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

Second Written Submission by the European Union

Geneva, 8 October 2010
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I. INTRODUCTION

1. The People's Republic of China ("China") has presented the objectives and the effects of the challenged measures very clearly in its opening statement during the first hearing of the Panel. China asserted its sovereign right to exploit the Raw Materials only for its own development. Restricting the access of other WTO Members to these Raw Materials is part of China's acknowledged industrial policy to keep the Raw Materials away from foreign competitors, "now and into the future".

2. However, it was in the exercise of its sovereignty that China decided to accede to the WTO and undertake the obligations set out in the WTO Agreements and its Accession Protocol. Complying with these obligations is also part of China's exercise of its sovereignty.

3. Through its accession to the WTO, China did not only undertake obligations. It also gained access to the advantages membership brings. The great economic growth enjoyed by China during the last ten years would probably not have been possible outside the WTO. Given the extremely positive impact that WTO membership has on China's economy and society, China has everything to gain from a strong and robust WTO system. Respecting the rules of the WTO covered agreements can only strengthen the multilateral trade system, to the benefit of China and its trading partners.

II. CHALLENGED MEASURES WHOSE WTO INCONSISTENCY IS NOT CONTESTED BY CHINA

4. China has acknowledged the WTO inconsistency of the following challenged measures.

A. Export Quotas

1. Zinc ores and concentrates
5. China acknowledges that it has (effectively) imposed an export ban on Zinc ores and concentrates (Chinese Commodity Codes 2608000001 and 2608000090).\(^1\) Moreover, China acknowledges that these measures are inconsistent with the covered agreements.\(^2\) Finally, China acknowledges that it has failed to publish the existence of this export ban.\(^3\) Therefore, the Panel may proceed with reaching its findings and issuing its recommendations on the incompatibility of the challenged measures with the covered agreements in accordance with the European Union's claims (including Articles X:1 and XI of the GATT and in paragraphs 162 and 164 of the Working Party Report on China's Accession).

2. **Bauxite**

6. The European Union challenges the export quotas imposed on the goods with HS numbers 25083000 (refractory grade bauxite) and 26060000 (aluminium ores and concentrates).

7. China has acknowledged that it imposes these export quotas. China has also acknowledged that the export quotas on the good with HS number 26060000 (i.e., aluminium ores and concentrates) are inconsistent with the covered agreements.\(^4\)

8. On the good with HS number 250803000, China draws a distinction between Bauxite with high aluminium oxide (i.e., more than 80%), which it calls "refractory grade Bauxite" and Bauxite with lower aluminium oxide (i.e., below 80%), which China calls "med alumina", "low alumina", "fireclay" or "kaolin".\(^5\)

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1. See China's first written submission, in paragraph 559.
2. See China's Reply to Question 8, in paragraph 37.
3. See China's Reply to Question 8, in paragraph 37.
4. See China's Reply to the Panel's Question 8, in paragraph 36.
5. See China's Reply to Question 8, in paragraphs 34 and 35.
China acknowledges that the export quota on the latter category of Bauxite is inconsistent with the covered agreements.6

9. Given that China has acknowledged the WTO inconsistency of the export quotas imposed on all types of Bauxite, with the exception of the sub-category of HS 25083000 called "refractory grade Bauxite", the Panel may proceed with reaching its findings and issuing its recommendations on the incompatibility of these measures with the covered agreements, in accordance with the European Union's claims. The European Union will address the issue of the "refractory grade Bauxite" export quota, further below in this submission.

3. Fluorspar

10. The European Union challenges the export quota imposed on the goods with HS numbers 25292100 (met-spar) and 25292200 (acid spar), both of them referred to here as "Fluorspar". China clarifies that it does not subject Fluorspar to an export quota in 2010. However, China acknowledges that Fluorspar was subject to an export quota at the time the panel was established.7 China also confirms that it continues to subject Fluorspar to an export duty.8 China invites the Panel to refrain from making the relevant finding on the basis that China has removed the challenged measure.9

11. The Panel should not follow China's suggestion. The Fluorspar export quota was still in place at the time the Panel was established and is within the Panel's terms of reference. There is no reason why the Panel should not make findings on that export quota's inconsistency with the covered agreements. It is noted that China does not expressly acknowledge the WTO inconsistency of Fluorspar's export quota, while the European Union claims that it is inconsistent

6 See China's Reply to Question 8, in paragraph 35.
7 See China's first written submission, in paragraph 66.
8 See China's first written submission, in paragraph 94.
9 See China's first written submission, in paragraph 67.
with the covered agreements. Therefore, there is still disagreement between the parties on the challenged measure's consistency with the covered agreements, which can be positively resolved only if the Panel makes the requested findings.

12. In addition, the European Union considers that the Panel should also recommend that China brings the challenged measures in compliance with the covered agreements. There are a number of reasons supporting this consideration. One reason is that the basic legislation for the imposition of export quotas on Fluorspar is still in place today.\textsuperscript{10} As China itself acknowledges, on the basis of this legislation, China publishes every year a notice listing the goods that will be subject to an export quota on a particular year.\textsuperscript{11} Therefore, the legal basis for the challenged measure has not been repealed.

13. More importantly, the fact that China chose not to subject Fluorspar to an export quota during the period of the current dispute settlement proceedings does not mean that the Fluorspar export quota has been permanently repealed or terminated. As China acknowledges, the decision to place a good on the list of goods subject to export restrictions is based on China's assessment of a number of factors.\textsuperscript{12} China appears to have determined that the exportation of Fluorspar should be restricted many years ago, because it has consistently imposed Fluorspar export quotas since 2006.\textsuperscript{13} Today, China continues to determine that the exportation of Fluorspar should be restricted. This is evidenced by the fact that, even during the period of the current dispute settlement proceedings, Fluorspar is subject to export restrictions in the form of export duties.

\textsuperscript{10} This legislation includes China's \textit{Foreign Trade Law}, China's \textit{Regulation on the administration of the import and export of goods}, the \textit{Measures on the administration of export quotas}, the \textit{Measures on Export Quota Bidding}, the \textit{Implementation rules on export quota bidding}, etc. See further the European Union's first written submission, in paragraph 103.

\textsuperscript{11} See China's first written submission, in paragraph 66.

\textsuperscript{12} See China's Reply to Question 26.

\textsuperscript{13} See China's Exhibit CHN-440.
14. In addition, China expressly admits that it intends to continue to subject the exportation of Fluorspar to restrictions in the future. In paragraphs 154 to 192 of its first written submission, China extensively argues that Fluorspar is a good whose exportation must be subject to restrictions and it describes the "comprehensive set of measures" it has adopted in that regard. China expressly states that it has a policy of conserving its "own resources of Fluorspar", that the export restrictions it imposes on Fluorspar are an "integral part of that policy" and that the purpose of the Fluorspar export restrictions is to ensure that Fluorspar will "continue to contribute to China's own social and economic development – now and into the future".\textsuperscript{14}

15. Therefore, the facts are as follows: The basic legislation for the imposition of export quotas on Fluorspar is still in place today. China continues to subject Fluorspar to export restrictions (in the form of export duties) today. Unlike the situation in other cases with which WTO panels have dealt in the past,\textsuperscript{15} China has not officially undertaken to refrain from re-imposing an export quota on Fluorspar in the future. Quite to the contrary, China acknowledges that it intends to continue to subject Fluorspar to export restrictions "now and into the future". And, China has not expressly acknowledged that the challenged measure is inconsistent with the covered agreements.

16. In light of these facts, China's decision to temporarily remove Fluorspar from the list of goods subject to export quotas, during the period of the current dispute settlement proceedings, does not prevent the Panel from making findings confirming the incompatibility of China's measure with the covered agreements. Moreover, these facts confirm that the Panel should recommend that China brings the challenged measure into conformity with the covered agreements, because this would be the only way to ensure that the Fluorspar

\textsuperscript{14} See China's first written submission, in paragraph 192.

\textsuperscript{15} See for example, the report of the Panel in Turkey-Rice, in paragraph 5.30, where the Panel noted Turkey's "declared intention" not to reintroduce the challenged measures.
export quota would be permanently repealed and, therefore, secure a positive solution to the dispute.\textsuperscript{16}

B. Export Duties

1. Manganese ores and Silicon metal

17. The European Union challenges the export duties imposed on the goods with HS number 26020000 (\textit{Manganese ores and concentrates}) and HS number 28046900 (\textit{Silicon metal}). China acknowledges the existence of these export duties and their inconsistency with the covered agreements.\textsuperscript{17} Therefore, the Panel may proceed with reaching its findings and issuing its recommendation on the inconsistency of these measures with China's obligations under in paragraph 11.3 of China's Accession Protocol.

2. Bauxite

18. The European Union challenges the export duties imposed by China on the goods with HS numbers 25083000 (refractory grade Bauxite), 26060000 (aluminium ores and concentrates) and 26204000 (aluminium ash and residues).

19. China clarifies that it does not impose export duties on these goods in 2010.\textsuperscript{18} China also points out that the Panel cannot make recommendations regarding these measures.\textsuperscript{19}

\textsuperscript{16} See, for example, the report of the Panel in \textit{EC-Customs matters}, in paragraph 7.36, where the panel referred to the "general principle" allowing a panel to issue recommendations for expired measures, where they are "necessary to secure a positive solution to the dispute".

\textsuperscript{17} See China's Reply to Question 4, in paragraph 26. There seems to be a typographic error with the HS number of Silicon Metal referred to in China's Reply: the HS number mentioned is that of Zinc ores and concentrates and not of Silicon Metal.

\textsuperscript{18} See China's first written submission, in paragraph 84.

\textsuperscript{19} See China's first written submission, in paragraph 85.
20. The challenged measures existed at the time the Panel was established and, therefore, they are within the Panel's terms of reference. Therefore, the Panel should proceed with making findings confirming their incompatibility with China's Accession Protocol.

21. In addition, for the same reasons as those discussed above in the section on the Fluorspar export quota, the European Union considers that the Panel should also recommend that China brings the challenged measures in conformity with the WTO rules: the basic legislation for the imposition of export duties on Bauxite is still in place today. Indeed, China expressly acknowledges this fact in its first written submission. Moreover, Bauxite is still subject to export restrictions (in the form of export quotas) today. In addition, China has not undertaken to refrain from re-imposing export duties on Bauxite in the future. China has also not acknowledged that the challenged measure is inconsistent with the covered agreements. In light of these facts, findings confirming that the challenged measures are inconsistent with the covered agreements and a recommendation to bring the challenged measures into compliance with the covered agreements are the only way to secure a positive solution to this dispute.

