measures are reflected in, among others:

- Foreign Trade Law of the People's Republic of China (adopted at the 8<sup>th</sup> Session of the Standing Committee of the Tenth National People's Congress on April 6, 2004, promulgated on July 1, 2004)
- Regulation of the People's Republic of China on the Administration of the Import and Export of Goods (passed at the forty-sixth executive meeting of the State Council on October 31, 2001, January 1, 2002)
- Measures for the Administration of License for the Export of Goods (Order of the Ministry of Commerce (2008) No. 11, July 1, 2008)
- Measures for the Administration of Export Commodities Quotas (Order of the Ministry of Foreign Trade and Economic Cooperation No. 12, adopted on December 20, 2001, January 1, 2002)
- Measures of Quota Bidding for Export Commodities (Decree of the Ministry of Foreign Trade and Economic Cooperation No. 11, adopted on December 20, 2001, January 1, 2002)
- Measures for the Administration of the Organs for Issuing the Licenses of Import and Export Commodities (Ministry of Foreign Trade and Economic Cooperation, wajingmaopeiguanhanzi (1999) No. 68, September 21, 1999)
- Implementation Rules of Export Quota Bidding for Industrial Products (Ministry of Foreign Trade and Economic Cooperation, November 8, 2001)

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<sup>6</sup> Silicon carbide includes but is not limited to items falling under the following ten-digit Chinese Commodity Codes as listed in the 2009 Export Licensing List and/or the eight-digit HS numbers as listed in the 2009 Export Duty List: 2849200000, 3824909910.

<sup>7</sup> Silicon metal includes but is not limited to items falling under the following ten-digit Chinese Commodity Codes as listed in the 2009 Export Licensing List and/or the eight-digit HS numbers as listed in the 2009 Export Duty List: 28046900.

<sup>8</sup> Yellow phosphorus includes but is not limited to items falling under the following ten-digit Chinese Commodity Codes as listed in the 2009 Export Licensing List and/or the eight-digit HS numbers as listed in the 2009 Export Duty List: 28047010.

<sup>9</sup> Zinc includes but is not limited to items falling under the following ten-digit Chinese Commodity Codes as listed in the 2009 Export Licensing List and/or the eight-digit HS numbers as listed in the 2009 Export Duty List: 2608000001/26080000, 2608000090/26080000, 79011111000/7901111100, 7901119000/79011190, 7901120000/79011200, 7901200000/79012000, 79020000, 26201100, 26201900.

- Working Rules on Issuing Export Licenses (Ministry of Commerce, shangpeifa (2008) No. 398, October 9, 2008)
- Rules on the Administration of Import and Export License Certificates (Ministry of Foreign Trade and Economic Cooperation, wajjingmaopeizi (1999) No. 87, December 6, 1999)
- Notice Regarding 2009 Export Quota Amounts for Agricultural and Industrial Products (Ministry of Commerce, Notice (2008) No. 83, January 1, 2009)
- Notice Regarding Passing Down the 2009 First Batch Regular Trade Coke Export Quota (Ministry of Commerce, shangmaohan (2008) No. 140, January 1, 2009)
- 2009 Coke Export Quota Declaration Conditions and Declaration Procedures (Ministry of Commerce, Notice (2008) No. 76, October 13, 2008)
- Notice "2009 Export Licensing Management Commodities List" (Ministry of Commerce and General Administration of Customs, Notice (2008) No. 100, January 1, 2009)
- Announcement of the Ministry of Commerce Issuing the "2009 Graded License-Issuing List of Commodities Subject to Export License Administration" (Ministry of Commerce, Notice (2008) No. 124, January 1, 2009)
- Announcement Regarding Printing "Working Rules on Issuing Export Licenses" (Ministry of Commerce, shangpeifa (2008) No. 398, October 9, 2008)
- Announcement of Ministry of Commerce on Matters regarding the First Bidding for Export Quotas of Industrial Products in 2009 (Ministry of Commerce, Announcement (2008) No. 85, October 30, 2008)
- Announcement of Ministry of Commerce on the Notice for the Second Invitation for the Bidding for Industrial Product Export Quotas in 2009 (Ministry of Commerce, Announcement (2009) No. 42, June 9, 2009)
- Circular of the Ministry of Foreign Trade and Economic Cooperation on Distribution of the "Implementation Rules of Export Quota Bidding for Industrial Products" (Ministry of Foreign Trade and Economic Cooperation, issued on November 8, 2001)
- Quotas of Fluorspar Lump (Powder) of 2009 (Committee for the Invitation for bid for Export Commodity Quotas, December 11, 2008)
- Quotas of Bauxite of 2009 (Committee for the Invitation for bid for Export Commodity Quotas, December 10, 2008)
- Quotas of Silicon Carbide of 2009 (Committee for the Invitation for bid for Export Commodity Quotas, December 11, 2008)

- Announcement on the Second Invitation for the Bidding of Select Industrial Product Export Quotas in 2009 (Committee for the Invitation for bid for Export Commodity Quotas, September 16, 2009)
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- Notice Regarding Passing Down the 2009 Second Batch Regular Trade Coke and Rare Earth Export Quota (Ministry of Commerce, shangzihan (2009) No. 73, September 8, 2009)
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- as well as any amendments or extensions; related measures; replacement measures; renewal measures; and implementing measures.

The European Communities considers that these measures are inconsistent with Article XI:1 of the GATT 1994 as well as China's obligations under the provisions of paragraph 1.2 of Part I of the *Protocol on the Accession of the People's Republic of China* (WT/L/432) ("Accession Protocol"), which incorporates commitments in paragraphs 162 and 165 of the *Working Party Report on the Accession of China* (WT/MIN(01)/3) ("Working Party Report").

## II. Export Duties

China subjects the materials to export duties.

China imposes export duty rates, "temporary" export duty rates, and/or "special" export duty rates of various magnitudes on bauxite, coke, fluorspar, magnesium, manganese, silicon metal, yellow phosphorus, and zinc. These export duties are imposed either on materials that are not listed in Annex 6 of the Accession Protocol, or on materials that are listed in Annex 6 of the Accession Protocol, but at rates that exceed the maximum rates designated in Annex 6.

In addition, China allocates the quotas<sup>10</sup> imposed on the exportation of bauxite, fluorspar, and silicon carbide through a bidding system. In connection with the administration of this bidding system, China requires enterprises to pay a charge in order to export these materials. However, bauxite, fluorspar, and silicon carbide are not listed in Annex 6 of the Accession Protocol.

The European Communities understands that these Chinese measures are reflected in, among others:

- Customs Law of the People's Republic of China (adopted at the 19<sup>th</sup> Meeting of the Standing Committee of the Sixth National People's Congress on January 22, 1987, amended July 8, 2000)

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<sup>10</sup> Discussed in Section I above.

