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CHINA – MEASURES RELATED TO THE EXPORTATION OF VARIOUS RAW MATERIALS

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Reports of the Appellate Body

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.

CASES CITED IN THESE REPORTS

Short title	**Full case title and citation**
Argentina – Footwear (EC)	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515
Argentina – Hides and Leather	Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather*, WT/DS155/R and Corr.1, adopted 16 February 2001, DSR 2001:V, 1779
Australia – Apples	Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/AB/R, adopted 17 December 2010
Australia – Apples	Panel Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/R, adopted 17 December 2010, as modified by Appellate Body Report WT/DS367/AB/R
Australia – Salmon	Appellate Body Report, *Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327
Brazil – Desiccated Coconut	Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, 167
Brazil – Retreaded Tyres	Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS332/AB/R, DSR 2007:V, 1649
Canada – Aircraft (Article 21.5 – Brazil)	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/AB/RW, adopted 4 August 2000, DSR 2000:IX, 4299
Canada – Autos	Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19

Short title	Full case title and citation
China – Auto Parts	Panel Reports, China – Measures Affecting Imports of Automobile Parts, 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
China – Publications and Audiovisual Products	Appellate Body Report, China –Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WT/DS363/AB/R, adopted 19 January 2010
China – Raw Materials	Panel Reports, China – Measures Related to the Exportation of Various Raw Materials, 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]
Colombia – Ports of Entry	Panel Report, Colombia – Indicative Prices and Restrictions on Ports of Entry, WT/DS366/R and Corr.1, adopted 20 May 2009
Dominican Republic – Import and Sale of Cigarettes	Panel Report, Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes, WT/DS302/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS302/AB/R, DSR 2005:XV, 7425
EC and certain member States – Large Civil Aircraft	Appellate Body Report, European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft, WT/DS316/AB/R, adopted 1 June 2011
EC – Approval and Marketing of Biotech Products	Panel Report, European Communities – Measures Affecting the Approval and Marketing of Biotech Products, 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
EC – Asbestos	Appellate Body Report, European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243
EC – Bananas III	Appellate Body Report, European Communities – Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591
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Short title	Full case title and citation
EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)	Appellate Body Reports, European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador, WT/DS27/AB/RW2/ECU, adopted 11 December 2008, and Corr.1 / European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States, WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008
EC – Fasteners (China)	Appellate Body Report, European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China, WT/DS397/AB/R, adopted 28 July 2011
EC – Hormones	Appellate Body Report, EC Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
EC – Sardines	Appellate Body Report, European Communities – Trade Description of Sardines, WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3359
EC – Selected Customs Matters	Appellate Body Report, European Communities – Selected Customs Matters, WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, 3791
EC – Trademarks and Geographical Indications	Panel Reports, European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, WT/DS290/R (Australia) / WT/DS174/R (US), adopted 20 April 2005, DSR 2005:VIII, 3499 to DSR 2005: X, 4603
Guatemala – Cement I	Appellate Body Report,

Short title	Full case title and citation
US – Orange Juice (Brazil)	Panel Report, United States – Anti-Dumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil, WT/DS382/R, adopted 17 June 2011
US – Poultry (China)	Panel Report, United States – Certain Measures Affecting Imports of Poultry from China, WT/DS392/R, adopted 25 October 2010
US – Section 301 Trade Act	Panel Report, United States – Sections 301-310 of the Trade Act of 1974, WT/DS152/R, adopted 27 January 2000, DSR 2000:II, 815
US – Shrimp	

ABBREVIATIONS USED IN THESE REPORTS

Abbreviation	Definition
2008 Export Licence Administration Measures	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)
2008 Export Licensing Working Rules	Working Rules on Issuing Export Licences, Ministry of Commerce, Shangpeifa (2008) No. 398, 9 October 2008 (Panel Exhibits CHN-344 and JE-97)
2009 Announcement of Second Bidding Round for Talc and Silicon Carbide	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)
2009 Export Licensing Catalogue	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)
2009 Export Quota Amounts	Export QsA56udeRegard(s,)]TJ0 -1.153 TD.001d(s,)]TJ0 -1.153 TD.001d(s,)]TJ0 -1.153 TD.00 (mmc-oerc(o)-Tccedhe Export of Goods,