3. Yellow phosphorus

22. The European Union challenges the export duties imposed on the good with HS number 28047010 (Yellow phosphorous). China has undertaken in its Accession Protocol to keep the value of the export duties imposed on Yellow Phosphorous below 20%. However, China subjected Yellow phosphorous to export duties of 70%.

23. China acknowledges that it had subjected the Yellow phosphorous to export duties of 70% and does not defend the consistency of this measure with its obligation under its Accession Protocol. However, China states that it has

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20 See China's first written submission, in paragraph 82.

21 See China's first written submission, in paragraph 54.
reduced the Yellow phosphorous export duties to 20% as of July 1, 2009. 22 China points out that this was before the date of the establishment of the Panel and requests the Panel not to make any findings on those export duties' consistency with the covered agreements. 23

24. For the reasons already discussed above in the sections on Fluorspar's export quotas and Bauxites' export duties, the Panel should not follow China's suggestion. A positive solution to the dispute can be reached only if it is made clear that the increased export duties on Yellow phosphorous are inconsistent with China's WTO obligations and that China shall not re-introduce them. This can only be achieved if the Panel make findings confirming the challenged measure's inconsistency with China's obligations under its Accession Protocol. 24 Unlike the situation in other cases dealt with by WTO panels in the past, 25 in the present case China has not officially undertaken to refrain from increasing the export duties on Yellow phosphorous above the limits provided for in its Accession Protocol. Moreover, the basic legislation for the imposition of such export duties is still in place and China continues to subject Yellow phosphorous to export restrictions in the form of export duties. Finally, China has not expressly acknowledged that the challenged measures are inconsistent with the covered agreements.


25. The European Union has challenged, among others, the consistency of China's export quotas and export licenses with the obligations undertaken by China in its Accession Protocol, in combination with the obligations reflected in the Working Party Report. China has chosen not to defend some of these claims.

22 See China's Reply to Question 4, in paragraph 25.
23 See China's first written submission, in paragraph 56.
24 See, for example, the report of the panel in EC – Approval and Marketing of Biotech Products, in paragraphs 7.1649 and 7.1650.
25 See, for example, the report of the panel in Turkey-Rice, in paragraph 5.30.
Instead, China invites the Panel simply to exercise judicial economy and not to make any findings on them.

26. China invites the Panel to exercise judicial economy on the following claims: (a) the inconsistency of China's export quotas with in paragraph 1.2 of China's Accession Protocol, in combination with in paragraphs 162 and 165 of the Working Party Report; 26 (b) the inconsistency of China's export licenses with in paragraph 5.1 of China's Accession Protocol and with in paragraph 1.2 of China's Accession Protocol in combination with in paragraphs 83 and 84 of the Working Party Report; 27 and (c) the inconsistency of China's export licenses with in paragraph 1.2 of China's Accession Protocol in combination with in paragraphs 162 and 165 of the Working Party Report. 28

27. In principle, a panel should examine all the claims put forward by a complainant. Judicial economy should generally be exercised only where a panel considers that exceptional circumstances justify it. In the present case, the European Union does not consider that there are any exceptional circumstances that would justify the exercise of judicial economy on these claims. Quite to the contrary, there are good reasons supporting the view that these claims should be examined and that findings (and recommendations) should be made. This view is supported by the following considerations.

28. First, China and the European Union disagree on whether the challenged measures are consistent with the identified provisions of the covered agreements. The Panel can help secure a positive solution to this dispute, resolve the disagreement between the parties and clarify the scope of the identified provisions and their application on the challenged measures only if it examines these claims and makes the corresponding findings and recommendations.

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26 See China's first written submission, in paragraphs 565 and 566.

27 See China's first written submission, in paragraph 811.

28 See China's first written submission, in paragraph 808.
29. Second, the Panel's findings on whether the challenged measures are consistent with the identified provisions of the covered agreements would be most helpful (and possibly necessary) for the next steps in these dispute settlement proceedings. For example, if the report of the Panel were appealed and certain legal interpretations developed by the panel happened to be reversed, the Appellate Body may need to complete the analysis in order to secure a positive solution to the dispute. The Panel's findings on those claims (which are in dispute between the parties) may be necessary for the Appellate Body to be able to perform that task. This is an important reason strongly supporting the Panel's making findings on all claims, as it has already been recognised by the Appellate Body:

…in some instances, a panel's decision to continue its legal analysis and to make factual findings beyond those that are strictly necessary to resolve the dispute may assist the Appellate Body should it later be called upon to complete the analysis… 29

30. Third, China's request does not seem to be motivated solely by concerns of procedural efficiency. It is noted that, in support of its request, China asserts that "the obligation to eliminate export restrictions, assumed by China under in paragraphs 162 and 165, merely confirms the obligation assumed by all WTO Members under Article XI:1". 30 This shows that China's request is in essence an effort to make the Panel adopt a particular interpretation of its Accession Protocol obligations: that these obligations "merely confirm" the provisions of the GATT. However, the relation between China's obligations under its Accession Protocol and the GATT is an important issue of substance, which goes to the heart of the present dispute. The Panel can positively resolve it only if it rejects China's request, examine all claims (including those based on China's Accession Protocol and Working Party Report) and make the corresponding findings.

IV. THE EUROPEAN UNION HAS ESTABLISHED PRIMA FACIE ALL ITS CLAIMS

See the report of the Appellate Body in US – Gambling, in paragraph 344.

See China's first written submission, in paragraph 565.
A. Export Quotas

31. The European Union challenges the consistency with Article XI:1 of the GATT and with in paragraph 1.2 of China's Accession Protocol in combination with in paragraphs 162 and 165 of the Working Party Report, of China's export quotas on (i) certain types of Bauxite, (ii) Coke, (iii) Fluorspar, (iv) Silicon Carbide and (v) certain types of Zinc. As mentioned above, China has acknowledged that the export quotas on Zinc ores and concentrates and most types of Bauxite are inconsistent with the covered agreements and has not defended the WTO consistency of the Fluorspar export quota.

32. China seeks to justify the consistency with the provisions of the GATT and its Accession Protocol only of the export quotas on (i) one type of Bauxite (which it calls Refractory Grade Bauxite), (ii) Coke and (iii) Silicon Carbide.31

33. China acknowledges the existence of the export quotas on Refractory Grade Bauxite, Coke and Silicon Carbide as described by the European Union. Therefore, there is no disagreement between the parties on the accuracy of the facts presented by the European Union.

34. In an effort to show that the European Union has not made a prima facie showing of inconsistency with its claims, China raises two preliminary objections. Both objections should be rejected, for the following reasons.

1. The European Union's first written submission properly identifies the measures at issue

35. China asserts that the European Union's first written submission allegedly "fails to identify the Chinese measures at issue".32 China's assertion is factually wrong.

31  See China's first written submission, in paragraphs 494, 495 and 528.

32  See China's first written submission, in paragraph 346.
36. The European Union's first written submission lists in paragraph 199 the challenged export quotas and the corresponding goods. In paragraph 197 refers to the Chinese laws, regulations, measures and decisions which establish these export quotas and mentions that they are discussed in the Facts section of the first written submission.

37. The Facts section of the first written submission contains specific references to specific provisions of the Chinese measures regulating the introduction, administration and management of the export quotas, such as China's *Foreign Trade Law, Regulation on the administration of the import and export of goods, Measures for the administration of export quotas, Measures on export quota bidding, Implementation rules on export quota bidding*, etc.

38. The Facts section of the first written submission also contains specific references to specific measures introducing and administering the export quotas for specific products, such as, for example, MOFCOM's Notice 100/2008 for export quotas allocated directly, or MOFCOM's Announcement 85/2008 and Announcement 42/2009 for export quotas allocated through bidding. It is noted that the first in paragraph of Notice 100/2008 lists the goods that are subject to export quotas allocated directly and includes Coke and Zinc, while the second in paragraph lists the goods that are subject to export quotas allocated through bidding and includes Silicon Carbide, Fluorspar and Bauxite. Likewise, Announcement 85/2008 contains a section titled "Commodities subject to bidding" and listing Fluorspar, Silicon Carbide and Bauxite.

39. The fact that China's assertions are wrong is further illustrated by China's own statements. For example, in paragraph 347 of its first written submission, China acknowledges that the European Union's first written submission identifies MOFCOM's Notice 100/2008 as a measure introducing the export quota on Coke. However, China goes on to assert in the same in paragraph that the

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33 See Exhibit JE – 22, defined in footnote 32 and referenced in numerous other footnotes of the European Union's first written submission.

34 See Exhibit JE – 90, defined in footnote 58 and referenced in numerous other footnotes of the European Union's first written submission.
European Union has failed to identify the "measures at issue". Moreover, during the first hearing, China complained that the European Union's first written submission contained too many references to specific Chinese measures, which, according to China, made China's prein paragraphtory work for its defence more cumbersome. It is difficult to understand how one can complain that the first written submission contains too many references to the measures at issue and, at the same time, assert that there are no references to the measures at issue.

40. In conclusion, the Panel should reject China's assertions. The European Union challenges the export quotas imposed on certain forms of Bauxite, Coke, Fluorspar, Silicon Carbide and certain forms of Zinc. The European Union has clearly identified these export quotas. In addition, the European Union has clearly identified the Chinese legislative instruments (in the form of Laws, Regulations, Measures, Implementing Rules, Notices, Announcements and Communications), which evidence the existence of the challenged export quotas.

41. In light of these facts and contrary to China's assertions, the Panel can issue precise recommendations requesting that China brings the challenged measures into compliance with its WTO obligations. China can easily bring itself into compliance with such recommendation by simply repealing the legislative instruments identified by the European Union.

2. Article XI:2(a) of the GATT is an affirmative defence and China bears the burden of invoking and proving it

42. In its first written submission, China argues that the provisions of Article XI:2(a) of the GATT are "not an affirmative defence" and that "it is for the complainant to demonstrate non-compliance" with Article XI:2, in order to show a violation of Article XI:1 of the GATT.  

35 See China's first written submission, in paragraphs 350, 360 and 364.
43. China's arguments are wrong. As already demonstrated during the first hearing with the Panel, the Appellate Body has consistently interpreted Article XI:2 of the GATT as an "affirmative defence" and has required the defending party to prove that the conditions for its application are met.

