China – Measures Related to the Exportation of Various Raw Materials
(DS395)

First Written Submission
by the European Union

Geneva 1 June 2010
TABLE OF CONTENTS

I. INTRODUCTION ........................................................................................................ 6

II. PROCEDURAL HISTORY ......................................................................................... 12

III. FACTS ..................................................................................................................... 13

A. The Raw Materials ................................................................................................. 13

1. Bauxite........................................................................................................ 14
2. Coke........................................................................................................ 15
3. Fluorspar.................................................................................................. 16
4. Magnesium............................................................................................ 17
5. Manganese............................................................................................ 19
6. Silicon Carbide.................................................................................... 20
7. Silicon Metal........................................................................................ 21
8. Yellow Phosphorus........................................................................... 22
9. Zinc.......................................................................................................... 22

B. Export Quotas ....................................................................................................... 24

1. General Overview of China's Export Quota Administration.................. 24
2. Export quotas allocated "directly"................................................................. 28
   (a) General.......................................................................................... 28
   (b) Export quotas for Coke............................................................... 31
   (c) Export quotas on Zinc ores and concentrates........................... 37
3. Export quotas allocated through "bidding" ............................................... 38
   (a) General.......................................................................................... 38
   (b) The Raw Materials allocated through bidding......................... 44

C. Export Duties ......................................................................................................... 48

1. Introduction .................................................................................................. 49
2. Export Duties............................................................................................ 50
3. Temporary Export Duties............................................................................ 51
   (a) Temporary Export Duties imposed on Bauxite:....................... 55
   (b) Temporary Export Duties imposed on Coke:......................... 55
   (c) Temporary Export Duties imposed on Fluorspar:.................... 56
   (d) Temporary Export Duties imposed on Magnesium:.............. 56
   (e) Temporary Export Duties imposed on Manganese:.............. 57
   (f) Temporary Export Duties imposed on Silicon Metal:............ 58
   (g) Temporary Export Duties imposed on Zinc:......................... 58
4. Special Export Duties.................................................................................... 59
   Yellow Phosphorous with HS No 28047010: .................................. 59

D. Export Licenses ..................................................................................................... 62

1. China's export licensing system .................................................................... 62
   (a) General.......................................................................................... 62
   (b) The License Bureau......................................................................... 63
   (c) The application procedure.......................................................... 64
   (d) The grant of export licenses......................................................... 66
   (e) Types of export licenses............................................................... 68
2. Raw Materials subject to Export Licenses ........................................... 69

E. Minimum Export Price Requirement .................................................. 70

1. The CCCMC .................................................................................. 71
2. Establishing Export Prices ............................................................ 74
3. Coordinated Export Price As a Minimum Export Price .................. 77
   (a) System of “Self-Discipline” .................................................. 77
   (b) MOFCOM Penalties .......................................................... 79
   (c) Licensing Authorities ....................................................... 80
   (d) Customs and the Price Verification and Chop Procedure .. 81
4. Conclusion ................................................................................... 84

IV. LEGAL ANALYSIS ........................................................................ 86

A. Export Quotas .................................................................................. 86
1. China's export quotas are inconsistent with Article XI of the GATT. ....... 86
2. China's export quotas are inconsistent with China's obligations under its Accession Protocol. ......................................................... 87
3. China's export restriction on Zinc is inconsistent with Article XI of the GATT and with China's obligations under China's Accession Protocol. ......................................................................................... 89
4. China's failure to publish the total amount of the Coke export quotas and the total amount and the procedure for the allocation of the Zinc export quotas are inconsistent with Article X:1 of the GATT. ................................................................................... 90

B. Conditions for allocation of export quotas and participation in export quota bidding procedures ......................................................... 92
1. The conditions applicants must satisfy in order to be allocated export quotas "directly" and in order to participate to export quota bidding procedures are inconsistent with China's obligations under its Accession Protocol. .......................................................... 92
   (a) The requirement of a "certain level of volumes exported, or supplied for export" .................................................. 92
   (b) The minimum capital requirement. ...................................... 96
2. China's administration of the export quota "direct" allocation system is inconsistent with Article X:3(a) of the GATT .......... 97

C. Export Duties ................................................................................... 100
1. China's Temporary Export Duties are inconsistent with China's obligations under its Accession Protocol ......................... 100
2. China's Temporary Export Duties imposed on different types of Bauxite are inconsistent with Article 11.3 of China's Accession Protocol: .................................................. 102
3. China's Temporary Export Duties imposed on Coke are inconsistent with Article 11.3 of China's Accession Protocol: .................. 104
4. China's Temporary Export Duties imposed on Fluorspar are inconsistent with Article 11.3 of China's Accession Protocol: .... 104
5. China's Temporary Export Duties imposed on Magnesium are inconsistent with Article 11.3 of China's Accession Protocol: .... 107
6. China's Temporary Export Duties imposed on Manganese are inconsistent with Article 11.3 of China's Accession Protocol: .... 109
7. China's Temporary Export Duties imposed on Silicon Metal are inconsistent with Article 11.3 of China's Accession Protocol: .... 110
8. China's Temporary Export Duties imposed on Zinc are inconsistent with Article 11.3 of China's Accession Protocol: ......................... 111
9. China's Special Export Duties on Yellow Phosphorus are inconsistent with China's obligations under its Accession Protocol ...................................................................................................... 113

D. Export Licenses ................................................................. 115

1. China's export licensing system is inconsistent with Article XI of the GATT...................................................................................... 115
2. China's export licensing system is inconsistent with China's obligations under its Accession Protocol. .................................... 118
   (a) Article 1.2 of China's Accession Protocol, in combination with paragraphs 162 and 165 of the Working Party Report .................................... 118
   (b) Article 5.1 and Article 1.2 of China's Accession Protocol, in combination with paragraphs 83 and 84 of the Working Party Report.......................................................... 119
3. China's administration of its export licensing system is inconsistent with Article X of the GATT. ........................................................ 122
   (a) Article X:1 of the GATT .................................................. 122
   (b) Article X:3(a) of the GATT.............................................. 123

E. China's Minimum Export Price Requirement Is Inconsistent with China's Obligations under the GATT 1994 ........................................................... 125

   (a) Coordinated Export Prices.................................................. 126
   (b) Observation of the Coordinated Export Prices by Exporters ...................................................................................................... 128
   (c) MOFCOM Penalties for Exporting at Low Prices ........... 129
   (d) Issuance of Licenses on the Basis of Coordinated Prices 129
   (e) Price Review by Customs and the PVC Procedure........... 130
   (f) Conclusion........................................................................ 133
2. China’s Administration of the Minimum Export Price Requirement Is Inconsistent with China’s Obligations under Article X:3(a) of the GATT 1994 ................................................................. 134
   (a) Article X:3(a) of the GATT 1994................................. 134
   (b) China’s Administration of the Minimum Export Price System through the PVC Procedure Is Not Impartial or Reasonable......................................................... 134
3. China’s Failure to Publish Measures Pertaining to the Minimum Export Price Requirement Is Inconsistent with China’s Obligations under Article X:1 of the GATT 1994 ........................................... 139
(a) Article X:1 of the GATT 1994 ............................................... 139
(b) China’s Minimum Export Price Requirements Are Rules of General Application .................................................. 139
(c) China Has Failed to Publish Important Measures and Provisions Relating to Minimum Export Prices ............. 139

V. CONCLUSION........................................................................................................ 142
<table>
<thead>
<tr>
<th>Short Title</th>
<th>Full Case Title and Citation</th>
</tr>
</thead>
</table>
I. INTRODUCTION

1. The People's Republic of China ("China") enjoys a unique position as regards the Raw Materials at issue\(^1\). China has access to some of the world's largest known reserves of these Raw Materials, and is the leading producer of several of them.

2. The rapid industrialisation and export-led growth of China over the past decades has resulted in a determined and conscious move by Chinese industries towards value-added products – often encouraged and facilitated by the Chinese state – as well as a sharp increase in the need for and use of the Raw Materials at issue by these domestic industries in their production.

3. The Chinese policy of applying export restraints in the form of quotas (including direct quota allocation and bidding), export duties, and temporary export duties, special export duties, licensing requirements and minimum export prices (and any combination of these) is by no means a recent phenomenon. The matter has been raised repeatedly by the European Union ("EU") and other WTO members in both bilateral and multilateral contexts with China.

4. More recently, China finally recognised the WTO-incompatibility of such measures. The EU for its part had raised the issue of the export restraints as one of a number of key concerns both during the bilateral as well as the multilateral talks leading to China's accession to the WTO.

5. Eventually, China acknowledged the WTO-incompatibility of the export restraints, except for unique situations, and, as a result, explicitly undertook to eliminate such

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\(^1\) Bauxite, coke, fluorspar, magnesium, manganese, silicon metal, silicon carbide, yellow phosphorus and zinc as identified in footnotes 1-9 of WT/DS395/7.
restrictions upon accession to the WTO. The Report of the Working Party on the Accession of China is replete with references to representations by WTO members highlighting the WTO-incompatibility of the Chinese use of export restraints, as well as assurances by the Chinese representatives that such measures would be eliminated, and also included in the Accession Protocol itself.

6. More specifically, China has undertaken, as part of the commitments in connection with its accession to the WTO, not to apply quantitative restrictions, as well as to eliminate all export duties except for those products listed in Annex 6 of the Accession Protocol where the permissible level of export duties is capped. In addition to this, China has explicitly undertaken a commitment in its WTO Accession Protocol to eliminate all restrictions on the "right to trade" (mentioned specifically in Art 5.1 of China's WTO Accession Protocol and extensively addressed by a panel and the Appellate Body in China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products WT/DS363/R of August 12, 2009 and WT/DS363/AB/R of December 21, 2009) as regards both imports and - as directly relevant for this case - exports, and this for both Chinese as well as foreign companies and individuals.

7. WTO members, including the EU, found reassurance in the Chinese commitments contained in the Accession Protocol and Working Party Report expecting that China would abide by its WTO commitments, and that the WTO-incompatible export restraints would be eliminated as required.

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3 WT/L/432.
8. However, subsequent developments have shown that China has paid only scant regard to the explicit commitments contained in the Accession Protocol as well as the generally applicable commitments of the GATT (1994), notably Articles VIII, X and XI thereof.

9. In fact, the period following China's accession to the WTO has been marked by an increase in the use and level of export duties and other duties, whether for products contained in Annex 6 or not, as well as by a significant decrease in the permissible volumes of exports of the Raw Materials at issue, which where subject to quotas.

10. The EU, as well as a number of other WTO members, has repeatedly raised China's continued and growing use of export restraints in bilateral and multilateral contexts, including by reminding China of its explicit commitments under the Accession Protocol, the Working Party Report as well as GATT (1994). More specifically, the EU has consistently raised the issue at technical and political level in its bilateral discussions with China, but to no avail. Likewise, the EU has raised the issue in the context of the 2008 Trade Policy Review of China and the Transitional Review Mechanism for China in the WTO, as well as other relevant WTO groups and committees, again to no avail.

11. The extent of China's use of export restraints causes serious economic hardship to EU industry. The Chinese export restraints translate directly into scarcity and higher prices of the Raw Materials in global markets, whereas the Chinese domestic industry enjoys a significant artificial advantage through the more generous supply and lower and more stable prices for the Raw Materials at issue. This places EU industry at a considerable competitive disadvantage as compared to its Chinese competitors.

12. The Chinese export restraints are applied not only to the Raw Materials at issue, but also to a range of additional products for which EU industry is exclusively or largely
dependent on Chinese exports. The pernicious effect of the export restraints is further reinforced by the fact that they are applied in a number of combinations, some of which have changed over time: some Raw Materials may be subject to both quotas and duties, others only to one or the other of these restraints, but then also to export licensing requirements or minimum export prices as monitored and enforced by Chinese chambers of commerce. This effectively means that even where a potential exporter may have been successful in obtaining an allocation of a part of a quota for a particular Raw Material, the exporter may still have to apply for an export license without any guarantee of obtaining such a licence and might even then be subject to a minimum export price requirement.

13. Additionally, many of the key terms and criteria of the Chinese measures are very vague and undefined and provide no clarity or certainty for potential exporters. This adds further uncertainty, unpredictability and lack of transparency to an already opaque system of export restraints such as the quotas and export duties, and provides no safeguards against arbitrary or capricious application of the terms and criteria by the relevant Chinese authorities.

14. While the EU would have preferred a resolution of this matter whereby China acknowledged its commitments under the Accession Protocol, the Working Party Report and GATT (1994) by the elimination of the multitude of WTO-incompatible export restraints, China has regrettably displayed no willingness to pursue such an option.

15. Consequently, the EU has been left with no choice but to seek recourse to WTO dispute settlement in order to safeguard its rights.

16. This submission will document China's use of export restraints for each of the Raw Materials at issue and demonstrate the incompatibilities of the Chinese measures with

17. At issue in this dispute are four types of restraints imposed by China on the exportation of the Raw Materials: (a) export quotas; (b) export duties; (c) export licences; and (d) minimum export pricing requirements. The European Union's Submission will address these issues as follows:

**Export Quotas**


19. In addition, the conditions imposed by China on enterprises in order to allow them to participate in export quota allocation procedures (both "direct" and through bidding) are inconsistent with Articles 5.1, 5.2 and 1.2 of China's Accession Protocol, in combination with paragraphs 83 and 84 of the Working Party Report. Moreover, China's administration of its export quota direct allocation system is inconsistent with Article X:3(a) of the GATT.

\(^4\) See the chart of Raw Materials subject to Export Quotas, attached as **Exhibit JE – 6**.
Export Duties

20. China imposes export duties on a number of Raw Materials that are not listed in Annex 6 of China's Accession Protocol. Moreover, China imposes export duties on yellow phosphorous at a rate that exceeds the maximum rate provided in Annex 6. These export duties are inconsistent with Article 11.3 of China's Accession Protocol.

Export Licensing

21. China imposes non-automatic licensing restrictions on the exportation of a number of Raw Materials. These export licences are inconsistent with Article XI of the GATT and with Article 5.1 and Article 1.2 of China's Accession Protocol, in combination with paragraphs 83, 84, 162 and 165 of the Working Party Report. Alternatively, China's administration of its export licensing system is inconsistent with Article X:1 and Article X:3(a) of the GATT.

Minimum Export Price Requirements

22. China establishes and enforces a minimum price for the exportation of a number of Raw Materials, thus restricting their exportation by prohibiting exportation at prices below a designated floor. These export restrictions are inconsistent with Article XI:1 of the GATT.

23. In addition, China's administration of its Minimum Export Price System is inconsistent with Article X:1 of the GATT and Article X:3(a) of the GATT.

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5 See the chart of Raw Materials subject to Export Duties, attached as Exhibit JE-5.
6 See the chart of Raw Materials subject to Export Licences, attached as Exhibit JE-6.
7 See the chart of Raw Materials subject to Minimum Export Prices, attached as Exhibit JE-7.
II. PROCEDURAL HISTORY

24. The European Union requested consultations with the Government of China on June 23, 2009, pursuant to Article 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”) with respect to China’s restraints on the export from China of various forms of Bauxite, Coke, Fluorspar, Magnesium, Manganese, Silicon Metal, Silicon Carbide, Yellow Phosphorus and Zinc (together the “Raw Materials”). On the same day, the United States of America requested consultations with China with respect to the same restraints. The requests were circulated to WTO Members on June 25, 2009 (WT/DS395/1, WT/DS394/1). On August 21, 2009, Mexico requested consultations with China regarding the same restraints. Mexico’s request was circulated to WTO Members on August 26, 2009 (WT/DS398/1).

25. The European Union, the United States and Mexico (together the “Co-Complainants”) each notified China of their desire to be joined in the consultations of the other complainants pursuant to Article 4.11 of the DSU. Two other Members (Canada and Turkey) notified their desire to be joined in the consultations, pursuant to Article 4.11 of the DSU. China accepted these requests. The Parties held joint consultations on July 30 and September 1-2, 2009. These consultations provided helpful clarification, but failed to resolve the dispute.

26. On November 4, 2009, the European Union, the United States and Mexico each requested the establishment of a panel pursuant to Article 6 of the DSU (WT/DS395/7, WT/DS394/7, WT/DS398/6, respectively). The Dispute Settlement Body (“DSB”) considered this request at its meeting on November 19, 2009, at which time China objected to the establishment of a panel.
27. On December 10, 2009, the European Union, the United States and Mexico each renewed its request for the establishment of a panel. Each complainant requested that a single panel be established to examine the three complaints pursuant to Article 9.1 of the DSU. At the DSB meeting of December 21, 2009, the DSB established a single panel with standard terms of reference to examine the complaints by the European Union, the United States and Mexico.

28. The Panel was composed on March 29, 2010.

III. FACTS

A. The Raw Materials

29. China has imposed various export restraints on nine key industrial Raw Materials, which are either naturally occurring minerals or materials that have undergone some initial processing. These Raw Materials are essential to the production of steel, aluminium and various chemicals. Consequently they are necessary for the manufacturing of a very broad array of goods including cars, trains, ships, airplanes, building elements (including for very big constructions, such as bridges, skyscrapers, railways, etc.), computers, solar cellars and even household detergents. China is a leading global producer of all nine of these Raw Materials. As a result, China's restrictions on the exportation of these materials have a particularly negative effect on the availability and price of the Raw Materials worldwide, which negatively impacts the competitive opportunities of non-Chinese users of these raw materials and the numerous products manufactured from them.
30. The European Union will provide in this section brief descriptions of the Raw Materials, their applications and China's production output and worldwide market share.

1. Bauxite

<table>
<thead>
<tr>
<th>Raw material category</th>
<th>Product Name</th>
<th>Product Name Short Form</th>
<th>Chinese HS number</th>
<th>Chinese Commodity code</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bauxite</td>
<td>Refractory clay</td>
<td>Refractory clay</td>
<td>2508.3000</td>
<td>2508300000</td>
</tr>
<tr>
<td></td>
<td>Aluminium ores and concentrates</td>
<td>Aluminium ores and concentrates</td>
<td>2606.0000</td>
<td>2606000000</td>
</tr>
<tr>
<td></td>
<td>Ash and residues primarily containing aluminium</td>
<td>Aluminium ash and residues</td>
<td>2620.4000</td>
<td>n/a</td>
</tr>
</tbody>
</table>

31. Bauxite is a naturally occurring, heterogeneous material comprised primarily of one or more aluminium hydroxide minerals, plus various mixtures of other minerals and impurities in smaller amounts. Bauxite is primarily used to produce aluminium, as well as abrasives, refractories, cement and various chemicals.

32. The aluminium and steel industries purchase and use very substantial quantities of bauxite. The vast majority of bauxite mined is converted to alumina (Al$_2$O$_3$) for the production of aluminium metal. The use of aluminium is widespread in various important sectors of the economy, such as vehicle manufacturing, in particular of important parts of cars, trains, ships and aircraft; in the building sector for the production of doors, balconies, chimneys and fences; and for packaging and engineering applications.
33. In 2008, China was the world’s second largest producer of bauxite, producing an estimated 35 million metric tons ("mt"), which accounted for approximately 17% of global production.

34. In 2008, the European Union imported 10.451,60 mt of refractory clay from China, rendering China the second largest source of imported refractory clay for the European Union. The European Union also imported 410.200,10 mt of aluminium ores and concentrates from China, again the second largest source of imported aluminium ores and concentrates for the European Union.

2. Coke

<table>
<thead>
<tr>
<th>Raw material category</th>
<th>Product Name</th>
<th>Product Name Short Form</th>
<th>Chinese HS number</th>
<th>Chinese Commodity code</th>
</tr>
</thead>
<tbody>
<tr>
<td>Coke</td>
<td>Coke and semi-coke made from coal whether or not agglomerated</td>
<td>Coke</td>
<td>2704.0010</td>
<td>2704001000</td>
</tr>
</tbody>
</table>

35. Coke is produced from the carbonization of coking coal. It is used as a fuel and as a source of carbon in various industrial, metallurgical and chemical manufacturing processes. Coke is also a key input in the manufacture of steel.

36. Coke produced from coking coal is often referred to as metallurgical coke because it is used in metal production. There are two principal types of metallurgical coke, distinguished by their size, shape and chemical properties, namely blast furnace coke and foundry coke. The former is a key input in the production of crude steel, whereas the latter is used in the production of cast iron products such as automobile engines and parts and pipe fittings.
37. China is the world’s leading producer of coke: China’s coke production was 340 million mt in 2008 and constituted approximately 60 percent of global production. The European Union imported 1,649,127,50 mt of coke from China in 2008, making China the most important source of imported coke for the European Union.

3. Fluorspar

<table>
<thead>
<tr>
<th>Raw material category</th>
<th>Product Name</th>
<th>Product Name Short Form</th>
<th>Chinese HS number</th>
<th>Chinese Commodity code</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fluorspar</td>
<td>Fluorspar containing by weight ≤ 97% calcium fluoride</td>
<td>Met-spar</td>
<td>2529.2100</td>
<td>2529210000</td>
</tr>
<tr>
<td></td>
<td>Fluorspar containing by weight &gt; 97% calcium fluoride</td>
<td>Acid-spar</td>
<td>2529.2200</td>
<td>2529220000</td>
</tr>
</tbody>
</table>

38. Fluorspar is a naturally occurring rock-like mineral which is milled into two principal grades: acid grade, also known as “acid-spar”; and sub-acid grade, which includes metallurgical and ceramic grades, also commonly called “met-spar”.

39. Fluorspar is used in the steel and iron industry, as well as, in the manufacture of products such as aluminium, gasoline, insulating foams, plastics, and refrigerants used in refrigerators and stationary air conditioning units. Met-spar is generally used for ceramics and steelmaking applications. Acid-spar is a key material in the manufacture of hydrofluoric acid (“HF”), which is an important substance in the chemical industry, in chemicals containing fluorine (“fluorochemicals” or “fluorocarbon chemicals”). Hydrofluoric acid is also used in the production
process of electronics, computer chips, printed circuit boards and thermal insulation.

40. China is the world’s largest producer of fluorspar (both acid-spar and met-spar). In 2008, China produced an estimated 54% of the world’s supply of fluorspar, while the other four major producing countries, combined, produced approximately 34%. In 2008, the European Union imported 145,611,10 mt of acid-spar from China, making China the leading source of imported acid-spar for the European Union. The European Union also imported 8,867 mt of met-spar from China, making China the second most important source of imported met-spar for the European Union.

4. Magnesium

<table>
<thead>
<tr>
<th>Raw material category</th>
<th>Product Name</th>
<th>Product Name Short Form</th>
<th>Chinese HS number</th>
<th>Chinese Commodity code</th>
</tr>
</thead>
<tbody>
<tr>
<td>Magnesium</td>
<td>Magnesium containing by weight, at least 99.8% magnesium</td>
<td>Magnesium metal</td>
<td>8104.1100</td>
<td>n/a</td>
</tr>
<tr>
<td></td>
<td>Other unwrought magnesium</td>
<td>Unwrought magnesium</td>
<td>8104.1900</td>
<td>n/a</td>
</tr>
<tr>
<td></td>
<td>Magnesium waste and scrap</td>
<td>Magnesium waste and scrap</td>
<td>8104.2000</td>
<td>n/a</td>
</tr>
</tbody>
</table>

41. Magnesium metal is produced from magnesium-containing materials such as seawater, well and lake brines and bitterns, and minerals such as dolomite, magnesite, brucite, carnallite, and olivine.
42. Magnesium metal’s principal use is as an alloying addition to aluminium and these aluminium-magnesium alloys are primarily used for beverage cans. Magnesium compounds, primarily magnesium oxide, are used mainly as refractory material in furnace linings for producing iron and steel, nonferrous metals, glass, and cement. Magnesium oxide and other compounds also are used in agricultural, chemical, and construction industries.