Abbreviation	Definition

Abbreviation	Definition
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, China – Measures Related to the Exportation of Various Raw Materials, 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
Regulation on Import and Export Administration	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)
Regulations on Import and Export Duties	Regulations of the People's Republic of China on Import and Export Duties, Order of the State Council (2003) No. 392, adopted at the 26th executive meeting of the State Council on 29 October 2003, 1 January 2004 (Panel Exhibits CHN-13 and JE-67)
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT Agreement	Agreement on Technical Barriers to Trade
TRIMS Agreement	Agreement on Trade-Related Investment Measures
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
US Panel Report	Panel Report, China – Measures Related to the Exportation of Various Raw Materials, complaint by the United States (WT/DS394/R)
Vienna Convention	Vienna Convention on the Law of Treaties, done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679.
Working Procedures	Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

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[1], Other Appellant, Appellee
Mexico, Other Appellant, Appellee

European Union each appeals certain issues of law and legal interpretations developed in the Panel Report, China – Measures Related to the Exportation of

3. On 30 March 2010, China requested a preliminary ruling by the Panel regarding the consistency of the complainants' panel requests[11] with the requirements of Article 6.2 of the

rights" obligations under its Accession Protocol and Accession Working Party Report.[21] The Panel, however, rejected the claim that China's prior export performance requirement operates to the detriment and exclusion of foreign enterprises.[22] 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[23] ("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.[24] 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.[25] 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.[26] 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.[27]

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.[28] 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.[29] The Panel declined to make findings on other claims

[21]Specifically, the Panel found China's prior expo

regarding China's export licensing system.[30] 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.[31] 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.[32]

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[33] and an appellant's submission pursuant to Rules 20 and 21, respectively, of the Working Procedures for Appellate Review[34] (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.[35] On the same day, the Division informed the participants and third participants that it had decided to extend the deadline for the filing

[30]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

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

Appellate Body to reverse the Panel's findings made pursuant to other claims allegedly contained in Section III of the panel requests.[48]

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

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.[51] 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

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.[59]

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".[60] 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.[61] 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.[62] 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.[63] 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.[64]

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

[59]China's appellant's submission, para. 152.
[60]China's appellant's submission, para. 160 (quoting Panel Reports, para. 7.30).
[61]China's appellant's submission, para. 161.
[62]China's appellant's submission, para. 164.
[63]China's appellant's submission, para. 165. (emphasis omitted)
[64]China's appellant's submission, para. 166.

Paragraph 11.3.[65] 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

special".[71] 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".[72]

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.[77] 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.[78] 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".[79]

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.[80]

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.[81] 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".[82] Finally, China argues that Paragraph 171, dealing with subsidies contingent on exportation, shows that this subsection "may deal with" export duties.[83]

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

[77]China's appellant's submission, para. 230.
[78]China's appellant's submission, para. 232. (emphasis omitted)
[79]China's appellant's submission, para. 233. (emphasis omitted)
[80]China's appellant's submission, para. 237.
[81]China's appellant's submission, para. 239. (original emphasis)
[82]China's appellant's submission, para. 239. (emphasis omitted)
[83]China's appellant's submission, para. 239.

imposed by the GATT 1994.[84] 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."[85]

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.[86] 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.[87] 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.[88] 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.[89]

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."[90] 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".[91] 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.[92] 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

[84]China's appellant's submission, para. 244.
[85]China's appellant's submission, para. 246.
[86]China's appellant's submission, para. 255. (emphasis omitted)
[87]China's appellant's submission, paras. 256 and 257. (emphasis omitted)
[88]China's appellant's submission, para. 257.
[89]China's appellant's submission, para. 259.
[90]China's appellant's submission, para. 268.
[91]China's appellant's submission, paras. 268 and 269.
[92]China's appellant's submission, para. 269.

effects."[93] 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

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.[100] 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.[101] 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.[102] Moreover, "[a]ny such suggestion turns inherent rights into acquired rights, autonomy into heteronomy, and the single undertaking into a series of detached agreements".[103] 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.[104] 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 J195(1R)4 3(-1.726 TD04urn,).5.7268 TD.0005 Tc3098868 li-6.5(i)-.31a811(])1; Ap1(])1verm4u3(rm4u3(diti6(t)4 3

justify restrictions concerning natural resources that can be renewed, such as wheat.[112] 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.[113] 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

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.[117] 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.[118] 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.[119] 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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[117]China's appellant's submission, para. 390 (quoting Panel Reports, para. 7.397).

[118]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).