- Regulations of the People's Republic of China on Import and Export Duties (Order of the State Council (2003) No. 392, adopted at the 26<sup>th</sup> executive meeting of the State Council on October 29, 2003, January 1, 2004)
- Notice Regarding the 2009 Tariff Implementation Program (State Council Tariff Policy Commission, shuiweihui (2008) No. 40, January 1, 2009)
- Foreign Trade Law of the People's Republic of China (adopted at the 8<sup>th</sup> Session of the Standing Committee of the Tenth National People's Congress on April 6, 2004, promulgated on July 1, 2004)
- Regulation of the People's Republic of China on the Administration of the Import and Export of Goods (passed at the forty-sixth executive meeting of the State Council on October 31, 2001, January 1, 2002)
- Measures for the Administration of License for the Export of Goods (Order of the Ministry of Commerce (2008) No. 11, July 1, 2008)
- Measures of Quota Bidding for Export Commodities (Decree of the Ministry of Foreign Trade and Economic Cooperation No. 11, adopted on December 20, 2001, January 1, 2002)
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- Notice Regarding 2009 Export Quota Amounts for Agricultural and Industrial Products (Ministry of Commerce, Notice (2008) No. 83, January 1, 2009)
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- Announcement on the Second Invitation for the Bidding of Select Industrial Product Export Quotas in 2009 (Committee for the Invitation for bid for Export Commodity Quotas, September 16, 2009)
- Quotas of Silicon Carbide of 2009, Second Round (Committee for the Invitation for bid for Export Commodity Quotas, September 16, 2009)
- Notice Regarding Announcement of the 2010 Export Quota Amounts for Agricultural and Industrial Products (Ministry of Commerce, Notice (2009) No. 88, October 29, 2009)
- as well as any amendments or extensions; related measures; replacement measures; renewal measures; and implementing measures.

The European Communities considers that these measures are inconsistent with paragraph 11.3 of Part I of the Accession Protocol, as well as China's obligations under the provisions of paragraph 1.2 of Part I of the Accession Protocol, which incorporates commitments referred to in paragraph 342 of the Working Party Report.

### **III. Additional Restraints Imposed on Exportation**

In addition to the export quotas and export duties discussed in Sections I and II above, China imposes other restraints on the exportation of the materials, administers its measures in a manner that is not uniform, impartial, and reasonable, 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 discussed in Section I above, through its ministries and other organisations 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.

China allocates the export quotas imposed on bauxite, fluorspar, and silicon carbide discussed in Section I above, through a bidding system. China administers the requirements and procedures for this bidding system through its ministries and other organisations 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 this bidding system, China also requires foreign-invested enterprises to satisfy certain criteria in order to export these materials that Chinese enterprises need not satisfy.

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.

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 discussed in Section I, as an additional restraint on the exportation of those materials.

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. Further, through its ministries and other organisations under the State Council as well as chambers of commerce and industry associations, China administers the price requirements in a manner that restricts exports and is not uniform, impartial, and reasonable. China also does not publish certain measures relating to these requirements in a manner that enables governments and traders to become acquainted with them.

China also imposes excessive fees and formalities in relation to the exportation of the materials.

The European Communities understands that these Chinese measures are reflected in, among others:

- Foreign Trade Law of the People's Republic of China (adopted at the 8<sup>th</sup> Session of the Standing Committee of the Tenth National People's Congress on April 6, 2004, promulgated on July 1, 2004)
- Regulation of the People's Republic of China on the Administration of the Import and Export of Goods (passed at the forty-sixth executive meeting of the State Council on October 31, 2001, January 1, 2002)
- Measures for the Administration of License for the Export of Goods (Order of the Ministry of Commerce (2008) No. 11, July 1, 2008)
- Measures for the Administration of Export Commodities Quotas (Order of the Ministry of Foreign Trade and Economic Cooperation No. 12, adopted on December 20, 2001, January 1, 2002)
- Measures of Quota Bidding for Export Commodities (Decree of the Ministry of Foreign Trade and Economic Cooperation No. 11, adopted on December 20, 2001, January 1, 2002)
- Measures for the Administration of the Organs for Issuing the Licenses of Import and Export Commodities (Ministry of Foreign Trade and Economic Cooperation, wajjingmaopeiguanhanzi (1999) No. 68, September 21, 1999)
- Working Rules on Issuing Export Licenses (Ministry of Commerce, shangpeifa (2008) No. 398, October 9, 2008)
- Rules on the Administration of Import and Export License Certificates (Ministry of Foreign Trade and Economic Cooperation, wajjingmaopeizi (1999) No. 87, December 6, 1999)
- Implementation Rules of Export Quota Bidding for Industrial Products (Ministry of Foreign Trade and Economic Cooperation, November 8, 2001)

- Notice Regarding 2009 Export Quota Amounts for Agricultural and Industrial Products (Ministry of Commerce, Notice (2008) No. 83, January 1, 2009)
- Notice Regarding Passing Down the 2009 First Batch Regular Trade Coke Export Quota (Ministry of Commerce, shangmaohan (2008) No. 140, January 1, 2009)
- 2009 Coke Export Quota Declaration Conditions and Declaration Procedures (Ministry of Commerce, Notice (2008) No. 76, October 13, 2008)
- Notice "2009 Export Licensing Management Commodities List" (Ministry of Commerce and General Administration of Customs, Notice (2008) No. 100, January 1, 2009)
- Announcement of the Ministry of Commerce Issuing the "2009 Graded License-Issuing List of Commodities Subject to Export License Administration" (Ministry of Commerce, Notice (2008) No. 124, January 1, 2009)
- Announcement Regarding Printing "Working Rules on Issuing Export Licenses" (Ministry of Commerce, shangpeifa (2008) No. 398, October 9, 2008)
- Announcement of Ministry of Commerce on Matters regarding the First Bidding for Export Quotas of Industrial Products in 2009 (Ministry of Commerce, Announcement (2008) No. 85, October 30, 2008)
- Announcement of Ministry of Commerce on the Notice for the Second Invitation for the Bidding for Industrial Product Export Quotas in 2009 (Ministry of Commerce, Announcement (2009) No. 42, June 9, 2009)
- Circular of the Ministry of Foreign Trade and Economic Cooperation on Distribution of the "Implementation Rules of Export Quota Bidding for Industrial Products" (Ministry of Foreign Trade and Economic Cooperation, issued on November 8, 2001)
- Quotas of Fluorspar Lump (Powder) of 2009 (Committee for the Invitation for bid for Export Commodity Quotas, December 11, 2008)
- Quotas of Bauxite of 2009 (Committee for the Invitation for bid for Export Commodity Quotas, December 10, 2008)
- Quotas of Silicon Carbide of 2009 (Committee for the Invitation for bid for Export Commodity Quotas, December 11, 2008)
- Announcement on the Second Invitation for the Bidding of Select Industrial Product Export Quotas in 2009 (Committee for the Invitation for bid for Export Commodity Quotas, September 16, 2009)
- Quotas of Silicon Carbide of 2009, Second Round (Committee for the Invitation for Bid for Export Commodity Quotas, September 16, 2009)

- Notice Regarding Passing Down the 2009 Second Batch Regular Trade Coke and Rare Earth Export Quota (Ministry of Commerce, ShangZiHan (2009) No. 73, September 8, 2009)
- Notice Regarding Announcement of the 2010 Export Quota Amounts for Agricultural and Industrial Products (Ministry of Commerce, Notice (2009) No. 88, October 29, 2009)
- Charter of the China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters
- Charter of the China Coking Industry Association
- Measures for the Administration over Foreign Trade and Economic Social Organizations (Ministry of Foreign Trade and Economic Cooperation, February 26, 1991)
- 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, September 23, 1994)
- 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)
- 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, December 30, 2003)
- Online Verification and Certification Operating Steps (China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters)
- Rules for Coordination with Respect to Customs Price Review of Export Products, (Ministry of Foreign Trade and Economic Cooperation guanzonghanzi No. 21, 1997)
- Notice of the Rules on Price Reviews of Export Products by the Customs, (Ministry of Foreign Trade and Economic Cooperation guanzonghanzi No. 21, 1997)
- Notice on the Issuance of "Various Provisions on the Strengthening of Export Product Coordination and Management" (Ministry of Foreign Economic Relations and Trade, jinchufa (1991) No. 52, February 22, 1991)
- "Various Provisions on the Strengthening of Export Product Coordination and Management" (Ministry of Foreign Economic Relations and Trade, jinchufa (1991) No. 52, February 22, 1991)
- 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)

- as well as any amendments or extensions; related measures; replacement measures; renewal measures; and implementing measures.