43. China is the world’s largest producer of magnesium metal, accounting for approximately 77% of global output, which in 2007 amounted to 860,000 mt.

44. In 2008, China was the primary source of imported Magnesium metal, Unwrought magnesium and Magnesium waste and scrap to the European Union, with 70.366,20, 61.072,20 and 1.137,30 mt respectively.
5. **Manganese**

<table>
<thead>
<tr>
<th>Raw material category</th>
<th>Product Name</th>
<th>Product Name Short Form</th>
<th>Chinese HS number</th>
<th>Chinese Commodity code</th>
</tr>
</thead>
<tbody>
<tr>
<td>Manganese</td>
<td>Manganese ores and concentrates, including ferromanganese ores and concentrates containing more than 20% manganese by dry weight</td>
<td>Manganese ores and concentrates</td>
<td>2602.0000</td>
<td>n/a</td>
</tr>
<tr>
<td></td>
<td>Unwrought manganese; Manganese waste and scrap; powder</td>
<td>Manganese metal</td>
<td>8111.0010</td>
<td>8111001010 (Unwrought manganese; waste and scrap)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>8111001090 (Unwrought manganese; powder)</td>
</tr>
</tbody>
</table>

45. Manganese is an element whose sulphur-fixing, deoxidizing, and alloying properties make it essential to iron and steel production. It is one of the most important metals, as it is currently indispensable for steel production and it has no satisfactory substitutes in its major applications.

46. Manganese ore is largely used in steel metallurgy to make pig iron and through upgrading ore to ferroalloys. Managanese is also used for non-metallurgical purposes, such as the production of dry cell batteries in its oxide form, in plant fertilizers and animal feed. Manganese metal (unwrought manganese) is used as a key component of certain widely used aluminium alloys.
47. China is one of the world’s leading producers of manganese ore, accounting for approximately 28% of world production by gross weight in 2007 and approximately 25% (2.4 million mt) of world production in 2009.

48. China is the world's leading producer of manganese metal by a significant margin. China's estimated annual capacity to produce manganese metal is 1.8 to 2.0 million mt per year, which is 35 times greater than production capacity in South Africa, the world's second largest producer of the metal. In 2008, China produced an estimated 950,000 mt of manganese metal, which accounted for over 95% of total world production of the metal.

49. In 2008, European Union imported 106.210,30 mt of manganese metal from China, making China the most important source of imported manganese metal for the European Union.

6. **Silicon Carbide**

<table>
<thead>
<tr>
<th>Raw material category</th>
<th>Product Name</th>
<th>Product Name Short Form</th>
<th>Chinese HS number</th>
<th>Chinese Commodity code</th>
</tr>
</thead>
<tbody>
<tr>
<td>Silicon Carbide</td>
<td>Silicon carbide</td>
<td>Silicon carbide</td>
<td>n/a</td>
<td>2849200000</td>
</tr>
<tr>
<td></td>
<td>Crude silicon carbide (of which the silicon carbide content is greater than 15% by weight).</td>
<td>Crude silicon carbide</td>
<td>n/a</td>
<td>3824909910</td>
</tr>
</tbody>
</table>

50. Silicon carbide (also commonly known by the trade names Carborundum and Crystolon) is used as an abrasive, in refractories, and as an additive in steel-making. Silicon carbide can withstand very high temperatures and retains its physical strength at those temperatures. It is also extremely hard. As a result, it is
primarily used as an abrasive, as an additive in steel and case iron, in non-clay refractories, as well as in metallurgical applications.

51. China has the world’s largest capacity for producing silicon carbide for abrasive applications, accounting for approximately 45% of the world’s capacity in 2009.

52. In 2008, the European Union imported 1.648,70 mt of crude silicon carbide from China, making China the third most important source of imported crude silicon carbide for the European Union.

7. Silicon Metal

<table>
<thead>
<tr>
<th>Raw material category</th>
<th>Product Name</th>
<th>Product Name Short Form</th>
<th>Chinese HS number</th>
<th>Chinese Commodity code</th>
</tr>
</thead>
<tbody>
<tr>
<td>Silicon metal</td>
<td>Silicon containing by weight less than 99.99% silicon</td>
<td>Silicon metal</td>
<td>2804.6900</td>
<td>n/a</td>
</tr>
</tbody>
</table>

53. Silicon is a light chemical element with metallic and non-metallic characteristics. Silica (silicon dioxide) as quartz or quartzite is used to produce silicon metal for the aluminum and chemical industries. Silicon metal is used in steel alloys, nonferrous (primarily aluminium) alloys, silicones, fumed silica, and other chemical applications. Downstream applications of silicon metal include the manufacture of cookware, medical applications, sealants, adhesives, lubricants, insulation, and breast implants. Another primary use of silicon metal is the manufacture of cast parts for the automotive industry.

54. China is the world's single largest producer of silicon metal accounting for approximately 75% of total global production. China produced an estimated
780,000 mt of silicon metal in 2009, accounting for nearly 50% of global output. Brazil, the second largest producer of silicon in 2009, produced only an estimated 157,500 mt, a mere 10% of global output.

55. In 2008, the European Union imported from China 47.888,20 mt of silicon metal, making China the third most important source of imported silicon metal for the European Union.

8. Yellow Phosphorus

<table>
<thead>
<tr>
<th>Raw material category</th>
<th>Product Name</th>
<th>Product Name Short Form</th>
<th>Chinese HS number</th>
<th>Chinese Commodity code</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yellow phosphorous</td>
<td>Yellow phosphorous (white phosphorous)</td>
<td>Yellow phosphorous</td>
<td>2804.7010</td>
<td>n/a</td>
</tr>
</tbody>
</table>

56. Yellow phosphorus (also known as white or elemental phosphorus) is used to make a number of industrial chemicals, including highly concentrated phosphoric acid, phosphorus trichloride, phosphorus pentasulfide, and phosphorus pentoxide, which are in turn used to manufacture products such as flame retardants, automotive lubricants, water treatment chemicals, cleaning agents, and food ingredients.

57. China is the leading producer of yellow phosphorus in the world, producing an estimated 740,000 mt in 2008, which is estimated at more than 70% of total world supply.

58. In 2008, the European Union imported from 7.393,30 mt of yellow phosphorus, making China its main source of imported yellow phosphorus.

9. Zinc
<table>
<thead>
<tr>
<th>Raw material category</th>
<th>Product Name</th>
<th>Product Name Short Form</th>
<th>Chinese HS number</th>
<th>Chinese Commodity code</th>
</tr>
</thead>
<tbody>
<tr>
<td>Zinc</td>
<td>Zinc ores and concentrates (excluding gray feed zinc oxide containing more than 80% zinc oxide)</td>
<td>Zinc ores and concentrates excluding gray feed zinc oxide</td>
<td>2608.0000 ex</td>
<td>2608000090</td>
</tr>
<tr>
<td></td>
<td>Gray feed zinc oxide containing more than 80% zinc oxide</td>
<td>Gray feed grade zinc oxide</td>
<td>2608.0000 ex</td>
<td>2608000001</td>
</tr>
<tr>
<td></td>
<td>Unwrought zinc containing by weight 99.995% or more zinc</td>
<td>Unwrought ≥ 99.995% zinc</td>
<td>7901.1110</td>
<td>7901111000</td>
</tr>
<tr>
<td></td>
<td>Unwrought zinc containing by weight 99.99% &lt; zinc content ≤ 99.995% zinc</td>
<td>Unwrought &lt; 99.99% zinc</td>
<td>7901.1200</td>
<td>7901120000</td>
</tr>
<tr>
<td></td>
<td>Unwrought zinc alloys</td>
<td>Unwrought zinc alloys</td>
<td>7901.2000</td>
<td>7901200000</td>
</tr>
<tr>
<td></td>
<td>Zinc waste and scrap</td>
<td>Zinc waste and scrap</td>
<td>7902.0000 n/a</td>
<td>n/a</td>
</tr>
<tr>
<td></td>
<td>Hard zinc ash and residues</td>
<td>Hard zinc spelter</td>
<td>2620.1100 n/a</td>
<td>n/a</td>
</tr>
<tr>
<td></td>
<td>Other zinc ash and residues</td>
<td>Other zinc ash and residues</td>
<td>2620.1900 n/a</td>
<td>n/a</td>
</tr>
</tbody>
</table>

59. Zinc is a malleable, ductile, gray metal. The most important uses of zinc are in its alloys (it is used to make bronze and brass) and as a protective coating on other metals to prevent corrosion on iron and steel. For example, zinc is widely used in
the production of corrosion-resistant steel. It is also used by the rubber, chemical, paint and agricultural industries.

60. China is the world’s largest producer of zinc. In 2009, China produced an estimated 2.8 million mt of zinc, approximately 25% of global production.

61. In 2008, there were almost no exports of Zinc ores and concentrates towards the European Union, because of China's very important export restrictions imposed on that material. In contrast, the European Union imported 2.994,70 mt of Unwrought Zinc from China, making China one of the five most important sources of imported Unwrought Zinc for the European Union.

B. Export Quotas

1. General Overview of China's Export Quota Administration

62. China's power to impose export quotas is based on China's Foreign Trade Law, which provides:

The state adopts the system of quota, license, etc. to the goods subject to import or export restrictions...For the goods and technologies subject to the administration of quota or license, they cannot be imported or exported unless it has been approved by the foreign department of the State Council independently or in collaboration with other departments of the State Council.8

63. The *Foreign Trade Law* provides for administrative and even criminal sanctions for anyone that "exports any goods that are banned from export, or unlawfully exports any goods that are restricted from export without approval".9

64. The general provisions of China's *Foreign Trade Law* are further developed in China's *Regulation on the Administration of the Import and Export of Goods*, which has been adopted in order to implement the relevant provisions of China's *Foreign Trade Law*.10

65. This Regulation provides that the foreign trade department of the State Council (in collaboration with other relevant departments of the State Council) shall "formulate, adjust and promulgate" the "list of goods limited in exportation".11 It also provides that "where there are quantitative limits on the goods limited in exportation, the goods shall be subject to the administration of quotas".12 Such export quotas are "subject to the administration of the foreign trade department of the State Council and the relevant economic administration departments of the State Council..."13 Following the merger and renaming of the relevant Chinese departments in 2003 and the creation of China's *Ministry of Commerce*, the references to the foreign trade department in the Regulation are to be understood as references to China's Ministry of Commerce.

66. The Regulation sets the basic rules for the administration of the export quotas. It provides that the total amount of the export quotas for a particular good to be allocated

9  See China's Foreign Trade Law, at Article 61.
10 See the 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 and entered into force on January 1, 2002, attached as *Exhibit JE – 73*.
11 See the Regulation on the Administration of the Import and Export of Goods, in Article 35.
12 See the Regulation on the Administration of the Import and Export of Goods, in Article 36.
13 See the Regulation on the Administration of the Import and Export of Goods, in Article 37.
during a year must be determined by October 31 of the previous year. Applications for
the allocation of an export quota must be submitted between November 1 and
November 15.\textsuperscript{14} A decision on the allocation must be issued within 30 days from the
submission of the application and no later than December 15 of the year preceding the
year for which the quota is allocated.\textsuperscript{15}

67. The holder of an export quota obtains a relevant certificate, which it must present to
the customs in order to export the goods.\textsuperscript{16} It must also present it to the authorities that
are responsible for the issuance of an export license, where the relevant good is also
subject to the export license regime.\textsuperscript{17}

68. The holder of an export quota must return the unused quotas by October 31 of the year
for which the export quotas have been issued. Failure to return the unused quotas on
time (and failure to use them by the end of the year for which the export quotas have
been issued) may result in administrative sanctions, such as the deduction of the
corresponding quantities from the quotas to be allocated to the same holder the
following year.\textsuperscript{18}

69. There are administrative sanctions (including the "revocation of the business license
for foreign trade", and the "taking back of the allocated quotas") and even criminal
sanctions for violations of the export restrictions. The Regulation provides a list of

\textsuperscript{14} See the Regulation on the Administration of the Import and Export of Goods, in Article 38.
\textsuperscript{15} See the Regulation on the Administration of the Import and Export of Goods, in Article 40.
\textsuperscript{16} See the Regulation on the Administration of the Import and Export of Goods, in Article 41.
\textsuperscript{17} See the Regulation on the Administration of the Import and Export of Goods, in Article 43. See also the
Measures on the Administration of Export Quotas, in Article 25.
\textsuperscript{18} See the Regulation on the Administration of the Import and Export of Goods, in Article 42.
such violations, including exporting without permission; exceeding the quantitative limitations; and buying or selling quota certificates or other "approval documents".19

70. China imposes export quotas on a number of Raw Materials, as follows:

<table>
<thead>
<tr>
<th>Raw Material</th>
<th>Product Name</th>
<th>Chinese Commodity Number</th>
<th>Allocation method</th>
<th>Total Quota Amount in mt in 2009</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bauxite</td>
<td>Refractory clay</td>
<td>2508300000</td>
<td>Bidding</td>
<td>930,000 tons</td>
</tr>
<tr>
<td></td>
<td>Aluminium ores and concentrates</td>
<td>2606000000</td>
<td>Bidding</td>
<td></td>
</tr>
<tr>
<td>Coke</td>
<td>Coke</td>
<td>2704001000</td>
<td>Direct</td>
<td>Not published</td>
</tr>
<tr>
<td>Fluorspar</td>
<td>Met-spar</td>
<td>2529210000</td>
<td>Bidding</td>
<td>550,000 tons</td>
</tr>
<tr>
<td></td>
<td>Acid-spar</td>
<td>2529220000</td>
<td>Bidding</td>
<td></td>
</tr>
<tr>
<td>Silicon carbide</td>
<td>Silicon carbide</td>
<td>2849200000</td>
<td>Bidding</td>
<td>216,000 tons</td>
</tr>
<tr>
<td></td>
<td>Crude silicon carbide</td>
<td>3824909910</td>
<td>Bidding</td>
<td></td>
</tr>
<tr>
<td>Zinc</td>
<td>Zinc ores and concentrates excluding gray feed zinc oxide</td>
<td>26080000090</td>
<td>Direct</td>
<td>Not published</td>
</tr>
</tbody>
</table>

19 See the Regulation on the Administration of the Import and Export of Goods, in Articles 64, 65, 66, 67 and 70.
2. Export quotas allocated "directly"

(a) General

71. China's Ministry of Commerce is responsible for the administration of the export quotas that are allocated "directly". The relevant rules are found in the Measures for the Administration of the Export Quotas, which were introduced by the predecessor of China's Ministry of Commerce (the then called Ministry of Foreign Trade and Economic Cooperation, or MOFTEC) in December 2001 and entered into force on January 1, 2002.\(^2\) The Measures implement the provisions of the Regulation on the Administration of the Import and Export of Goods and repeat, to a certain extent, a number of the Regulation's provisions.

72. These Measures apply to all export quotas with the exception of (i) export quotas allocated through "quota bidding or paid use administration"; (ii) commodities subject to "passive quota administration according to the provisions of multilateral or bilateral agreements"; and (iii) certain export commodities listed in an Annex to the Measures.\(^2\) None of the Raw Materials that are the subject of the present case are

\(^{20}\) See the Measures for the Administration of Export Commodities Quotas approved at the 9th ministerial meeting of the MoFTEC in 2001 and entered into force on January 1, 2002 through MoFTEC's Order No. 12 of 2001, attached as Exhibit JE - 76. Following the renaming of MoFTEC and its merger into China's Ministry of Commerce in 2003, all references to MoFTEC in the Measures should be understood as references to China's Ministry of Commerce.

\(^{21}\) See the Measures for the Administration of Export Quotas, in Article 4.
listed in that Annex. Importantly, these Measures do not apply to Foreign Invested Enterprises.22

73. China's Ministry of Commerce determines the total amount of export quotas for any particular year by October 31 of the preceding year.23 China's Ministry of Commerce allocates the export quotas of a specific year to the enterprises "under central administration" and to the local administrative authorities by December 15 of the previous year.24 The local administrative authorities allocate the export quotas further to the applicant enterprises in their respective areas.25 The Ministry of Commerce may allocate the export quotas in two instalments (70% by December 15 of the previous year and the rest no later than June 30 of the year for which the export quotas have been issued), where this is justified by "precarious factors in the international markets".

74. The export quota allocation is based on the Ministry of Commerce's assessment of (i) the export performance of the particular good; (ii) the utilization rate of the export quota; (iii) the "business management capacity" of the applicant; and (iv) the "production scale and resources status of the applicant enterprise or area" during the previous 3 years.26

22 See the Measures for the Administration of Export Quotas, in Article 31. For an example of the rules that apply to Foreign Invested Enterprises, see further below in the section discussing the procedures for the allocation of the Coke export quotas.

23 See the Measures for the Administration of Export Quotas, in Articles 9 and 11.

24 See the Measures for the Administration of Export Quotas, in Article 18.

25 See the Measures for the Administration of Export Quotas, in Article 17.

26 See the Measures for the Administration of Export Quotas, in Article 19.
75. The Ministry of Commerce may increase or decrease the export quotas already allocated to enterprises or local authorities where it considers that this is justified by (i) major changes in the international market; (ii) major changes in domestic resources; or (iii) "obvious imbalances in the quota-use-pace" between enterprises or areas. To that end, the Ministry of Commerce requires the local administrative authorities to verify and inspect the utilisation rate of export quotas by the companies of their respective areas and to take back export quotas from specific companies and reallocate them to other companies, where they consider that the utilisation rate of the former "does not meet the requirements".

76. The holders of export quotas must return to the Ministry of Commerce (or the relevant local administrative authority) any unused export quotas by October 31 of the year for which the export quotas have been issued. The Ministry of Commerce and the local administrative authorities may reallocate such "unused and returned" export quotas to other enterprises within their respective areas. Failure to return such "unused" export quotas timely to the Ministry of Commerce, or the local administrative authorities as the case may be, may expose the holder of the export quotas to an equivalent deduction of the export quotas to be allocated the following year.

77. Just like China's Regulation on the Administration of Import and Export of Goods, China's Measures for the Administration of Export Quotas provide for administrative

27 See the Measures for the Administration of Export Quotas, in Article 20.
28 See the Measures for the Administration of Export Quotas, in Article 21.
29 See the Measures for the Administration of Export Quotas, in Article 22.
30 See the Measures for the Administration of Export Quotas, in Article 23.
and even criminal sanctions for violations of the export quota administration provisions, such as exporting quantities above those authorised by the export quotas.\textsuperscript{31}

\textbf{(b) Export quotas for Coke}

78. China "directly" allocates the export quotas for \textbf{Coke}. This is done on the basis of China's \textit{Foreign Trade Law}, China's \textit{Regulation on the Administration of the Import and Export of Goods} and China's \textit{Measures for the Administration of Export Quotas}. On the basis of these measures, China's Ministry of Commerce publishes Notices announcing that the exportation of Coke in the following year will be subject to an export quota.\textsuperscript{32} China's Ministry of Commerce also publishes each year (during the month of December) the allocation of the export quotas to the selected applicants for the following year. Some years, China's Ministry of Commerce allocates a part of these export quotas in the course of the year for which the export quotas are issued.

79. Pursuant to the \textit{Measures for the Administration of the Export Quotas}, China's Ministry of Commerce must determine every year during the month of October the total amount of export quotas to be allocated during the following year.\textsuperscript{33} However, China does not publish the total amount of Coke quotas determined by the Ministry of Commerce. Moreover, China does not announce in advance whether it will allocate Coke export quotas in one "batch" (i.e., only in one instalment during the month of December of the preceding year), or in two "batches", (i.e., whether more export quotas will be allocated during the relevant year). As a result, China's trading partners,

\textsuperscript{31} See the Measures for the Administration of Export Quotas, in Article 26.

\textsuperscript{32} See, for example, Article I(1) of the \textbf{Notice No. 100 / 2008} titled "2009 List of goods submitted to export license management", published by China's Ministry of Commerce, General Customs Administration, on December 10, 2008, attached as \textbf{Exhibit JE – 22}.

\textsuperscript{33} See the Measures for the Administration of Export Quotas, in Articles 9 and 11.
as well as companies interested in exporting Coke do not know on time the total quantity of Coke that China will allow to be exported during the following year.

80. China's Coke export quota allocation procedures are as follows: Coke exporting companies under "central administration" are invited to submit their applications to China's Ministry of Commerce, with a copy to the China Chamber of Commerce of Metals, Minerals and Chemical Importers and Exporters ("CCCMC") in the month of October of the year prior to the year to which the export quotas relate. Companies not under central administration are invited to send their applications to the local trade management administration of their respective provinces. Importantly, applicants are invited to send their applications without knowing the total quantity of Coke that China's Ministry of Commerce has decided to allow for exportation, because China does not publish the total amount of the Coke export quotas in advance of the submission of the applications.

81. The local administrative authorities examine the applications, carry out a preliminary check of whether the applicants satisfy the requisite conditions, establish the list of applicant companies that fulfil the conditions and send it with their opinion to China's Ministry of Commerce (together with the accompanying documents), with a copy to the CCCMC.

82. Coke producing companies need to satisfy the following conditions in order to be allocated an export quota for Coke:

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34 See Section II of the "Communication on the Conditions Applicable to Coke Export Quota Applications and Application Procedures for 2009", published by China's Ministry of Commerce as Communication No. 76 / 2008, attached as Exhibit JE – 85. Different rules apply to Foreign Invested Enterprises, pursuant to Communication 76 / 2008, in Section I(9), which are discussed further below.

35 See Communication 76 / 2008, in Section I(1).
(a) Be registered pursuant to China's national legislation on economic, industrial and trade management administration. Qualify for import and export operations, or proceeding with the registration as a foreign trade operator. Have the credentials of an independent legal person.

(b) Have supplied for export purposes in the previous year a volume of at least 250,000 tons of Coke, in accordance with the Coking Sector Minimum Requirements.

(c) If the previous condition is not fulfilled, to have exported an average yearly volume of at least 200,000 tons of Coke over the previous three years.

(d) Produce goods in compliance with China's national standards and be ISO 9000 certified.

(e) Comply with China's national and local governments' relevant regulations, lawfully participate to a social insurance scheme covering workers' social security needs (i.e. pension, health, accident insurance, etc.) and duly pay the corresponding social insurance fees.

(f) Have an adequate production scale allowing for environmental protection management and equipment, comply with the national and local regulations related to pollutant emissions, have the payment certificates delivered by the provincial authorities for the previous two years, have no record of infringement of environmental laws, have established an environmental emergency plan and a sound coordination system.

(g) Have no record of infringement of relevant national laws and regulations.

83. Coke trading companies need to satisfy the following conditions in order to be allocated an export quota for Coke:36

36 See Communication 76 / 2008, in Section I(2).
(a) Be registered pursuant to China's national legislation on economic, industrial and trade management administration. Qualify for import and export operations, or proceeding with the registration as a foreign trade operator. Have the credentials of an independent legal person.

(b) Have a registered capital of at least RMB 50 million. Have exported an average yearly volume of at least 200,000 tons of Coke over the previous three years, or in case the company has a domestic scope of activity, to have supplied an average yearly volume of at least 400,000 tons of export goods over the previous three years.

(c) Comply with China's national and local government's relevant regulations, lawfully participate to a social insurance scheme covering the social security needs of workers and duly pay the social insurance fees.

(d) Be ISO 9000 certified.

(e) Have no record of infringement of China's relevant national laws and regulations.

84. To prove their compliance with these conditions, applicants are required to submit together with their application the following documents.

(i) A copy of the license to operate as a legal person; a copy of the completed and registered Foreign Trade Operator Registration Form, or the PRC Import and Export Compliance Certificate; and the Customs number and Identification number.

(ii) The ISO 9000 quality management system certificate.