[119]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.[120] 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".[121]

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".[122] 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".[123] Paragraph 130(a)(ii) of China's Accession Working Party Report also explicitly refers to "historical performance" as a criterion for quota allocation.[124] 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".[125] The Appellate Body has stated that this provision allows quota allocation by supplying countries "in accordance with the proportions supplied by those

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.[128]

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".[129] 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".[130] 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

[128]China's appellant's submission, para. 468.

[129]China's appellant's submission, para. 469 (quoting Panel Reports, para. 7.655). (emphasis added by China)

[130]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".[131] For China, there is a significant difference between the two standards, given than 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)".[132] 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

Administration Measures", and Articles 5(5) and 8(4) of China's Working Rules on Issuing Export Licences[135] (the "2008 Export Licensing Working Rules", as applicable to export licences granted to

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.[139] In China's view, its authorities could always choose a WTO-consistent course of action by requiring documents that do

restricted exports".[142] China refers to evidence showing that

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

annual replacement measures", which China argues are outside the Panel's terms of reference.[149] 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".[150]

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[154] (the "Vienna Convention").[155] 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".[156]

(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.[157] 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.[158]

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.[159] 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

[154]Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679.
[155]Joint appellees' submission of the United States and Mexico, para. 96.
[156]Joint appellees' submission of the United States and Mexico, para. 97.
[157]Joint appellees' submission of the United States and Mexico, para. 111.
[158]Joint appellees' submission of the United States and Mexico, para. 111.
[159]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.[160] 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.[161]

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.[162]

(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

[160]Joint appellees' submission of the United States and Mexico, para. 114.
[161]Joint appellees' submission of the United States and Mexico, para. 114.
[162]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.[163] 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.[164]

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.[165] 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.[166] Similarly, the Panel properly found support for its interpretation of Paragraph 11.

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.[168]

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".[169] 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.[170] 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"[171] 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'".[172]

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.[173]

(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

[168]Joint appellees' submission of the United States and Mexico, para. 127.
[169]Joint appellees' submission of the United States and Mexico, para. 128.
[170]Joint appellees' submission of the United States and Mexico, para. 130.
[171]Joint appellees' submission of the United States and Mexico, para. 132.
[172]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)
[173]Joint appellees' submission of the United States and Mexico, para. 136.

China's Accession Protocol "are flawed in several respects, and should be rejected".[174] 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.[175]

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.[176] 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.[177]

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".[178] 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

interpretation" of the text of Paragraph 11.3.[182] 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".[183] 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".[184] 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.[185]

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".[188] 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".[189] This suggests that a showing of finite availability is not sufficient to

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

[189]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).

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).[192]

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".[193] 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

[192] 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 Repor9 0 x be t ued StS– ShrR

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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.[194] 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

[194]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".[195] 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."[196]

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.[198] 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".[199]

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 whi246a surpg(3e 2103 Tw9-7.ut10062 Tw[(first wj-23.95.77.6UnJ-e Article su)-(.0991 su(p)-1.o)-2.i4o.0991 i

requests were in fact "defective", which, according to the European Union is not the case in the present dispute.[200]

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'".[201] 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.[202]

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'".[203] 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.[204] 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".[205]

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

[200] European Union's appellee's submission, para. 22.
[201]

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.[207] The European Union also asserts that the Panel was correct in finding that "China had 'exercised its

WTO agreements" in order to make them applicable to Paragraph 11.3 of China's Accession Protocol.[213]

110. The European Union further submits that China disregards the Panel's reasoning regarding the "fundamental difference"[214] 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"[215] of WTO Members to make Article XX applicable to Paragraph 11.3 as "pure conjecture".[216] 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.[217]

(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.[218] The European Union also highlights that

[213]European Union's appellee's submission, para. 64.
[214]European Union's appellee's submission, para. 70.
[215]European Union's appellee's submission, para. 75 (referring to China's appellant's submission, para. 226).
[216]European Union's appellee's submission, para. 77.
[217]European Union's appellee's submission, para. 78.
[218]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"[219] attempts to "distort" what the Panel had "actually stated"[220]: 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".[221]

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

agreements and China's Accession Protocol therefore "delineate" China's exercise of its inherent and sovereign right to regulate trade.[223]

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 Pa

deals only with a subset, namely those critical shortages that are "capable of being 'prevented or relieved' through the 'temporary application' of export restrictions".