44. For example, the Appellate Body confirmed in *US – Wool Shirts and Blouses* that Article XI:2 of the GATT, just like Article XX of the GATT, are limited exceptions, in the nature of affirmative defences and that the defending part bears the burden to prove them:

...Articles XX and XI:(2)(c)(i) are limited exceptions from obligations under certain other provisions of the GATT 1994, not positive rules establishing obligations in themselves. They are in the nature of affirmative defences. It is only reasonable that the burden of establishing such a defence should rest on the party asserting it.\(^{36}\)

45. The Appellate Body re-confirmed this interpretation in its report in *EC-Tariff Preferences*.\(^{37}\)

46. There is no reason for the Panel to depart, in the present case, from this correct and consistent interpretation of Article XI:2 of the GATT. The Panel should summarily reject China's objection and find (a) that Article XI:2(a) is an "affirmative defence" to an Article XI:1 claim; and (b) that China has the burden of invoking it and establishing that the conditions for its application are satisfied.

3. Conclusion

47. The European Union has established that the challenged measures, i.e., China's export quotas on (i) refractory grade Bauxite; (ii) Coke; and (iii) Silicon Carbide, are inconsistent with Article XI:1 of the GATT, as well as with in paragraph 1.2 of China's Accession Protocol in combination with China's obligations contained in paragraphs 162 and 165 of the Working Party Report.

\(^{36}\) See the report of the Appellate Body in *US – Wool Shirts and Blouses*, on page 16.

\(^{37}\) See the report of the Appellate Body in *EC – Tariff Preferences*, in footnote 211.
48. In its defence, China has invoked the provisions of Article XI:2(a) and XX(g) of the GATT for the export quota on refractory grade Bauxite and the provisions of Article XX(b) of the GATT for the export quotas on Coke and Silicon Carbide. China has failed to establish that the conditions for the application of these exceptions are met, as the European Union will show in the relevant sections of this submission.

B. Export Duties

49. China does not contest that the European Union has established that the challenged export duties are inconsistent with in paragraph 11.3 of China's Accession Protocol. China only tries to justify them pursuant to Article XX(b) or Article XX(g) of the GATT. Therefore, there is no disagreement between the parties that the European Union has made a prima facie showing of the challenged measures’ inconsistency with in paragraph 11.3 of China's Accession Protocol.

C. Export Licences

1. The effect of the statements made by China in the course of the present dispute settlement proceedings

50. The European Union has claimed that China's export licenses are inconsistent with China's obligations under the covered agreements because they are non-automatic and discretionary. China accepts that a non-automatic export licensing system would not be consistent with its obligations under the covered agreements. However, China asserts that the export licensing system it

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38 See China's first written submission, in paragraphs 76, 78, 92 and 93.

39 See China's first written submission, in paragraph 765.
imposes on the Raw Materials is automatic and, therefore, it does not constitute a restriction under the covered agreements.40

51. China further asserts that its license issuing agencies do not enjoy any discretion to reject applications for export licenses, provided that the documents required by Chinese law are included together with the application. China asserts that the agencies' examination of the applications is purely of a "procedural nature" and that they have no discretion to reject applications that are "complete".41 China also asserts that this "automaticity" applies both to goods subject to export quotas and to goods that are not subject to export quotas, such as Manganese and certain types of Zinc in the present case.

52. As a preliminary matter, the European Union notes that China has provided, as Exhibits, official statements issued by China's competent authorities describing China's interpretation of the Chinese export licensing rules.42 In addition, China has included unequivocal statements in its submissions to the Panel, confirming this interpretation of its export licensing rules. Through all these statements, China expressly and officially declares that its export licensing agencies do not have the discretion to refuse any export license application, provided that the application includes the requisite documentation.

53. WTO panels have found in the past that such statements issued by the defending WTO Member may "lawfully remove" its violation of the covered agreements, provided that a number of conditions are met:43

(a) The defending member's statements should be a reflection of official policy in its application of the domestic rules.44

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40 See China's first written submission, in paragraph 753.
41 See China's first written submission, in paragraph 771.
42 See the official statements issued by China's competent authorities and annexed to China's first written submission as Exhibit CHN 345.
43 See, for example, the report of the Panel in US – Section 301 Trade Act, in paragraph 7.104.
44 See the report of the Panel in US – Section 301 Trade Act, in paragraph 7.121.
(b) The representations and statements by the defending member's representatives appearing before the panel must have been solemnly made, in a deliberative manner, for the record and repeated in writing and orally.45

(c) The Panel must be satisfied that the defending member's representatives appearing before the Panel have full powers to make such legal representations and that they are acting within the authority bestowed on them.46

(d) The Panel must be satisfied that the statements made by the defending party are intended to be part of the record in the full knowledge and understanding that they could be made part of the Panel's final report. The Panel must also be satisfied that the statements were made with the intention not only that the Panel relies on them, but also that the complaining parties and effectively all WTO Members place reliance on them.47

54. If the Panel is satisfied that these conditions are met in the present dispute settlement proceedings and that, on the basis of China's official statements, it is made clear as a matter of fact that China's export licensing system is automatic and China's export license issuing agencies have no discretion to reject applications for export licenses, then the Panel should reflect these findings in its report to the DSB. The Panel should also clearly state in its report that, should China repudiate or remove in any way these undertakings, then China would "incur State responsibility" since its domestic rules would be rendered inconsistent with the covered agreements.48

2. The facts: China's export licenses are not automatic

55. The European Union reads China's statements in good faith and cannot doubt China's sincerity when China officially and publicly undertakes to operate its export licensing system as an automatic system, without any right or discretion

45 See the report of the Panel in US – Section 301 Trade Act, in paragraph 7.122.

46 See the report of the Panel in US – Section 301 Trade Act, in paragraph 7.123.

47 See the report of the Panel in US – Section 301 Trade Act, in paragraph 7.124.

48 See the report of the panel in US – Section 301 Trade Act, in paragraph 7.126.
left to its export license issuing agencies to reject applications for export licenses.

56. However, it must also be examined whether the "offending element" in China's legislation can be lawfully removed. As other WTO panels have found in the past, "conformity with WTO obligations cannot be obtained by an administrative promise to disregard the defending Member's own binding internal legislation, i.e., by an administrative undertaking to act illegally".\(^49\) This means that the Panel must examine whether Chinese domestic law allows China (where "China" refers to all legislative, executive and judicial authorities in China) to undertake to implement its export licensing system in an automatic and non-discretionary manner, i.e., in a manner that does not allow the Chinese export license issuing authorities the right to reject applications for export licenses.

57. Unfortunately, the relevant provisions of Chinese domestic law cast some doubt on whether China can lawfully undertake to ensure that its export licensing issuing agencies do not have the right to reject applications for export licenses and, therefore, operate an automatic licensing system.

58. As China has acknowledged, the export licenses imposed on the Raw Materials are based on Article 19 of China's Foreign Trade Law.\(^50\) As a reminder, Article 19 reads as follows:

   The state applies quota and licensing system to the management of goods subject to import or export restrictions, while applying the licensing system to the management of technologies that are restricted from import or export…

59. It is difficult to see how export licenses based on this provision (which is also the legal basis for China's export quotas) can be "automatic", or operate as anything but an alternative to export quotas in restricting the quantities of the goods allowed to be exported. It is also difficult to see how, on the basis of this

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\(^{49}\) See the report of the panel in \textit{US – Section 301 Trade Act}, in paragraph 7.103.

\(^{50}\) See China's Reply to European Union's Question 1, in paragraph 275.
provision, the Chinese export license issuing agencies are deprived from the right to reject applications.

60. If indeed the export licenses imposed on the Raw Materials were intended to be automatic, then they should have been imposed on the basis of Article 15 of China's Foreign Trade Law, which reads as follows:

[China] may, where the monitoring of imports and exports so requires, employ a system of automatic licensing for import and export of some goods that can be imported and exported freely…

61. The fact that Article 15 regulates the automatic export licenses imposed on goods that "can be exported freely", while Article 19 regulates the export licenses that are imposed on goods that are "subject to export restrictions" supports the conclusion that, by law, the Article 19 export licenses are non-automatic and operate as a tool to restrict the quantities of the goods allowed to be exported.

62. China argues that the words in its own law do not mean what they say. According to China, the word "restriction" in Article 19 does not mean restriction, while the word "free export" in Article 15 does not mean free export. China does not clarify whether this means that also the Article 15 export licenses are non-automatic, despite the fact that the provision states that they are "automatic".

63. China has also argued that the meaning of the "restriction" in Article 19 export licenses must be identified on the basis of the "content" of the provision. The European Union asked China to clarify the content of Article 19 and Article 15, by explaining whether China's authorities have the right to reject an Article 19 application for reasons that are different from the reasons on the basis of which they can reject an Article 15 application. China refused to answer this question, simply stating that "the premise to the question is false". Therefore, China

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51 See China's first written submission, in paragraph 763.
52 See China's first written submission, in paragraph 765.
53 See China's Reply to the European Union's Question 1, in paragraph 276.
refused to confirm that the "content" of Article 19 is the same with the "content" of Article 15 and, consequently, that the Article 19 export licenses are as "automatic" as the Article 15 export licenses.

64. In any event, the "content" of China's Foreign Trade Law further shows that the Article 19 export licenses are non-automatic. For example, Article 16, Article 17 and Article 18 of the Foreign Trade Law list the conditions that must be met and the procedures that must be followed in order for a good to be declared as "restricted or forbidden from export". Article 19 is the corollary of these provisions: it provides that the enforcement of the export restrictions (decided on the basis of Articles 16, 17, or 18) can take the form of either export quotas, or export licenses. This means that China's Foreign Trade Law mandates the Chinese authorities to treat the Article 19 export licenses as non-automatic: these export licenses are the tool through which the Chinese authorities enforce the restrictions on the exportation, which are mandated by other provisions of the Foreign Trade Law (i.e., Articles 16, 17 and 18).

65. Consequently, an analysis of China's Foreign Trade Law establishes "as a matter of fact"\textsuperscript{54} that the challenged export licenses are, by operation of the law, non-automatic and designed to restrict the quantities of the Raw Materials allowed to be exported. As China acknowledges,\textsuperscript{55} non-automatic licenses constitute an export restriction within the meaning of Article XI of the GATT. They are also inconsistent with in paragraphs 162 and 165 of China's Working Party Report (which refer expressly to China's obligation to remove non-automatic export licenses), with in paragraph 5.1 of China's Accession Protocol and in paragraphs 83 and 84 of the Working Party Report.

66. In addition, the analysis of the content of China's Foreign Trade Law casts doubt on whether China can undertake to implement the Article 19 export licenses as non-automatic, without acting inconsistently with its own Foreign Trade Law as it currently stands. Therefore, in order to secure a positive

\textsuperscript{54} See China's first written submission, in paragraph 765.