(iii) All supporting documents issued by the labour and social insurance administration proving the participation to a social insurance scheme covering the workers' social security needs and the proper payment of the social insurance fees.

(iv) Production companies should provide, in addition, the following:

- for exports sold to an export company, the original VAT invoices drawn up by the National Tax Bureau for export sales, the export customs declarations and the export verification records.
- for exports operated by an export company agent, the original export invoice, the customs declaration, the export verification records and a piece of evidence concerning the goods handled by the export agent.

- environmental protection documents drawn up at Province level or at a higher level proving the compliance with the relevant laws, including the certificate of absence of administrative sanction for environmental infringements, the certificate concerning the implementation of the "Three Simultaneous Actions" program and the certificate proving the compliance with the standards for the main pollutants, as well as the environmental monitoring reports for the previous two years.

(v) Export companies should provide, instead of the items under (iv), the original VAT invoice or the original special export invoice, the export customs declaration, export verification record and a piece of evidence concerning the goods exported as an agent.

(vi) Other trading companies should submit, instead of the items under (iv) and (v), the following documents for the previous three years:

- for exports bought by an export company, the original VAT invoice drawn up by the National Tax Bureau for export sales, the export customs declaration and the export verification records.

- for exports operated by an export company agent, the original export invoice, the customs declaration, the export verification records and a piece of evidence concerning the goods handled by the export agent.

(vii) New applicants for a Coke export quota should provide all of the above documents for the previous three years. Companies that have already received coke export quotas during the previous year, only have to provide the relevant documents for the year before the last, except for the environmental monitoring report, which should be submitted for the last two years.

85. China's Ministry of Commerce delegates to the CCCMC and the China Coking Industry Association the examination of the applicants' compliance with the requisite
conditions. CCCMC sends its opinion to the Ministry of Commerce in the month of November. The Ministry of Commerce publishes the list of all applicants, as well as the list of the successful applicants, on the basis of the "compliance advice" given by the CCCMC.

86. The allocation of Coke export quotas to Foreign Invested Enterprises is done separately. In addition to the documents mentioned above, Foreign Invested Enterprises are also required to submit the following documents:  

(i) Permits issued by the provincial coking industry administrative agencies giving permissions to the enterprises to set up projects that are of legal capacities;  

(ii) FIE certificates and permits that have passed annual inspections; and  

(iii) Certificates of registration of the shareholders of the Foreign Invested Enterprises.

87. As mentioned above, China does not publish the total amount of the Coke export quotas available for allocation, prior to their actual allocation. China's Ministry of Commerce's announcements of quota allocation are the only source from which the total amount of the export quotas for any specific year can be calculated. Thus, for 2009, China's Ministry of Commerce allocated to Chinese wholly owned companies export quotas of a total quantity of 5,780,000 tons of Coke as a "first batch", on December 26, 2008.  

See, for example, the Notice on the First Batch of 2010 Coke export quotas for enterprises with foreign investment and the submission of relevant documents on Coke export, issued by the International Trade Division of the Department of Commerce of the Shanxi Province on March 9, 2010, attached as Exhibit JE–129.  

See the Notice for the passing down of the 2009 first batch of export quotas for non-processed Coke, published by China's Ministry of Commerce as Notice 140 / 2008 on December 26, 2008, attached as Exhibit JE – 80.
total quantity of 6,130,000 tons of Coke as a "second batch", on June 29, 2009.\(^{39}\) This brought the total quantity of the Coke export quotas for 2009 to 11,910,000 tons.

88. In addition, China allocated 591,000 tons of Coke export quotas to Foreign Invested Enterprises on January 9, 2009\(^{40}\) and another 591,000 tons on September 8, 2009.\(^{41}\) Therefore, the total quantity of Coke export quotas allocated to Foreign Invested Enterprises in 2009 was 1,182,000 tons.

(c) Export quotas on Zinc ores and concentrates

89. China also imposes export quotas on Zinc ores and concentrates.\(^{42}\) However, China does not publish any information on the quantities of Zinc ores and concentrates that can be exported in any particular year, nor does it publish any invitations for applications from interested companies or any announcements indicating the allocation of Zinc ores and concentrates export quotas to any company. As a result, China imposes a very important quantitative restriction on the exportation of Zinc ores and concentrates: China effectively imposes an export quota of zero quantity.

90. In any event, even if China allocates some export quotas to some exporters, China does not publish any invitation for applications for the allocation of the export quotas.

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\(^{39}\) See the Notification from the Ministry of Commerce concerning the 2009 second batch of Coke export quotas under the general trade regime, published as Notice 60 / 2009 on June 29, 2009, attached as Exhibit JE – 81.

\(^{40}\) See the Notice on the allocation of 2009 export quotas for industrial products for enterprises with foreign investment, published by China's Ministry of Commerce on January 9, 2009 as Notice 92 / 2009, attached as Exhibit JE – 82.

\(^{41}\) See the Communication on the transfer of the 2009 second batch of Coke and Rare Earth export quota quantities to foreign trade and investment companies, published by China's Ministry of Commerce on September 8, 2009 as Notice 73 / 2009, attached as Exhibit JE – 83.

\(^{42}\) See Notice No. 100 / year 2008, in Article 1(1).
China also does not publish any information on the companies that have been allocated such export quotas, or any information on the quantities of Zinc ores and concentrates that have been allocated for export through an export quota.

3. Export quotas allocated through "bidding".

(a) General

91. China's Ministry of Commerce is responsible for the administration of the "bidding" procedures for the allocation of export quotas. The basic rules are found in China's Measures on Quota Bidding for Export Commodities ("Measures on Export Quota Bidding"), which were adopted by the MOFTEC on December 20, 2001 and entered into force on January 1, 2002.43

92. These Measures were adopted on the basis of China's Foreign Trade Law,44 and pursuant to China's Regulation on the Administration of the Import and Export of Goods, which provides that "the quotas may be allocated…by way of invitation for bids",45 and that "the administrative departments of export quotas…shall, on the basis of the provisions of the present Regulation, formulate specific Measures of administration…".46

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43 See the Measures on Quota Bidding for Export Commodities approved at the 9th ministerial meeting of the MOFTEC in 2001 and entered into force on January 1, 2002 through MoFTEC's Order No. 11 of 2001, attached as Exhibit JE – 77. As mentioned above, following the renaming of MoFTEC and its merger into China's Ministry of Commerce in 2003, all references to MoFTEC in these Measures should be understood as references to China's Ministry of Commerce.

44 See the Foreign Trade Law, in Article 19.

45 See the Regulation on the Administration of the Import and Export of Goods, in Article 39.

46 See the Regulation on the Administration of the Import and Export of Goods, in Article 44.
93. China's rules on export quota bidding are further developed in China's *Implementation rules on Export Quota Bidding*, which were published by the then MOFTEC on November 8, 2001 in the form of an attachment to a Circular.\(^{47}\) All references to the MOFTEC in the *Implementation Rules on Export Quota Bidding* should be understood as references to what is currently China's Ministry of Commerce.

\[ \textit{i) The Bidding Committee} \]

94. China's Ministry of Commerce is responsible for the centralised administration of export quota bidding, for determining the types of goods that are subject to export quota bidding and for determining the total quantity of export quotas to be allocated through bidding.\(^{48}\) To that end, the Ministry of Commerce has set up a "Committee on Quota Bidding for Export Commodities" also known as the "Bidding Committee". The composition of the Bidding Committee is defined in the *Implementation Rules on Export Quota Bidding*.\(^{49}\)

95. The Bidding Committee is authorised to (i) determine the quantity of the export quotas, the bidding mode adopted for each bidding, the number of biddings and the quantity to be distributed under each bidding mode, (ii) determine the plan of quota bidding for each good, take charge of opening and evaluating the bids and approving the outcome of the bidding procedure, (iii) publish all necessary notices and announcements; (iv) accept the filings submitted by local bidding offices on unused quotas that are returned to the Ministry of Commerce, or quotas that the winning

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\(^{47}\) See the Circular on the distribution of the *Implementation Rules on Export Quota Bidding for Industrial Products* attached as *Exhibit JE – 78*.

\(^{48}\) See the Measures on Export Quota Bidding, in Article 3.

\(^{49}\) See the Implementation Rules on Export Quota Bidding, in Article 2.
companies may assign and transfer to other companies, (v) inspect the collection of security deposits and total award prices, and (vi) determine the qualifications that bidders should have, verify the existence of these qualifications and approve the list of companies that have the right to participate to the bidding procedure in accordance with these qualifications.  

96. The Bidding Committee is authorised to "direct export quota biddings". It may set a "base bid price" and invalidate bid prices that are "excessively high and obviously deviate from the law of price". The Bidding Committee is also authorised to set a maximum and minimum quantity to be allocated through each bid. Bidders need to bid for quantities within that range in order to avoid having their bids disqualified.

**ii) The Bidding Offices**

97. China's Ministry of Commerce and its Bidding Committee are assisted in the implementation of the export quota bidding by the respective Chinese Chamber of Commerce dealing with the good that is subject to quota bidding. To that effect, the Ministry of Commerce establishes local "offices of quota bidding" (known as "Bidding Offices") within China's Chambers of Commerce. The Bidding Offices are composed of representatives of the relevant Chamber of Commerce, the China Association of Enterprises with Foreign Investment and the "authority responsible for the

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50 See the Measures on Export Quota Bidding, in Article 8. See also the Implementation Rules on Export Quota Bidding, in Article 3.

51 See the Measures on Export Quota Bidding, in Articles 14 and 16.

52 See the Measures on Export Quota Bidding, in Article 16.
coordination of the relevant industry".53 The head of the relevant Chamber of Commerce also serves as director of the Bidding Office.54

98. The Bidding Offices are authorised to (i) draft the plan of quota bidding for a particular good, taking into consideration the views expressed by the relevant industry, (ii) examine whether the bidders satisfy the requisite qualifications, (iii) participate in the opening and the evaluation of the bids, (iv) inspect the proper collection of the security deposits and of the total award price, (v) accept the unused quotas returned by the successful bidders to the Ministry of Commerce and approve the assignment and transfer of unused quotas from one company to another, (vi) track the export quota holders' use of their quotas, as well as the situation in the market and the exports of the relevant good, (vii) print the relevant award certificates and (viii) generally handle any bidding-related matter delegated to them by the Bidding Committee of China's Ministry of Commerce.55 The Bidding Offices are also authorised to submit to the Bidding Committee their opinions on the qualifications that bidders should have for future bidding procedures.56

53 See the Measures on Export Quota Bidding, in Article 9.
54 See the Implementation Rules on Export Quota Bidding, in Article 4.
55 See the Measures on Export Quota Bidding, in Article 10.
56 See the Implementation Rules on Export Quota Bidding, in Article 5(I).
iii) Qualifications required by Bidders

99. China follows two types (or "modes") of export quota bidding: public bidding and negotiated bidding. China used the "public bidding" procedure for the allocation of export quotas for the Raw Materials in 2009. This is why the European Union will provide in this and the following sections brief descriptions of only the "public bidding" procedure.

100. To participate in an export quota public bidding procedure, a company must satisfy a number of conditions:\textsuperscript{57}

(a) it must be qualified to engage in export, or must have "completed the procedures relevant to the recording of foreign trade operators";\textsuperscript{58}

(b) it must be registered with the relevant Chinese "business administration authority" and "possess independent corporate authority";

(c) it must be a member of the relevant Chamber of Commerce and registered with the corresponding Bidding Office, or for Foreign Invested Enterprises a member of the China Association of Enterprises with Foreign Investment;

(d) it must have reached a "certain level in the volumes" of its exports of the relevant good, or in the volumes supplied for export;\textsuperscript{59}

\textsuperscript{57} See the Measures on Export Quota Bidding, in Article 11. See also the Implementation Rules on Export Quota Bidding, in Article 6(I).

\textsuperscript{58} See, for example, Article III(I)i in the Announcement on Matters regarding the First Bidding for Export Quotas for Industrial Products in 2009, published by the Ministry of Commerce on October 30, 2008 as Announcement No. 85 / 2008, attached as Exhibit JE – 90. See also Article III.1 in the Announcement on the Notice for the Second Invitation for the Bidding for Industrial Products Export Quotas in 2009, published by the Ministry of Commerce on June 8, 2009 as Announcement No. 42 / 2009 attached as Exhibit JE – 91.

\textsuperscript{59} The assessment of this "export performance" is based on the data derived from China's Customs; see the Measures on Export Quota Bidding, in Article 13.
(e) it must comply with the Chinese legislation on the social security and health and safety rights of workers and have paid its dues to the relevant pension funds, health and accident funds and other relevant workers' rights funds.\(^{60}\)

(f) it must not have been involved in any violation of any relevant Chinese laws and regulations during the previous three years;\(^{61}\)

(g) if it is a company producing the Raw Materials, it must comply with all environmental and anti-pollution Chinese legislation;\(^{62}\) and

(h) if it is a company only trading in Raw Materials, it must have procured its goods from production companies that satisfy the environmental and social security and protection rules mentioned above.\(^{63}\)

101. The bidders' qualifications are examined in two steps. First, by the "local department for commerce"\(^{64}\) and, then by the Bidding Office in the relevant Chamber of Commerce. The results of these examinations are submitted to the Bidding Committee of China's Ministry of Commerce, for final approval.\(^{65}\)

102. In order to show that they satisfy these conditions, bidders are required to submit together with their application, the following documents: (i) a balance sheet and income statement for the most recent completed financial year, together with an audit certificate issued by a certified public accounting firm; (ii) certificates issued by the competent labour and social security departments confirming the timely and full

\(^{60}\) See Announcement 85 / 2008, in Article III(I)iv. See also Announcement 42 / 2009, in Article III.1(4).

\(^{61}\) See Announcement 85 / 2008, in Article III(I)vi. See also Announcement 42 / 2009, in Article III.1(6).

\(^{62}\) See Announcement 85 / 2008, in Article III(I)iii.

\(^{63}\) See Announcement 85 / 2008, in Article II(I)v.

\(^{64}\) See Announcement No. 85 / 2008, in Article V(I)1. See also Announcement No. 42 / 2009, in Article IV.1(1).

payment of all relevant fees and premiums to the social security and workers' rights funds; (iii) companies producing the raw materials should also submit certificates and environmental monitoring reports confirming their compliance with the Chinese environmental and pollution control rules and regulations.  

(b) The Raw Materials allocated through bidding

103. Each year China allocates export quotas for various Raw Materials through bidding, pursuant to China's Foreign Trade Law, China's Regulation on the Administration of Import and Export of Goods, China's Measures on Export Quota Bidding and China's Implementation Rules on Export Quota Bidding. On the basis of the provisions of these measures, China's Ministry of Commerce publishes each year (during the month of October), Announcements and Notices announcing the Raw Materials that will be subject to export quotas during the following year and for which the export quotas will be allocated through bidding, the specific conditions that applicants must satisfy and the documents that applicants must submit together with their application. These Announcements and Notices of China's Ministry of Commerce are published once or twice per year, depending on whether the allocation of the export quotas through bidding will take place in "one batch" or in "two batches". The Announcements and Notices all have essentially the same content and effect. The only differences are the total quantities of the Raw Materials' export quotas to be allocated and the dates of the bidding.

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67 See, for example, the Announcement No. 85 / 2008. See also Announcement No. 42 / 2009.
104. In 2009, China used bidding for the allocation of the export quotas on Bauxite (Refractory-clay and Al ores, concentrates), Silicon Carbide and Fluorspar. China had set the total quantities of these export quotas for 2009 for Bauxite at 930,000 tons, for Fluorspar at 550,000 tons and for Silicon Carbide at 216,000 tons.

i) Bauxite

105. In the first bidding for the 2009 export quota for Bauxite, companies needed to have (i) registered capital of at least RMB 4 million, (ii) for Bauxite trading companies, an average annual volume of exports of 1,200 tons of Bauxite for the period 2006 to 2007, (iii) for Bauxite producing companies, an average annual volume of exports of 500 tons of Bauxite for the period 2005 to 2007, or an average annual volume of supply for export of 20,000 tons of Bauxite for the same period.

106. The first bidding procedure for the 2009 export quotas was for 465,000 tons of Bauxite and it took place on December 15 and December 16, 2008. The security deposit was set at 10% of the total award price and had to be paid into a bank account of the CCCMC by February 18, 2009.

107. The second invitation for the 2009 bidding, which was published on June 5, 2009, required the same conditions for the participation of Chinese wholly-owned companies

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68 See Announcement No. 85 / 2008, in Article I. See also Notice No. 100 / 2008, in Article I(2).

69 See the Ministry of Commerce's Announcement No. 83 / 2008 regarding 2009 Agricultural and Industrial Products Export Quota Amounts, published on October 10, 2008, attached as Exhibit JE – 79.

70 See Announcement No. 85 / 2008, in Article III(II)v.

71 See the Notice on the First Public Bidding for Export Quotas of Bauxite for 2009, published by the Bidding Committee on December 10, 2008, attached as Exhibit JE – 94.
(i.e., the conditions mentioned in the preceding paragraph of this submission). However, it introduced different thresholds for the participation of Foreign Invested Enterprises: an export volume of 500 tons of bauxite in 2008, or a "supply volume" of 20,000 tons of bauxite in 2008. Interestingly, the reference period for these thresholds was only one year (2008), while Chinese wholly-owned companies could use the average of three years (i.e., 2005 to 2007).

108. China published the list of companies qualifying for the second bidding for the 2009 export quotas on September 16, 2009. The dates for the second bidding were supposed to be announced separately. The European Union has not been able to identify any documents indicating that China actually held such a second bidding procedure in 2009.

ii) Silicon Carbide

109. In the first bidding for the 2009 export quota on Silicon Carbide, companies needed to have (i) registered capital of RMB 4 million, (ii) for Silicon Carbide trading companies, an average annual volume of exports of 600 tons of Silicon Carbide for the period 2005 to 2007, (iii) for Silicon Carbide manufacturing companies, an average annual volume of exports of 300 tons of Silicon Carbide for the period 2005 to 2007, or an average annual volume of supply for export of 1,200 tons of Silicon Carbide for the same period.

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72 See Announcement No. 42 / 2009.
73 See Announcement No. 42 /2009, in Article III(6).
74 See the Communication on the second call for tender for some industrial products export quotas in the year 2009, published by the Bidding Committee on September 16, 2009, attached as Exhibit JE – 95.
75 See Announcement No. 85 / 2008, in Article III(II)vi.
110. China held the first bidding procedure for 108,000 tons of Silicon Carbide on December 15 and December 16, 2008. The security deposit was set at 10% of the total award price and had to be paid into a bank account of the CCCMC by February 18, 2009.76

111. The second invitation for bidding, which was published on June 5, 2009, required the same conditions for the participation of Chinese wholly-owned companies. It introduced different thresholds for the participation of Foreign Invested Enterprises: exports of 200 tons, or "supply volume" of 1,200 tons of Silicon Carbide for the year 2008.77

112. China held a second bidding for 12,000 tons of Silicon Carbide between September 25, 2009 and September 27, 2009. There was a mandatory minimum bid price (which would be revealed to bidders only on their "electronic bid form").78 There were also mandatory minimum and maximum bid quantities. The security deposit was set at 10% of the total award price.

iii) Fluorspar

113. In the first bidding for the 2009 export quota on Fluorspar, companies needed to have (i) registered capital of RMB 5 million, (ii) an average annual volume of export of

76 See the Notice on the First Public Bidding for Export Quotas of Silicon Carbide for 2009, published by the Bidding Committee on December 10, 2008, attached as Exhibit JE - 95.

77 See Announcement No. 42 / 2009, in Article III(5).

78 See Article 6 of the Announcement of the second open call for bids for silicon carbide export quotas in 2009, published by the Bidding Committee on September 16, 2009, attached as Exhibit JE – 94.
4,000 tons of Fluorspar for the period 2005 to 2007, or an average annual volume of supply for export of 10,000 tons of Fluorspar, for the same period.79

114. The first bidding procedure was for 350,000 tons of Fluorspar and it took place on December 15 and December 16, 2008. The security deposit was set at 10% of the total award price and had to be paid into a bank account of the CCCMC by February 18, 2009.80

115. The second invitation for a public bidding, which was published on June 9, 2009, required the same conditions for the participation of Chinese wholly-owned companies. It introduced different thresholds for the participation of Foreign Invested Enterprises: exports of 1,000 tons, or "supply volume" of 10,000 tons of Fluorspar for the year 2008.81

C. Export Duties

116. In 2001, when China acceded to the WTO, it subjected 84 products to the imposition of export duty rates.82 Actually, at the time China imposed export duty rates on fewer than 84 products. Since then, the number of products on which China imposes export duty rates has increased substantially, from 36 products in 2002,83 to 373 in 2009.84

79 See Announcement No. 85 / 2008, in Article III(II)iii.
80 See the Notice on the First Public Bidding for Export Quotas of Fluorspar for 2009, published by the Bidding Committee on December 10, 2008, attached as Exhibit JE – 93.
81 See Announcement 42 / 2009, in Article III(3).
82 Exhibit JE-2, China's Accession Protocol to the WTO WT/L/432, para. 156.
117. China restrains the exportation of bauxite, coke, fluorspar, silicon carbide, silicon metal, magnesium, manganese, yellow phosphorus, and zinc through the imposition of export duties of various kinds.

1. Introduction

118. The text of the "Report of the Working Party on the Accession of China" to the WTO, also reflects the fact that during the course of negotiations for China's accession to the WTO, concerns were raised by other WTO Members about taxes and charges applied to Chinese exports. Specifically, it provides that:

"Some members of the Working Party raised concerns over taxes and charges applied exclusively to exports. In their view, such taxes and charges should be eliminated unless applied in conformity with GATT Article VIII or listed in Annex VI to the Draft Protocol."\(^85\)

119. According to China's Protocol of the Accession to the WTO of 2001\(^86\), China is committed to:

"... 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."\(^87\)

120. Annex 6 of the Protocol\(^88\) entitled "Products Subject to Export Duty" lists 84 different products (in an 8-digit Harmonised System Code), each specifying an export duty

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\(^84\) Exhibit JE-21, Notice Regarding the 2009 Tariff Implementation Program (State Council Customs Tariff Commission, shuiweihui (2008) No. 40, January 1, 2009), Schedule 7.


\(^86\) Exhibit JE-2, China's Accession Protocol to the WTO W/TL/432.

\(^87\) Exhibit JE-2, China's Accession Protocol to the WTO W/TL/432, para. 11.3.
rate indicated as an *ad valorem* percentage. The products which are listed in Annex 6 are therefore those products on which China retained the right to impose export duties, in accordance with the percentage duty listed in the same Annex.

121. Additionally, a Note at the end of Annex 6 of China's Accession Protocol states that:

"China confirmed that the tariff levels included 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."

2. **Export Duties**

122. The General Customs Administration of China, set up by the State Council, exercises unified administration of the Customs offices throughout the country.\(^89\) Customs offices exercise their functions and powers independently and in accordance with the law, and fall under the responsibility of the General Customs Administration.\(^90\) One of the responsibilities of the General Customs Administration of the Republic of China is to *"collect customs duties and other taxes and fees"*.\(^91\)

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88 **Exhibit JE-2**, China's Accession Protocol to the WTO W/TL/432, Annex 6 entitled "Products Subject to Export Duty".


90 Ibid.

91 Ibid. Article 2.
123. The Customs Law of China, specifies that "customs duties shall be levied by the Customs according to law." The duty-paying value of a good which is to be exported from the Republic of China is decided by the Customs Administration "on the basis of its transaction price". However, if the transaction price cannot be determined, then the Customs Administration "shall assess the duty-paying value in accordance with law". The duty-paying value of an imported or exported article from the Republic of China is fixed by the Customs administration in accordance with the law.