The European Communities considers that these measures are inconsistent with Article VIII:1 and VIII:4, Article X:1 and X:3(a), and Article XI:1 of the GATT 1994 and paragraphs 2(A)2, 5.1, 5.2 and 8.2 of Part I of the Accession Protocol, as well as China's obligations under the provisions of paragraph 1.2 of Part I of the Accession Protocol, which incorporates commitments in paragraphs 83, 84, 162, and 165 of the Working Party Report.

\* \* \* \* \*

Accordingly, the European Communities respectfully requests that, pursuant to Article 6 of the DSU, the Dispute Settlement Body establish a panel to examine this matter, with the standard terms of reference as set out in Article 7.1 of the DSU.

The European Communities asks that this request be placed on the agenda for the meeting of the Dispute Settlement Body to be held on 19 November 2009.

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ANNEX III

**WORLD TRADE  
ORGANIZATION**

**WT/DS398/6**  
9 November 2009

(09-5568)

Original: English

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

Request for the Establishment of a Panel by Mexico

The following communication, dated 4 November 2009, from the delegation of Mexico to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 21 August 2009, Mexico requested consultations with the Government of the People's Republic of China ("China") pursuant to Articles 1 and 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Article XXII of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") with respect to China's restraints on the exportation from China of various forms of bauxite<sup>1</sup>, coke<sup>2</sup>, fluorspar<sup>3</sup>, magnesium<sup>4</sup>, manganese<sup>5</sup>, silicon carbide<sup>6</sup>, silicon metal<sup>7</sup>, yellow phosphorus<sup>8</sup>, and zinc<sup>9</sup> (the "materials"). Mexico held

<sup>1</sup> Bauxite includes but is not limited to items falling under the following ten-digit Chinese Commodity Codes, as listed in Attachment 1 of Notice "2009 Export Licensing Management Commodities List" (Ministry of Commerce and General Administration of Customs, Notice (2008) No. 100, January 1, 2009) ("2009 Export Licensing List") and/or the following eight-digit HS numbers as listed in Table 7 of Notice Regarding the 2009 Tariff Implementation Program (State Council Tariff Policy Commission, shuiweihui (2008) No. 40, January 1, 2009) ("2009 Export Duty List"): 2508300000/25083000, 2606000000/26060000, 26204000.

<sup>2</sup> Coke includes but is not limited to items falling under the following ten-digit Chinese Commodity Codes as listed in the 2009 Export Licensing List and/or the eight-digit HS numbers as listed in the 2009 Export Duty List: 2704001000/27040010.

<sup>3</sup> Fluorspar includes but is not limited to items falling under the following ten-digit Chinese Commodity Codes as listed in the 2009 Export Licensing List and/or the eight-digit HS numbers as listed in the 2009 Export Duty List: 2529210000/25292100, 2529220000/25292200.

<sup>4</sup> Magnesium includes but is not limited to items falling under the following ten-digit Chinese Commodity Codes as listed in the 2009 Export Licensing List and/or the eight-digit HS numbers as listed in the 2009 Export Duty List: 81041100, 81041900, 81042000.

<sup>5</sup> Manganese includes but is not limited to items falling under the following ten-digit Chinese Commodity Codes as listed in the 2009 Export Licensing List and/or the eight-digit HS numbers as listed in the 2009 Export Duty List: 26020000, 8111001010/81110010, 8111001090/81110010.

<sup>6</sup> Silicon carbide includes but is not limited to items falling under the following ten-digit Chinese Commodity Codes as listed in the 2009 Export Licensing List and/or the eight-digit HS numbers as listed in the 2009 Export Duty List: 2849200000, 3824909910.

consultations with China on September 1-2, 2009. Those consultations unfortunately did not resolve the dispute.

## I. Export Quotas

China subjects the exportation of bauxite, coke, fluorspar, silicon carbide, and zinc to quantitative restrictions such as quotas.

Mexico understands that these Chinese measures are reflected in, among others:

- Foreign Trade Law of the People's Republic of China (adopted at the 8<sup>th</sup> Session of the Standing Committee of the Tenth National People's Congress on April 6, 2004, promulgated on July 1, 2004)
- Regulation of the People's Republic of China on the Administration of the Import and Export of Goods (passed at the forty-sixth executive meeting of the State Council on October 31, 2001, January 1, 2002)
- Measures for the Administration of License for the Export of Goods (Order of the Ministry of Commerce (2008) No. 11, July 1, 2008)
- Measures for the Administration of Export Commodities Quotas (Order of the Ministry of Foreign Trade and Economic Cooperation No. 12, adopted on December 20, 2001, January 1, 2002)
- Measures of Quota Bidding for Export Commodities (Decree of the Ministry of Foreign Trade and Economic Cooperation No. 11, adopted on December 20, 2001, January 1, 2002)
- 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)
- Implementation Rules of Export Quota Bidding for Industrial Products (Ministry of Foreign Trade and Economic Cooperation, November 8, 2001)
- Working Rules on Issuing Export Licenses (Ministry of Commerce, shangpeifa (2008) No. 398, October 9, 2008)

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<sup>7</sup> Silicon metal includes but is not limited to items falling under the following ten-digit Chinese Commodity Codes as listed in the 2009 Export Licensing List and/or the eight-digit HS numbers as listed in the 2009 Export Duty List: 28046900.

<sup>8</sup> Yellow phosphorus includes but is not limited to items falling under the following ten-digit Chinese Commodity Codes as listed in the 2009 Export Licensing List and/or the eight-digit HS numbers as listed in the 2009 Export Duty List: 28047010.

<sup>9</sup> Zinc includes but is not limited to items falling under the following ten-digit Chinese Commodity Codes as listed in the 2009 Export Licensing List and/or the eight-digit HS numbers as listed in the 2009 Export Duty List: 2608000001/26080000, 2608000090/26080000, 79011111000/790111100, 7901119000/79011190, 7901120000/79011200, 7901200000/79012000, 79020000, 26201100, 26201900.