\textsuperscript{55} See China's first written submission, in paragraph 753.
solution to the dispute, the Panel needs to make findings confirming that the
challenged export licenses are inconsistent with the covered agreements and to
recommend that China brings the challenged measures into compliance with the
covered agreements.

3. The facts: China's export licenses are "discretionary"

67. Understanding the degree of discretion enjoyed by China's export license
issuing agencies when assessing applications for export licenses is important for
a number of issues: First, it would help to clarify the fact of whether China's
export licensing system is automatic (as asserted by China), or non-automatic
and discretionary. In the latter case, the export licenses imposed by China on
the Raw Materials would be inconsistent with Article XI of the GATT (as China
has acknowledged)56 and the other provisions identified by the European Union.
Second, it would help to clarify whether the administration of China's export
licensing system is compatible with the requirements of Article X of the GATT
and, in particular, Article X:1 and Article X:3(a). These issues would be most
useful in understanding the nature of the export restrictions imposed particularly
on those Raw Materials that are subject to an export license requirement, but not
to an export quota requirement, i.e., certain types of Manganese and Zinc. For
the exportation of these goods, the export licenses could have a restrictive effect
which is equivalent to the effect that the export quotas have on the exportation
of the other Raw Materials.

(a) The European Union's claims

68. As a reminder, the European Union identified three elements in the Chinese
legislation which strongly indicate that the Chinese export license issuing
agencies enjoy a very important degree of discretion in accepting or rejecting
applications for export licenses. These elements are, in summary, the following:

56 See China's first written submission, in paragraph 753.
69. First, China's *Working Rules on Issuing Export Licenses* provide in Article 5, in paragraph 5, that applicants must submit together with their application "other documents/materials as required by MOFCOM". In contrast to the other documents listed in this Article 5 (e.g., the export contract, the documents proving that a quota has been allocated, etc.), there is no definition of these "other documents/materials".

70. Second, China's *Working Rules on Issuing Export Licenses* provide in Article 8, in paragraph 1, that China's export license issuing agencies have the right to reject applicants, when they consider that they do not posses "business qualifications". The term "business qualifications" is not defined in the *Working Rules on Issuing Export Licenses*, or any other piece of Chinese legislation.

71. Third, China's *Measures for the Administration of Export Licenses* provide in Article 11, in paragraph 7 that the export licenses issuing agencies "shall issue export licenses" for "other goods subject to export licensing" on the basis of the "documents of approval issued by MOFCOM". No "good subject to export licensing" can be exported without an export license. The effect of this provision is that, by issuing the undefined "documents of approval", MOFCOM can altogether prohibit the exportation of a particular good, or restrict the quantity of that good that can be exported (e.g., through issuing a "document of approval" for an export license with a smaller quantity, than what is requested by the applicant). Chinese legislation does not define these "documents of approval", not does it contain a provision limiting MOFCOM's discretion to require or issue such "documents of approval" only for specific applicants, or specific Raw Materials, or specific export destinations.

(b) China's response

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57 The European Union had translated this term as "management qualifications". China stated that the correct translation is "business qualifications", in paragraph 819 of its first written submission.
72. China suggests a very different interpretation of the provisions identified by the European Union. China reaffirms that its export licensing system is automatic and states unequivocally that "Chinese law does not grant the licensing authorities the discretion to refuse the issuance of an export license" for the Raw Materials. China also submits as Exhibit CHN-345 an official statement of its competent authorities confirming that the export license issuing agencies' review of the applications is "of a procedural nature". However, this statement is limited to the export licenses granted to goods that are already subject to an export quota. In contrast, there is no express statement that the review of applications for goods not subject to an export quota (such as certain types of Manganese and Zinc) is also purely procedural. As mentioned above, the exportation of that category of goods is most exposed to the restrictive effects of China's export licenses.

73. The European Union reads China's statements in good faith and cannot doubt China's sincerity when China officially and publicly states that this is the way it interprets the relevant provisions of its own law and that it undertakes to continue to interpret and apply them in the same manner in the future. If the Panel is satisfied that these Chinese undertakings meet the conditions discussed by the European Union in the preceding sections of this submission, the Panel should reflect them in its final report and state the consequences to be faced by China in case it repudiates them.

74. However, a careful analysis of the challenged provisions indicates that China enjoys a very broad discretion in issuing export licenses.

(c) Article 5(5) of the Working Rules on Issuing Export Licenses

75. China asserts that the "other documents/materials" of Article 5(5) of the Working Rules on Export Licenses are defined in Chapter II of the Measures for

58 See China's first written submission, in paragraph 783.

59 See China's first written submission, in paragraph 777.

60 See China's first written submission, in paragraph 771.
the Administration of Export Licenses and that "no other documents are required", other than the documents listed in that Chapter II. This assertion does not seem to be accurate. As correctly identified by the Panel in its question 23, the Working Rules on Export Licenses are implementing the Measures for the Administration of Export Licenses and are more specific and detailed than the Measures. It is unlikely that the undefined terms of the more specific, implementing measure (i.e., the Working Rules) would be defined in more detail in the more general measure (i.e., the Measures), which the implementing measure is intended to implement.

76. More importantly, the Measures provide in Article 9 a general statement on the need to submit "other documents of approval". In contrast, the Working Rules provide in Article 5 a more detailed list of documents to be submitted, including documents that are not listed in the Measures, e.g., the export contract, or the "entrusted agency agreement". Therefore, China's assertion that Chapter II of the Measures provides an exhaustive list of documents and that "no other documents are required" does not seem to be true: the Working Rules do require more documents than Chapter II of the Measures.

77. In its Reply to Question 22 of the Panel, China modifies its position. It asserts that the definition of the "other documents/materials" is found in a different Chapter of the Measures: Chapter III, which is entitled "Basis for issuance of Export Licenses". This new assertion does not seem to be more accurate than the previous one. First, as mentioned above, it is unlikely that the undefined terms of the implementing measure (i.e., the Working Rules) would be defined in more detail in the more general, "implemented" measure (i.e., the Measures). Second, Chapter III of the Measures does not contain an exhaustive list of the required documents and, therefore, cannot and does not define the "other documents/materials" of Article 5(5) of the Working Rules: In particular, Article 11, in paragraph 7 of the Measures (which is part of Chapter III) refers to the undefined "documents of approval issued by the MOFCOM". As a result,

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61 See China's first written submission, in paragraph 816.
62 China confirms this fact in its Reply to Question 23, in paragraph 113.
the definition suggested by China is cyclical: the undefined "other materials" of Article 5(5) of the Working Rules are "defined" by the undefined "documents of approval issued by MOFCOM" of Article 11(7) of the Measures.

78. The analysis of China's legislation leads to these conclusions: One, the "other materials" of Article 5(5) of the Working Rules are not defined anywhere, or at least China has not published their definition. Two, there is no statutory limitation on the discretion of MOFCOM and the Chinese export license issuing agencies to require such "other materials", nor is there any statutory obligation imposed on them to require the same "other materials" in all cases and at all times. An export licensing system with these characteristics cannot be considered "non-discretionary".

(d) Article 11(7) of the Measures for the Administration of Export Licenses

79. Article 11(7) of the Measures provides that China's export license issuing agencies "shall issue export licenses" on (i) the "basis of the documents of approval issued by MOFCOM"; and (ii) on the basis of the export contracts of the applicants. This provision applies to "other goods subject to export licensing", i.e., goods that are not subject to export quotas, such as certain types of Manganese and Zinc.

80. As China has acknowledged, there can be no exportation without an export license. This means that only the quantities provided for in the export licenses can be exported. Logically, the applicant would request an export license for the entire quantity written in the export contract (if not more). If the export licensing system was automatic and non-discretionary (as China asserts), then the export license would always be issued for the entire quantity requested, which would normally be, at least, the quantity written in the contract.
Therefore, Article 11(7) of the *Measures* would simply provide that the export licenses shall be issued on the basis of the export contract.63

81. However, this is not what Article 11(7) of the *Measures* mandates: it adds the qualification that the export licenses will be issued (and, therefore, the quantities to be exported will be determined) on the basis of the "documents of approval issued by MOFCOM". There is no provision in the Chinese legislation that would prevent MOFCOM from issuing "documents of approval" authorising the exportation of *less* quantities than the quantities originally applied for, or originally contained in the export contract. Moreover, there is no provision in the Chinese legislation that would prevent MOFCOM from issuing "documents of approval" authorising zero quantities for exportation.

82. It is noted that China subjects the exportation of Zinc ores and concentrates to an export quota, but does not set any quantity for such quota, nor allocates any quota. The result is an export ban on Zinc ores and concentrates. What would prevent MOFCOM from repeating the same scenario with Manganese and the other types of Zinc, i.e., subject the issue of the export license to "documents of approval" which are never issued, or are issued for less quantity than what is requested?

83. China's response is found in paragraph 798 of its first written submission. China states that "in no instance do China's export license-issuing authorities determine the quantity that an applicant may export". China also refers to in paragraph 777 of its first written submission in support of its assertion that "Chinese law does not grant the license-issuing authorities the discretion to refuse the issuance of an export license, provided a valid and complete set of application documents is submitted".

84. The European Union considers that its interpretation of Article 11(7) of the *Measures*, discussed in the preceding in paragraphs, shows that, through this

63 In the present case, the European Union does not express any view on whether the requirement to submit the export contract to the export license issuing agencies is consistent with the covered agreements. It may well not be, but this is not within the terms of reference of the Panel.
provision, MOFCOM determines the quantities applicants may export in the "instance" of Manganese and unwrought Zinc.

85. In relation to in paragraph 777 of China's first written submission, the European Union notes that in that in paragraph China simply reproduces the text of Article 9 of the Working Rules, which describes the sequence of actions that the Chinese export license issuing authorities must follow. Article 9 does not discuss the substance of the Chinese authorities' evaluation of the applications. This is done in Article 8 of the Working Rules, which contains numerous references to the authorities' assessment of the "documents of approval" (in paragraph 2), the "other materials" (in paragraph 4) and the conformity of the "documents of approval" with the content of the application (in paragraph 3). Far from defining the "documents of approval", or limiting the Chinese agencies' authority to "assess" them, Article 8 of the Working Rules confirms the vagueness of these terms and the agencies' discretion in evaluating applications. Article 9 of the Working Rules, to which China bases its defence, comes into play only after the authorities have concluded that the "applications conform to the regulations"64 and, therefore, does not provide any support to China's assertions.

86. Just like with the provisions of the Working Rules, the analysis of the Measures leads to two conclusions: One, the "documents of approval" of Article 11(7) of the Measures are not defined anywhere, or at least China has not published their definition. Two, there is no statutory limitation on the discretion of MOFCOM to issue such "documents of approval". An export licensing system with these characteristics cannot be considered "non-discretionary".