124. The Customs Law also specifies that: "Customs duty fees levied on imports or exports shall be paid within 15 days following the date of issuance of the duty memorandum." If this is not done, the Customs Administration can impose a fee for late payment on the person or entity responsible for paying the fees, or on its guarantor.

3. Temporary Export Duties

125. The Customs Tariff Commission of China, which is established by the State Council, has various responsibilities referred to specifically in the "The Regulations of the People's Republic of China on Import and Export Duties" which came into force on

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92 Ibid. Article 53.
93 Ibid. Article 55.
94 Ibid.
95 Ibid.
96 Ibid., Article 60.
97 Ibid.
January 1, 2004. It is responsible for adjusting and interpreting items subject to duties, duty nomenclature and heading numbers, as well as decisions on the "goods subject to temporary duty rates". Another of its responsibilities is that it "decides the implementation of other measures relating to customs duties and the application of duty rates under special circumstances."

According to the same measure, "temporary duty rates may be applied to export goods within a defined time limit". Moreover, "where a temporary duty rate is set up for the export goods, to which the export duty rate applies, the temporary duty rate shall prevail".

The Regulations of the People's Republic of China on Import and Export Duties also provide more detail about the collection of these duties. In fact, "import and export duties may be collected ad valorem or by quantity or by any other means as provided by the state." The duties are to be paid to a designated bank within 15 days of the issue of the duty payment form by the Customs Administration, and in default of payment within the prescribed time limit, a fee of 0.05% of the amount of the duty due shall be imposed.

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99 Ibid.

100 Ibid.

101 Ibid., Article 9.

102 Ibid., Article 11.

103 Ibid. Article 36.

104 Ibid. Article 37.
128. On December 15, 2008, the Tariff Commission issued the "State Council Tariff Policy Commission Notice Regarding 2009 Tariff Implementation Programme"\(^{105}\) which came into force on January 1, 2009. This measure sets out the details for the Tariff Implementation Programme for 2009. Section II entitled "Export Tariff Adjustment", provides that the regular export tariffs for 2009 shall remain unchanged,\(^{106}\) and that special export tariffs will be in force for other products: "for certain fertilizers as well as their raw materials and others, continue to impose the special export duty (See Schedule 7)".\(^{107}\)

129. The detailed list of products in Schedule 7, consisting of 373 different goods which were subject to export duties in 2009, indicates the duty rates applicable to the different goods (listed in an 8-digit HS numeric code). The rates applicable to these goods are indicated as "regular" export duty rates", "temporary" export duty rates and/or "special" export duty rates."


\(^{106}\) Ibid., Sect II (I).

\(^{107}\) Ibid., Sect II (II) Emphasis added.
130. The following table sets out the temporary export duty rates applicable to the following raw materials in 2009:

<table>
<thead>
<tr>
<th>Raw Material</th>
<th>Duty List Item No.</th>
<th>HS No.</th>
<th>Temporary Export Duty Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bauxite</td>
<td>37</td>
<td>2508.3000</td>
<td>15%</td>
</tr>
<tr>
<td></td>
<td>67</td>
<td>2606.0000</td>
<td>15%</td>
</tr>
<tr>
<td></td>
<td>96</td>
<td>2620.4000</td>
<td>10%</td>
</tr>
<tr>
<td>Coke</td>
<td>109</td>
<td>2704.0010</td>
<td>40%</td>
</tr>
<tr>
<td>Fluorspar</td>
<td>53</td>
<td>2529.2100</td>
<td>15%</td>
</tr>
<tr>
<td></td>
<td>54</td>
<td>2529.2200</td>
<td>15%</td>
</tr>
<tr>
<td>Magnesium</td>
<td>363</td>
<td>8104.1100</td>
<td>10%</td>
</tr>
<tr>
<td></td>
<td>364</td>
<td>8104.1900</td>
<td>10%</td>
</tr>
<tr>
<td></td>
<td>365</td>
<td>8104.2000</td>
<td>10%</td>
</tr>
<tr>
<td>Manganese</td>
<td>63</td>
<td>2602.0000</td>
<td>15%</td>
</tr>
<tr>
<td></td>
<td>369</td>
<td>8111.0010</td>
<td>20%</td>
</tr>
<tr>
<td>Silicon Metal</td>
<td>113</td>
<td>2804.6900</td>
<td>15%</td>
</tr>
<tr>
<td>Zinc</td>
<td>353</td>
<td>7902.0000</td>
<td>10%</td>
</tr>
<tr>
<td></td>
<td>91</td>
<td>2620.1100</td>
<td>10%</td>
</tr>
<tr>
<td></td>
<td>92</td>
<td>2620.1900</td>
<td>10%</td>
</tr>
</tbody>
</table>

131. Annex 6 of China's Accession Protocol does not include bauxite (refractory clay, aluminium ores and concentrates, aluminium ash and residues, coke, fluorspar (metspar, acid-spar, magnesium (magnesium metal, unwrought magnesium, magnesium waste and scrap), manganese (manganese ores and concentrates, manganese metal), silicon metal, or zinc (zinc waste and scrap, hard zinc spelter, and other zinc ash and residues).
(a) Temporary Export Duties imposed on Bauxite:

i) Refractory Clay with HS Code 25083000:

132. Item 37 of Schedule 7 of the 2009 Notice,\textsuperscript{108} imposes a 15% Interim Duty rate as from January 1, 2009 on Refractory Clay with HS Code 25083000.

ii) Aluminium Ores and Concentrates with HS Code 26060000:

133. Item 67 of Schedule 7 of the 2009 Notice,\textsuperscript{109} imposes a 15% Interim Duty Rate as from January 1, 2009 on Aluminium Ores Concentrates with HS Code 26060000.

iii) Aluminium Ash and Residues with HS Code 26204000:

134. Item 96 of Schedule 7 of the 2009 Notice,\textsuperscript{110} imposes a 10% Interim Duty Rate from January 1, 2009 on Aluminium Ash Residues with HS Code 26204000.

(b) Temporary Export Duties imposed on Coke:

i) Coke and Semi-Coke with HS Code 27040010:

135. Item 109 of Schedule 7 of the 2009 Notice,\textsuperscript{111} imposes a 40% Interim Duty Rate as from January 1, 2009 on Coke and Semi-Coke with HS Code 27040010.

\textsuperscript{108} Ibid., Schedule 7.
\textsuperscript{109} Ibid.
\textsuperscript{110} Ibid.
\textsuperscript{111} Ibid.
(c) Temporary Export Duties imposed on Fluorspar:

136. Item 53 of Schedule 7 of the 2009 Notice,\textsuperscript{112} imposes a 15% Interim Duty Rate as from January 1, 2009 on Met-spar (CaF\textsubscript{2} content < 97\%) with HS Code 25292100.

137. Item 54 of Schedule 7 of the 2009 Notice,\textsuperscript{113} imposes a 15% Interim Duty Rate as from January 1, 2009 on Acid-spar (CaF\textsubscript{2} content < 97\%) with HS Code 25292200.

(d) Temporary Export Duties imposed on Magnesium:

138. Item 363 of Schedule 7 of the 2009 Notice,\textsuperscript{114} imposes a 10% Interim Duty Rate as from January 1, 2009 on Magnesium Metal with HS Code 81041100.
ii) Unwrought Magnesium with HS Code 81041900:

139. Item 364 of Schedule 7 of the 2009 Notice,\(^{115}\) imposes a 10% Interim Duty Rate as from January 1, 2009 on Unwrought Magnesium with HS Code 81041900.

iii) Magnesium Waste and Scrap with HS Code 81042000:

140. Item 365 of Schedule 7 of the 2009 Notice,\(^{116}\) imposes a 10% Interim Duty Rate as from January 1, 2009 on Magnesium Waste and Scrap with HS Code 81042000.

(e) Temporary Export Duties imposed on Manganese:

i) Manganese Ores and Concentrates with HS Code 26020000:

141. Item 63 of Schedule 7 of the 2009 Notice,\(^{117}\) imposes a 15% Interim Duty Rate as from January 1, 2009 on Manganese Ores and Concentrates with HS Code 26020000.

ii) Manganese Metal with HS Code 81110010:

142. Item 369 of Schedule 7 of the 2009 Notice,\(^{118}\) imposes a 20% Interim Duty Rate as from the January 1, 2009 on Manganese Metal with HS Code 81110010.

\(^{115}\) Ibid.

\(^{116}\) Ibid.

\(^{117}\) Ibid.

\(^{118}\) Ibid.
(f) Temporary Export Duties imposed on Silicon Metal:

\[ i) \quad \text{Silicon} \leq 99.99\% \text{ with HS Code} \ 28046900: \]

143. Item 113 of Schedule 7 of the 2009 Notice,\(^{119}\) imposes a 15 \% Interim Duty Rate as from January 1, 2009 on Silicon \leq 99.99\% with HS Code 28046900.

(g) Temporary Export Duties imposed on Zinc:

\[ i) \quad \text{Zinc Waste and Scrap with HS Code} \ 79020000: \]

144. Item 353 of Schedule 7 of the 2009 Notice,\(^{120}\) imposes a 10\% Interim Duty Rate as from January 1, 2009 on Zinc Waste and Scrap with HS Code 79020000.

\[ ii) \quad \text{Hard Zinc Spelter with HS Code} \ 26201100: \]

145. Item 91 of Schedule 7 of the 2009 Notice,\(^{121}\) imposes a 10\% Interim Duty Rate from January 1, 2009 on Hard Zinc Spelter with HS Code 26201100.

\(^{119}\) Ibid.

\(^{120}\) Ibid.

\(^{121}\) Ibid.
iii) Other Zinc Ash and Residues with HS Code 26201900:

146. Item 92 of Schedule 7 of the 2009 Notice, \textsuperscript{122} imposes a 10% Interim Duty Rate as from January 1, 2009 on Other Zinc Ash and Residues with HS Code 26201900.

4. Special Export Duties

Yellow Phosphorous with HS No 28047010:

147. Article 4 of the Chinese Regulations on Import and Export Duties\textsuperscript{123} provides that "the Customs Tariff Commission.....decides on the application of duty rates under special circumstances..."

148. On May 14, 2008, the Chinese Customs Tariff Commission introduced a special export duty rate of a 100% on yellow phosphorus, effective from May 20, 2008.\textsuperscript{124} This 100% special export duty rate was thus imposed in addition to the then existing export duty rate applicable to yellow phosphorous, which at the time was set at 20%. On May 16, 2008, the Chinese General Administration of Customs issued a Notice implementing the special export duty on yellow phosphorous.\textsuperscript{125}

\textsuperscript{122} Ibid.


\textsuperscript{125} Exhibit JE-70, Notice Regarding the Scope of Phosphorous Products subject to Increased Special Export Duties (General Administration of Customs (2008) No. 33, May 20, 2008.)
149. Accordingly, the total export duty rate applicable to yellow phosphorous increased from 20% to 120% within one week of the issue of the Chinese Customs Tariff Commission Notice. 126

150. On November 13, 2008, the Tariff Commission lowered the special export duty rate on certain goods with effect from December 1, 2008,127 as set out in two annexed Tables to the State Council Customs Tariff Commission Notice. Table 1 of this measure indicated that the special export duty rate for yellow phosphorous was being lowered, while Table 2 provided that the special export duty rate for yellow phosphorous was being lowered from 100% to 75%. The "regular" export duty rate of 20% applicable to yellow phosphorous remained unchanged. This had the result of a combined export duty rate on yellow phosphorous of 95%.

151. On December 15, 2008, the Tariff Commission issued the 2009 Tariff Implementation Program, which took effect on January 1, 2009. The 2009 Tariff Implementation Program sets out the details for the Tariff Implementation Program for the year 2009. Section II of the 2009 Tariff Implementation Program outlines the adjustments to export duties, providing that in 2009, certain raw materials would continue to be subject to the imposition of special duties128 as set out in detail in the 2009 Export Commodities Duty Rate List. The 2009 Tariff Implementation Program does not specify any distinct time limit for the duration of the application of the special export duty rates.


128 Exhibit JE-21, Notice Regarding the 2009 Tariff Implementation Program (State Council Customs Tariff Commission, shuiweihui (2008) No. 40, January 1, 2009), Section II(2).
152. The 2009 Export Commodities Duty Rate List provides for a 50 percent special export
duty rate for yellow phosphorus for 2009 as well as a 20 percent "regular" export duty
rate, for a combined export duty rate of 70 percent. China did not consult with the
European Union prior to imposing the 70 percent export duty on yellow phosphorus in
December 2008.

153. Yellow phosphorus is one of the 84 goods listed in Annex 6. The maximum duty rate
for yellow phosphorus designated in Annex 6 of China's WTO Accession Protocol is
20 percent.\textsuperscript{129} China did not consult with the European Union prior to increasing the
export duty imposed on yellow phosphorus to 120 percent in May 2008. Nor did China
consult with the European Union when it imposed the 95 percent export duty on
yellow phosphorus in November 2008. Nor did China consult with the European
Union when it imposed the 70 percent export duty on yellow phosphorus in January
2009.

\textsuperscript{129} \textbf{Exhibit JE-2}, China's Accession Protocol to the WTO WT/L/432, Annex 6, Item no. 11.
D. Export Licenses

1. China's export licensing system

(a) General

154. China imposes non-automatic licensing restrictions on the exportation of certain Raw Materials. "Export licenses" are defined as "the various kinds of certificates and documents that are of export nature as provided in laws and administrative regulations".\(^{130}\) China's *Foreign Trade Law* draws a distinction between, on the one hand, goods whose exportation is free and, on the other hand, goods whose exportation is restricted through non-automatic export licensing. Goods qualified as "freely exported goods" can be subject to automatic licensing for "monitoring purposes".\(^{131}\) In contrast, China's Foreign Trade Law provides that non-automatic export licensing is one of the restrictive measures that can be imposed on "goods subject to export restriction".\(^{132}\) China restricts the exportation of a number of Raw Materials through non-automatic licensing. The European Union will discuss in this Section the main characteristics of China's non-automatic export licensing system.

155. The export licenses generally have a period of validity of up to 6 months.\(^{133}\) If the good is also subject to an export quota, the exporting company must submit its

\(^{130}\) See the Regulation on the Administration of the Import and Export of Goods, in Article 43.

\(^{131}\) See the Foreign Trade Law, in Article 15.

\(^{132}\) See the Foreign Trade Law, in Article 19.

\(^{133}\) See Article 30 of the *Measures for the Administration of Licenses for the Export of Goods*, adopted at the 6th executive meeting of the Ministry of Commerce on May 7, 2008 and entered into force on July 1, 2008.
Companies that fail to use an export license during its period of validity may apply for an extension of its duration only once.\textsuperscript{135}

156. China's legislation provides for administrative and even criminal sanctions for anyone who "exports any goods that are banned from export, or unlawfully exports any goods that are restricted from export, without approval".\textsuperscript{136} These sanctions also apply to the exportation without an export license of the Raw Materials that are subject to export licenses.

(b) The License Bureau

157. China's Ministry of Commerce is the department of "centralised administration of export licenses". Its \textit{Measures for the Administration of Export Licenses} define the procedures that must be followed for the issuance of export licenses, as well as the bodies that are responsible for the administration of the system.

158. Within the Ministry of Commerce, the "Bureau of Quota License" (known as the "\textbf{License Bureau}") is responsible for the "uniform" application of the export licensing rules and for the coordination of work of the local "export license issuing agencies", which are established within China's local administrative authorities (e.g., provinces, (the \textit{Measures for the Administration of Export Licenses}), attached as \textit{Exhibit JE – 74}. Their period of validity cannot exceed the end of the year for which they are issued.

\textsuperscript{134} See the Measures for the Administration of Export Licenses, in Article 28.

\textsuperscript{135} See the Working Rules on Issuing Export Licenses, in Articles 17, 18 and 19. No extensions are granted beyond the end of the relevant year, where the export licenses relate to goods that are also subject to export quotas and the export licenses are "handled by using the export quotas of the current year"; see the Measures for the Administration of Export Licenses, in Article 31.

\textsuperscript{136} See the Foreign Trade Law, in Article 61.
autonomous regions, municipalities directly under the central government, etc.). The License Bureau is responsible for handling applications for export licenses submitted by companies that fall under the central government of Beijing, while the local export license issuing agencies are responsible for handling the applications submitted in their respective areas.

(c) The application procedure

159. The Ministry of Commerce, together with China's General Administration of Customs publishes every year a "Catalogue of Goods subject to the Administration of Export Licenses". This Catalogue includes several Raw Materials, such as Bauxite, Coke, Fluorspar, Manganese, Silicon Carbide and Zinc.

160. Companies applying for a license to export these Raw Materials are required to submit to the export license issuing agencies the following documents:

(i) The "Application Form for Export Licenses".

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137 See the Measures for the Administration of Export Licenses, in Articles 4 and 5. See also Article 4 of the Measures for the Administration of the Organs for issuing the Licenses of Import and Export Goods, issued by the then MoFTEC on September 21, 1999, as Notice No. 68 / 1999 (the "Measures for the Administration of Export License Organs").

138 See the Measures for the Administration of Export Licenses, in Article 20. See also Notice No. 124 / 2008, in Article 1(2) and 1(3), attached as Exhibit JE – 96.

139 See the Measures for the Administration of Export Licenses, in Article 3.

140 See, for example, Notice No. 100 / 2008 attached as Exhibit JE - 22, in Article I.

(ii) The first time a company applies for an export license a particular year, it must submit (a) its business license and (b) the "registration form of foreign trade operators", annexed with the operator's seal that is especially used for record-keeping and registration purposes or the qualification certificate of import-export enterprises, or the certificate of approval of Foreign Invested Enterprises" (as the case may be). 142

(iii) The documents of approval for export issued by the competent authority in charge.

(iv) The export contract.

(v) The "Entrusted Agency Agreement", if the exporter is not identical with the consignor.

(vi) Any other documents prescribed by China's Ministry of Commerce. There is no definition of what these "other documents" may be. Moreover, there is no limitation on China's Ministry of Commerce's discretion to require such "other documents" in relation to specific Raw Materials or even specific applicant companies.

161. Companies wishing to export Raw Materials that are also subject to export quotas must first be allocated such an export quota, before they apply for an export license. 143 To prove that it has been allocated such an export quota, the applicant company must submit to the competent export license issuing agency the relevant quota allocation certificate issued by the Bidding Committee or the Bidding Offices, in addition to the other documents mentioned above. 144 The issuance of an export license without or exceeding a quota is strictly prohibited. 145

142 See the Working Rules on Issuing Export Licenses, in Article 6. See also the Measures for the Administration of Export Licenses, in Article 10.

143 See the Measures for the Administration of Export Licenses, in Article 21.

144 See the Measures for the Administration of Export Licenses, in Article 9.

145 See the Measures for the Administration of Export Licenses, in Article 21.
As a general rule, an export license must be issued within 3 working days from the receipt of a completed application.\textsuperscript{146} However, by law, the grant of the export license for the Raw Materials is not automatic, i.e., China's export license issuing agencies are entitled to refuse the grant of export licenses.

Moreover, China's administrative authorities have the discretion to refuse the grant of export licenses where they consider that the applicant does not satisfy certain "conditions". These "conditions" include China's administrative authorities' assessment of whether the applicant has "management qualifications".\textsuperscript{147} China's rules do not define or explain what these "management qualifications" should be, or how their supposed presence should be verified. This allows China's Ministry of Commerce a large discretion on whether to grant, or refuse applications for export licenses.

If the Chinese export license issuing agencies are satisfied that a particular applicant meets the conditions to be granted an export license, they proceed with the determination of the quantity that the applicant may export and the corresponding export license that should be issued\textsuperscript{148}. In deciding the quantity of Raw Material that they will allow for exportation, China's export license issuing agencies are authorised to take into consideration the following:

(i) the terms and conditions of the export contract;

\textsuperscript{146} See the Measures for the Administration of Export Licenses, in Article 19. See also the Working Rules on Issuing Export Licenses, in Article 10.

\textsuperscript{147} See the Working Rules on Issuing Export Licenses, in Article 8.

\textsuperscript{148} See the Working Rules on Issuing Export Licenses, in Article 9.
(ii) the certificates evidencing that an export quota has been allocated, read together with the relevant lists of export quota recipients issued by the Bidding Committee, 149 and

(iii) any other "documents of approval of the Ministry of Commerce". 150

165. There is no definition of these "other documents of approval" to be issued by the Ministry of Commerce. Moreover, there is no limitation on the discretion of the Ministry of Commerce to require or issue such other "documents of approval", potentially restricting the quantities of Raw Materials that the applicant may export.

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149. See Notice No. 124 / 2008, in Article 5. Where the export quota is allocated through a quota bidding procedure and the winning company has transferred through assignment the export quota to the applicant company, the applicant company must also submit to the export license issuing agency the "Certificate for Transfer and Acceptance of Commodities Applying Quota Bidding," see the Measures for the Administration of Export Licenses, in Article 11, paragraphs 1 and 2.

150. See the Measures for the Administration of Export Licenses, in Article 11, paragraph 7.
(e) Types of export licenses

166. China uses three types of export licenses: First, export licenses issued pursuant to the system "one license for one customs house". These export licenses can be used to export the goods only from a specific customs house. Second, export licenses issued pursuant to the system "one batch, one license". These export licenses can be used for custom declaration only once within their period of validity. Third, export licenses issued pursuant to the system "non-one batch, one license". These export licenses can be used for customs declaration up to twelve times within their period of validity. The customs houses are instructed to indicate the respective quantity of "outbound cargo" on the "endorsement of customs examination and release" column every time they are presented with such an export license.

167. China issues such multiple-use export licenses (i.e., "non-one batch, one license" type licenses) for (i) goods exported by Foreign Invested Enterprises, (ii) goods "in compensation trade" and (iii) any goods accorded such treatment by the Catalogue for Goods Subject to the Administration of Export Licenses.

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151 See the Measures for the Administration of Export Licenses, in Article 22.

152 See, for example, Notice No. 100 / 2008, in Article VII.

153 See the Measures for the Administration of Export Licenses, in Article 22.
2. **Raw Materials subject to Export Licenses**

168. China imposes export licensing obligations on a number of Raw Materials.

<table>
<thead>
<tr>
<th>Raw Material</th>
<th>Product Name Short Form</th>
<th>Chinese Commodity Number</th>
<th>Non-automatic export licensing</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bauxite</td>
<td>Refractory clay</td>
<td>2508300000</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>Aluminium ores and concentrates</td>
<td>2606000000</td>
<td>Yes</td>
</tr>
<tr>
<td>Coke</td>
<td>Coke</td>
<td>2704001000</td>
<td>Yes</td>
</tr>
<tr>
<td>Fluorspar</td>
<td>Met-spar</td>
<td>2529210000</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>Acid-spar</td>
<td>2529220000</td>
<td>Yes</td>
</tr>
<tr>
<td>Manganese</td>
<td>Manganese metal</td>
<td>8111001010</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>(unwrought manganese) waste and scrap</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Manganese metal</td>
<td>8111001090</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>(unwrought manganese), powder</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Silicon carbide</td>
<td>Silicon carbide</td>
<td>2849200000</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>Crude silicon carbide</td>
<td>3824909910</td>
<td>Yes</td>
</tr>
<tr>
<td>Zinc</td>
<td>Zinc ores and concentrates excluding gray feed zinc oxide</td>
<td>2608000090</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>Gray feed grade zinc oxide</td>
<td>2608000001</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>Unwrought ≥ 99.995% zinc</td>
<td>7901111000</td>
<td>Yes</td>
</tr>
<tr>
<td></td>
<td>Unwrought 99.99% &lt; zinc</td>
<td>7901119000</td>
<td>Yes</td>
</tr>
</tbody>
</table>
E. Minimum Export Price Requirement

169. China restrains the exportation of bauxite, coke, fluorspar, magnesium, silicon carbide, yellow phosphorus, and zinc by imposing a minimum price requirement on their exportation.\(^{154}\) China implements this restraint through a non-transparent system that, in industry trade journals, is acknowledged to exist, but is characterized as being based on informal statements and oral agreements of traders and export regulators.\(^{155}\) Based on statements made by China and documents submitted by Chinese exporters in U.S. courts, as detailed below, it appears that export prices that are set by the CCCMC are observed by exporters through an official \textit{"system of self-discipline"} and further reinforced through the availability of penalties imposed by MOFCOM, China’s licensing authorities, and Customs.