- Rules on the Administration of Import and Export License Certificates (Ministry of Foreign Trade and Economic Cooperation, waijingmaopeizi (1999) No. 87, December 6, 1999)
- Notice Regarding 2009 Export Quota Amounts for Agricultural and Industrial Products (Ministry of Commerce, Notice (2008) No. 83, January 1, 2009)
- Notice Regarding Passing Down the 2009 First Batch Regular Trade Coke Export Quota (Ministry of Commerce, shangmaohan (2008) No. 140, January 1, 2009)
- 2009 Coke Export Quota Declaration Conditions and Declaration Procedures (Ministry of Commerce, Notice (2008) No. 76, October 13, 2008)
- Notice "2009 Export Licensing Management Commodities List" (Ministry of Commerce and General Administration of Customs, Notice (2008) No. 100, January 1, 2009)
- Announcement of the Ministry of Commerce Issuing the "2009 Graded License-Issuing List of Commodities Subject to Export License Administration" (Ministry of Commerce, Notice (2008) No. 124, January 1, 2009)
- Announcement Regarding Printing "Working Rules on Issuing Export Licenses" (Ministry of Commerce, shangpeifa (2008) No. 398, October 9, 2008)
- Announcement of Ministry of Commerce on Matters regarding the First Bidding for Export Quotas of Industrial Products in 2009 (Ministry of Commerce, Announcement (2008) No. 85, October 30, 2008)
- Announcement of Ministry of Commerce on the Notice for the Second Invitation for the Bidding for Industrial Product Export Quotas in 2009 (Ministry of Commerce, Announcement (2009) No. 42, June 9, 2009)
- Circular of the Ministry of Foreign Trade and Economic Cooperation on Distribution of the "Implementation Rules of Export Quota Bidding for Industrial Products" (Ministry of Foreign Trade and Economic Cooperation, issued on November 8, 2001)
- Quotas of Fluorspar Lump (Powder) of 2009 (Committee for the Invitation for bid for Export Commodity Quotas, December 11, 2008)
- Quotas of Bauxite of 2009 (Committee for the Invitation for bid for Export Commodity Quotas, December 10, 2008)
- Quotas of Silicon Carbide of 2009 (Committee for the Invitation for bid for Export Commodity Quotas, December 11, 2008)
- Announcement on the Second Invitation for the Bidding of Select Industrial Product Export Quotas in 2009 (Committee for the Invitation for bid for Export Commodity Quotas, September 16, 2009)

- Quotas of Silicon Carbide of 2009, Second Round (Committee for the Invitation for bid for Export Commodity Quotas, September 16, 2009)
- Notice Regarding Passing Down the 2009 Second Batch Regular Trade Coke and Rare Earth Export Quota (Ministry of Commerce, shangzihan (2009) No. 73, September 8, 2009)
- Notice Regarding Announcement of the 2010 Export Quota Amounts for Agricultural and Industrial Products (Ministry of Commerce, Notice (2009) No. 88, October 29, 2009)
- As well as any amendments or extensions; related measures; replacement measures; renewal measures; and implementing measures.

Mexico considers that these measures are inconsistent with Article XI:1 of the GATT 1994 as well as China's obligations under the provisions of paragraph 1.2 of Part I of the *Protocol on the Accession of the People's Republic of China* (WT/L/432) ("Accession Protocol"), which incorporates commitments in paragraphs 162 and 165 of the *Working Party Report on the Accession of China* (WT/MIN(01)/3) ("Working Party Report").

## II. Export Duties

China subjects the materials to export duties.

China imposes export duty rates, "temporary" export duty rates, and/or "special" export duty rates of various magnitudes on bauxite, coke, fluorspar, magnesium, manganese, silicon metal, yellow phosphorus, and zinc. These export duties are imposed either on materials that are not listed in Annex 6 of the Accession Protocol, or on materials that are listed in Annex 6 of the Accession Protocol, but at rates that exceed the maximum rates designated in Annex 6.

In addition, as discussed in Section III below, China allocates the quotas<sup>10</sup> imposed on the exportation of bauxite, fluorspar, and silicon carbide through a bidding system. In connection with the administration of this bidding system, China requires enterprises to pay a charge in order to export these materials. However, bauxite, fluorspar, and silicon carbide are not listed in Annex 6 of the Accession Protocol.

Mexico understands that these Chinese measures are reflected in, among others:

- Customs Law of the People's Republic of China (adopted at the 19<sup>th</sup> Meeting of the Standing Committee of the Sixth National People's Congress on January 22, 1987, amended July 8, 2000)
- Regulations of the People's Republic of China on Import and Export Duties (Order of the State Council (2003) No. 392, adopted at the 26<sup>th</sup> executive meeting of the State Council on October 29, 2003, January 1, 2004)
- Notice Regarding the 2009 Tariff Implementation Program (State Council Tariff Policy Commission, shuiweihui (2008) No. 40, January 1, 2009)

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<sup>10</sup> Discussed in Section I above.

- Foreign Trade Law of the People's Republic of China (adopted at the 8<sup>th</sup> Session of the Standing Committee of the Tenth National People's Congress on April 6, 2004, promulgated on July 1, 2004)
- Regulation of the People's Republic of China on the Administration of the Import and Export of Goods (passed at the forty-sixth executive meeting of the State Council on October 31, 2001, January 1, 2002)
- Measures for the Administration of License for the Export of Goods (Order of the Ministry of Commerce (2008) No. 11, July 1, 2008)
- Measures of Quota Bidding for Export Commodities (Decree of the Ministry of Foreign Trade and Economic Cooperation No. 11, adopted on December 20, 2001, January 1, 2002)
- Implementation Rules of Export Quota Bidding for Industrial Products (Ministry of Foreign Trade and Economic Cooperation, November 8, 2001)
- Notice Regarding 2009 Export Quota Amounts for Agricultural and Industrial Products (Ministry of Commerce, Notice (2008) No. 83, January 1, 2009)
- Notice "2009 Export Licensing Management Commodities List" (Ministry of Commerce and General Administration of Customs, Notice (2008) No. 100, January 1, 2009)
- Announcement of Ministry of Commerce on Matters regarding the First Bidding for Export Quotas of Industrial Products in 2009 (Ministry of Commerce, Announcement (2008) No. 85, October 30, 2008)
- Announcement of Ministry of Commerce on the Notice for the Second Invitation for the Bidding for Industrial Product Export Quotas in 2009 (Ministry of Commerce, Announcement (2009) No. 42, June 9, 2009)
- Circular of the Ministry of Foreign Trade and Economic Cooperation on Distribution of the "Implementation Rules of Export Quota Bidding for Industrial Products" (Ministry of Foreign Trade and Economic Cooperation, issued on November 8, 2001)
- Quotas of Fluorspar Lump (Powder) of 2009 (Committee for the Invitation for bid for Export Commodity Quotas, December 11, 2008)
- Quotas of Bauxite of 2009 (Committee for the Invitation for bid for Export Commodity Quotas, December 10, 2008)
- Quotas of Silicon Carbide of 2009 (Committee for the Invitation for bid for Export Commodity Quotas, December 11, 2008)
- Announcement on the Second Invitation for the Bidding of Select Industrial Product Export Quotas in 2009 (Committee for the Invitation for bid for Export Commodity Quotas, September 16, 2009)

- Quotas of Silicon Carbide of 2009, Second Round (Committee for the Invitation for bid for Export Commodity Quotas, September 16, 2009)
- Notice Regarding Announcement of the 2010 Export Quota Amounts for Agricultural and Industrial Products (Ministry of Commerce, Notice (2009) No. 88, October 29, 2009)
- As well as any amendments or extensions; related measures; replacement measures; renewal measures; and implementing measures.

Mexico considers that these measures are inconsistent with paragraph 11.3 of Part I of the Accession Protocol, as well as China's obligations under the provisions of paragraph 1.2 of Part I of the Accession Protocol, which incorporates commitments referred to in paragraph 342 of the Working Party Report.

### **III. Additional Restraints Imposed on Exportation**

In addition to the export quotas and export duties discussed in Sections I and II above, China imposes other restraints on the exportation of the materials, administers its measures in a manner that is not uniform, impartial, and reasonable, 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 discussed in Section I above, 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.