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".[231]

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 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)[240], the panel in Argentina – Hides and Leather found that the risk that

administration.[241] The European Union argues therefore that the analysis and findings by the panel in

"discretion" to grant or refuse export licences is not inconsistent with Article XI:1 of the GATT 1994.[248]

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".[249] The European Union contends that both types of "discretion" create uncertainty which, in turn, "leads to increased transaction costs and has negative

to impose a 'restriction' on export[s]".[253] 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.[254] 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.[255]

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.[256] 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.[257] In addition to seeking findings that the measures at issue were inconsistent with WTO rules, the complainants sought recommendations with respect to these m

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.[258]

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.[259] By contrast, the complainants asked the Panel to focus its review on the challenged

Mexico, the Panel "misconstrued" its terms of reference and the "relevant point in time" for its analysis of these annually recurring measures.[262]

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

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".[265] 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".[266] 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.[267] 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 ou VII.( )-5.4 Iistead, in the United(States)64.2'l vied, fe it yoes not ctmetofbethe(requ(ire)3981(red to the approxim)898a

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.

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.[272]

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).[273] 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.[274] 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.[275]

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.[276] Even assuming arguendo that the CCCMC's role is merely administrative, it may still present a "very real risk" of partial administration.[277] 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".[278] 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.[279]

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

[272]Mexico's other appellant's submission, para. 58.
[273]Mexico's other appellant's submission, para. 39.
[274]Mexico's other appellant's submission, para. 39.
[275]Mexico's other appellant's submission, para. 39.
[276]Mexico's other appellant's submission, para. 43.
[277]Mexico's other appellant's submission, para. 42.
[278]Mexico's other appellant's submission, para. 42 (referring to Panel Reports, para. 7.777).
[279]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.

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."[287] Therefore, the Panel erred in finding that the European Union requested the Panel to "narrow" its terms of reference.[288]

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.[289] 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 theed as o2bf. i 0 TD" bTw[(e6005e state)-e.07p04

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

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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 t they(.34)Tj.34

in this case being the "maintenance" of export duties and quotas on certain products "over time".[293] 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".[294] 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.[295]

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".[296] 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".[297] 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".[298] 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'".[299]

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".[300] 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.[301] 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

[293]China's appellee's submission, para. 90. xguing4O43wisnae e5(pa)7nd "were

excluded from the dispute.[302] Finally, China "strongly objects" to the argument that, during the Panel proceedings, it "moved the target" in order to "evade 'responsibility'"[303]; 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"[304], 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".[305] According to China, in assessing the European Union's remarks, the Panel took them at "face value" and did not commit any legal error.[306]

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".[307] 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

[302]China's appellee's submission, para. 102.

[303]China's appellee's submission, paras. 107 and 108 (referring to China's first written submission to the Panel, paras. 51 and 70).

[304]China's appellee's submission, para. 132 (quoting European Union's ot5.5(c1l2 l"n)42 [(Pe3a)4.2"nos submis

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"[313] 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.[314] 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.[315] China also rejects Mexico's suggestion that requiring evidence of partiality or unreasonableness "ignores" certain realities.[316] This is not a reason to abandon the interpretation stated by the Appellate Body, namely, that a complainant must provide "solid evidence"[317] showing how and why the features of the measure and the administrative processes

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".[328] 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"[329], but adds that the Appellate Body has also underscored a panel's discretion to give "certain elements of evidence more weight than other elements".[330] 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."[331] Mexico failed to identify any evidence demonstrating that the CCCMC Secretariat undertakes its delegated quota administration tasks with "no real oversight9n]TJ7.022Tc.1864 T.7(ss1g66.2203 Tm.0043 Tc0 Tw(332)Tj10.98 0 0 10

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

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

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

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

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 less ca4ure. 186 a m06 cTc 20718 Tw[(the near uwh)3.51754a

in Annex 6.[343] The Panel, therefore, erred in "acquiescing"[344] 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.[345] 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.[346] 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,

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

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.[351]

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.[352]

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).[353] 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".[354]

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[351]Colombia's third participant's submission, para. 22.

[352]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).

[353]Colombia's third participant's submission, para. 49.