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\(^{154}\) See Exhibit JE-7, "Chart of Raw Materials Subject to Minimum Export Prices" for products subject to minimum export price requirements.

1. The CCCMC

170. The CCCMC is one of China’s Chambers of Commerce. It was established in Beijing on September 1, 1988.\(^{156}\) It is a representative association made up of industry members. Members of the CCCMC must be legally listed and registered entities engaged in the import and export, or other trade-related activities, of metals, minerals, and chemicals (which includes the Raw Materials).\(^{157}\) Based on the most recent data, the CCCMC has more than 4000 members,\(^{158}\) consisting of foreign trade companies, trade and manufacturing companies, joint venture companies, private enterprises and research institutes operating businesses in ferrous metals, non-ferrous metals, non-metallic minerals and products, construction materials, coal and coal products, oil and oil products, chemicals, plastics, fine chemicals, agro-chemicals, rubber products, etc.\(^{159}\)

171. According to MOFCOM’s statements of its official view, unlike trade associations and other private organizations that might typically be called “Chambers of Commerce” in other economies, China’s Chambers of Commerce are organizations representing private members that also function as entities under MOFCOM’s direct and active supervision and, accordingly, play a central role in regulating the trade of China’s industries.\(^{160}\)

\(^{156}\) CCCMC Brochure at 2, para. 1. \textit{Exhibit JE-89}.

\(^{157}\) \textit{2001 CCCMC Charter}, Article 8. \textit{Exhibit JE-87}.

\(^{158}\) CCCMC Website Pages at 1, \textit{Exhibit JE-88}.

\(^{159}\) CCCMC Website Pages at 1, \textit{Exhibit JE-88} ; CCCMC Brochure at 2, paras. 2 and 3, \textit{Exhibit JE-89}.

172. In 2006, MOFCOM took the unprecedented step of intervening as *amicus curiae* in a U.S. court proceeding involving allegations by private litigants of price fixing and other anti-competitive behaviour by certain Chinese exporters of Vitamin C. In the *amicus curiae* brief it submitted in that case, MOFCOM referenced the various provisions of the *Measures for Administration of Trade Social Organizations* and the *Regulations for Personnel Management of Chambers of Commerce*, which apply generally to MOFCOM’s authority over China’s social organizations, including China’s Chambers of Commerce. Noting in particular Article 14 of the *Measures for Administration of Trade Social Organizations*, MOFCOM described its own authority over the relevant Chamber of Commerce in that case as “plenary” and asserted its official view that the Chamber of Commerce is “the instrumentality through which [MOFCOM] oversees and regulates the business of importing and exporting [] products in China.” It is on the basis of these and related

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161 As the U.S. Judge in that proceeding noted, “The Chinese government’s appearance as amicus curiae is unprecedented. It has never . . . come before the United States as amicus to present its views.” Opinion *In re Vitamin C Antitrust Litigation*, 584 F. Supp. 2d 546 (E.D. NY Nov. 6, 2008), at 547-55, Exhibit JE-103.

162 Exhibit JE-101.

163 Exhibit JE-102.

164 Brief of Amicus Curiae: MOFCOM at 9, Exhibit JE-98.

165 Two years later, in June 2008, MOFCOM intervened again in the same U.S. court proceeding to reiterate that its 2006 *amicus curiae* brief reflected MOFCOM’s official views and that MOFCOM had participated actively in the drafting of the brief and that the brief “was reviewed and edited word-for-word in Beijing by officials of the Ministry and the U.S. counsel engaged by the Ministry.” MOFCOM Statement in *In re Vitamin C Antitrust Litigation* (June 9, 2008) at 4, para. 2, Exhibit JE-104.

166 Brief of Amicus Curiae: MOFCOM at 9, Exhibit JE-98. In October 2009, in a separate U.S. court proceeding in which private litigants are alleging price fixing and other anti-competitive behaviour by certain Chinese exporters of bauxite, the defending Chinese exporters of bauxite, who are members of the CCCMC, asserted, consistently with MOFCOM’s views expressed in its 2006 *amicus curiae* brief in the Vitamin C proceeding, that the CCCMC and its members are “directly subject to the direction, control and influence of the Chinese government.” Memorandum in Support of Defendants’ Joint Motion to Dismiss
representations made by MOFCOM, that the European understands that the CCCMC’s export-price related functions and responsibilities described below are attributable to China.

173. The CCCMC’s functions are generally described as providing services in the form of coordination, guidance, and consultation to its members in the minerals, metals, and chemicals industries. With respect to its export-related functions, the CCCMC broadly offers “coordination service in metals, minerals, chemicals exports.”

174. The CCCMC’s export coordination functions are set out in the CCCMC Export Coordination Measures. The content of the CCCMC’s export coordination includes export quotas and volume, sales markets and customers, product quality, trademarks, and commercial disputes. Two of the key areas in which the CCCMC coordinates export activities are: (1) the administration and implementation of the export quota and export quota bidding system, and (2) the coordination of export prices for commodities.

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167 1994 CCCMC Charter, Articles 3 and 6, Exhibit JE-86; 2001 CCCMC Charter, Articles 3 and 6, Exhibit JE-87. See also CCCMC Website Pages, para. 3, Exhibit JE-88.

168 CCCMC Website Pages, para. 3, Exhibit JE-88.

169 Exhibit JE-107.

170 CCCMC Export Coordination Measures, Article 4, Exhibit JE-107.
in the CCCMC’s jurisdiction. The CCCMC's role and responsibilities related to export quota and export quota bidding are discussed in detail in Section III.B above.

2. Establishing Export Prices

175. In the early 1990s, the State Council tasked Chambers of Commerce with coordinating and managing the export prices of export commodities in effecting reform and improvement to China’s export trade. In 1998, in the wake of the Asian financial crisis, MOFCOM issued a circular instructing the Chambers of Commerce to redouble their efforts in export coordination by, among other things, evaluating and adjusting coordinated export prices in order to improve the competitiveness of Chinese exports and enhance the normal development of China’s export trade. The coordination of export prices by the CCCMC has also been encouraged as a way to enhance the reputation of Chinese exports, to avoid anti-dumping actions by other countries, and to maximize the profitability of China’s trade in valuable, non-renewable raw material resources.

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171 CCCMC Export Coordination Measures, Article 4, Exhibit JE-107. See also 1994 CCCMC Charter, Article 6, Exhibit JE-86.; 2001 CCCMC Charter, Article 6, Exhibit JE-87; CCCMC Bauxite Branch Coordination Measures, Article 2, Exhibit JE-108; MOFTEC Assistant Minister Liu Xiangdong’s Speech to the Third Congress of the CCCMC, paras. 10-11, Exhibit JE-109; MOFTEC Circular on Strengthening the Job in the Coordination of Export Commodities (1998), paras. 2 and 4, Exhibit JE-110; CCCMC Website Pages, para. 3, Exhibit JE-88; CCCMC Brochure, para. 4, Exhibit JE-89.

172 Measures for Administration of Trade Social Organizations, Section 7, Exhibit JE-110; Regulations for Personnel Management of Chambers of Commerce, Section II, Exhibit JE-111.

173 MOFTEC Circular on Strengthening the Job in the Coordination of Export Commodities (1998), para. 2, Exhibit JE-110.

174 MOFTEC Assistant Minister Liu Xiangdong’s Speech to the Third Congress of CCCMC, paras. 11 and 12, Exhibit JE-109.
176. The means by which the CCCMC coordinates export prices, or exports more generally, is not at all transparent. In a U.S. court proceeding involving allegations by private litigants of price fixing and other anti-competitive behaviour by Chinese exporters of magnesite (also known as magnesium carbonate), defendant Chinese exporters submitted a copy of the *CCCMC Export Coordination Measures*.175 According to these Measures, all commodities subject to coordination require an annual coordination program that covers, among other things, the coordination of export prices.176

177. The *CCCMC Export Coordination Measures* provide that commodity-specific sub-units of the CCCMC called “Branches” or “Coordination Groups” shall be established to assume CCCMC’s coordination functions with respect to specific commodities.177 Established branches of the CCCMC relating to the Raw Materials are:178

- the Branch of Bauxite;
- the Branch of Coke;
- the Branch of Fluorspar;
- the Coordination Group of Magnesium;
- the Branch of Silicon Carbide;
- the Branch of Phosphorus and Phosphorus Products;

175 *Exhibit JE-107.*
177 *CCCMC Export Coordination Measures*, Articles 3 and 5, *Exhibit JE-107.*
· the Coordination Group of Yellow Phosphorus; and

· the Branch of Lead and Zinc.

178. These Branches and Coordination Groups carry out the CCCMC’s export coordination functions for bauxite, coke, fluorspar, magnesium, silicon carbide, yellow phosphorus, and zinc. These functions include, among other things: formulating or revising specific import-export product coordination regulations; formulating or revising export price coordination plans; coordinating export quotas and quota bidding invitations, administration, and allocation; implementing, monitoring, and supervising coordination measures and the coordinated prices set by the CCCMC; and making suggestions on dealing with problems arising from coordination and violations of coordinated rules by members.  

179. Some additional detail on how the CCCMC and its Branches coordinate export prices is provided in the Bauxite Coordination Measures, which Chinese exporters of bauxite submitted in a U.S. court proceeding involving private allegations of price fixing and anti-competitive behaviour by Chinese exporters of bauxite. According to the CCCMC Bauxite Branch Coordination Measures, the governing body of the Bauxite Branch coordinates the bauxite industry’s export price once every half year. The Bauxite Branch’s governing body is permitted to adjust the coordinated export price at other times as well, for example, if a large variation in price occurs in the international market. The Branch is then responsible for notifying the industry

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179 See 1994 CCCMC Charter, Article 26, Exhibit JE-86; CCCMC Export Coordination Measures, Articles 3, 4, 5, and 10, Exhibit JE-107; CCCMC Bauxite Branch Coordination Measures, Article 2, Exhibit JE-108.

180 Exhibit JE-108.

181 CCCMC Bauxite Branch Coordination Measures, Article 4, Exhibit JE-108.
coordinated export price to its members\textsuperscript{182} as well as reporting it to the CCCMC to be sent to each license issuing entity to serve as the basis for issuing licenses, and reporting it to MOFCOM for filing.\textsuperscript{183}

3. Coordinated Export Price As a Minimum Export Price

180. The export price coordinated by the CCCMC serves as a floor below which exports are not permitted. Again, although the precise means by which the CCCMC-coordinated export price is implemented as a minimum export price are not transparent, it appears that the systems and mechanisms, which are described below, comprise or contribute to these means.

(a) System of “Self-Discipline”

181. In August 2009, in a further official intervention that MOFCOM made in the U.S. court proceeding related to alleged anti-competitive behaviour by Chinese exporters of Vitamin C, MOFCOM explained that a “system of self-discipline” among exporters is an “actual specific measure[] taken by China to effect its regulatory policies.”\textsuperscript{184} According to MOFCOM,

\textsuperscript{182} CCCMC Bauxite Branch Coordination Measures, Article 4, Exhibit JE-108.

\textsuperscript{183} CCCMC Bauxite Branch Coordination Measures, Article 7, Exhibit JE-108.

\textsuperscript{184} MOFCOM Statement in In re Vitamin C Antitrust Litigation (Aug. 31, 2009), para. 3, Exhibit JE-111.
This system [of self-discipline] has a long history in China and has been well known to, and complied with by, Chinese companies. Self-discipline does not mean complete voluntariness or self-conduct. In effect, self-discipline refers to a system of regulation under the supervision of a designated agency acting on behalf of the Chinese government. Under this regulatory system, the parties involved consult with each other to reach consensus on coordinated activities for the purpose of reaching the objectives and serving the interest as set forth under Chinese laws and policies. Persons engaged in such required self-discipline are well aware that they are subject to penalties for failure to participate in such coordination, or for non-compliance with self-discipline, including forfeiting their export right.185

182. Indeed, according to the CCCMC Export Coordination Measures and the Bauxite Coordination Measures, the industry coordinated export price is considered “a collective contract” that industry members must abide by.186 These measures, in addition to the 2001 CCCMC Charter and the Bauxite Branch Charter, identify the promotion of industry “self-discipline” as a key part of the CCCMC’s mission.187 The “self-discipline” appears to encompass: inspection by the CCCMC (or its Branches) of its members’ compliance with its coordination programs (including coordinated export prices),188 rewarding members that do comply and, as explicitly referenced in MOFCOM’s August 2009 statement in the Vitamin C litigation, imposing penalties on members that do not comply with coordination programs, including the industry

185 MOFCOM Statement in In re Vitamin C Antitrust Litigation (Aug. 31, 2009), para. 3, Exhibit JE-111.
186 CCCMC Export Coordination Measures, Article 18, JE-107; CCCMC Bauxite Branch Coordination Measures, Article 10, Exhibit JE-108.
188 CCCMC Export Coordination Measures, Articles 19-20, Exhibit JE-107.
coordinated price. These penalties include warnings; suspension of membership or expulsion from the CCCMC, circulating a notice of criticism, payment of fines, or in the most severe cases, recommendations to MOFCOM for revocation of an exporter’s right to trade, to bid on export quotas, and to receive export tax rebates, policy-oriented financial support, and other such penalties.

(b) MOFCOM Penalties

183. MOFCOM is authorized independently to impose penalties on exporters that export below acceptable prices. The Export Price Penalties Regulations, which were issued in 1996 and remain in effect, provide for all exporting enterprises to submit to the coordination of the various Chambers of Commerce and take part in setting export prices that are suitable to the importing markets. The Export Price Penalties Regulations also assign MOFCOM responsibility for punishing specifically the conduct of “exporting at lower than normal prices” and gives MOFCOM the authority to impose a variety of sanctions on enterprises that engage in such conduct. Those sanctions include those which the CCCMC is authorized to recommend to MOFCOM – i.e., circulating a notice of criticism or issuing a warning; imposition of

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191 Bauxite Coordination Measures, Article 8, Exhibit JE-108; CCCMC Export Coordination Measures, Article 21, Exhibit JE-107.

192 Export Price Penalties Regulations, Article 4, Exhibit JE-113.

193 Export Price Penalties Regulations, Article 3, Exhibit JE-113.
fines; suspension or revocation of the right to bid for export quotas of related products; suspension or revocation of export licenses; or suspension or revocation of the right to trade.

184. The Export Price Penalties Regulations also provide MOFCOM with the authority to investigate and assign liability to the legal representative of any exporting enterprise found responsible for exporting at lower than normal prices. MOFCOM may also choose to delegate to the relevant Chamber of Commerce the authority to carry out such an investigation.

(c) Licensing Authorities

185. China’s licensing authorities appear to play a role in enforcing coordinated export prices as minimum prices required for exportation. Exporters of bauxite, coke, fluorspar, silicon carbide, and zinc (products subject to non-automatic licensing) must apply for and obtain an export license before they are permitted to export the raw material at issue.

186. As evidenced in the CCCMC Bauxite Branch Coordination Measures, coordinated export prices are notified to China’s license issuing entities to enable those authorities to issue licenses on the basis of those prices. The Measures for Administration of Licensing Entities also provide that license issuing entities that fail to issue export licenses in accordance with the coordinated export prices are subject to sanctions from

194 Export Price Penalties Regulations, Article 6, Exhibit JE-113.
195 Export Price Penalties Regulations, Article 9, Exhibit JE-113.
196 Bauxite Coordination Measures, Article 7, Exhibit JE-108.
MOFCOM.\textsuperscript{197} Those sanctions include circulation of a notice of criticism, suspension of the authority to issue licenses to the same type of goods, or termination of the authority to issue licenses to all goods\textsuperscript{198}.

(d) Customs and the Price Verification and Chop Procedure

187. According to references in the 2002 PVC Notice\textsuperscript{199} and in the 2004 PVC Notice,\textsuperscript{200} in 1997, MOFCOM issued three measures: the Notice of the Rules on Price Reviews of Export Products by the Customs (Ministry of Foreign Trade and Economic Cooperation guanzonghanzi No. 21, 1997) ("Customs Export Price Review Rules"), the Rules for Coordination with Respect to Customs Price Review of Export Products (Ministry of Foreign Trade and Economic Cooperation guanzonghanzi No. 21, 1997) ("Customs Export Price Review Coordinating Rules"), and the Provisional Rules on Export Price Verification and Chop for Key Products Subject to Price Review (Ministry of Foreign Trade and Economic Cooperation guanzonghanzi No. 21, 1997) ("Provisional Rules on Export PVC"). Despite diligent attempts, these measures could not be located and appear not to be published, although all three appear to continue to be in effect.

188. Based on the titles of these measures and the references made to them in the 2002 PVC Notice and the 2004 PVC Notice, it appears that these measures subject the exportation of certain products to price review by Customs as part of the export clearance process. For these products, which includes yellow phosphorus, the Chambers of Commerce

\textsuperscript{197} Measures for Administration of Licensing Entities, Article 40(3), Exhibit JE-75.

\textsuperscript{198} Measures for Administration of Licensing Entities, Article 41, Exhibit JE-75.

\textsuperscript{199} Exhibit JE-121.

\textsuperscript{200} Exhibit JE-122.
are required to administer the Price Verification and Chop ("PVC") procedure, whose goals include: (1) facilitating the ability of the Chambers of Commerce to coordinate export prices and enforce industry self-discipline, and (2) promoting the development of Chinese industries and exports.  

189. The PVC procedure requires exporters of yellow phosphorus to submit their export contracts to the CCCMC for "verification." The CCCMC is required to examine the export contracts and verify that the contracts comply with relevant regulations and industry coordination, including the industry coordinated export price. Where the CCCMC verifies the elements of a particular export contract, in particular the export price, are in compliance, it must affix its PVC chop (i.e., its seal or stamp) to a special PVC form and to the export contract where the prices and quantities are indicated. The CCCMC must return the contract to the exporter within three days. Once the exporter receives the verified export contract bearing the CCCMC’s PVC chop, it must declare the contract to Customs for clearance. Customs is required to deny clearance for any export contracts that do not bear the CCCMC’s PVC chop. Exporters forging PVC chops on non-conforming contracts are subject to penalties imposed by Customs and the Chambers of Commerce.

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201 MOFCOM referred to this procedure as the “Verification and Chop” system in 2006. Brief of Amicus Curiae: MOFCOM at 14-15, Exhibit JE-98.

202 2002 PVC Notice, Article 4, Exhibit JE-121.


204 2004 PVC Notice, para. 4, Exhibit JE-122.


206 2004 PVC Notice, para. 4, Exhibit JE-122.
190. Over time, the PVC system administered by the CCCMC permitted exporters to submit export contract information electronically for verification. Exporters of yellow phosphorus are instructed to log onto the CCCMC’s website with their usernames and passwords and enter their contract information for verification. The CCCMC website provides instructions in the *Online PVC Instructions*, which includes instructions that make clear that the coordinated export price operates as a minimum export price:

If the contract price type is in CIF, etc., but the coordinate price type is FOB, you must also separately fill out the transport fee (the unit of the transportation fee must be consistent with the unit used in the contract unit price).

At this time, you will pass the price-review only if the contract price less the transportation fee is greater or equal to the coordinated price.

191. A computer screen shot, downloaded in 2008, of the online interface for an exporter submitting contract information for CCCMC verification and chop for an export transaction for yellow phosphorus shows that the exporter is instructed to input the contract price for the export, while the screen displays that the industry coordinated price as US$8000 per metric ton FOB. The notes to the user appearing at the

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207 See *Online PVC Instructions*, Exhibit JE-123.

208 Exhibit JE-123, Sections 1 and 4.

209 Exhibit JE-123, Section 9(2).

210 CCCMC PVC Online Input Screen Shots (May 2008) at 1-2, Exhibit JE-124. This form was obtained from a Chinese exporter in May 2008. The blank form already identified the export price of $8,000. Note that the form is identified as a print-out of “V_C_Value_Add.asp.” The extension “.asp” indicates that the document was generated from a web page using “Active Server Pages” or “Classic ASP” technology. This technology enables the user to produce an interactive web page. That is, the “.asp” printout is the printout of an interactive web page. Web pages containing ASP cannot simply be accessed through a web browser. The page must be requested by a server that supports ASP.
bottom of the screen state that whenever the contract price is more than or equivalent to the coordinated price, it will be approved.\footnote{CCC\MC PVC Online Input Screen Shots (May 2008) at 3-4, \textit{Exhibit JE-124}.}

192. It appears that China formally repealed the 2004 PVC Notice on May 26, 2008.\footnote{See \textit{Communication} (Ministry of Commerce and General Administration of Customs, (2008) No. 33, May 26, 2008), \textit{Exhibit JE-125}.} However, there is evidence that administration of the PVC procedure continued after that date. A printout of the online PVC form that is dated May 28, 2008, two days after the formal repeal of 2004 PVC Notice, shows that as of that date, the PVC procedure continued to be enforced.\footnote{CCC\MC PVC Online Input Screen Shots (May 2008) at 3-4, \textit{Exhibit JE-124}.} In addition, CCC\MC measures implementing the PVC procedure, \textit{i.e.}, the \textit{CCCM\MC PVC Rules}\footnote{Exhibit JE-127.} and \textit{Online Verification and Certification Operating Steps}, remained posted on its website until at least October 15, 2009.\footnote{See \textit{Exhibit JE-127} (Chinese version captured from website).}

193. Furthermore, it appears that the measures authorizing the 2002 PVC Notice and the 2004 PVC Notice, including the Customs Export Price Review Rules, the Customs Export Price Review Coordinating Rules, and the Provisional Rules on Export PVC, which do not appear to be published, remain in effect.

4. Conclusion

194. China’s minimum export price system is not transparent. However, based on the explicit statements that MOFCOM has made and the related documents and measures
submitted by Chinese exporters and members of the CCCMC, it appears that export prices are coordinated by the CCCMC for bauxite, coke, fluorspar, magnesium, silicon carbide, yellow phosphorus and zinc, and that those prices are enforced as minimum export prices through a combination of CCCMC’s “system of self-discipline,” which MOFCOM has stated is a measure taken by China to effect its regulatory policies,^{216} penalties that MOFCOM is authorized to impose for exporting at low prices, and enforcement by China’s licensing authorities and Customs.

^{216} See MOFCOM Statement in In re Vitamin C Antitrust Litigation (Aug. 31, 2009), para.3, Exhibit JE-111.
IV. **LEGAL ANALYSIS**

A. **Export Quotas**

1. **China's export quotas are inconsistent with Article XI of the GATT.**

195. Article XI of the GATT provides that Members may not adopt or maintain "prohibitions or restrictions…whether made effective through quotas, import or export licences or other measures…on the exportation or sale for export of any product destined for the territory of any other [Member]." It is noted that the text of Article XI expressly prohibits export quotas.

196. It is generally accepted that a measure falls within the prohibition of GATT Article XI when two conditions are satisfied: First, it is a "governmental measure",\(^{217}\) i.e., it has been introduced by the government of a WTO Member or there is "sufficient governmental involvement with it".\(^{218}\) Second, it is a "quantitative restriction", i.e., it "prohibits or restricts the exportation or sale for export of products".\(^{219}\)


197. China's export quotas satisfy both these conditions. First, the export quotas are governmental measures: they are introduced by the government of China through China's Foreign Trade Law and the Chinese Regulations, Measures and Decisions discussed in the Facts section of this submission.