China allocates the export quotas imposed on bauxite, fluorspar, and silicon carbide discussed in Section I above, through a bidding system. China administers the requirements and procedures for this bidding system 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 this bidding system, China also requires foreign-invested enterprises to satisfy certain criteria in order to export these materials that Chinese enterprises need not satisfy. Further, China requires enterprises to pay a charge in order to export these materials that is excessive and imposes excessive formalities on the exportation of these materials.

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.

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 discussed in Section I, as an additional restraint on the exportation of those materials.

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. Further, through its ministries and other organizations under the State Council as well as chambers of commerce and industry associations, China administers the price requirements in a manner that restricts exports and is not uniform, impartial, and reasonable. China also does not publish certain measures relating to these requirements in a manner that enables governments and traders to become acquainted with them.

Mexico understands that these Chinese measures are reflected in, among others:

- Foreign Trade Law of the People's Republic of China (adopted at the 8<sup>th</sup> Session of the Standing Committee of the Tenth National People's Congress on April 6, 2004, promulgated on July 1, 2004)
- Regulation of the People's Republic of China on the Administration of the Import and Export of Goods (passed at the forty-sixth executive meeting of the State Council on October 31, 2001, January 1, 2002)
- Measures for the Administration of License for the Export of Goods (Order of the Ministry of Commerce (2008) No. 11, July 1, 2008)
- Measures for the Administration of Export Commodities Quotas (Order of the Ministry of Foreign Trade and Economic Cooperation No. 12, adopted on December 20, 2001, January 1, 2002)
- Measures of Quota Bidding for Export Commodities (Decree of the Ministry of Foreign Trade and Economic Cooperation No. 11, adopted on December 20, 2001, January 1, 2002)
- 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)
- Working Rules on Issuing Export Licenses (Ministry of Commerce, shangpeifa (2008) No. 398, October 9, 2008)
- Rules on the Administration of Import and Export License Certificates (Ministry of Foreign Trade and Economic Cooperation, waijingmaopeizi (1999) No. 87, December 6, 1999)
- Implementation Rules of Export Quota Bidding for Industrial Products (Ministry of Foreign Trade and Economic Cooperation, November 8, 2001)
- Notice Regarding 2009 Export Quota Amounts for Agricultural and Industrial Products (Ministry of Commerce, Notice (2008) No. 83, January 1, 2009)
- Notice Regarding Passing Down the 2009 First Batch Regular Trade Coke Export Quota (Ministry of Commerce, shangmaohan (2008) No. 140, January 1, 2009)

- 2009 Coke Export Quota Declaration Conditions and Declaration Procedures (Ministry of Commerce, Notice (2008) No. 76, October 13, 2008)
- Notice "2009 Export Licensing Management Commodities List" (Ministry of Commerce and General Administration of Customs, Notice (2008) No. 100, January 1, 2009)
- Announcement of the Ministry of Commerce Issuing the "2009 Graded License-Issuing List of Commodities Subject to Export License Administration" (Ministry of Commerce, Notice (2008) No. 124, January 1, 2009)
- Announcement Regarding Printing "Working Rules on Issuing Export Licenses" (Ministry of Commerce, shangpeifa (2008) No. 398, October 9, 2008)
- Announcement of Ministry of Commerce on Matters regarding the First Bidding for Export Quotas of Industrial Products in 2009 (Ministry of Commerce, Announcement (2008) No. 85, October 30, 2008)
- Announcement of Ministry of Commerce on the Notice for the Second Invitation for the Bidding for Industrial Product Export Quotas in 2009 (Ministry of Commerce, Announcement (2009) No. 42, June 9, 2009)
- Circular of the Ministry of Foreign Trade and Economic Cooperation on Distribution of the "Implementation Rules of Export Quota Bidding for Industrial Products" (Ministry of Foreign Trade and Economic Cooperation, issued on November 8, 2001)
- Quotas of Fluorspar Lump (Powder) of 2009 (Committee for the Invitation for bid for Export Commodity Quotas, December 11, 2008)
- Quotas of Bauxite of 2009 (Committee for the Invitation for bid for Export Commodity Quotas, December 10, 2008)
- Quotas of Silicon Carbide of 2009 (Committee for the Invitation for bid for Export Commodity Quotas, December 11, 2008)
- Announcement on the Second Invitation for the Bidding of Select Industrial Product Export Quotas in 2009 (Committee for the Invitation for bid for Export Commodity Quotas, September 16, 2009)
- Quotas of Silicon Carbide of 2009, Second Round (Committee for the Invitation for Bid for Export Commodity Quotas, September 16, 2009)
- Notice Regarding Passing Down the 2009 Second Batch Regular Trade Coke and Rare Earth Export Quota (Ministry of Commerce, ShangZiHan (2009) No. 73, September 8, 2009)
- Notice Regarding Announcement of the 2010 Export Quota Amounts for Agricultural and Industrial Products (Ministry of Commerce, Notice (2009) No. 88, October 29, 2009)

- Charter of the China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters
- Charter of the China Coking Industry Association
- Measures for the Administration over Foreign Trade and Economic Social Organizations (Ministry of Foreign Trade and Economic Cooperation, February 26, 1991)
- 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, September 23, 1994)
- 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)
- 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, December 30, 2003)
- Online Verification and Certification Operating Steps (China Chamber of Commerce of Metals, Minerals and Chemicals Importers and Exporters)
- Rules for Coordination with Respect to Customs Price Review of Export Products, (Ministry of Foreign Trade and Economic Cooperation guanzonghanzi No. 21, 1997)
- Notice of the Rules on Price Reviews of Export Products by the Customs, (Ministry of Foreign Trade and Economic Cooperation guanzonghanzi No. 21, 1997)
- Notice on the Issuance of "Various Provisions on the Strengthening of Export Product Coordination and Management" (Ministry of Foreign Economic Relations and Trade, jinchufa (1991) No. 52, February 22, 1991)
- "Various Provisions on the Strengthening of Export Product Coordination and Management" (Ministry of Foreign Economic Relations and Trade, jinchufa (1991) No. 52, February 22, 1991)
- 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)
- As well as any amendments or extensions; related measures; replacement measures; renewal measures; and implementing measures.

Mexico considers that these measures are inconsistent with Article VIII:1(a) and VIII:4, Article X:1 and X:3(a), and Article XI:1 of the GATT 1994 and paragraphs 2(A)2, 5.1, 5.2 and 8.2 of Part I of the Accession Protocol, as well as China's obligations under the provisions of paragraph 1.2

of Part I of the Accession Protocol, which incorporates commitments in paragraphs 83, 84, 162, and 165 of the Working Party Report.

Accordingly, Mexico respectfully requests that, pursuant to Article 6 of the DSU, the Dispute Settlement Body establish a panel to examine this matter, with the standard terms of reference as set out in Article 7.1 of the DSU.

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ANNEX IV

**WORLD TRADE  
ORGANIZATION**

**WT/DS394/11  
WT/DS395/11  
WT/DS398/10**  
2 September 2011  
(11-4301)

Original: English

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

Notification of an Appeal by China under Article 16.4 and Article 17  
of the Understanding on Rules and Procedures Governing the  
Settlement of Disputes (DSU), and under Rule 20(1)  
of the *Working Procedures for Appellate Review*

The following notification, dated 31 August 2011, from the Delegation of the People's Republic of China, is being circulated to Members.