(e) The notion of "business qualifications"

87. The Working Rules provide in Article 8(1) that, to receive an export license, applicants must show that they posses "business qualifications". China asserts in its first written submission that this requires applicants simply to show that

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64 See the Working Rules on Issuing Export Licenses, in Article 9, in paragraph 2.
they are registered to do business in China.\textsuperscript{65} China also asserts that such a showing can be made through the submission of the applicants' Business License and the certificate showing that the applicants are authorised to engage in import and export trade.\textsuperscript{66} The official declaration of China's competent authorities submitted as Exhibit CHN-345 seems to confirm these statements. In light of these Chinese unequivocal statements, the European Union accepts that this is the way that China interprets "business qualifications" and does not discuss further this point.

4. The facts: conclusion

88. The analysis of China's \textit{Foreign Trade Law} establishes that, contrary to China's assertions, the export licenses imposed on the basis of Article 19 of the Law are non-automatic. Moreover, the analysis of China's \textit{Measures for the Administration of Export Licenses} and \textit{Working Rules on Issuing Export Licenses} establishes that MOFCOM and the Chinese export license issuing agencies do enjoy broad discretion in assessing whether to grant the requested export licences. Therefore, China's export licensing system is both non-automatic and discretionary, as a matter of fact.

5. The challenged measures are inconsistent with Article XI of the GATT, in paragraphs 1.2 and 5.1 of China's Accession Protocol in combination with in paragraphs 83, 84, 162 and 165 of the Working Party Report

(a) \textit{China's export licenses are non-automatic and, therefore, inconsistent with Article XI of the GATT and the other cited provisions.}

\textsuperscript{65} See China's first written submission, in paragraph 787.

\textsuperscript{66} See China's first written submission, in paragraph 786.
89. The European Union claims and China has not denied that a non-automatic export licensing system is inconsistent with Article XI of the GATT. The European Union has shown that China's export licensing system is non-automatic by virtue of China's *Foreign Trade Law*. Therefore, the European Union has *prima facie* established that China's export licensing system is incompatible with Article XI of the GATT and the cited provisions of China's Accession Protocol and Working Party Report.

(b) China's export licenses are discretionary and, therefore, inconsistent with Article XI of the GATT and the other cited provisions.

90. A discretionary export licensing system is inconsistent with Article XI of the GATT. Article XI protects trading and competitive opportunities. A discretionary export licensing system, by its very nature, limits such opportunities because certain exports may not be permitted. The European Union has shown that China's export licensing system is discretionary, on the basis of Article 11(7) of the *Measures for the Administration of Export Licenses* and Article 5(5) of the *Working Rules on Issuing Export Licenses*. This is particularly true for goods that are subject to export licenses, but not to export quotas such as Manganese and unwrought Zinc.

i) Discretion resulting from Article 11(7) of the Measures

91. On Article 11(7) of the *Measures*, China states that, for the current year, MOFCOM has not issued or required any such "documents of approval" for the grant of export licenses on Manganese and unwrought Zinc. China refers to the 2010 *Catalogue of goods subject to export licensing administration* and points

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67 See China's first written submission, in paragraph 753.

68 See, for example, the report of the panel in *Argentina – Hides*, in paragraph 11.20.

69 This would be sufficient to make the discretionary export licensing system inconsistent with Article XI of the GATT. See, for example, the report of the panel *India – Quantitative Restrictions*, in paragraph 5.129.
out that, for the current year, a note has been added to Appendix 1 of that Catalogue providing that for Manganese and unwrought Zinc the export licenses will be issued on the basis of the export contracts alone. On the basis of this provision, China asserts that its authorities do not currently enjoy any discretion when assessing an application for an export license.

92. The European Union notes that the 2009 Catalogue of goods subject to export licensing administration (which is Exhibit JE-22 and Exhibit CHN-6) does not contain a similar provision. This means that, under the 2009 Catalogue, MOFCOM enjoyed the discretion to issue "documents of approval" limiting the quantities of Manganese and unwrought Zinc that could be exported, in application of Article 11(7) of the Measures. The 2009 Catalogue was still in force at the time the Panel was established and is within the Panel's terms of reference.

93. In any event, China's decision not to exercise the discretion afforded to MOFCOM during the course of these proceedings, does not alter the fact that its export licensing system is discretionary. As a matter of fact, Article 11(7) of the Measures grants MOFCOM the discretion to issue "documents of approval" limiting the export licenses to be issued and, consequently the quantities to be exported, for Manganese and unwrought Zinc. Whether China exercises this discretion or not during a particular time period does not affect the fact that Article 11(7) grants the Chinese authorities the discretion.

94. Indeed, China's decision to introduce that note in Appendix 1 of the 2010 Measures during the course of the present proceedings is a strong indication that China too shared the understanding that Article 11(7) makes its export licensing system discretionary. China probably considered that the introduction of that note in Appendix 1 would reduce the discretionary character of its export licensing system.

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70 See China's first written submission, in paragraph 796 and, in particular, footnote 1138.

71 The European Union generally refers to that Chinese legislative instrument as "Notice 100/2008".
95. It is also noted that China has not removed permanently the discretion enjoyed by MOFCOM on the basis of Article 11(7) of the Measures. The rule providing that export licenses shall be issued on the basis of the "documents of approval issued by MOFCOM" is still there in Article 11(7). The new note to the Appendix 1 did not exist in previous versions of the Catalogue, including the 2009 one, which is within the Panel's terms of reference. China may at any point this year amend the 2010 Catalogue and delete the note to Appendix 1. And China may not include such note to Appendix 1 in the 2011 Catalogue. For as long as the offending provision has not been permanently repealed, China's export licensing system will be discretionary, by virtue of Article 11(7) of the Measures.

96. If China wishes to remove permanently this discretionary element from its export licensing system, China simply needs to delete the relevant provision from Article 11(7) of the Measures. China's decision not to do so provides further support to the conclusion that China does not wish to make its export licensing system automatic.

   ii) Discretion resulting from Article 5(5) of the Working Rules

97. On Article 5(5) of the Working Rules, China raises two objections. First, that "requiring documentation as a condition for receipt of a license" does not constitute a "prohibited restriction on the quantity of exports". Second, that maintaining "discretion to require the provision of an additional document does not demonstrate a restriction on the quantity of exports".

98. On the abstract question of whether "requiring documents" can be a "quantitative restriction" in general, the European Union notes that the response would depend on the nature of the documents required. If an authority requires the submission of "documents" or "materials" that the applicants cannot

72 See China's first written submission, in paragraph 800.
73 See China's first written submission, in paragraph 801.
reasonably produce, or cannot produce within the time limits necessary for the performance of their obligations under an export contract, then "requiring documents" would in essence make the grant of the export license impossible: certain applicants would never be able to submit a "completed" application and, therefore, their application would always be rejected, ostensibly for "procedural" reasons. Given that no exportation can take place without an export license, the measure would have an immediate impact on the quantities of the goods exported. Consequently, China's assertion is incorrect: "requiring documents" can indeed be a "quantitative restriction", depending on the nature (and number) of the documents "required" for a "complete" application.

99. On the question of whether the "discretion to require additional documents" constitutes a "restriction on the quantity of exports", China bases its defence on the assertion that it "should be deemed to have acted in good faith in the performance of its obligations under Article XI of the GATT"74 and, therefore, that its authorities would not abuse their discretion.

100. To begin with, China's construction of this "presumption of good faith" is incorrect and is not supported by the interpretation consistently followed by the Appellate Body and the WTO panels. For example, in *Canada – Continued Suspension* (a case cited by China), the panel found in paragraph 7.323 that:

"...every State benefits from the application of the principle of good faith...[I]f the [responding party] can claim good faith compliance, [the complaining party] too should also benefit from the same presumption...In other words, both parties can invoke good faith in relation to diametrically opposed positions as affecting the applicability of this principle in this case."

101. Likewise, in *US – Oil Country Tubular Goods Sunset Reviews* (another case cited by China), the Appellate Body stated in paragraph 173 that:

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74 See China's first written submission, in paragraph 804.
"We also expect that measures…would normally have undergone, under municipal law, thorough scrutiny…to ensure consistency with the Member's international obligations, including those found in the covered agreements and that the enactment of such a measure would implicitly reflect the conclusion of that Member that the measure is not inconsistent with those obligations...[P]anel requests should leave respondent parties in little doubt that, notwithstanding their own considered views on the WTO-consistency of their measures, another Member intends to challenge those measures…" (Emphasis added).

102. Therefore, under WTO law, there is no presumption that the defending party will always act consistently with its WTO obligations. Moreover, the good faith presumption in favour of the defending party's interpretation of its WTO obligations is counterbalanced by the good faith presumption in favour of the complaining party's interpretation of the defending party's obligations under the covered agreements, as well as the presumption that the complaining party is engaging in dispute settlement proceedings in good faith.

103. In any event, China's assertions are not relevant for the analysis of the European Union's interpretation of Article 5(5) of the Working Rules, or Article 11(7) of the Measures. The European Union does not claim that the quantitative restriction is the exercise of China's discretion in a WTO inconsistent manner. The European Union claims that the discretionary character of China's export license system is by itself the quantitative restriction. As mentioned above, Article XI protects the trading and competitive opportunities of both WTO Members and traders and creates the predictability needed to plan future trade. It operates as a guarantee for a stable market place and reduces the transaction costs and the uncertainties that hinder trade. Just like the existence of an export quota constitutes a quantitative restriction, irrespective of whether it has (already) restricted particular exports, the very existence of a discretionary export licensing system constitutes a quantitative restriction, even where the discretion has not been exercised (yet) in a WTO inconsistent manner.

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75 See, for example, the report of the GATT panel in Japan-Leather II (US), in paragraph 55.

76 See, for example, the report of the GATT panel in US – Superfund, in paragraph 5.2.2. See also the report of the panel in India-Quantitative Restrictions, cited above.
104. In conclusion, in addition to the fact that China's export licensing system is non-automatic by virtue of the provisions of the *Foreign Trade Law*, the fact that China's export licensing system is also discretionary (by virtue of Article 11(7) of the *Measures* and Article 5(5) of the *Working Rules*) provides further support to the conclusion that it is inconsistent with Article XI of the GATT and the cited provisions of China's Accession Protocol and Working Party Report.