198. Second, China's export quotas are clearly "quantitative restrictions", i.e., measures that "prohibit or restrict the exportation" of goods, as expressly provided for in the text of Article XI of the GATT by expressly limiting exports of the Raw Materials to a certain maximum volume.

199. Consequently, China's export quotas are inconsistent with Article XI of the GATT. As mentioned in the Facts section of this submission, in 2009 China imposed export quotas for the exportation of **Bauxite** (Refractory clay and Aluminium ores, concentrates), **Coke, Fluorspar, Silicon Carbide** and **Zinc** (Zinc ores and concentrates).

2. **China's export quotas are inconsistent with China's obligations under its Accession Protocol.**

200. The Protocol on the Accession of the People's Republic of China to the WTO (the "**Accession Protocol**") provides in Article 1.2 of Part I that "this Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement". Therefore, China must comply

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with the commitments undertaken in the Working Party Report and listed in paragraph 342 of the Working Party Report.\textsuperscript{221}


202. Paragraph 162 of the Working Party Report provides that

\begin{quote}
...China would abide by WTO rules in respect of...export restrictions...Moreover, export restrictions...would only be applied...in those cases where this was justified by GATT provisions...
\end{quote}

203. Paragraph 165 of the Working Party Report provides that

\begin{quote}
...upon accession, remaining non-automatic restrictions on exports would be notified to the WTO annually and would be eliminated unless they could be justified under the WTO Agreement or the Draft Protocol...
\end{quote}

204. China's export quotas are inconsistent with these commitments. China has failed to eliminate the export quotas on the Raw Materials "upon accession" to the WTO and continues to have export quotas restricting the exportation of the Raw Materials in place today. These export quotas constitute a violation of Article XI of the GATT and are not justified by the GATT or the WTO Agreement.

205. Consequently, China's export quotas are inconsistent with Article 1.2 of Part I of China's Accession Protocol, which incorporates China's commitments reproduced in paragraphs 162 and 165 of the Working Party Report.

\textsuperscript{221} The Report of the Working Party on the Accession of China to the WTO was circulated on October 1, 2001, as WT/ACC/CHN/49.
3. China's export restriction on Zinc is inconsistent with Article XI of the GATT and with China's obligations under China's Accession Protocol.

206. As mentioned in the Facts section of this submission, China subjects the exportation of Zinc ores and concentrates to an export quota. However, China does not announce the total amount of export quotas to be allocated on any particular year, does not publish invitations for applications by interested enterprises to obtain an export quota and does not announce the allocation of any volume of such export quota to any enterprise. As a result, in effect, China sets the export quota for Zinc ores and concentrates at zero. Through this practice, China restricts and effectively prohibits the exportation of zinc ores and concentrates.

207. Article XI of the GATT expressly prohibits "prohibitions or restrictions…made effective through quotas…on the exportation or sale for export of any product destined for the territory" of another WTO Member. Therefore, restrictions and prohibitions such as those imposed on Zinc, fall within the scope of Article XI.222

208. In addition, such export restrictions and prohibitions also fall within the scope of paragraphs 162 and 165 of China's Accession's Working Party Report, as mentioned in the preceding section of this submission.

209. Consequently, China's restriction and effective prohibition imposed on the exportation of Zinc ores and concentrates is inconsistent with GATT Article XI, as well as with Article 1.2 of Part I of China's Accession Protocol, which incorporates China's commitments reproduced under paragraphs 162 and 165 of the Working Party Report.

222 See, for example, par. 7.14 of the Report of the Panel in Brazil-Measures affecting the importation of Retreaded Tyres, WT/DS 332/R, circulated on June 12, 2007.
4. China's failure to publish the total amount of the Coke export quotas and the total amount and the procedure for the allocation of the Zinc export quotas are inconsistent with Article X:1 of the GATT.

210. Article X:1 of the GATT provides:

Laws, regulations…and administrative rulings of general application made effective by any contracting party, pertaining to…requirements, restrictions or prohibitions on…exports…shall be published promptly in such manner as to enable governments and traders to become acquainted with them…

211. As mentioned in the Facts section of this submission, China's Measures for the Administration of Export Quotas provide that the Ministry of Commerce determines every year, by the end of October, the total amount of export quotas to be allocated during the following year.\(^{223}\)

212. However, China does not publish the total amount for the Coke export quotas to be allocated for the following year. Moreover, China does not announce in advance whether it will allocate the Coke export quotas in one "batch", or in two "batches" (i.e., in one or more instalments during the year). China simply invites interested enterprises to submit applications for an export quota, without allowing them knowledge of the total quantity of Coke that China will allow to be exported (and, consequently, the total amount of export quotas available for allocation). Later on, China publishes the list of enterprises that have been allocated a Coke export quota and the export quota allocated to each of them.

213. In addition, As discussed in the preceding section of this submission, China effectively sets the export quota for zinc ores and concentrates at zero and prohibits the exportation of zinc ores and concentrates. However, even if China does allocate some

\(^{223}\) See the Measures for the Administration of Export Quotas, in Articles 9 and 11.
export quotas of zinc ores and concentrates (something on which the European Union does not have any information), China does not publish the total amount of export quota for Zinc ores and concentrates that it will allocate for a specific year. China does not publish any information regarding the conditions that interested enterprises should satisfy in order to be allocated a Zinc ores and concentrates export quota. China also does not publish any invitation for applications for an export quota by interested enterprises, or the list of the enterprises that have been allocated a Zinc ores and concentrates export quota. As a result, neither interested enterprises, nor other WTO Members know how much Zinc ores and concentrates China will allow to be exported, when the allocation of the export quotas will take place, how and to whom applications are to be submitted, which conditions applicants should satisfy, etc.

214. These unpublished measures relate to the determination of the total amount of export quotas, the procedures for the allocation of the export quotas, the timing of the applications to be submitted by interested enterprises and the conditions that applicants must satisfy. They constitute "regulations" or "administrative rulings of general application", within the meaning of Article X:1 of the GATT. Moreover, these measures relate to "requirements, restrictions or prohibitions" on the export of the relevant Raw Materials. Consequently, Article X:1 of the GATT imposes on China the obligation to publish these measures in a proper manner, so as to allow interested enterprises and other WTO Members the possibility properly and timely to know (i) the total quantity and export quotas of Coke and Zinc ores and concentrates that would be allowed to be exported, (ii) the procedures and timing for the allocation of the Zinc ores and concentrates export quotas and (iii) the conditions that applicants should meet in order to be allocated Zinc ores and concentrates export quotas.

215. China's failure to publish properly and timely these measures is inconsistent with Article X:1 of the GATT.
B. Conditions for allocation of export quotas and participation in export quota bidding procedures

216. The conditions and requirements imposed by China for the allocation of export quotas, both "directly" and through bidding procedures, are inconsistent with a number of commitments that China has undertaken through its Accession Protocol.

217. Moreover, China's administration of its export quota system is not "uniform, impartial and reasonable" and is inconsistent with Article X(3)a of the GATT.

1. The conditions applicants must satisfy in order to be allocated export quotas "directly" and in order to participate to export quota bidding procedures are inconsistent with China's obligations under its Accession Protocol.

   (a) The requirement of a "certain level of volumes exported, or supplied for export".

   i) Article 1.2 of the Accession Protocol in combination with paragraphs 83(a) and 83(d) of the Working Party Report and Article 5.1 of the Accession Protocol

218. Article 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…within three years after accession all enterprises in China shall have the right to trade in all goods…Such right to trade shall be the right to…export goods…

219. Paragraph 83(a) of the Working Party Report provides:
…upon accession, China would eliminate for both Chinese and foreign-invested enterprises any export performance…and prior experience requirements such as in…exporting, as criteria for obtaining or maintaining the right to …export.

220. Paragraph 83(d) of the Working Party Report provides:

…within three years after accession, all enterprises in China would be granted the right to trade…

221. Despite these commitments, China only allows companies to participate in export quota allocation procedures (where the quotas are allocated "directly") and/or export quota bidding procedures (where the quotas are allocated through a bidding procedure), if they have reached a certain "level of volumes" in their exports, or "supply for export"\(^{224}\) of the relevant Raw Materials.\(^{225}\)

222. China's Ministry of Commerce usually specifies the required "level of volumes" for each Raw Material in the annual (or semi-annual) announcements establishing the conditions for applicants participating in export quota "direct" allocation, or in export quota bidding procedures.\(^{226}\) Typically, the Ministry of Commerce sets the "threshold" at a certain "average yearly volume" of exports, or supply for export, over the preceding three years.\(^{227}\) For Foreign Invested Enterprises seeking to participate in

\(^{224}\) The former is usually required from applicants that are "trading" companies, while the latter is usually required from applicants that are "producing" companies.

\(^{225}\) See for example, Communication 76 / 2008, in Section I(1) and I(2); the Measures on Export Quota Bidding, in Article 11; and the Implementation Rules on Export Quota Bidding, in Article 6(1).

\(^{226}\) See, for example, Communication 76 / 2008 for the allocation of the Coke export quotas for 2009; and Announcement 85 / 2008 and Announcement 42 / 2009 for the bidding procedure for the export quotas for Bauxite, Silicon Carbide and Fluorspar.

\(^{227}\) See, for example, Communication 76 / 2008; Announcement 85 / 2008; and Announcement 42 / 2009.
an export quota bidding procedure, the "threshold" is usually set on the basis of the
exports achieved during the preceding year.228

223. Enterprises that have not achieved the threshold "levels of volume" are excluded from
participating in the direct export quota allocation, or export quota bidding procedures
and, consequently, cannot obtain an export quota. Given that China prohibits the
exportation of the relevant Raw Materials without an export quota, this means that
enterprises that have not achieved the threshold "levels of volume" are not granted the
trading right to export the Raw Materials.

224. Moreover, the practical effect of this requirement is to deny new applicants the
possibility of exporting the relevant Raw Materials as new entrants to the market.
Enterprises that have not previously exported the relevant Raw Material will never be
able to satisfy the "level of volumes" requirement, as they can never achieve the
requisite sales figures during the period of reference (i.e., the preceding one, or three,
years). As a result, they are effectively prevented from participating both in future
export quota "direct" allocation procedures and future export quota bidding
procedures.

225. The exclusion of new applicants is further reinforced by the fact that China does not
reserve any export quotas for distribution to new applicants/entrants, through a
different allocation procedure.

226. Therefore, the requirement of "certain level of volumes exported or supplied for
export" is inconsistent with Article 1.2 of China's Accession Protocol, in combination
with paragraph 83(a) of the Working Party Report. Conditioning the enterprises' right
to obtain an export quota and, therefore, the trading right to export the Raw Materials,

228 See Announcement 42 / 2009.
on their having achieved a "certain level of volumes" in their exports in the past, is precisely the "export performance" and "prior experience" requirement explicitly prohibited by paragraph 83(a) of the Working Party Report.

227. This requirement is also inconsistent with Article 5.1 and Article 1.2 of China's Accession Protocol, in combination with paragraph 83(d) of the Working Party Report. Through this requirement, China fails to grant the trading right to export the Raw Materials to "all enterprises in China", including new applicants.

ii) Article 5.2 of the Accession Protocol and paragraphs 84(a) and 84(b) of the Working Party Report

228. In addition, Article 5.2 of China's Accession Protocol provides:

Except as otherwise provided for in the Protocol, all foreign individuals and enterprises, including those not invested or registered in China, shall be accorded treatment no less favourable than that accorded to enterprises in China with respect to the right to trade.

229. Paragraph 84(a) of the Working Party Report provides:

…[after three years from accession] China would permit all enterprises in China and foreign enterprises and individuals…of other WTO Members to export…all goods…

230. Paragraph 84(b) of the Working Party Report provides:

With respect to the grant of trading rights to foreign enterprises and individuals…of other WTO Members…China confirmed that such rights would be granted in a non-discriminatory and non-discretionary way.

231. The prior "level of volumes exported" requirement is inconsistent with these commitments of China, as it is more likely to result in the exclusion of foreign enterprises and individuals from the right to export the relevant Raw Materials. This is because foreign enterprises are more likely to be new applicants for export quotas than
Chinese companies producing, or traditionally exporting, the Raw Materials. As a result, this requirement operates in a discretionary and potentially discriminatory way to the detriment of foreign enterprises and individuals wishing to export the Raw Materials. This is contrary to the obligations undertaken by China in the relevant provisions of its Accession Protocol and Working Party Report.

(b) The minimum capital requirement.

232. Article 5.1 of the Accession Protocol provides:

…within three years after accession all enterprises in China shall have the right to trade in all goods…Such right to trade shall be the right to…export goods.

233. Paragraph 83(b) of the Working Party Report provides:

…In order to accelerate this approval process and increase the availability of trading rights…China would reduce the minimum registered capital requirement [gradually over a period of three years]…and would eliminate the examination and approval system at the end of the phase-in period for trading rights.

234. Paragraph 83(d) of the Working Party Report provides:

…within three years after accession, all enterprises in China would be granted the right to trade…

235. Paragraph 84(a) of the Working Party Report provides:

…China would eliminate its system of examination and approval of trading rights within three years after accession. At that time, China would permit all enterprises in China and foreign enterprises and individuals…to export…all goods…

236. Despite these commitments, China continues to require applicants for export quotas to have a minimum registered capital. For example, Coke trading companies are required
to have a "registered capital of at least RMB 50 million", in order to be allocated a Coke export quota. Likewise, applicants should have a registered capital of at least RMB 4 million, in order to participate in export quota bidding procedures for Bauxite and Silicon Carbide; and of at least RMB 5 million, in order to participate in export quota bidding procedures for Fluorspar.

237. These requirement are inconsistent with Article 5.1 and Article 1.2 of China's Accession Protocol, in combination with paragraphs 83(b), 83(d) and 84(a) of the Working Party Report, which provide that China would reduce the minimum registered capital requirement to obtain trading rights during the 3-year phase-in period and would eliminate the examination and approval system at the end of the phase-in period, in order to allow all enterprises in China the trading right to export goods, including the Raw Materials.

2. China's administration of the export quota "direct" allocation system is inconsistent with Article X:3(a) of the GATT

238. As mentioned in the Facts section of this submission, China's Measures for the Administration of Export Quotas, provide that, when directly allocating export quotas, China's Ministry of Commerce may determine whether to allocate export quotas to a particular applicant and, if so, the quantity to be allocated on the basis of the applicant's "business management capacity".

See, for example, Communication 76 / 2008, in Section I(2).

See, for example, Announcement No. 85 / 2008, in Article III(II)v and Article III(II)vi and Announcement No. 42 / 2009, in Article III.2(6).

See, for example, Announcement No. 85 / 2008, in Article III(II)iii and Announcement No. 42 / 2009, in Article III.2(3).

See the Measures for the administration of Export Quotas, in Article 19.
239. There is no definition of the term "business management capacity". More importantly, there is no limitation on the Ministry of Commerce's discretion to use this undefined "business management capacity" as a justification in order to refuse to grant export quotas to particular applicants and/or severely restrict the quantities of Raw Materials that such applicants may export in general, or in relation to particular export destinations.

240. The condition of "business management capacity" is not further defined or explained in the various Notices and Announcements, with which China imposes further conditions that applicants should meet in order to be allocated "directly" an export quota. It remains an additional, "residual" criterion for export quota allocation, which China's Ministry of Commerce can use at its own discretion. The European Union considers that through the administration of this condition, China's administration of its export quota "direct" allocation system becomes inconsistent with Article X:3(a) of the GATT.

241. The requirement for "uniform" administration of laws and regulations in Article X:3(a) of the GATT has been interpreted to mean that:

"...every exporter should be able to expect treatment of the same kind, in the same manner, both over time and in different places and with respect to other persons...Uniform administration requires that Members ensure that their laws are applied consistently and predictably...This is a requirement of uniform administration of [laws and procedures] between individual shippers and even with respect to the same person at different times and different places".233

242. In the present case, there are no rules uniformly defining the notion of "business management capacity", or setting the standard against which the supposed "business management capacity" of a particular applicant should be compared in order to decide

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233 See, for example, paragraph 11.83 in the Report of the Panel in Argentina- hides.
whether its application should be accepted or not. Moreover, there are no rules ensuring that this export quota allocation condition would be applied consistently in the same manner towards all applicants, all Raw Materials, all export destinations and all periods of time. The administration of an export quota allocation system based on such broad discretion by Chinese authorities cannot be said to be "uniform", within the meaning of Article X(3)a of the GATT.

243. Moreover, the administration of laws and regulations has been interpreted to meet the requirement of "impartial" where there are "adequate safeguards" to ensure that the system could not be used to the advantage of some applicants and the disadvantage of others.\textsuperscript{234} In the present case, there are no rules or procedures in place that could prevent China's authorities from using this condition in order to administer the export quota allocation system to the disadvantage of certain applicants, or export destinations, and to the advantage of others. The administration of an export quota allocation system without any such safeguards cannot be said to be "impartial", within the meaning of Article X(3)a of the GATT.

244. The administration of laws and regulations has been interpreted to meet the requirement of "reasonable" where it is "proportionate, not asking for too much, sensible".\textsuperscript{235} In the present case, the "business management capacity" condition allows China's authorities to administer the export quota allocation system in an arbitrary, discretionary and potentially discriminatory manner. This is definitely not "proportionate" or "sensible" and it is definitely "asking for too much".

\textsuperscript{234} See, for example, paragraph 11.101 of the Report of the Panel in \textit{Argentina-hides}.

245. The administration of China's export quota "direct" allocation system based on such vague and opaque eligibility criteria cannot be consistent with Article X(3)a of the GATT.

C. Export Duties

1. China's Temporary Export Duties are inconsistent with China's obligations under its Accession Protocol

246. The second sentence of Article 1.2 of China's Accession Protocol states:

"This Protocol, which shall include the commitments referred to in paragraph 342 of the Working Party Report, shall be an integral part of the WTO Agreement."

Thus, as an integral part of the WTO Agreement, the provisions of the Accession Protocol are enforceable in WTO dispute settlement proceedings pursuant to Article 1.1 of the DSU.236

247. In fact, as the Panel in *China-Auto Parts*237 held, which was then later confirmed by the Appellate Body in the same dispute:

"The Accession Protocol is an integral part of the WTO Agreement pursuant to Part I, Article 1.2 of the Accession Protocol"

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236 It is understood that the provisions of the Accession Protocol and the commitments in paragraph 342 of the Working Party Report are subject to WTO dispute settlement. Panel Report in *China – Audiovisual Products*, paras 7.229 – 7.232. Article 1.1 of the DSU provides that the rules and procedures of the DSU shall apply to "the consultations and the settlement of disputes between Members concerning their rights and obligations" under the provisions of the WTO Agreement and of the DSU "taken in isolation or in combination with any other covered agreement." The WTO Agreement is a covered agreement as specified in Appendix 1 of the DSU.

248. The Accession Protocol provides in its Article 11.3 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."

249. Annex 6 of China's Accession Protocol, entitled "Products Subject to Export Duty" lists 84 different products, each identified by an 8-digit HS (Harmonised System) number, and by a product description. Moreover, at the end of the list of the different 84 products there is a Note stating that:

"China confirmed that the tariff levels included 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."

250. Article VIII of the GATT 1994 applies to “[a]ll 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 . . . exportation…”

251. The export duties imposed by China on the exportation of the relevant Raw Materials cannot be justified by either of these exceptions. Firstly, the relevant raw materials are not included in Annex 6 of China's Accession Protocol. Secondly, these export duties are duties and not other "fees and charges" within the meaning of Article VIII of the GATT. As a result, they do not fall within the scope of Article VIII.

238 Exhibit JE-2, China's Accession Protocol to the WTO WT/L/432.

239 Ibid., page 93.
2. China's Temporary Export Duties imposed on different types of Bauxite are inconsistent with Article 11.3 of China's Accession Protocol:

Bauxite - Refractory Clay with HS No. 25083000:

252. China imposed a temporary export duty set at the level of 15% on refractory-clay (HS No. 25083000) as from January 1, 2009 \(^{240}\) (listed as Item 37 of Annex 7).

253. Refractory - clay (HS No. 25083000) is not one of the products subject to export duty listed in Annex 6 of China's WTO Accession Protocol, and cannot be justified by Article VIII of the GATT 1994.

254. China did not consult with other affected WTO members prior to the imposition of this export duty on refractory-clay, as it had committed itself to do in its Accession Protocol to the WTO.\(^{241}\)

255. The imposition and maintenance of the temporary export duty on refractory-clay (HS No 2508300) by China is thus inconsistent with Article 11.3 of China's Accession Protocol.

Aluminium Ores and Concentrates with HS Code 26060000:

256. China imposed a temporary export duty set at the level of 15% on aluminium ores and concentrates (HS No. 26060000) as from January 1, 2009 \(^{242}\) (listed as Item 67 of Annex 7).

\(^{240}\) Exhibit JE-21, Notice Regarding the 2009 Tariff Implementation Program (State Council Customs Tariff Commission, shuiweihui (2008) No. 40, January 1, 2009), Section II(2).

\(^{241}\) Exhibit JE-2, China's Accession Protocol to the WTO WT/L/432, note at the end of Annex 6.

\(^{242}\) Exhibit JE-21, Notice Regarding the 2009 Tariff Implementation Program (State Council Customs Tariff Commission, shuiweihui (2008) No. 40, January 1, 2009), Section II(2).
257. Aluminium ores and concentrates (HS No. 26060000) is not one of the products subject to export duty listed in Annex 6 of China's WTO Accession Protocol, and cannot be justified by Article VIII of the GATT 1994.

258. China did not consult with other affected WTO members prior to the imposition of this export duty on aluminium ores and concentrates, as it had committed itself to do in its Accession Protocol to the WTO.\(^\text{243}\)

259. The imposition and maintenance of the temporary export duty on aluminium ores and concentrates (HS No 26060000) by China is thus inconsistent with Article 11.3 of China's Accession Protocol.

Aluminium Ash Residues with HS Code 26204000:

260. China imposed a temporary export duty set at the level of 10% on aluminium ash residues (HS No. 26204000) as from January 1, 2009 \(^\text{244}\) (listed as Item 96 of Annex 7).

261. Aluminium ash residues (HS No. 26204000) is not one of the products subject to export duty listed in Annex 6 of China's WTO Accession Protocol, and cannot be justified by Article VIII of the GATT 1994.

262. China did not consult with other affected WTO members prior to the imposition of this export duty on aluminium ash residues, as it had committed itself to do in its Accession Protocol to the WTO.\(^\text{245}\)

\(^{243}\) Exhibit JE-2, China's Accession Protocol to the WTO WT/L/432, note at the end of Annex 6.


\(^{245}\) Exhibit JE-2, China's Accession Protocol to the WTO WT/L/432, note at the end of Annex 6.
263. The imposition and maintenance of the temporary export duty on aluminium ash residues (HS No 26204000) by China is thus inconsistent with Article 11.3 of China's Accession Protocol.

3. China's Temporary Export Duties imposed on Coke are inconsistent with Article 11.3 of China's Accession Protocol:

Coke and Semi-Coke with HS No. 27040010:
264. China imposed a temporary export duty set at the level of 40% on Coke and semi-coke (HS No. 27040010) as from the January 1, 2009 \(^{246}\) (listed as Item 109 of Annex 7).

265. Coke and semi-Coke (HS No. 27040010) are not products subject to export duty listed in Annex 6 of China's WTO Accession Protocol, and cannot be justified by Article VIII of the GATT 1994.