1. Pursuant to Articles 16.4 and 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the *Working Procedures for Appellate Review* (WT/AB/WP/6, 16 August 2010), the People's Republic of China ("China") hereby notifies the Dispute Settlement Body ("DSB") of its decision to appeal certain issues of law and legal interpretations in the Panel Reports in *China – Measures Related to the Exportation of Various Raw Materials* (WT/DS394, WT/DS395, WT/DS398) ("Panel Report"). As set out in this notice of appeal, and pursuant to Article 17.13 of the DSU, China requests that the Appellate Body reverse or modify various legal findings and conclusions of the Panel, as a result of the errors identified below.

2. Pursuant to Rule 20(2)(d)(iii) of the *Working Procedures for Appellate Review*, this notice of appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to China's ability to refer to other paragraphs of the Panel Report in the context of its appeal.

**I. APPEAL OF THE PANEL'S FINDING THAT SECTION III OF THE COMPLAINANTS' PANEL REQUESTS "PRESENTS THE PROBLEM CLEARLY" BY PROVIDING SUFFICIENT CONNECTIONS BETWEEN THE 37 LISTED MEASURES AND THE 13 LISTED TREATY PROVISIONS**

3. The Panel erred in its interpretation and application of Article 6.2 of the DSU, in finding, in paragraph 77 of its Second Preliminary Ruling of 1 October 2010 and paragraph 7.3(b) of the Panel

Report, that Section III of the Complainants' Panel Requests<sup>1</sup> complies with the requirement to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly".

4. China requests that the Appellate Body reverse this finding, and find that Section III of the Panel Requests does not comply with Article 6.2 of the DSU, with the exception of the Complainants' claims under Article X:1 of the GATT 1994 regarding non-publication of measures concerning zinc.

5. As a consequence of this reversal, China also requests that the Appellate Body reverse the Panel findings regarding claims purportedly made by the Complainants on the basis of Section III of the Panel Requests, including the findings in paragraphs 7.669; 7.670; 7.678; 7.756; 7.807; 7.958; 7.1082; 7.1102; 7.1103; 8.4(a)-(b); 8.5(b); 8.6 (a)-(b); 8.11(a), (c), (e) and (f); 8.12(b); 8.13(a)-(b); 8.18(a)-(b); 8.19(b) and 8.20(a)-(b) of the Panel Report.

## **II. APPEAL OF THE PANEL'S DECISION TO MAKE RECOMMENDATIONS WITH RESPECT TO THE "SERIES OF MEASURES" THAT HAVE AN ONGOING EFFECT THROUGH ANNUAL REPLACEMENT MEASURES**

6. China appeals the Panel's recommendations in paragraphs 8.8; 8.15 and 8.22 of the Panel Report that China must bring its export duty and quota measures into conformity with its WTO obligations, to the extent that the Panel's recommendations apply to annual replacement measures regarding export quotas and export duties on products at issue in these disputes.

7. In making recommendations extending to measures excluded from the dispute, the Panel acted inconsistently with Article 7.1 of the DSU; failed to make an objective assessment of the matter under Article 11 of the DSU; and, made recommendations on measures that are not part of the matter, inconsistently with Article 19.1 of the DSU.

8. China requests that the Appellate Body reverse the Panel's recommendations in paragraphs 8.8; 8.15 and 8.22 of the Panel Report to the extent that they apply to annual replacement measures.

## **III. APPEAL OF THE PANEL'S FINDING THAT CHINA DOES NOT HAVE THE RIGHT TO INVOKE ARTICLE XX OF THE GATT 1994 IN DEFENSE OF A CLAIM UNDER PARAGRAPH 11.3 OF CHINA'S ACCESSION PROTOCOL**

9. China appeals the Panel's erroneous interpretation and application of Paragraphs 1.2 and 11.3 of China's *Accession Protocol*<sup>2</sup> and Paragraphs 170 and 342 of China's *Working Party Report*<sup>3</sup> as not according China the right to invoke Article XX of the GATT 1994 in defense of a claim under Paragraph 11.3 of China's *Accession Protocol* and Paragraph 170 of China's *Working Party Report*.

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<sup>1</sup>*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).

<sup>2</sup>*Protocol on the Accession of the People's Republic of China*, WT/L/432 (23 November 2001) ("*Accession Protocol*").

<sup>3</sup>*Report of the Working Party on the Accession of China*, WT/MIN(01)/3 (10 November 2001) ("*Working Party Report*").

10. As a result of these errors, China requests that the Appellate Body reverse the Panel's findings, in paragraphs 7.158; 7.159; 8.2 (b)-(c); 8.9 (b)-(c) and 8.16 (b)-(c) of the Panel Report, that China may not seek to justify export duties pursuant to Article XX of the GATT 1994.

**IV. APPEAL OF THE PANEL'S INTERPRETATION AND APPLICATION OF THE TERM "TEMPORARILY" AND THE PANEL'S INTERPRETATION OF THE TERM "CRITICAL SHORTAGES" IN ARTICLE XI:2(A) OF THE GATT 1994, AND THE PANEL'S ASSESSMENT OF THE MATTER, UNDER ARTICLE 11 OF THE DSU**

11. China appeals the Panel's erroneous interpretation and application of the term "temporarily" and the Panel's erroneous interpretation of the term "critical shortages", in Article XI:2(a) of the GATT 1994. The Panel also failed to make an objective assessment of the matter, as required under Article 11 of the DSU. Specifically, the Panel failed to assess properly evidence that China's export restriction is annually reviewed and renewed, and employed internally inconsistent and incoherent reasoning in its assessment of the possibility to prevent or relieve critical shortages of exhaustible natural resources through the temporary application of export restrictions.

12. As a result of these errors, China requests that the Appellate Body reverse the Panel's interpretation and application of the term "temporarily" and the Panel's interpretation of the term "critical shortages", as set out in paragraphs 7.257-7.258; 7.297-7.302; 7.305; 7.306; 7.346; 7.349; 7.351; 7.354 and 7.355 of the Panel Report.

**V. APPEAL OF THE PANEL'S INTERPRETATION OF THE PHRASE "MADE EFFECTIVE IN CONJUNCTION WITH" IN ARTICLE XX(G) OF THE GATT 1994**

13. China appeals the Panel's erroneous interpretation of the phrase "... made effective in conjunction with ...", in Article XX(g) of the GATT 1994. Specifically, the Panel erred in interpreting this phrase to require a showing that the "purpose" of a challenged measure is to make effective restrictions on domestic production or consumption. As a result of this error, China requests that the Appellate Body reverse the Panel's finding in paragraph 7.397 of the Panel Report.

**VI. APPEAL OF THE PANEL'S INTERPRETATION AND APPLICATION OF PARAGRAPHS 1.2 AND 5.1 OF CHINA'S ACCESSION PROTOCOL AND PARAGRAPHS 83 AND 84 OF THE WORKING PARTY REPORT IN CONNECTION WITH THE PRIOR EXPORT PERFORMANCE AND MINIMUM CAPITAL REQUIREMENTS**

14. China appeals the Panel's erroneous interpretation and application of Paragraphs 1.2 and 5.1 of China's *Accession Protocol*, read in combination with Paragraphs 83(a), 83(b), 83(d), 84(a), and 84(b) of China's *Working Party Report*, to prohibit any "examination and approval system" for WTO-consistent export quotas operated subsequent to 11 December 2004, including elimination of "export performance" and "prior experience requirements" and minimum registered capital requirements. As a result of these errors, China requests that the Appellate Body reverse the Panel's findings in paragraphs 7.655; 7.665; 7.669; 7.670; 7.678; 8.4(a)-(b); 8.11(a); 8.11(c) and 8.18(a)-(b) of the Panel Report.