[354]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.[355] 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'".[356] Although not "a priori a 'restriction'"[357], if such discretion causes "a reasonable uncertainty that will discourage exportations", then it constitutes a "restriction" on exports under Article XI:1.[358] This interpretation would be in keeping with the purpose of Article XI, which, as China acknowledges, is "to protect the competitive opportunities for exports".[359]

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".[360]

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.[361] Japan sees the Panel's recommendations on the "series of measures" as aimed at plugging this "loophole".[362]

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.[363]

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.[364] 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

resource ever to cease to exist, meaning that it will not be possible to "relieve or prevent" it through

According to Korea, it is not clear whether the "inherent discretion" accorded to a panel permits such a discrepancy.[375] 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.[376] 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.[377]

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".[378] Given the implications for other protocols of accession, China's appeal warrants "careful scrutiny".[379] 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

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.[383] 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".[384] 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.[385]

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".[386] Saudi Arabia points out that, in *US – Gasoline*, Venezuela and Brazil referred the Appellate

licensing systems are not inconsistent with this provision unless they create "a restriction or limiting effect on … exportation".[387] 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.[388] 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 co 0 TD8tr1

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.[393] Recalling China's argument that a

(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[397], 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

[397]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 tR

summary of the legal basis of the complaint sufficient to present the problem clearly".[401] 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 liste

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

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.[415] 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 wit0 TD[(.Articln35 -r question of)5.7(whet6in tdJ5"TD.000)5.4(of.0005 n)T0217 Two.005.4(.8(in th

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".[422]

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

This involves a case-by-case analysis. Submissions by a party may be referenced in order to confirm the meaning of the words used

> 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.**]
>
> ---
>
> [*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: …"[435] The legal instruments listed range from entire codes or charters (such as the Foreign Trade Law of the People's Republic of China[436] (China's "Foreign Trade Law")) to specific administrative measures (such as the Quotas of Fluorspar

[435]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".

[436]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[437] ("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."[438] 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".[439] 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 identifiest2surhd CusQr5 -1sna"exp3552 0 TDu. 0 10ed()7.5(p)[(6(sbn1y3 Tc6e-5.5(Tw[(wheeach)5.5

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.[441] More specifically, the complainants state that they consider that "these measures are inconsistent with Article VIII:1(a)[442] 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".[443] 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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[441]See Appellate Body Report, Korea – Dairy, para. 124.

[442]We note that, in its panel request, the European Union invokes more broadly Article VIII:1 of the GATT 1994.

[443]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

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.[444] 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.[445] 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

claims with respect to several subsets of measures affecting several subsets of product categories"[448], 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".[449]

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".[450] 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".[451] 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

[448]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).
[449]Joint appellees' submission of the United States and Mexico, para. 57.
[450]Appellate Body Report, EC and certain member States – Large Civil Aircraft, para. 640.
[451]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

Goods[462] ("Regulation on Import and Export Administration"); Measures of Quota Bidding for Export Commodities[463] ("Export Quota Bidding Measures"); Measures for the Administration of Licence for the Export of Goods[464] ("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"[465] ("2009 Graded Export Licensing Entities Catalogue"); Working Rules on Issuing Export Licences[466] ("2008 Export Licensing Working Rules"); Implementation Rules of Export Quota Bidding for Industrial Products[467] ("

Bidding Announcement"), and Quotas of Bauxite of 2009[473] ("2009 First Round Bauxite Bidding Procedures"). Similarly, the Panel found that the export duties imposed in 2009 on the raw materials at issue[474] were imposed through the application of China's Customs Law of the People's Republic of China[475] (China's "Customs Law"), the Regulations of the People's Republic of China on Import and Export Duties[476] ("Regulations on Import and Export Duties"), and the Notice Regarding the 2009 Tariff Implementation Program[477] ("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".[478] 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.[479] 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[480] ("2010

[473]Quotas of Bauxite of 2009, Committee for the Invitation for bid for Export Commodity Quotas, 10 December 2008 (Panel Exhibit JE-94).

[474]See Panel Reports, paras. 7.76, 7.80, 7.84, 7.88, 7.92, 7.97, and 7.101.

[475]Customs Law of the People's Republic of China, adopted at the 19th Meeting of the Standing

Tariff Implementation Plan"), which specified export duty rates for the raw materials at issue applicable as of 1 January 2010.[481]

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.[482] China recognized that the Panel could make findings on 2009 measures specifying export quota and duty levels[483], 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.[484]

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".[485] They asserted that the Panel "should not consider the claims as addressing the 2010 measures"[486], and requested that the Panel not "make any findings and recommendations on any of the 2010 measures invoked by China".[487] The

[481]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)

[482]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

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*".[488]

245. The Panel observed that the complainants' panel requests refer to "any amendments or extensions; related measures; replacement measures; renewal measures; and implementing measures".[489] As it had done in the first phase of its preliminary ruling[490], 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".[491]

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

[488]Panel Reports, para. 7.7.
[489]Panel Reports, para. 7.15.
[490]Panel's preliminary ruling (first phase), para. 20.
[491]Panel Reports, para. 7.20.