266. China did not consult with other affected WTO members prior to the imposition of this export duty on coke and semi-coke, as it had committed itself to do in its Accession Protocol to the WTO.\(^{247}\)

267. The imposition and maintenance of the temporary export duty on coke and semi-coke (HS No 27040010) by China is thus inconsistent with Article 11.3 of China's Accession Protocol.

4. China's Temporary Export Duties imposed on Fluorspar are inconsistent with Article 11.3 of China's Accession Protocol:

Met-spar (Calcium Fluoride content < 97%) with HS No 25292100:


\(^{247}\) Exhibit JE-2, China's Accession Protocol to the WTO WT/L/432, note at the end of Annex 6.
268. China imposed a temporary export duty set at the level of 15% on Met-spar (Calcium Fluoride content < 97%) with HS No 25292100 as from the January 1, 2009 \(^{248}\) (listed as Item 53 of Annex 7).

269. Met-spar (Calcium Fluoride content < 97%) with HS No 25292100 is not a product subject to export duty listed in Annex 6 of China's WTO Accession Protocol and cannot be justified by Article VIII of the GATT 1994.

270. China did not consult with other affected WTO members prior to the imposition of this export duty on met-spar, as it had committed itself to do in its Accession Protocol to the WTO.\(^{249}\)

271. The imposition and maintenance of the temporary export duty on met-spar (HS No 25292100) by China is thus inconsistent with Article 11.3 of China's Accession Protocol.

**Acid-spar (Calcium Fluoride content > 97%) with HS No 25292200:**

272. China imposed a temporary export duty set at the level of 15% on Acid-spar (Calcium Fluoride content > 97%) with HS No 25292200 as January 1, 2009 \(^{250}\) (listed as Item 54 of Annex 7).

273. Acid-spar (Calcium Fluoride content > 97%) with HS No 25292100 is not a product subject to export duty listed in Annex 6 of China's WTO Accession Protocol, and cannot be justified by Article VIII of the GATT 1994.


\(^{249}\) Exhibit JE-2, China's Accession Protocol to the WTO WT/L/432, note at the end of Annex 6.

274. China did not consult with other affected WTO members prior to the imposition of this export duty on acid-spar, as it had committed itself to do in its Accession Protocol to the WTO.\textsuperscript{251}

275. The imposition and maintenance of the temporary export duty on acid-spar (HS No 25292200) by China is thus inconsistent with Article 11.3 of China's Accession Protocol.

5. China's Temporary Export Duties imposed on Magnesium are inconsistent with Article 11.3 of China's Accession Protocol:

Magnesium Metal with HS No 81041100:

276. China imposed a temporary export duty set at the level of 10% on magnesium metal with HS No. 81041100 as from January 1, 2009 252 (listed as Item 363 of Annex 7).

277. Magnesium metal with HS No. 81041100 is not a product subject to export duty listed in Annex 6 of China's WTO Accession Protocol and cannot be justified by Article VIII of the GATT 1994.

278. China did not consult with other affected WTO members prior to the imposition of this export duty on magnesium metal as it had committed itself to do in its Accession Protocol to the WTO. 253

279. The imposition and maintenance of the temporary export duty on magnesium metal with HS No. 81041100 by China is thus inconsistent with Article 11.3 of China's Accession Protocol.

Unwrought Magnesium with HS Code 81041900:

280. China imposed a temporary export duty set at the level of 10% on unwrought magnesium with HS No. 81041900 as from January 1, 2009 254 (listed as Item 364 of Annex 7).


281. Unwrought magnesium with HS No. 81041900 is not a product subject to export duty listed in Annex 6 of China's WTO Accession Protocol, and cannot be justified by Article VIII of the GATT 1994.

282. China did not consult with other affected WTO members prior to the imposition of this export duty on unwrought magnesium as it had committed itself to do in its Accession Protocol to the WTO.255

283. The imposition and maintenance of the temporary export duty on unwrought magnesium with HS No. 81041900 by China is thus inconsistent with Article 11.3 of China's Accession Protocol.

**Magnesium Waste and Scrap with HS Code 81042000:**

284. China imposed a temporary export duty set at the level of 10% on magnesium waste and scrap with HS No. 81042000 as from January 1, 2009 256 (listed as Item 365 of Annex 7).

285. Magnesium waste and scrap with HS No. 81042000 is not a product subject to export duty listed in Annex 6 of China's WTO Accession Protocol and cannot be justified by Article VIII of the GATT 1994.

286. China did not consult with other affected WTO members prior to the imposition of this export duty on magnesium waste and scrap as it had committed itself to do in its Accession Protocol to the WTO.257

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257 Exhibit JE-2, China's Accession Protocol to the WTO WT/L/432, note at the end of Annex 6.
287. The imposition and maintenance of the temporary export duty on magnesium waste and scrap with HS No. 81042000 by China is thus inconsistent with Article 11.3 of China's Accession Protocol.

6. China's Temporary Export Duties imposed on Manganese are inconsistent with Article 11.3 of China's Accession Protocol:

Manganese Ores and Concentrates with HS Code 26020000:

288. China imposed a temporary export duty set at the level of 15% on manganese ores and concentrates with HS No. 26020000 as from January 1, 2009 \(^{258}\) (listed as Item 63 of Annex 7).

289. Magnesium ores and concentrates with HS No. 26020000 is not a product subject to export duty listed in Annex 6 of China's WTO Accession Protocol, and cannot be justified by Article VIII of the GATT 1994.

290. China did not consult with other affected WTO members prior to the imposition of this export duty on manganese ores and concentrates as it had committed itself to do in its Accession Protocol to the WTO.\(^{259}\)

291. The imposition and maintenance of the temporary export duty on manganese ores and concentrates with HS No. 26020000 by China is thus inconsistent with Article 11.3 of China's Accession Protocol.


\(^{259}\) Exhibit JE-2, China's Accession Protocol to the WTO WT/L/432, note at the end of Annex 6.
Manganese Metal with HS Code 81110010:

292. China imposed a temporary export duty set at the level of 20% on manganese metal with HS No. 81110010 as from January 1, 2009\(^\text{260}\) (listed as Item 369 of Annex 7).

293. Manganese metal with HS No. 81110010 is not a product subject to export duty listed in Annex 6 of China's WTO Accession Protocol and cannot be justified by Article VIII of the GATT 1994.

294. China did not consult with other affected WTO members prior to the imposition of this export duty on manganese metal as it had committed itself to do in its Accession Protocol to the WTO.\(^\text{261}\)

295. The imposition and maintenance of the temporary export duty on manganese metal with HS No. 81110010 by China is thus inconsistent with Article 11.3 of China's Accession Protocol.

7. China's Temporary Export Duties imposed on Silicon Metal are inconsistent with Article 11.3 of China's Accession Protocol:

Silicon < 99.99% with HS No. 28046900:

296. China imposed a temporary export duty set at the level of 15% on silicon metal < 99.99% with HS No. 28046900 as from the January 1, 2009\(^\text{262}\) (listed as Item 113 of Annex 7).


\(^{261}\) Exhibit JE-2, China's Accession Protocol to the WTO WT/L/432, note at the end of Annex 6.


298. China did not consult with other affected WTO members prior to the imposition of this export duty on silicon metal <99.99% as it had committed itself to do in its Accession Protocol to the WTO.\textsuperscript{263}

299. The imposition and maintenance of the temporary export duty on silicon metal <99.99% with HS No. 28046900 by China is thus inconsistent with Article 11.3 of China's Accession Protocol.

8. China's Temporary Export Duties imposed on Zinc are inconsistent with Article 11.3 of China's Accession Protocol:

Zinc Waste and Scrap with HS Code 79020000:

300. China imposed a temporary export duty set at the level of 10% on zinc waste and scrap with HS No. 79020000 as from January 1, 2009 \textsuperscript{264} (listed as Item 353 of Annex 7).

301. Zinc waste and scrap with HS No. 79020000 is not a product subject to export duty listed in Annex 6 of China's WTO Accession Protocol, and cannot be justified by Article VIII of the GATT 1994.

302. China did not consult with other affected WTO members prior to the imposition of this export duty on zinc waste and scrap as it had committed itself to do in its Accession Protocol to the WTO.\textsuperscript{265}

\textsuperscript{263} Exhibit JE-2, China's Accession Protocol to the WTO WT/L/432, note at the end of Annex 6.

303. The imposition of the temporary export duty on zinc waste and scrap with HS No. 79020000 by China is thus inconsistent with Article 11.3 of China's Accession Protocol.

Hard Zinc Spelter with HS No. 26201100:

304. China imposed a temporary export duty set at the level of 10% on hard zinc spelter with HS No. 26201100 as from the January 1, 2009 266 (listed as Item 91 of Annex 7).

305. Hard zinc spelter with HS No. 26201100 is not a product subject to export duty listed in Annex 6 of China's WTO Accession Protocol, and cannot be justified by Article VIII of the GATT 1994.

306. China did not consult with other affected WTO members prior to the imposition of this export duty on hard zinc spelter as it had committed itself to do in its Accession Protocol to the WTO.267

307. The imposition and maintenance of the temporary export duty on hard zinc spelter with HS No. 26201100 by China is thus inconsistent with Article 11.3 of China's Accession Protocol.

Other Zinc Ash and Residues with HS No. 26201900:

308. China imposed a temporary export duty set at the level of 10% on other zinc ash and residues with HS No. 26201900 as from the January 1, 2009 268 (listed as Item 92 of Annex 7).

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309. Other Zinc ash and residues with HS No. 26201900 is not a product subject to export duty listed in Annex 6 of China's WTO Accession Protocol, and cannot be justified by Article VIII of the GATT 1994.

310. China did not consult with other affected WTO members prior to the imposition of this export duty on other zinc ash and residues as it had committed itself to do in its Accession Protocol to the WTO.269

311. The imposition and maintenance of the temporary export duty on other zinc ash and residues with HS No. 26201900 by China is thus inconsistent with Article 11.3 of China's Accession Protocol.

9. China's Special Export Duties on Yellow Phosphorus are inconsistent with China's obligations under its Accession Protocol

312. China imposes a "regular" ad valorem export duty rate of 20 percent on yellow phosphorus. In addition to this regular export duty, China imposes a "special" export duty rate of 50 percent on yellow phosphorus.270 As provided in the "State Council Tariff Commission Notice Regarding Imposition of Special Export Duties to Phosphorous Products"271 and the "Notice Regarding the Scope of Phosphorous Products subject to Increased Special Export Duties",272 in May 2008, China first imposed a special export duty rate of 100 percent on exports of yellow phosphorus, in

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269 Exhibit JE-2, China's Accession Protocol to the WTO WT/L/432, note at the end of Annex 6.


addition to the 20 percent regular export duty rate, raising the total export duty rate applicable to yellow phosphorus to 120 percent. In November 2008, the "State Council Customs Tariff Commission Notice Regarding Adjusting Export Duties" 273 adjusted the special export duty rate to 75 percent, resulting in a total export duty rate of 95 percent for yellow phosphorus from December 1, 2008 through December 31, 2009. However, in December 2008, through the "State Council Tariff Policy Commission Notice Regarding 2009 Tariff Implementation Programme", 274 China subsequently further adjusted the special export duty rate for yellow phosphorus to 50 percent, resulting in a total export duty rate of 70 percent effective January 1, 2009.

313. The export duty resulting from the application of these duty rates to exports of yellow phosphorus is explicitly excluded from the coverage of Article VIII of the GATT 1994.

314. Yellow phosphorus is listed as Item No. 11 in Annex 6 of the Accession Protocol, however, the maximum ad valorem export duty rate permitted to be applied to yellow phosphorus under Annex 6 is 20 percent. 275

315. Accordingly, China's maintenance of a combined regular and special export duty rate of 70% applied to the exportation of yellow phosphorus is inconsistent with China's commitment under paragraph 11.3 of the Accession Protocol, as clarified in the note to Annex 6, to limit the export duty rates applied to products listed in Annex 6 at or below the levels indicated in Annex 6.


D. **Export Licenses**

1. **China's export licensing system is inconsistent with Article XI of the GATT.**

316. Article XI of the GATT prohibits "...prohibitions or restrictions...made effective through...import or export licences...". It is generally accepted that an import or export licensing requirement falls within the scope of GATT Article XI when it is "discretionary or non-automatic".\(^{276}\) The export licensing restriction that China imposes on the exportation of the Raw Materials is both non-automatic and discretionary and, therefore, it is inconsistent with Article XI of the GATT.

317. First, the export licenses imposed by China on the Raw Materials are non-automatic by law. This is made clear from the text of the Notices that China publishes annually announcing the "list of goods that are submitted to export license management". These Notices state expressly that they are issued pursuant to China's *Regulations on the Administration of the Import and Export of Goods*.\(^{277}\) As mentioned in the Facts section of this submission, these Regulations contain only one chapter on the "Administration of the Export of Goods". This Chapter contains rules only for the goods "prohibited from exportation" and the goods "limited in exportation"\(^{278}\). The Regulations further provide that the "goods limited in exportation" include those that are "subject to the administration of licenses".\(^{279}\) This confirms that the goods listed in

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\(^{276}\) See, for example, paragraph 5.129 in the Report of the Panel in *India-Quantitative Restrictions*, WT/DS 90/R, circulated on April 6, 1999.

\(^{277}\) See, for example, Notice 100 / 2008, at its introductory language.

\(^{278}\) See the Regulations on the Administration of the Import and Export of Goods, in Articles 33 and 35.

\(^{279}\) See the Regulations on the Administration of the Import and Export of Goods, in Article 43.
these annual Notices are "limited to exportation" through the "administration of export licenses", as provided for in the Regulations for the Administration of the Import and Export of Goods. Pursuant to China's Foreign Trade Law, the goods that are "limited to exportation" through the "administration of export licenses", are subject to non-automatic export licenses.280

318. This is further illustrated by the fact that the Notices expressly state that they provide the rules applied to "goods banned from export, goods that are submitted to export quota license or goods that are submitted to export license management".281

319. Second, China's export licensing system allows China's authorities a very broad and unfettered discretion on whether to grant or refuse export licenses to applicants. For example, China's Measures for the Administration of Export Licenses and China's Working Rules on Issuing Export Licenses provide that applicants must submit together with their application for an export license "any other documents prescribed by China's Ministry of Commerce".282 There is no definition of the "other documents" that China's Ministry of Commerce may require. Moreover, there is no limitation on China's Ministry of Commerce's discretion to require such "other documents" from some applicants, but not from others; or to require such "other documents" in relation to specific Raw Materials, but not others; or to require such "other documents" during certain time periods, but not others. This broad discretion effectively allows China's authorities to use the requirement of "other documents" to restrict, or even completely prohibit, the exportation of selected Raw Materials, by selected companies, or to selected export destinations.

280 See China's Foreign Trade Law, in Article 19.

281 See, for example, Notice 100 / 2008, in Articles I, XI and XII.
320. Moreover, China's *Working Rules on Issuing Export Licenses* provide that China's export license issuing agencies may refuse the grant of an export license if they consider that the applicant does not have "management qualifications". There is no definition of "management qualifications", nor is there any defined and clear "standard" that China's export license issuing agencies should apply in order to verify whether a specific applicant possesses such "management qualifications" or not. There is also no limitation on the discretion of China's authorities to interpret the undefined and unclear "management qualifications" differently and, potentially, discriminatorily in relation to specific applicants, both as between different export license issuing agencies, as well as between different applicants applying to the same agency. Therefore, this provision allows China's authorities a broad and unfettered discretion to restrict or prohibit the quantity of Raw Materials that can be exported in general, or towards specific WTO Members, by refusing the grant of export licenses on the basis of non-objective criteria.

321. In addition, China's *Measures for the Administration of Export Licenses* provide that China's export license issuing agencies may determine the quantity that an applicant may export (and, therefore, the corresponding export licenses that it will be granted), on the basis of "documents of approval of the Ministry of Commerce". There is no definition of those "documents of approval of the Ministry of Commerce". There is also no description of what they may contain or how they may be obtained. Moreover, there is no limitation on China's Ministry of Commerce's discretion to require or issue

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282 See Article 11 of the Measures for the Administration of Export Licenses and Article 5 of the Working Rules on Issuing Export Licenses.

283 See Article 8 of the Working Rules on Issuing Export Licenses.

284 See Article 11, paragraph 7 of the Measures for the Administration of Export Licenses. These "documents of approval" are in addition to the other documents required, such as the export contract or the certificates
such "documents of approval" only for specific applicants, or specific Raw Materials, or specific export destinations. Therefore, this provision allows China's authorities a broad discretion to prohibit or restrict the quantities of particular Raw Materials that can be exported in general, or towards specific WTO Members.

322. Consequently, China's export licensing system is both non-automatic and discretionary and, therefore, it is incompatible with Article XI of the GATT.

2. China's export licensing system is inconsistent with China's obligations under its Accession Protocol.

(a) Article 1.2 of China's Accession Protocol, in combination with paragraphs 162 and 165 of the Working Party Report

323. As mentioned above, Article 1.2 of China's Accession Protocol in combination with paragraphs 162 and 165 of the Working Party Report provides that, upon accession to the WTO, China would be obliged to terminate the existing and not introduce new restrictions on exports. Paragraph 162 of the Working Party Report expressly refers to China's commitment to remove non-automatic export licenses. Likewise, paragraph 165 of the Working Party Report expressly refers to China's commitment to remove non-automatic restrictions on exports of raw materials (such as non-automatic licenses).


proving that an export quota has been allocated (for those Raw Materials that are also subject to an export quota restriction).
(b) Article 5.1 and Article 1.2 of China's Accession Protocol, in combination with paragraphs 83 and 84 of the Working Party Report

325. Article 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…within three years after accession, all enterprises in China shall have the right to trade in all goods…except for those goods listed in Annex 2A…Such right to trade shall be the right to import and export goods…For those goods listed in Annex 2B, China shall phase out limitation on the grant of trading rights pursuant to the schedule in that Annex. China shall complete all necessary legislative procedures to implement these provisions during the transition period.

326. The transition period of "three years after accession" ended on December 31, 2004. Moreover, none of the Raw Materials are listed in the exportation part of Annex 2A, or in Annex 2B. Therefore, pursuant to Article 5.1 of its Accession Protocol, China has the obligation to allow "all enterprises in China" the "right to export" the Raw Materials since December 31, 2004.


328. Paragraph 83(d) of the Working Party Report provides:

…China also confirmed that within three years after accession, all enterprises in China would be granted the right to trade.

329. Paragraph 84(a) of the Working Party Report provides:

…China reconfirmed that China would eliminate its system of examination and approval of trading rights within three years after accession. At that time, China would permit all enterprises in China and foreign enterprises and individuals…to export…all goods...

330. Paragraph 84(b) of the Working Party Report provides:
With respect to the grant of trading rights to foreign enterprises and individuals...China confirmed that such rights would be granted in a non-discriminatory and non-discretionary way...Any requirements for obtaining trading rights would be for customs and fiscal purposes only and would not constitute a barrier to trade.

331. On the basis of these provisions, China has undertaken to (i) grant the right to export the Raw Materials to all enterprises in China and to all foreign enterprises and individuals, and (ii) eliminate the system of examination and approval of the enterprises' right to export the Raw Materials. China should have eliminated the system of prior approval and should have allowed all enterprises to export the Raw Materials already at the end of 2004.

332. However, despite its explicit undertakings, China continues to subject the Raw Materials to the export restriction of a non-automatic export licensing obligation. Without such export licenses, the Raw Materials cannot be exported from China.\textsuperscript{285} Enterprises seeking to exercise the trading right to export the Raw Materials, must submit to the examination and approval procedure of applying and obtaining an export license. Without such an export license, enterprises do not have the trading right to export the Raw Materials.

333. China's export licensing system is inconsistent with China's obligations under its Accession Protocol for a number of reasons.

334. First, China conditions the exportation of the relevant Raw Materials on the prior issuance of non-automatic export licenses. This means that enterprises can exercise their trading right to export the Raw Materials only if they first go through the procedure for the grant of an export license. China's authorities have the right to refuse the grant of such export license, which means that they can refuse to grant the

\textsuperscript{285} See, for example, China's Foreign Trade Law, in Article 61.
trading right to export the Raw Materials to selected enterprises. Therefore, China continues to have in place and operate an "examination and approval of trading rights" system, contrary to China's explicit obligations under paragraph 84(a) of the Working Party Report.

335. Second, China's export license issuing agencies may refuse to grant export licenses on the basis of the applicant's alleged lack of "management qualifications". In addition, China's authorities may refuse to grant export licenses, on the basis of the rules on "additional documents prescribed by China's Ministry of Commerce" and/or the rules on the other "documents of approval from China's Ministry of Commerce", as discussed in the Facts section of this submission. Through these vague and opaque provisions, China retains a broad discretion to deny to selected enterprises the trading right to export Raw Materials. As a result, through these provisions, China fails to grant to "all enterprises" in China the trading right to export the Raw Materials, contrary to China's obligations under Article 5.1 of its Accession Protocol and paragraphs 83(d) and 84(a) of the Working Party Report.

336. In addition, these provisions allow China's export licensing agencies a broad and unfettered discretion in accepting or refusing applications for export licenses submitted by foreign enterprises and individuals. This discretion is inconsistent with China's obligations under paragraph 84(b) of the Working Party Report, which provides that China would grant to foreign enterprises and individuals the trading right to export the Raw Materials in a non-discretionary way.

3. China's administration of its export licensing system is inconsistent with Article X of the GATT.

338. Alternatively, the European Union considers that China's administration of its export licensing system is inconsistent with Article X of the GATT.

(a) Article X:1 of the GATT

339. Article X:1 of the GATT provides:

Laws, regulations…and administrative rulings of general application made effective by any [WTO Member] pertaining to…requirements, restrictions or prohibitions on…exports…shall be published promptly in such a manner as to enable governments and traders to become acquainted with them.

340. As mentioned in the previous section of this submission, China has failed to publish, "in a manner as to enable governments and traders to become acquainted with them", the following regulations, or administrative rulings of general application: (a) First, the definition and the list of the "other documents prescribed by China's Ministry of Commerce" that applicants must submit together with their application for an export license; (b) Second, the definition and method of verification of the "management qualifications" that applicants must have in order to be allocated an export license; (c) Third, the definition and list of the "documents of approval of the Ministry of Commerce", on the basis of which China's export license issuing agencies may determine the quantity of Raw Materials an exporter can export and, consequently, the export licenses to be issued.

341. China's failure to publish these regulations and administrative rulings of general application is inconsistent with Article X:1 of the GATT.
(b) Article X:3(a) of the GATT

342. Article X:3(a) of the GATT provides:

Each [WTO Member] shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of the Article.

343. In the field of exports, the requirement for "uniform" administration of laws, regulations, etc. in Article X:3(a) has been interpreted to mean that:

"…every exporter should be able to expect treatment of the same kind, in the same manner, both over time and in different places and with respect to other persons...Uniform administration requires that Members ensure that their laws are applied consistently and predictably...This is a requirement of uniform administration of [laws and procedures] between individual shippers and even with respect to the same person at different times and different places".\(^{286}\)

344. This means that the administration of an export restrictions' system can be considered "uniform" only where it offers the same treatment in the same manner (i) to all exporting enterprises, (ii) at all points in time, and (iii) in respect of all export destinations.

345. The requirement for an "impartial" administration of laws and regulations in Article X:3(a) has been interpreted to require WTO Members to maintain "adequate safeguards" to ensure that the system could not be used to the advantage of some applicants and the disadvantage of others.\(^{287}\)

\(^{286}\) See, for example, paragraph 11.83 in the Report of the Panel in Argentina-hides.

\(^{287}\) See, for example, paragraph 11.101 of the Report of the Panel in Argentina-hides.
346. The requirement for a "reasonable" administration of laws and regulations is usually defined as "proportionate, not asking for too much, sensible". This means that the administration of an export restrictions' system can only be considered "reasonable" where there are adequate safeguards to prevent it from being arbitrary, discretionary and potentially discriminatory.