**VII. APPEAL OF THE PANEL'S INTERPRETATION AND APPLICATION OF ARTICLE XI:1 OF THE GATT 1994, AND ITS ASSESSMENT OF THE MATTER UNDER ARTICLE 11 OF THE DSU, IN CONNECTION WITH CHINA'S EXPORT LICENSING REGIME**

15. China appeals various elements of the Panel's findings under Article XI:1 of the GATT 1994 in connection with China's export licensing requirement.

16. First, the Panel erred in interpreting Article XI:1 to prohibit a measure *as such*, even where, as a matter of municipal law, the measure can always be—and has always been—interpreted and applied in a WTO-consistent manner.

17. Second, the Panel also erred in applying its erroneous interpretation of Article XI:1 to China's export licensing requirement. Specifically, the Panel erroneously found that Article 11(7) of China's *Measures for the Administration of License for the Export of Goods* and Articles 5(5) and 8(4) of China's *Working Rules on Issuing Export Licenses, as such*, are inconsistent with Article XI:1, because they accord discretion to request undefined or unspecified documents or materials of applicants for export licenses.

18. Third, the Panel erred in its assessment of the matter, under Article 11 of the DSU. Specifically, the Panel had no evidentiary basis on which to find that any documents requested of an applicant pursuant to Article 11(7) of China's *Measures for the Administration of License for the Export of Goods* and Articles 5(5) and 8(4) of China's *Working Rules on Issuing Export Licenses* would be of such a nature as to impose an export restriction.

19. As a result of these errors, China requests that the Appellate Body reverse the Panel's findings and recommendations, at paragraphs 7.921; 7.946; 7.948; 7.958; 8.5(b); 8.8; 8.12(b); 8.15; 8.19(b) and 8.22 of the Panel Report.

**VIII. APPEAL OF THE PANEL'S INTERPRETATION AND APPLICATION OF ARTICLE X:3(A) OF THE GATT 1994, AND ITS ASSESSMENT OF THE MATTER UNDER ARTICLE 11 OF THE DSU, IN CONNECTION WITH THE "OPERATION CAPACITY" CRITERION FOR EXPORT QUOTA ADMINISTRATION**

20. China appeals various elements of the Panel's findings under Article X:3(a) of the GATT 1994 in connection with the "operation capacity" criterion for export quota administration, under Article 19 of China's *Measures for the Administration of Export Commodities Quotas*.

21. First, the Panel erred in interpreting Article X:3(a) to prohibit a measure *as such*, even where, as a matter of municipal law, the measure can always be—and has always been—interpreted and applied in such a way as to avoid WTO-inconsistent administration.

22. Second, the Panel also erred in applying its erroneous interpretation of Article X:3(a) to China's "operation capacity" criterion. Specifically, the Panel erroneously found that Article 19 of China's *Measures for the Administration of Export Commodities Quotas, as such*, is inconsistent with Article X:3(a), because the term "operation capacity" is undefined, thus reserving the discretion for China to interpret and apply the term in such a manner as to constitute WTO-inconsistent administration.

23. Third, the Panel erred in its assessment of the matter, under Article 11 of the DSU. Specifically, the Panel had no evidentiary basis on which to find that the term "operation capacity" would be interpreted and applied in a manner that would constitute WTO-inconsistent administration.

24. As a result of these errors, China requests that the Appellate Body reverse the Panel's findings and recommendations, at paragraphs 7.708; 7.742-7.746; 7.748-7.752; 7.756; 8.11(e) and 8.15 of the Panel Report.

ANNEX V

**WORLD TRADE  
ORGANIZATION**

**WT/DS394/12**  
12 September 2011

(11-4373)

Original: English

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

Notification of an Other Appeal by the United States  
under Article 16.4 and Article 17 of the Understanding on Rules  
and Procedures Governing the Settlement of Disputes (DSU),  
and under Rule 23(1) of the Working Procedures for Appellate Review

The following notification, dated 6 September 2011, from the Delegation of the United States, is being circulated to Members.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 23 of the *Working Procedures for Appellate Review*, the United States hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Report of the Panel in *China – Measures Related to the Exportation of Various Raw Materials* (WT/DS394/R) ("Panel Report") and certain legal interpretations developed by the Panel.

1. The United States seeks review by the Appellate Body of the Panel's legal conclusion that China's requirement that enterprises pay a quota allocation fee (also referred to as the total award price or bid-winning price) in order to export bauxite, fluorspar, and silicon carbide under its export quota regime<sup>1</sup> is not inconsistent with Article VIII:1(a) of the *General Agreement on Tariffs and Trade 1994* or Paragraph 11.3 of China's Protocol of Accession to the WTO. These conclusions are in error and are based on erroneous findings on issues of law and legal interpretations of the fees and charges subject to Article VIII.<sup>2</sup> The United States requests the Appellate Body to reverse the Panel's legal interpretation and conclusion and to find that China's requirement that enterprises pay a total award price in order to export bauxite, fluorspar, and silicon carbide under its export quota regime is inconsistent with Article VIII:1(a) of the GATT 1994 and Paragraph 11.3 of China's Protocol of Accession to the WTO.

<sup>1</sup>See Panel Report, Section VII.C.2(b). Relevant legal instruments include the *Import and Export Regulations, Quota Bidding Measures, Quota Bidding Implementation Rules, 2009 First Round Fluorspar Bidding Procedures, 2009 First Round Bauxite Bidding Procedures, and 2009 First Round Silicon Carbide Bidding Procedures*.

<sup>2</sup>See, e.g., Panel Report, paras. 7.827-7.839, 7.844-7.851, 7.859-7.861, and 8.4(e).

2. The United States also seeks conditional review by the Appellate Body relating to the Panel's recommendations. If the Appellate Body, pursuant to China's appeal of the Panel's "recommendation with respect to the 'series of measures' that have an ongoing effect through annual replacement measures,"<sup>3</sup> were to grant China's request to "reverse the Panel's recommendations in paragraphs 8.8; 8.15 and 8.22 of the Panel Report to the extent that they apply to replacement measures,"<sup>4</sup> and if the Appellate Body were to find that no recommendation should have been made on the "series of measures" as they existed as of the date of panel establishment, then the United States would seek review of the Panel's legal interpretation<sup>5</sup> and conclusion<sup>6</sup> not to make a recommendation on the export quota and export duty measures that were annually recurring and in effect on the date of panel establishment, *i.e.*, December 21, 2009, but that subsequently were replaced or superseded by other legal instruments. In that event, the United States would contend that this interpretation and conclusion are in error and based on erroneous findings on issues of law and related legal interpretations of Articles 6.2, 7.1, 11, and 19.1 of the DSU. The United States would request the Appellate Body to reverse the Panel's legal conclusion and to make the recommendation provided for in DSU Article 19.1. However, the Appellate Body would not need to review this legal interpretation and conclusion if the condition precedent to this appeal is not met.

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<sup>3</sup>See China's Appellant Submission, Section III.