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

requests.[507] 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.[508] 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

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"[515] 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".[516]

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".[517]

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 –

262. In arguing that the complainants "decided"

that no longer exist.[526] 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.[527] 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.[528] (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

[526]Panel Reports, para. 7.28 (referring to Panel Reports, EC – Trademarks and Geographic Indications

obligations for a responding member, and in that sense would merely be declaratory.[529] 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"[530], 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".[531]

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".[532] 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 eSfereainan a mf6p7.3926that easures into con3.5(nsorm)8.31ity

obligations such that the "series of measures" do not operate to bring about a WTO-inconsistent result.[533]

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.[534] 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.[535]

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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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".[536] 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.[537] 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".[538] 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"[539], suggest that WTO Members did not intend to incorporate the defences available under Article XX into Paragraph 11.3.[540] 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.[541] 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.[542] 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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[536]Panel Reports, para. 7.124.
[537]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.

[538]Panel Reports, para. 7.126.
[539]Panel Reports, para. 7.129.
[540]Panel Reports, paras. 7.126-7.129.
[541]Panel Reports, para. 7.150.
[542]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.[543] 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.[544]

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.[545] 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.[546] 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".[547]

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 P1

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.[548] 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.[549]

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*[550] (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.[551] 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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[548]European Union's appellee's submission, para. 54.

[549]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)

[550]Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679.

[551]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.[552] 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.[553] 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".[554] 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

[552]Panel Reports, para. 7.66.

[553]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.

[554]China's appellant's submission, para. 216.

justify such duties."[555] 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.[556] In their view, the second and third sentences of the Note also

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.[558]

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.[559] 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[560], 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."[561]

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.[562] 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.

[558]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 Un

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".[563] According to China, "[i]f they are not, the measure violates both Paragraph 11.3 and Article VIII."[564] 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".[565] It follows that "China is not deprived of its right to justify a measure that violates Article VIII through recourse to Article XX simply

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."[568]

3.

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"[572] 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".[573] 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.[574]

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.

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.[577] 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'".[578] 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.[579] 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.[580] In China's view, the Panel's interpretation of Paragraph 11.3 "turns inherent rights into acquired rights"[581] and "distorts the balance of rights and obligations" established when China acceded to the WTO".[582]

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.[583] They assert that the Appellate Body report in China – Publications and Audiovisual

[577]China's appellant's submission, para. 275.
[578]China's appellant's submission, para. 275 (quoting Appellate Body Report,

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.[584] 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

inherent right to regulate trade and the commitments undertaken by China in its Accession Protocol.[592] 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.[593]

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".[594] 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".[595] 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.

[592] European Union's appellee's submission, para. 110 (quoting Panel Rep(o)-1.7(t)3.J-20.fe[006 ,(pa)8(a.( )67.[006 (1)4.3

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."[596]

306. The preamble of the WTO Agreement lists various objectives, including "raising standards of living", "seeking both to protect and preserve the

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

"limited timeframe".[602] 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.[603] In the Panel's view, the absence of such additional

importance", or one that is "grave", rising to the level of a "crisis".[610] 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.[611]

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 "lo

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).[615] 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".[616] 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.[617] 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 -1.7Une

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".[618] 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"[619], 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".[620] The Panel found that this title suggests that Article XI governs the elimination of "quantitative restrictions" generally.[621] We have previously referred to the title of a provision when interpreting the requirements within the provision.[622] 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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[618] Shorter Oxford English Dictionary, 6th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 2, p. 2363.

[619] Shorter Oxford English Dictionary, 6th edn, W.R. Trumble, A. Stevenson (eds) (Oxford University Press, 2007), Vol. 2, p. 2553.

[620] Emphasis added.

[621] Panel Reports, para. 7.912.

[622] 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".[623] Thus,

lacking".[628] 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

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".[633] China, however, alleges that the Panel subsequently "adjusted" its interpretation of the term "temporarily" to exclude the "long-term" application of export restrictions.[634] China argues that the term "temporarily" does not mark a "bright line"[635] 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.[636]

330. We note that the Panel found that the word "temporarily" suggests "a fixed time-limit for the application of a measure"[637], 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".[638] 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

[633]China's appellant's submission, para. 335 (quoting Panel Reports, para. 7.255).