347. In the present case, China's Measures for the administration of export licenses and China's Working rules for the issuance of export licenses grant China's authorities broad discretion (i) to "prescribe other documents" in support of an application for an export license; (ii) to require "management qualifications" from applicants for an export license; and (iii) to issue "documents of approval" limiting the quantities of Raw Materials that can be exported by particular exporters to particular export destinations.

348. There is no definition of the conditions and circumstances that must be met and exist in order for China's Ministry of Commerce to "prescribe other documents" in relation to an application for an export license, nor is there any definition or list of such "other documents". There is not even an obligation on China's Ministry of Commerce to "prescribe" the same "other documents" for all applicants, at all times and for all Raw Materials.

349. Likewise, there is no definition of the meaning of "management qualifications" and there is no limitation on China's discretion to interpret the term "management qualifications" differently in relation to particular applicants, to particular Raw Materials, or to particular export destinations. Most importantly, there is no

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288 See, for example, paragraph 7.385 of the Report of the Panel in Dominican Republic-Measures affecting the importation and internal sale of cigarettes, WT/DS 302/R, circulated on November 26, 2004.
justification for requiring applicants to demonstrate "management qualifications" in order to be granted an export license.

350. In addition, there is no definition of these "other documents of approval" and there is no limitation on China's Ministry of Commerce's discretion to issue additional "documents of approval", limiting the quantities particular exporters may export to particular export destinations. There is no definition of the conditions and circumstances that must be met and be present for these documents to be issued or required by the Ministry of Commerce.

351. The administration of an export licensing system based on a nexus of such vague and opaque provisions and requirements fails to satisfy the conditions of "uniform, impartial and reasonable", within the meaning of Article X(3)a of the GATT.

E. China's Minimum Export Price Requirement Is Inconsistent with China's Obligations under the GATT 1994

352. China’s minimum export price requirement for bauxite, coke, fluorspar, magnesium, silicon carbide, yellow phosphorus, and zinc, as described above in Section III.E, constitutes a restriction on the exportation of these Raw Materials that is inconsistent with Article XI:1 of the GATT 1994. Furthermore, the manner in which China administers the minimum export price requirement through the CCCMC contravenes China’s obligation to administer its laws, regulations, decisions, and rulings pertaining to restrictions on exports in a uniform, impartial and reasonable manner under Article X:3(a) of the GATT 1994. Finally, China’s failure to publish its laws, regulations, decisions, and rulings pertaining to the minimum export price requirement for these

See Chart of Raw Materials Subject to Minimum Export Prices, Exhibit JE-7, for products subject to minimum export price requirements.
Raw Materials, is inconsistent with China’s obligations under Article X:1 of the GATT 1994.


China’s minimum export price system is largely opaque. It appears to be based on rules that are not published. Industry trade journals have observed that minimum export price requirements exist, but that understanding of the system is based on informal statements and oral agreements of traders and export regulators. Nevertheless, based on the statements that MOFCOM has made of its official views and through documents submitted by Chinese exporters and members of the CCCMC in various U.S. court proceedings described in more detail in Section III. E above, China effects a minimum export price requirement for bauxite, coke, fluorspar, magnesium, silicon carbide, yellow phosphorus, and zinc through: (1) a system of “self-discipline” among exporters; (2) penalties imposed by MOFCOM; (3) China’s export license issuing entities; and (4) Customs. This requirement prohibits the exportation of bauxite, coke, fluorspar, magnesium, silicon carbide, yellow phosphorus, and zinc below the price coordinated by the CCCMC and its Branches. The minimum export price requirement thus restricts the exportation of these products and is inconsistent with Article XI:1 of the GATT 1994.

(a) Coordinated Export Prices

See Industrial Minerals Articles (2009), Exhibit JE-126; and “Import and Export and Production of Magnesium between January and August This Year,” China Magnesium Materials Network website (Inmo.gov.cn) (October 7, 2008), Exhibit JE-133.
354. As explained in Section III.E above, it is MOFCOM’s official view that China’s Chambers of Commerce, which includes the CCCMC, oversee and regulate the business of importing and exporting products in China on behalf of MOFCOM.291 According to the 1994 CCCMC Charter and the 2001 CCCMC Charter, among the CCCMC’s export-related oversight and regulation functions is the coordination of exports for metals, minerals, and chemicals products.292 The CCCMC Export Coordination Measures provide that the scope of the CCCMC’s export coordination encompasses the coordination of industry export prices.293 The CCCMC Export Coordination Measures require that commodity-specific Branches or Coordination Groups be established to carry out CCCMC’s coordination work for individual commodities. The CCCMC has established Branches and Coordination Groups for coordinating export matters, including export prices, for bauxite, coke, fluorspar, magnesium, silicon carbide, yellow phosphorus, and zinc.294

355. While the rules and coordination measures governing the setting of industry export prices by the CCCMC’s various Branches are not published, Chinese exporters of bauxite submitted a copy of the Coordination Measures of the Bauxite Branch in a U.S. court proceeding involving private allegations of price fixing and other anti-competitive behaviour by Chinese exporters of bauxite.295 According to the Bauxite Coordination Measures, the Bauxite Branch coordinates the bauxite industry’s export

291 Brief of Amicus Curiae: MOFCOM at 9, Exhibit JE-98.
292 1994 CCCMC Charter, Articles 3 and 6, Exhibit JE-86; 2001 CCCMC Charter, Articles 3 and 6, Exhibit JE-87.
293 CCCMC Export Coordination Measures, Article 4(3), Exhibit JE-107.
294 CCCMC Brochure at 14, Exhibit JE-89; CCCMC Website Pages at 3-5, Exhibit JE-88.
295 Exhibit JE-108.
prices at least twice a year. These prices are then required to be notified to MOFCOM and China’s export licensing authorities.

(b) Observation of the Coordinated Export Prices by Exporters

356. The export prices coordinated by the CCCMC Branches and Coordination Groups serve as a minimum export price by virtue of exporters’ adherence to these prices. According to MOFCOM, the system of “self-discipline” is an “actual specific measure[] taken by China to effect its regulatory policies,” under which exporters consult with each other to come to consensus on a matter. Exporters abide by the result of the consensus by virtue of their awareness of penalties that apply for failure to observe the consensus matter, including the forfeiture of their exporting rights.

357. Consistent with MOFCOM’s explanation of how the system of “self-discipline” functions, the CCCMC Export Coordination Measures and the Bauxite Coordination Measures provide that the industry coordinated export price is a “collective contract” that all members must abide by. These measures also provide for penalties for failure to comply with the coordinated export price, including warnings, suspension of membership or expulsion from the CCCMC, circulating a notice of criticism, fines, or in the most severe cases, recommendations to MOFCOM to revoke an exporter’s right

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296 CCCMC Bauxite Branch Coordination Measures, Article 4, Exhibit JE-108.
297 CCCMC Bauxite Branch Coordination Measures, Article 7, Exhibit JE-108.
298 MOFCOM Statement in In re Vitamin C Antitrust Litigation (Aug. 31, 2009), para. 3, Exhibit JE-111.
299 CCCMC Export Coordination Measures, Article 18, Exhibit JE-107; CCCMC Bauxite Branch Coordination Measures, Article 10, Exhibit JE-108.
to trade, to bid on export quotas, and to receive export tax rebates.\textsuperscript{300} In addition, it appears that under the \textit{CCCMC Export Coordination Measures}, exporters are also incentivized to observe the coordinated export prices through rewards such as an increase in the amount of the export quotas awarded to them.\textsuperscript{301}

(c) MOFCOM Penalties for Exporting at Low Prices

358. In addition, the \textit{Export Price Penalties Regulations} require exporting enterprises to abide by the coordination of the Chambers of Commerce and appear to require them to take part in setting export prices.\textsuperscript{302} According to the \textit{Export Price Penalties Regulations}, exporters that export at prices that are too low are subject to penalties imposed by MOFCOM,\textsuperscript{303} including warnings, fines, suspension or revocation of the right to bid for export quotas of related products, suspension or revocation of export licenses, and suspension or revocation of the right to import or export.\textsuperscript{304}

(d) Issuance of Licenses on the Basis of Coordinated Prices

359. China’s licensing authorities issue export licenses for bauxite, coke, fluorspar, silicon carbide, and zinc, which are subject to non-automatic export licensing, on the basis of the coordinated export prices. Article 7 of the \textit{Bauxite Coordination
Measures requires that industry coordinated export prices be notified to export license issuing entities to enable such entities to issue licenses on the basis of these prices. In addition, China’s license issuing entities are subject to punishment by MOFCOM if they fail to ensure that the coordinated export price is observed. Article 40(3) of the Measures for the Administration of License Issuing Entities provides that license issuing entities that fail to issue export licenses in accordance with the coordinated export prices are subject to sanctions. These sanctions include circulation of a notice of criticism, suspension of the authority to issue licenses for the same type of goods, or termination of the authority to issue licenses for any goods.

(e) Price Review by Customs and the PVC Procedure

360. Customs enforces the coordinated export prices for at least yellow phosphorus. While all goods to be exported from China must be cleared by Customs before they are permitted to be exported, yellow phosphorus is subject to additional rules – and in this case, those rules enforce minimum export prices.

361. In 1997, MOFCOM issued three measures that govern the review of export prices by Customs: the Customs Export Price Review Rules, the Customs Export Price Review Coordinating Rules, and the Provisional Rules on Export PVC. Despite not being published, these measures appear to continue to be in force and appear to continue to authorize review by Customs of export prices in the clearance process as a method of enforcing industry coordinated export prices as minimum export prices.

Exhibit JE-108.

Measures for Administration of Licensing Entities, Article 40(3), Exhibit JE-75.

Measures for Administration of Licensing Entities, Article 40(3), Exhibit JE-75.
362. These three measures formed the basis for additional measures, the 2002 PVC Notice and the 2004 PVC Notice, which applied an enhanced minimum export price enforcement mechanism called the PVC procedure to yellow phosphorus among other products. The PVC Procedure for yellow phosphorus relies on strengthened coordination between the CCCMC and Customs and requires Customs, in reviewing the prices of export products, to deny clearance for any proposed export whose contract price has not been verified by the CCCMC as meeting or exceeding the industry coordinated export prices.309

363. The PVC Procedure requires exporters of yellow phosphorus to submit their export contracts and special PVC forms to the CCCMC for verification. The PVC Procedure requires the CCCMC to review the exporters’ documents and verify, among other things, that the price indicated on the export contract meets or exceeds the industry coordinated price. If the CCCMC verifies that the contract prices at issue comply with the industry coordinated export price, the CCCMC must affix its chop to the contracts where the prices are indicated. The PVC Procedure then requires that exporters obtaining the CCCMC’s verification to approach Customs for export clearance and submit to Customs evidence of the CCCMC’s verification. Customs is required to deny clearance to proposed exports whose contracts do not bear the CCCMC’s chop, or seal.310

308 Customs Law, Articles 2, 9, and 23, Exhibit JE-68.

309 2004 PVC Notice, paras. 2 and 4, Exhibit JE-122.

310 2004 PVC Notice, paras. 2 and 4, Exhibit JE-122.
The 2004 PVC Notice\textsuperscript{311} superseded the 2002 PVC Notice\textsuperscript{312} and appears to have been repealed on May 26, 2008 by the 2008 PVC Notice.\textsuperscript{313} Nevertheless, CCCMC measures implementing the 2004 PVC Notice, i.e., the CCCMC PVC Rules and the Online PVC Instructions, remained in force after May 26, 2008. Indeed, they were published on the CCCMC website until at least October 15, 2009,\textsuperscript{314} serving as evidence that the PVC procedure continues to be applicable to exports of yellow phosphorus.

Furthermore, the Notice of the Rules on Price Review of Export Products by the Customs, the Rules for Coordination with Respect to Customs Price Review of Export Products, and the Provisional Rules on Export Price Verification and Chop for Key Products Subject to Price Review appear to continue to be in force and appear to continue to authorize review by Customs of export prices in the clearance process as a method of enforcing industry coordinated export prices as minimum export prices for all of the Raw Materials.

\textsuperscript{311} Exhibit JE-122.

\textsuperscript{312} Exhibit JE-121.

\textsuperscript{313} Exhibit JE-125.

\textsuperscript{314} See CCCMC PVC Rules, Exhibit JE-127.
(f) Conclusion

366. As a result of China’s minimum export price requirement, the exportation of coke, bauxite, fluorspar, magnesium, silicon carbide, yellow phosphorus, and zinc are prohibited if the export price does not meet the industry coordinated export price. This constitutes a restriction on the exportation of these materials in contravention of China’s obligations under Article XI:1 of the GATT 1994.

367. The reasoning of a General Agreements on Tariff and Trade 1947 (“GATT 1947”) panel supports this analysis. In EEC – Fruits and Vegetables, that panel examined a minimum price requirement imposed on the importation of tomato concentrates by what was then the European Economic Community (“EEC”). The minimum import price requirement at issue in that dispute consisted of a Regulation providing for the annual establishment of a minimum import price for tomato concentrates, which was enforced by an associated security system. The associated security system conditioned the issuance of import certificates for tomato concentrates on the lodging of an additional security in order to guarantee that the free-at-frontier price of imports plus the customs duty for the good together equalled or exceeded the minimum price that had been set for that year. In any case where tomato concentrates were imported at a price lower than the established minimum import price, the security would be forfeited. The EEC – Fruits and Vegetables panel found that “the minimum import price system, as enforced by the additional security, was a restriction ‘other than duties[,] taxes or other charges’ within the meaning of Article XI:1.”


316 GATT Panel Report, EEC – Fruits and Vegetables, para. 4.9 (“the Panel considered that the minimum import price system, as enforced by the additional security, was a restriction ‘other than duties taxes or other charges’ within the meaning of Article XI:1.”) Another GATT panel in Japan – Semiconductors
2. China’s Administration of the Minimum Export Price Requirement Is Inconsistent with China’s Obligations under Article X:3(a) of the GATT 1994

368. China administers the minimum export price system for yellow phosphorus through the enhanced enforcement procedure known as the PVC procedure. The PVC procedure requires participation of the CCCMC in the export clearance process. Accordingly, China does not administer the minimum export price in an impartial and reasonable manner, and therefore contravenes its obligations under Article X:3(a) of the GATT 1994.

(a) Article X:3(a) of the GATT 1994

369. Article X:3(a) provides:

> Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.

> The laws, regulations, decisions and rulings described in Article X:1 are those “of general application, made effective by any contracting party, pertaining to . . . restrictions . . . on . . . exports.”

370. As a threshold matter, as discussed above, the laws and regulations establishing China’s minimum export price requirement pertain to an export restriction of general application. The minimum export price requirement applies to all products for which an export price has been coordinated.

(b) China’s Administration of the Minimum Export Price System through the PVC Procedure Is Not Impartial or Reasonable

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found this reasoning of the EEC – Fruits and Vegetables panel to be “equally applicable to restrictions on exports below certain prices.” GATT Panel Report, Japan – Semiconductors, para. 105.
371. The PVC procedure provides the CCCMC a key role in reviewing and approving export prices in order for exports to be cleared through Customs, and the CCCMC’s membership structure leads to administration of rules in a way that is neither impartial nor reasonable. The PVC procedure thus constitutes administration of the minimum export price system that is inconsistent with Article X:3(a) of the GATT 1994.

372. In examining the impact of the CCCMC’s participation in the administration of the PVC procedure as described above in Section IV.E.1.e, it is crucial to take note of CCCMC’s role in that administration and the nature of CCCMC as an entity. While the CCCMC apparently assumes responsibilities in managing and coordinating trade on behalf of the state, unlike a regular governmental entity, it is also a membership association of private commercial participants in a common industry – i.e., the metals, minerals, and chemicals industry. Its membership of over 4000 entities comprehensively represent not just traders, but also researchers and manufacturers of processed downstream products, all of whom are operating businesses in ferrous metals, non-ferrous metals, non-metallic minerals and their products, construction materials, coal and coal products, oil and oil products, chemicals, plastics, fine chemicals, agro-chemicals, rubber products, and so on.\(^\text{317}\) By virtue of its membership, the CCCMC represents an individual exporter’s competitors as well as competitors of the foreign buyer.

373. Despite the conflicts of interest lurking in its membership structure, the CCCMC plays a central role in the PVC procedure for enhanced enforcement of minimum export prices for yellow phosphorus. The PVC procedure requires that all export contracts for yellow phosphorus be submitted by the exporter to the CCCMC. As a result, the CCCMC (including its private membership) has access to a contract in its entirety,

\(^{317}\) CCCMC Website Pages at 1, Exhibit JE-88; CCCMC Brochure at 2, paras. 2 and 3, Exhibit JE-89.
with all of its terms and conditions, and is then required to scrutinize in particular the prices and quantities negotiated and agreed between the exporter and its foreign buyer. The CCCMC’s active role in reviewing export contracts for export prices thus introduces the eyes and ears of these external, potentially adverse commercial interests into the private commercial transaction at issue in the export process.

374. The inherent risk that confidential information will be revealed through the PVC procedure makes it unreasonable under Article X:3(a). There is no reason why exporters should have to submit their entire contract for a process whose purpose is to verify only the export price. These exporters are forced to provide irrelevant but sensitive business information in order to obtain clearance for exportation. This information is thus unreasonably made available to parties who under normal circumstances would have no reason to see it.

375. Indeed, permitting the representatives of competing exporters and potential customers to have access to this type of confidential information creates an inherent conflict of interest adverse to the interests of the exporter at issue and foreign buyers. It permits these groups access to sensitive details regarding the terms and conditions of transactions negotiated between exporters and their foreign buyers. Other exporters are provided an opportunity to free-ride on the negotiations of their competitors and gain access to information regarding potential foreign customers’ bottom line. At the same time, the domestic manufacturers and processors are provided access to the details of their foreign competitors’ purchasing, including identities of their suppliers, quantities, and costs. This inherent conflict of interest renders the administration of

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318 The 2004 PVC Notice instructs the CCCMC to affix its chop, if it verifies the prices are in conformity with the industry coordinated export prices, on the contract where the price is indicated as well as where the quantity is indicated. Exhibit JE-122, Annex 2, para. A.
376. The reasoning of the Panel in *Argentina – Hides* supports the conclusion regarding the unreasonableness and partiality of China’s PVC procedures. That Panel concluded that the presence and participation of representatives of the industry association representing producers of leather and leather products in the Customs clearance process for exports of leather constituted the partial and unreasonable administration of the Customs laws because it implicated an inherent danger of the inappropriate flow of one private person’s confidential information to another as a result of the administration of the Customs law.\(^{319}\)

377. As that Panel noted, in the context of the participation of the leather manufacturers’ industry association in the Customs clearance for leather exports from Argentina, the clearance process required disclosure of information that was not relevant to the making of export classifications. The Panel thus concluded that the administration of this process was unreasonable, because the “[industry association] representatives should not be able to see the pricing information of the suppliers to [the association’s] members. . . . We also see no need for them to be made aware of the destination or quantities involves . . . .”\(^{320}\) The requirement to disclose this confidential information, when it had no bearing on the administration of the law at issue, was found to be unreasonable.

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\(^{320}\) Panel Report, *Argentina – Hides*, para. 11.92.
378. The panel in *Argentina – Hides* also stated that “[t]he only parties that have a contractual legal interest in the product and transaction are the exporter (and his agent) and the foreign buyer.”\(^{321}\) The Panel further reasoned,

"the [industry association] representatives have, outside of the measure in question itself, no legal relationship with either the products or the sales contract. [The industry association], in fact, represents an adverse commercial interest in that the exports are not in its members’ interests as such exports potentially drive up the costs of hides. Furthermore, [the industry association] members are competitors of the foreign buyers of the hides".\(^{322}\)

379. This flow of confidential information to potentially adverse commercial interests led to partiality in administration of the export classification system.

380. The role of the CCCMC in verifying export contracts in the Customs clearance process prescribed by the PVC procedure has an inherent danger of the “inappropriate flow of one private person’s confidential information to another as a result of the administration the Customs laws”\(^{323}\) and thus constitutes unreasonable and partial administration in contravention of the requirements of Article X:3(a) of the GATT 1994.

\(^{321}\) Panel Report, *Argentina – Hides*, para. 11.98.

\(^{322}\) Panel Report, *Argentina – Hides*, para. 11.98.

3. **China’s Failure to Publish Measures Pertaining to the Minimum Export Price Requirement Is Inconsistent with China’s Obligations under Article X:1 of the GATT 1994**

   (a) **Article X:1 of the GATT 1994**

   381. As explained above, Article X:1 provides, in relevant part:

   Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to . . . restrictions or prohibitions on . . . exports . . . shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. . . .

   382. Article X:1 thus requires that laws, regulations, decisions, and rulings that impact trade and traders generally must be made known to traders and other governments.

   (b) **China’s Minimum Export Price Requirements Are Rules of General Application**

   383. As discussed above, the measures establishing the minimum export price requirement apply generally to the exportation of all products for which an export price has been coordinated. Accordingly, these measures are of general application and thus subject to the requirements of Article X.

   (c) **China Has Failed to Publish Important Measures and Provisions Relating to Minimum Export Prices**

   384. The legal framework that appears to establish China’s minimum export price requirement is highly non-transparent. Articles in industry publications have characterized the regime as an “informal” one that relies on oral agreement or
announcements by China’s export gatekeepers.\textsuperscript{324} Specific rules and measures establishing the details of the minimum export price requirement are not published.

385. Despite the CCCMC’s apparent role in overseeing and regulating trade on behalf of the state, formal measures, in the form of laws or regulations or administrative rulings, providing rules and details on how the CCCMC coordinates export prices do not appear to be published. Specific coordination programs and Branch coordination measures prescribed under the \textit{CCCMC Export Coordination Measures} are not published. The \textit{Bauxite Coordination Measures} only became public when Chinese bauxite exporters filed the document with a U.S. court.

386. The \textit{2001 CCCMC Charter} was not published on the CCCMC website until well into 2009, after the request for consultations in this dispute was made. There is also no evidence that it was published in any other way. This failure to publish promptly the \textit{2001 CCCMC Charter} evidently resulted in the failure of Chinese traders to become acquainted with it: in the U.S. court proceeding alleging anti-competitive behaviour by Chinese exporters of bauxite during the period from 2003 to the present, those exporters submitted a copy of the \textit{1994 CCCMC Charter}, not the \textit{2001 CCCMC Charter}.

387. Three measures related to export price review by Customs are referenced in the \textit{2002 PVC Notice} and the \textit{2004 PVC Notice}: 1) the \textit{Notice of the Rules on Price Review of Export Products by the Customs}; (2) the \textit{Rules for Coordination with Respect to Customs Price Review of Export Products}; and (3) the \textit{Provisional Rules on Export Price Verification and Chop for Key Products Subject to Price Review}. These measures are apparently important parts of the legal framework for setting minimum prices.

\textsuperscript{324} See Industrial Minerals Articles (2009), \textbf{Exhibit JE-126}; and “Import and Export and Production of Magnesium between January and August This Year,” China Magnesium Materials Network website (lnmo.gov.cn) (October 7, 2008), \textbf{Exhibit JE-133}. 

140
export prices. Nevertheless, despite diligent attempts, these measures could not be located and appear to be unpublished.

388. Accordingly, although evidence demonstrates that certain measures related to the establishment and functioning of the minimum export price requirement do exist, they remain unpublished or were not published promptly. By failing to publish these measures and provisions and by not publishing the 2001 CCCMC Charter for eight years after it came into effect, China has acted inconsistently with the requirements of Article X:1 of the GATT 1994.
V. CONCLUSION

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