6. The challenged measures are inconsistent with Article X of the GATT

105. The European Union claims that China's export licenses are inconsistent with Article XI of the GATT and with the cited provisions of China's Accession Protocol and Working Party Report. China should bring the challenged measures into compliance with its WTO obligations. One way of achieving such compliance would be to replace its non-automatic and discretionary export licensing system with an automatic one. This could be easily achieved if, for example, the export licenses are based on Article 15 of the *Foreign Trade Law* (as opposed to Article 19) and if China repeals the provisions of Article 11(7) of the *Measures for the administration of export licenses* and the provisions of Article 5(5) of the *Working Rules on issuing export licenses*.

106. If the Panel considers that China may continue to have in place the provisions of Article 11(7) of the *Measures* and of Article 5(5) of the *Working Rules*, then the Panel should examine the European Union's claims under Article X of the GATT.

(a) Article X:1 of the GATT

107. China does not contest that the definition and list of the documents provided for in Article 5(5) of the *Working Rules* and of the documents provided for in Article 11(7) of the *Measures* are "laws, regulations and administrative rulings of general application" covered by Article X:1 of the GATT. However, China asserts that it has published the lists and definitions of these documents and,
therefore, that it has not breached its obligations under Article X:1 of the GATT.

108. The European Union has discussed China's factual assertions in sections IV(C)3(c) and IV(C)3(d) above. The European Union considers that it has been established as a matter of fact that China has failed to publish these "laws, regulations, or administrative rulings of general application". Therefore, the Panel should find that China has acted inconsistently with its obligations under Article X:1 of the GATT.

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

109. China asserts two defences against the European Union's claims. First, that the European Union raises claims against specific provisions of specific legislative instruments and not against the administration of China's export licensing system.77 Second, that the European Union has not shown that the identified elements of China's export licensing system will necessarily lead to non-uniform, partial and unreasonable administration.78 Both arguments are wrong, for the following reasons.

i) The challenge is against China's administration of its export licensing system

110. With its first defence, China seeks to create a confusion between, on the one hand, the European Union's claims against China's administration of the export licensing system and, on the other hand, the description of the legal provisions on which this administration is based and which allow China to administer the system in a manner that is not consistent with its obligations under Article X:3(a) of the GATT. China's assertions are wrong for a number of reasons.

77 See China's first written submission, in paragraph 826.
78 See China's first written submission, in paragraph 829.
111. First, the ability to assess the administration of "laws, regulations and administrative rulings of general application" presupposes the prior identification of the "laws, regulations and administrative rulings" themselves. For example, in Argentina – Hides, the complaining party identified and discussed the legal provisions of the defending party which led to an administration that was inconsistent with Article X:3(a) of the GATT. The panel in that case did not consider that this was inappropriate for a claim under Article X:3(a) of the GATT. There is no reason for the Panel to follow a different interpretation in the present case.

112. Second, in Argentina – Hides, the complaining party had claimed that the identified legal provisions also constituted quantitative restrictions that were inconsistent with Article XI of the GATT. Contrary to what China requests the Panel to do in the present case, the panel in Argentina – Hides did not consider that this was an element showing that the complaining party's claims were addressed solely against the legal provisions and not against the administration of the system and, therefore, that they fell outside the scope of Article X:3(a) of the GATT. There is no reason for the Panel to follow a different interpretation in the present case.

113. Third, a complaining party may challenge under Article X:3(a) even the substance of a domestic measure, where that measure is administrative in nature. In applying this principle to the facts before it, the panel in Argentina – Hides concluded that the identified legislative instrument in that case was administrative in nature because it provided for "a certain manner of applying the substantive rules".

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79 See, for example, the report of the panel in Argentina – Hides in paragraph 4.162.

80 See the report of the panel in Argentina – Hides, in paragraph 11.58.

81 See China's first written submission, in paragraph 827.

82 See the report of the panel in Argentina-hides, in paragraphs 11.70 and 11.71. See also the report of the Appellate Body in EC – Selected Customs Matters, in paragraph 200.

83 See the report of the panel in Argentina – Hides, in paragraph 11.72.
114. Just like in Argentina – Hides, the Chinese legal provisions identified and described by the European Union (i.e., the Measures for the administration of the export licenses and the Working rules for issuing export licenses) are administrative in nature. This is seen immediately from their titles: "Measures for the administration" and "Working rules for issuing". But, it is also established from their content. The specific provisions identified by the European Union do not impose the export licenses themselves, but provide for the "certain manner" with which the export licensing system is administered, i.e., the "materials" that must be submitted together with the application and the "documents" on which the authorities should base their decisions. Consequently, even if the European Union was challenging the "substance" of the identified Chinese legal provisions, its claims would still be properly brought under Article X:3(a) of the GATT.

115. In conclusion, China's assertions should be rejected. The European Union properly challenges the consistency with Article X:3(a) of China's administration of its export licensing system.

ii) The European Union has established that China's administration of its export licensing system is inconsistent with Article X:3(a) of the GATT

116. With its second defence, China asserts that the European Union's claim should "fail for lack of evidence". China's defence is structured as follows. First, China states that a claim under Article X:3(a) of the GATT can succeed only if (a) there is a showing that an element of the administration is "inherently" non-uniform, partial or unreasonable; or (b) there is "solid evidence" of non-uniform, partial or unreasonable administration. Second, China asserts that the European Union has only shown that China has the "discretion" to administer its export licenses in a WTO inconsistent manner and that this is not good enough: the Panel should deem that China would act in good faith in the

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84 See China's first written submission, in paragraph 828.
85 See China's first written submission, in paragraph 831.
performance of its obligations under Article X:3(a) of the GATT and, therefore, that the Chinese authorities should be "deemed" not to abuse their discretion in administering the export licenses in a WTO inconsistent manner. Third, China asserts that the European Union has not explained which aspects of China's administrative process are non-uniform, which are impartial and which are unreasonable. All three of China's assertions are wrong, for the following reasons.

117. Firstly, China has tried to confuse the Panel with the use of the term "inherently". This term stems from the report of the panel in *Argentina – Hides* and it has a very different meaning from what China tries to have us believe. The panel in that case found that:

> …we must conclude that a process…which inherently contains the possibility of revealing confidential business information is an unreasonable manner of administering the laws…and therefore is inconsistent with Article X:3(a).88

> …there is an inherent danger that the [laws] will be applied in a partial manner…89

118. As it is clear from that report, the panel based its finding of an Article X:3(a) violation on the fact that there was an inherent possibility, or an inherent danger that a certain prejudice to the interests of some category of traders, could result from the challenged measures. That panel concluded that this inherent possibility or danger was sufficient to render the challenged measures unreasonable and impartial. Importantly, that panel did not require for its Article X:3(a) analysis the complaining party to show that the administration would bring about the prejudice certainly.

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86 See China's first written submission, in paragraph 832.

87 See China's first written submission, in paragraph 830.

88 See the report of the panel in *Argentina – Hides*, in paragraph 11.94. We have underlined the word.

89 See the report of the panel in *Argentina – Hides*, in paragraph 11.100. We have underlined the word.
119. China asserts that "a claim that China might administer…the export licensing system in a way that could potentially be non-uniform, partial and unreasonable is simply not sufficient to state a prima facie claim under Article X:3(a)".\(^{90}\) Almost every word in that statement is wrong. The panel in *Argentina-hides* has stated exactly the opposite:

...Article X:3(a) requires an examination of the real effect that a measure *might* have on traders...This, of course, does not require a showing of trade damage...But it can involve an examination of whether there is a *possible* impact on the competitive situation due to alleged partiality, unreasonableness or lack of uniformity...\(^{91}\)

120. Therefore, the report of the panel in *Argentina – Hides* stands for the principle that, to establish a violation of Article X:3(a), the complainant needs to show that there is an inherent *possibility*, or *danger* of a prejudice to some traders. Contrary to China's assertions, there is no requirement to show that there is an inherent *certainty* that the prejudice would occur or has already occurred. And contrary to China's assertions, showing that the measure *might* have a negative impact on traders is sufficient to establish *prima facie* a violation of Article X:3(a) of the GATT.

121. This interpretation of Article X:3(a) of the GATT is consistent with its text. The words "shall administer" show that a WTO Member is obliged to ensure that its administration is *always* and *certainly* uniform, impartial and reasonable. A WTO Member cannot allow its authorities any discretion which could create the *possibility* or the *danger* of non-uniform, partial or unreasonable administration. Therefore and contrary to China's assertions, if the system allows the *possibility* or *danger* of non-uniformity, partiality or unreasonableness in its administration, then the implementing WTO Member has failed to act consistently with its obligations under Article X:3(a).

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\(^{90}\) See China's first written submission, in paragraph 832.

\(^{91}\) See the report of the panel in *Argentina – Hides*, in paragraph 11.77; we have underlined the relevant words.
122. This interpretation is also consistent with the provision's object and purpose. Article X:3(a) of the GATT protects traders and seeks to ensure the transparency and security necessary for them to accurately understand the risks, the dangers and, hence the costs of engaging in trade on a particular good with a particular country. Allowing the possibility or the danger of administering the trading rules in a non-uniform, impartial or unreasonable manner introduces a significant uncertainty, which severely curtails the traders' ability to plan their activities and engage in trade. This is also consistent with the interpretation given to other provisions of the GATT that protect traders, such as Article III of the GATT:

…most tellingly, even where there was no certainty but only a risk under the domestic law that the tax would be discriminatory, certain GATT panels found that the law violated the obligation in Article III.

Article III:2 is not only a promise not to discriminate in a specific case, but is also designed to give certain guarantees to the market place and the operators within it that discriminatory taxes will not be imposed.

123. On the facts of the present case, the European Union has established that the identified provisions of the Measures for the administration of export licenses and the Working rules on issuing export licenses create the possibility and the danger of an administration that is not always uniform, impartial and reasonable. Importantly, China appears to acknowledge this fact in paragraph 832 of its first written submission (where it argues that this fact is not enough to support a claim under Article X:3(a)). Consequently, the European Union has prima facie established that China's administration of its export licensing system is inconsistent with Article X:3(a) of the GATT.

124. Secondly, China has asserted that the Panel should deem that China will act in good faith in the performance of its obligations under Article X:3(a). The European Union has already discussed in this submission (in Section IV(C)5(b))

92 See the report of the panel in Argentina – Hides, in paragraph 11.76.

93 See the report of the panel in US – Section 301 Trade Act, in paragraphs 7.81 to 7.85.
the reasons for which, under WTO law, the principle of good faith does not dictate to panels that they should deem that the defending party will always act in accordance with its WTO obligations. The European Union has also discussed that the presumption of good faith in favour of the defending party is counterbalanced by the presumption of good faith in favour of the complaining party. Therefore, China's assertions to the contrary should be rejected.