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"[639] 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".[640] 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).[641] 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".[642] The Panel considered that the existence of these further requirements under

[639]Panel Reports, para. 7.255.
[640]China's appellant's submission, para. 336 (quoting Panel Reports, paras. 7.298 and 7.305, respectively, and referring to para. 7.349).
[641]China's appellant's submission, para. 374.
[642]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

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".[645] 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."[646]

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.[652] 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

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.[658] This margin includes the discretion of a panel to decide which evidence it chooses to utilize in making its findings[659], and to determine how much weight to attach to the various items of evidence placed before it by the parties.[660] 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.[661] 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".[662] 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 Co 4has

possible to 'relieve or prevent' it through an export restriction applied on a temporary basis'".[667] 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."[668] 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"[669], 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".[670]

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.[671]

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

[667]China's appellant's submission, para. 373 (quoting Panel Reports, para. 7.297). (emphasis added by China)
[668]Panel Reports, para. 7.297. (emphasis added)
[669]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)
[670]Panel Reports, para. 7.397.
[671]See Panel Reports, para. 7.356.

it, the Panel found this not to be the case.[672] 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

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.[678] 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).[679]

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.[680] 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.[681] 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.[682]

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

Herring and Salmon panel's reasoning.[684] 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

ends and means".[687] The word "conservation", in turn, means "the preservation of the environment, especially of natural resources".[688]

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".[689] 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)".[690] 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.[691] 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 ... (emphasis added)

> 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.[692]

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"[693], 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

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

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", wit,d", wit3 of Chh

(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

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:

_____
Ricardo Ramírez-Hernández
Presiding Member

_____ _____
Jennifer Hillman
Member

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

(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:

_____
Ricardo Ramírez-Hernández
Presiding Member

_____ _____
Jennifer Hillman
Member

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[1], coke[2], fluorspar[3], magnesium[4], manganese[5],

[1] 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

silicon carbide[6], silicon metal[7], yellow phosphorus[8], and zinc[9] (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 8th 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)

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[6] 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.

[7] 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.

[8] 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.

[9] 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, 790111111000/790111100, 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, 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 G 0 TSdLisense -]TJ-18.0388 0

- 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[10] 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 19th Meeting of the Standing Committee of the Sixth National People's Congress on January 22, 1987, amended July 8, 2000)

[10] 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 26th 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 8th 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, issu2 0 nA4p3.2787istryE1(, J)7. J ry ent of 8

- 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,

- 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,

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[1], coke[2], fluorspar[3], magnesium[4], manganese[5],

[1] 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.

[2] 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.

[3] 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.

[4] 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, 9ts but10o,ooooooool47(040)-5.7(010)-5.7(5)]TJ6.48 0 0 6.48 108 149. 6.4 Tm0 Tc0 Tw(4)T3

silicon carbide[6], silicon metal[7], yellow phosphorus[8], and zinc[9] (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 Tw.000i2u e 360.06J0 -1.-2, 260 -1.-9( )]TJ0 ar.06J0.14e

- 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)

- 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 4f Commerce on

- 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 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[10] imposed on the exportation of bauxite, fluorspar, and silicon carbide through a bidding system. In conn

- 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 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 8th 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 Ta25(Co)-7.p8s9e People'i

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 8th 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)

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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 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.

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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.

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

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 8th 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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[7] 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.

[8] 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.

[9] 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, 790111111000/790111100, 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)

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- 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[10] 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 19th 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 26th

- 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 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 Matters regarding the First Bidding for Export Quotas of Industrial P.278merce (ment(Mi)5[(Eng for)]TJ-ot at Bidding fof Industrial Prod009

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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 8th 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 Commodit-18.3388 -1.1nt-6.55ieptember 6("2)3.6Exp8)

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- 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)

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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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Report, that Section III of the Complainants' Panel Requests[1] 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

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

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 evidentiaruch

ANNEX V

WORLD TRADE ORGANIZATION

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.[1]

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".

[1]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)

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.

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measures" as they existed as of the date of panel establishment, then Mexico would seek review of the Panel's legal interpretation[3] and conclusion[4] not to make a recommendation on the export quota and export duty measures that were annually recurring a