<sup>4</sup>China's Appellant Submission, para. 167.

<sup>5</sup>See, *e.g.*, Panel Report, paras. 7.26-7.32.

<sup>6</sup>See, *e.g.*, Panel Report, paras. 7.33(d), 8.8.

ANNEX VI

**WORLD TRADE  
ORGANIZATION**

**WT/DS395/12**  
12 September 2011

(11-4371)

Original: English

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

Notification of an Other Appeal by the European Union  
under Article 16.4 and Article 17 of the Understanding on Rules  
and Procedures Governing the Settlement of Disputes (DSU),  
and under Rule 23(1) of the *Working Procedures for Appellate Review*

The following notification, dated 6 September 2011, from the Delegation of the European Union, is being circulated to Members.

Pursuant to Article 16.4 and Article 17 of the DSU, the European Union hereby notifies to the Dispute Settlement Body its decision to appeal to the Appellate Body certain issues of law covered in the Report of the Panel and certain legal interpretations developed by the Panel in its Report in the dispute *China – Measures relating to the exportation of various Raw Materials* (WT/DS395/R). Pursuant to Rule 23(1) of the *Working Procedures for Appellate Review*, the European Union simultaneously files this Notice of Other Appeal with the Appellate Body Secretariat.

For the reasons to be further elaborated in its submissions to the Appellate Body, the European Union appeals, and requests the Appellate Body to reverse and/or modify the findings, conclusions and recommendations of the Panel, with respect to the following errors of law and legal interpretations contained in the Panel Report.<sup>1</sup>

- I. THE EUROPEAN UNION NEVER REQUESTED THE PANEL "NOT TO MAKE FINDINGS OR RECOMMENDATIONS ON THE LEGAL INSTRUMENTS TAKING EFFECT ON 1 JANUARY 2010". THE EUROPEAN UNION NEVER "NARROWED THE PANEL'S TERMS OF REFERENCE DURING THE COURSE OF THE PROCEEDINGS".**

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<sup>1</sup>Pursuant to Rule 23(2)(c)(ii)(C) of the *Working Procedures for Appellate Review* this Notice of Other Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to the ability of the European Union to refer to other paragraphs of the Panel Report in the context of its appeal.

- (a) In paragraph 7.21 of its Report, the Panel found that the European Union requested the Panel not to make findings or recommendations on the legal instruments taking effect on 1 January 2010. In paragraph 7.22 of its Report, the Panel found that the European Union narrowed the Panel's terms of reference during the course of the proceedings. The Panel makes reference to these erroneous findings in various other paragraphs of its Report, such as paragraph 7.24.
  - (b) In reaching these erroneous legal interpretations and findings, the Panel acted inconsistently with its obligations under Articles 7.1, 11 and 19.1 of the DSU.
  - (c) The European Union appeals these erroneous Panel legal interpretations and findings and requests the Appellate Body to reverse them. The European Union also requests the Appellate Body to complete the analysis and find that the relevant measures are inconsistent with China's obligations under the covered agreements and to recommend that China brings its measures into compliance with its WTO obligations.
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ANNEX VII

**WORLD TRADE  
ORGANIZATION**

**WT/DS398/11**  
12 September 2011

(11-4372)

Original: English

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

Notification of an Other Appeal by Mexico  
under Article 16.4 and Article 17 of the Understanding on Rules  
and Procedures Governing the Settlement of Disputes (DSU),  
and under Rule 23(1) of the Working Procedures for Appellate Review

The following notification, dated 6 September 2011, from the Delegation of Mexico, is being circulated to Members.

1. Pursuant to Articles 16.4 and 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 23(1) of the *Working Procedures for Appellate Review*, Mexico hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report on *China – Measures Related To The Exportation Of Various Raw Materials* (WT/DS398) ("Panel Report"), and certain legal interpretations developed by the Panel in this dispute.

2. Pursuant to Rule 23(2)(c)(ii) of the *Working Procedures for Appellate Review*, this notice of appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to Mexico's ability to refer to other paragraphs of the Panel Report in the context of this appeal.

**I. Conditional Appeal of the Panel's Recommendations on Annual Export Quota and Export Duty Measures**

3. Mexico also seeks conditional review by the Appellate Body relating to the Panel's recommendations. If the Appellate Body, pursuant to China's appeal of the Panel's "recommendation with respect to the 'series of measures' that have an ongoing effect through annual replacement measures,"<sup>1</sup> were to grant China's request to "reverse the Panel's recommendations in paragraphs 8.8; 8.15 and 8.22 of the Panel Report to the extent that they apply to replacement measures,"<sup>2</sup> and if the Appellate Body were to find that no recommendation should have been made on the "series of

<sup>1</sup>See China's Appellant Submission, Section III.

<sup>2</sup>China's Appellant Submission, para. 167.

measures" as they existed as of the date of panel establishment, then Mexico would seek review of the Panel's legal interpretation<sup>3</sup> and conclusion<sup>4</sup> not to make a recommendation on the export quota and export duty measures that were annually recurring and in effect on the date of panel establishment, *i.e.*, December 21, 2009, but that subsequently were replaced or superseded by other legal instruments. In that event, Mexico would contend that this interpretation and conclusion are in error and based on erroneous findings on issues of law and related legal interpretations of Articles 6.2, 7.1, 11, and 19.1 of the DSU. Mexico would request the Appellate Body to reverse the Panel's legal conclusion and to make the recommendation provided for in DSU Article 19.1. However, the Appellate Body would not need to review this legal interpretation and conclusion if the condition precedent to this appeal is not met.

## **II. Appeal of the Panel Conclusion that China's Administration of its Export Quota through the Involvement of the CCCMC Complied With Article X:3(a) of GATT 1994**

4. Mexico appeals various elements of the Panel's findings under Article X:3(a) of the GATT 1994 regarding the involvement of the China Chamber of Commerce on Metals, Minerals in the administration of export quotas.

5. Mexico addresses the following errors in the Panel's findings and conclusions concerning China's and CCCMC's administration of quotas<sup>5</sup>:

- a) First, the Panel erred in its interpretation of Article X:3(a) as requiring complainants to demonstrate, in an *as such* claim, that a challenged measure must necessarily lead to partial and/or unreasonable administration of export quotas.
- b) Second, the Panel erred in its interpretation of Article X:3(a) requiring evidence of partiality/unreasonableness when complainants argue that a measure is inherently partial/ unreasonable. Proper interpretation of Article X:3(a) leads to the conclusion that China's delegation of authority to CCCMC is inherently partial/unreasonable.
- c) Third, the Panel failed to make an objective assessment of the facts of the case as required by Article 11 of the DSU with respect to the role of CCCMC in the quota process. The CCCMC Secretariat's role in administering quotas is much more than purely administrative in nature. Specifically, the CCCMC gains access to confidential business information on applicants, exercises discretion in determining qualifying applicants, and is the sole verifier of certain eligibility data.

6. As a result, Mexico requests that the Appellate Body reverse the Panel's findings and conclusions at, *e.g.*, paragraphs 7.784-7.787, 7.795-7.797, 8.18 c) and d) of the Panel Report.

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<sup>3</sup>*See, e.g.*, Panel Report, paras. 7.26-7.32.

<sup>4</sup>*See, e.g.*, Panel Report, paras. 7.33(d), 8.22.

<sup>5</sup>*See* Panel Report, paras. 7.774-7.797.