125. In any event, the European Union does not claim that the Chinese authorities would administer the export licensing system in a conscious effort to show bad faith vis-à-vis China's WTO obligations. It is very possible that the Chinese authorities would in good faith consider that their acts are consistent with the WTO rules, but in fact administer the export licenses in a manner that is not consistent with Article X:3(a) of the GATT. As it has already been found in the past:

…that does not mean that the State invoking good faith compliance, while acting in total good faith, actually complied with its treaty obligations. It could make an illegal interpretation of its obligations without breaching the principle of good faith.95

126. This could result from the fact that China has not put in place adequate safeguards to ensure that its authorities have access to the guidance and clarity needed to ensure that they administer the export licenses in a manner consistent with Article X:3(a). Such guidance and clarity could be achieved, for example, if China defined or listed the "other materials" of Article 5(5) of the Working rules, or the "documents of approval" of Article 11(7) of the Measures, or simply repealed these provisions.

127. Thirdly, China asserts that the European Union has not explained which aspects of China's administration are non-uniform, which are partial and which are unreasonable. China's assertion is both legally and factually wrong.

128. China's assertion is legally wrong, because it is settled law that the same facts can constitute evidence that an administration is at the same time non-uniform,

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94 See China's first written submission, in paragraph 832.
partial and unreasonable. For example, past panels have confirmed that the same set of facts and the same aspects of a WTO Member's administration can be both unreasonable and partial:

Although the requirements of reasonableness and impartiality are distinct in nature, both relate to the question of information flows in this case.\(^{96}\)

129. China's assertion is also factually incorrect, because the European Union has described in paragraphs 347 to 351 of its first written submission the specific elements of the nexus of Chinese provisions and requirements on which China's administration of its export licenses is based and which make such administration at the same time non-uniform, partial and unreasonable.

130. As a reminder, (a) the absence of any definition of the conditions and circumstances that should exist for MOFCOM to prescribe "other materials" for export license applications, the absence of any definition or list of such "other materials" and the absence of any obligation on MOFCOM to require the same "other materials" from all applicants that are in the same situation from an exported good and timing point of view, combined with (b) the absence of any definition of the conditions and circumstances that should exist for MOFCOM to issue other "documents of approval", the absence of any definition or list of such other "documents of approval" and the absence of any obligation on MOFCOM to issue the same "documents of approval" for all applicants that are in the same situation. Such administration does not satisfy the requirement of uniformity in Article X:3(a) of the GATT.

131. In addition, the same set of facts creates the danger of different treatment of applicants that are otherwise in the same situation, as well as the danger that such different treatment would be to the advantage of some and the

\(^{95}\) See the report of the panel in Canada – Continued Suspension, in paragraph 7.322.

\(^{96}\) See the report of the panel in Argentina – Hides, in paragraph 11.86.
disadvantage of other traders. Such administration does not satisfy the requirement of impartiality in Article X:3(a) of the GATT.

132. Likewise, the same set of facts creates an environment of uncertainty for traders: the "materials" that they may be required to submit together with their applications for export licenses and the other "documents of approval" that may be issued by MOFCOM regulating how many licenses they can receive and for which quantities, may be modified at any point in time and for any good. This uncertainty is likely to have a "chilling effect" on trade. Moreover, there is no legitimate reason pursued by China through such administration, which outweighs the administration's negative effects. For example, why should China not issue the export licenses on the basis of the contract alone? And why should China keep such a residual category of "other materials" that it may or may not require together with an application? Such administration does not satisfy the requirement of reasonableness in Article X:3(a) of the GATT.

D. Administration of China's Export Quotas

133. As a reminder, China imposes export quotas on Zinc ores and concentrates, Bauxite, Coke, Silicon Carbide and Fluorspar. The European Union claims that these export quotas are inconsistent with Article XI of the GATT and with China's Accession Protocol and Working Party Report. China has acknowledged that its export quotas on Zinc ores and concentrates and most types of Bauxite are inconsistent with the covered agreements and has asserted that it has stopped subjecting Fluorspar to an export quota. China defends only the legality of the imposition of the export quotas on Coke, Silicon Carbide and refractory grade Bauxite, which the European Union contests.

134. The European Union considers that, in order to bring itself into compliance with its obligations under the covered agreements, China must repeal all of these export quotas. However, if the Panel finds that China should be allowed to continue to impose some or all of these export quotas, the European Union requests the Panel to find that China's conditions for the allocation of these export quotas are inconsistent with the covered agreements.
1. **Claims under China's Accession Protocol**

135. The European Union has challenged two of the conditions that China imposes on enterprises as a prerequisite for their participation in export quota allocation procedures: (a) the requirement to have a minimum registered share capital; (b) the requirement to have achieved a certain level of volumes in their past exports (or supplies for exports).

136. China acknowledges that it imposes both these conditions.\(^{97}\) Therefore, there is no disagreement between the parties on the facts underpinning the European Union's claims.

137. China's first written submission contains certain references to the European Union's alleged failure to "specify measures",\(^{98}\) without, however, raising any relevant objection or requesting the Panel to make any relevant ruling. China's references are of course wrong. The European Union has extensively described the Chinese legislative instruments that impose these conditions both in the Facts section (e.g., in paragraphs 105, 107, 109, 111, 113, 115, etc.), and in the Legal Analysis Section of its first written submission. Therefore, the Panel should simply ignore China's statements.

138. China has explicitly undertaken in its Accession Protocol and Working Party Report to eliminate these two conditions. For example, in paragraph 83(a) of the Working Party Report expressly provides that China would eliminate for both Chinese and foreign-invested enterprises "any export performance and prior experience requirements" as criteria for obtaining or maintaining the right to export. Likewise, in paragraph 83(b) of the Working Party Report expressly provides that China would reduce the minimum registered capital requirement gradually over a period of three years after accession and would eliminate the examination and approval system (including the minimum registered capital requirement) thereafter. Despite China's express undertakings to remove these

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\(^{97}\) See China's first written submission, in paragraph 622.

\(^{98}\) See, for example, China's first written submission, in paragraphs 613 and 634.
conditions, China not only continues to impose them, but argues that it has the right to continue imposing them.

139. China's defence is difficult to follow. China starts by asserting that, if it has the right to impose export quotas, then it should also have the right to adopt "quota allocation rules that are used to identify those enterprises that are granted a share of the quota and to exclude those enterprises that are not granted any such share". Then, China goes on to acknowledge that its allocation rules and conditions should be WTO consistent, but draws a very selective list of the WTO provisions with which they have to comply: "inter alia, Article X:3(a) and XIII of the GATT". It is interesting to note that China does not elaborate further what this "inter alia" would include. However, China makes it clear that it does not include its obligations under its Accession Protocol: China asserts that, given that the GATT does not include an express prohibition of these two particular conditions, then China can continue imposing them. China's assertions are wrong for a number of reasons.

140. First, China's export quotas are inconsistent with the covered agreements and China does not have the right to impose them.

141. But, even if China had the right to impose export quotas on the Raw Materials, its quota allocation procedures should be consistent with all its obligations under the covered agreements. China appears to acknowledge this fact, when it refers to its supposed right to impose "WTO consistent quota allocation rules". What China does not mention is that its WTO obligations include the obligations that it has expressly undertaken in the Accession Protocol and the Working Party Report. And, in these covered agreements, China has expressly undertaken to eliminate the "prior export performance" and the "minimum

99 See China's first written submission, in paragraph 627.
100 See China's first written submission, in paragraphs 627 and 629.
101 See China's first written submission, in paragraph 628.
102 See China's first written submission, in paragraphs 630 and 632.
103 See China's first written submission, in paragraphs 625 and 626.
registered capital requirement" from the conditions it could impose when it allocates export quotas, or in any other way regulates trade.\textsuperscript{104}

142. Second, China's defence is circular. China invites the Panel to find that the obligations it has undertaken on how to regulate trade (i.e., the obligations not to impose these two conditions) are superseded by its right to regulate trade in general.\textsuperscript{105} In other words China asserts that, on the one hand, it has undertaken to regulate trade in a certain manner, but, on the other hand, it is not obliged to regulate trade in that manner, because it has the general right to regulate trade. And this despite the fact that China's Working Party Report expressly provides that China will eliminate the "prior export performance" and "minimum registered capital" conditions. This line of argument should be summarily rejected.

143. Third, China's defence raises important systemic issues. China, in essence, seeks to wipe out the provisions of its Accession Protocol and Working Party Report, i.e., the specific provisions it has negotiated with the WTO Membership at the time of its accession. This is illustrated by China's stating that its quota allocation rules must comply only with a couple of GATT Articles, while it does not refer at all to its undertakings under the Accession Protocol and the Working Party Report. This appears to be a consistent objective of China throughout the current dispute settlement proceedings: it is noted that China refused to defend the claims under its Accession Protocol and invites the Panel to exercise judicial economy on them.

144. China's effort to "neutralise" the provisions of its Accession Protocol should be resisted. Allowing a WTO Member to escape from the obligations it has expressly undertaken as conditions for its accession into the WTO would have a

\textsuperscript{104} See China's Working Party Report in paragraphs 83(a) and 83(b) respectively. China appears to acknowledge that these in paragraphs of the Working Party Report expressly prohibit the imposition of the challenged measures, because in footnote 921 of its first written submission it draws a distinction between them and in paragraph 83(d) of the Working Party Report, stating that, unlike the former, the latter "does not appear to pertain to past export performance requirements and minimum capital requirements".

\textsuperscript{105} See China's first written submission, in paragraph 627.
significant negative impact on the entire structure of the WTO and on the legal certainty that the WTO agreements (including the members' accession protocols) offer to the entire membership.

145. Consequently, the Panel should find that the measures challenged by the European Union are inconsistent with in paragraph 1.2 of China's Accession Protocol, in combination with in paragraphs 83(a), 83(b), 83(d), 84(a) and 84(b) of the Working Party Report, as well as with in paragraph 5.1 of China's Accession Protocol.

146. The Panel should also find that the "past export performance" requirement is inconsistent with in paragraph 5.2 of China's Accession Protocol, in combination with in paragraphs 84(a) and 84(b) of the Working Party Report. As stated in the European Union's first written submission, this requirement operates to the detriment and exclusion of foreign enterprises from quota allocation. How could a foreign enterprise that has never exported any Raw Material from China in the past, ever be able to satisfy the "past export performance" condition and be able to start participating to export quota allocation?

147. China simply discards this claim of the European Union and, in essence, denies the obvious: that, as a result of the challenged measures, foreign enterprises can never meet the conditions for participation to export quota allocation procedures.

148. If China is so convinced that the European Union's claim lacks merit, then China should provide a list with the foreign enterprises that have been allocated a Raw Material export quota, before the initiation of the current dispute settlement proceedings. Such list would be extremely short: to the European Union's knowledge, it would not include any foreign enterprise.

2. Claims under Article X:3(a) of the GATT

(a) The Panel should make findings
149. The European Union has claimed that, on the basis of Article 19 of its *Measures for the Administration of Export Quotas*, China administers the system of "direct" allocation of export quotas in a manner that is not consistent with Article X:3(a) of the GATT. These *Measures* are applied only to the "direct" allocation of export quotas.

150. China has stated that Zinc ores and concentrates is the only Raw Material that falls within the scope of the *Measures*. China has also stated that it does not allocate any export quotas for Zinc ores and concentrates and, consequently, that it does not currently apply the *Measures* to the allocation of any Raw Material. The European Union accepts the veracity of this Chinese statement.

151. However, China did allocate Zinc ores and concentrates export quotas until 2005. This means that China has administered the system for the direct allocation of export quotas, on the basis of the procedures and legal provisions identified by the European Union. Therefore, contrary to China's assertions, the European Union's claim on the administration of the system for direct allocation of export quotas is not "moot".

152. China will probably claim that the fact that it has not allocated any export quotas for Zinc ores and concentrates since 2005 makes the challenged administration an "expired measure", i.e., a measure that expired before the establishment of the Panel and was not replaced. China will probably also invite the Panel not to make findings on the relevant claims of the European Union.

153. However, there are good reasons which support the view that the Panel should examine and make findings on whether China's administration of the system for

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106 See China's first written submission, in paragraph 640.
107 See China's first written submission, in paragraph 641.
108 See the United States' Reply to Question 5, the table in paragraph 6.
109 See China's first written submission, in paragraph 641.
the direct allocation of export quotas is consistent with Article X:3(a) of the GATT.

154. First, the underlying legislation on which China's administration is based, i.e., the *Measures for the Administration of Export Quotas* is still in place. China has not accepted that its administration of the system for the direct allocation of export quotas is inconsistent with the covered agreements. Quite to the contrary, China has presented an elaborate defence in its first written submission, challenging both the facts and the law underpinning the European Union's claims. Therefore, the "matter" is before the Panel and is being litigated and argued fully by both parties. In light of this situation, the Panel can and should make findings on whether the challenged administration is consistent with Article X:3(a) of the GATT, in order to secure a positive solution to the dispute.

155. Second, China acknowledges that it administers the system for the direct allocation of export quotas as the European Union claims. China asserts that "the logic [for such administration] is simple". For China "there is little point in allocating" an export quota to a trader, if (China considers that) the applicant "does not have the operational ability to engage in export trade".\(^{110}\) There is no doubt that China will continue to administer the system for the direct allocation export quotas in the same manner. Consequently, findings on whether such administration is consistent with Article X:3(a) of the GATT are warranted in order to offer China clear guidance as to what it can do and what it cannot do on the basis of the covered agreements.

156. Third, it is very likely that China will again allocate export quotas for Zinc ores and concentrates, as it has done up to 2005. This likelihood is reinforced by the fact that (i) the underlying legislation is still in place and is probably applied on the other goods that are subject to the system of direct allocation of export quotas; (ii) Zinc ores and concentrates are in the list of the goods "restricted

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\(^{110}\) See China's first written submission, in paragraph 643.
from export"; and (iii) China considers that this administration is consistent with its obligations under the covered agreements.

157. In addition, the list of Raw Materials whose export quotas are allocated directly has not been permanently defined. As China acknowledges, it issues every year a Notice listing (i) the Raw Materials whose export quotas are allocated directly and (ii) the Raw Materials whose export quotas are allocated through a bidding procedure. It is very possible that China would move Raw Materials from the category of "bidding" to the category of "direct". This would be particularly probable, if the Panel finds that China can continue to subject the Raw Materials to export quotas (as China claims), but also finds that China's bidding procedures are inconsistent with the covered agreements (as the United States and Mexico claim). In such a scenario, the only way to achieve a positive solution to the dispute is for the Panel also to reach findings on whether China's administration of the system for the direct allocation of export quotas is consistent with the covered agreements.

158. In light of these considerations, the European Union invites the Panel to make findings on whether China's administration of the system for direct allocation of export quotas is consistent with Article X:3(a) of the GATT.

(b) China's administration of the system for the direct allocation of export quotas is inconsistent with Article X:3

159. China has raised against that claim the same objections as those raised against the European Union's equivalent claim against China's administration of its export licensing system: (a) that the European Union challenges the substance of the Measures for the Administration of Export Quotas and not the administration of the system for the direct allocation of export quotas;\(^\text{112}\) (b) that China should be deemed to act in good faith in the performance of its

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\(^{111}\) See, for example, Notice 100/2008 for the year 2009. China refers to Notice 125/2009, attached to its first written submission as Exhibit CHN-007.

\(^{112}\) See China's first written submission, in paragraphs 645 and 648.
obligations under Article X:3(a) and, therefore, that China's authorities should be deemed to administer the direct allocation system in accordance with China's obligations under the covered agreements;\(^{113}\) (c) that even if it is shown that China might administer the system in a way that could potentially discriminate against some traders, this would not be sufficient to establish that the administration is inconsistent with Article X:3(a).\(^{114}\)

160. The European Union has already presented its views on the proper interpretation of Article X:3(a) of the GATT above, in the section discussing China's export licensing system. The European Union refers the Panel to Sections IV(C)3 and IV(C)6, above.

161. In addition, the European Union notes the following:

162. (a) The European Union challenges under Article X:3(a) the administration of the system and not the specific provisions of a legislative instrument. However, even the identified provisions of the Measures for the administration of export quotas can be challenged under Article X:3(a) of the GATT, because they are administrative in nature, as evidenced both by the name of the legislative instrument (i.e., Measures for the Administration) and its content (i.e., procedures for direct allocation of export quotas).

163. (b) The European Union has already shown (in the section discussing China's export licensing system) that China has incorrectly interpreted the impact of the principle of good faith on the facts of the present case. Moreover, the presumption of China's good faith compliance with its obligations is counter-balanced by the European Union's good faith interpretation of China's obligations under the covered agreements. In any event, the European Union does not claim that China's administration would be inconsistent with Article X:3(a) of the GATT as a result of China's bad faith, but as a result of the absence of safeguards in the domestic rules that could ensure that China's good faith administration is consistent with the covered agreements.

\(^{113}\) See China's first written submission, in paragraphs 658 and 663.
164. (c) On the basis of the consistent (and correct) interpretation of Article X:3(a) by WTO panels in the past, the danger or possibility of prejudice for some traders as a result of the administration is sufficient to make such administration inconsistent with Article X:3(a) of the GATT. \(^{115}\)

165. The European Union has already shown in its first written submission (in paragraphs 239 to 244) that China's administration of the system for the direct allocation of export quotas carries the inherent danger and possibility to be non-uniform and to cause prejudice to some traders. As a result, such administration does not satisfy the requirements of uniformity, impartiality and reasonableness in the sense of Article X:3(a) of the GATT.

166. In addition to the points already made in its first written submission, the European Union notes the following.

167. First, China's assertion that the "operation capacity" is only one of a series of criteria for the selection of the enterprises that will receive export quotas and that focusing on it, "in isolation", does not offer a picture of China's overall administration of the system, is wrong. \(^{116}\) China acknowledges that it uses the "operation capacity" assessment in order to eliminate those applicants that, in China's opinion, do not have the "ability to execute exports". \(^{117}\) China's admission of this fact is sufficient to show that the "operation capacity" assessment is a most important part of China's administration of the export quota allocation system. All the other aspects and criteria provided for in the Chinese legislation cannot overrule the effects of this assessment, because even applicants that satisfy all the other conditions can be rejected, if in the opinion of China's export quota allocation authorities they do not have the "ability to execute exports". Consequently, this objection of China should be dismissed.

\(^{114}\) See China's first written submission, in paragraphs 661 and 664.

\(^{115}\) See, for example, the report of the panel in Argentina – Hides, cited above.

\(^{116}\) See China's first written submission, in paragraph 646.

\(^{117}\) See China's first written submission, in paragraph 643.
168. Second, China acknowledges that there are no safeguards ensuring that all Chinese export quota allocation authorities interpret "operation capacity" and, therefore, assess the applicants' "ability to perform exports" in the same way throughout the territory of China and at all times.\(^{118}\) This inherently creates the danger and the possibility that different export quota allocation authorities, e.g., at different parts of China, assess the applicants' "ability to perform exports" using different criteria. This also inherently creates the danger and the possibility (if not the certainty), that such assessment differs from one export allocation authority to another. Such administration does not satisfy the requirement of uniformity in Article X:3(a) of the GATT.

169. Likewise, the absence of a precise definition of "operation capacity" and of clear guidance as to the criteria that must taken into consideration in order to assess whether a particular applicant has the "ability to perform exports" creates the danger and the possibility that such assessment may work to the advantage of some applicants and the disadvantage of others. This outcome would not necessarily result from the Chinese authorities' "bad faith", but from the lack of guidance as to how they should perform the required assessment. Such administration does not satisfy the requirements of impartiality in Article X:3(a) of the GATT.

170. Finally, China has failed to explain the legitimate reasons which could justify such administration and could outweigh its negative effects on traders and trade. China states that this administration "ensures quota fill and avoids wasting the quota on applicants who cannot achieve quota fill".\(^{119}\) But, China has not set the criteria on the basis of which an allocation authority should determine that a particular applicant "cannot achieve quota fill". Moreover, the vagueness of the "operation capacity" and the uncertainty on the assessment and its results are most likely to create legal insecurity for traders, which would have a "chilling effect" on trade: there is a danger that fewer enterprises would apply for an export quota. Concentrating large quantities of the limited Raw Material

\(^{118}\) See China's first written submission, in paragraph 657.

\(^{119}\) See China's first written submission, in paragraph 643.
available for export in the hands of a small number of exporters would likely result increases in export prices and in a general distortion of trade in Raw Materials. Such administration does not satisfy the requirement of reasonableness in Article X:3(a) of the GATT.

171. In conclusion, the Panel should find that China's administration of the system for the direct allocation of export quotas is inconsistent with Article X:3(a) of the GATT and recommend that China brings itself into compliance with its obligations under the covered agreements, for example, through the repeal of the "operation capacity" criterion from the Measures for the Administration of Export Quotas.

E. Minimum Export Pricing

172. The European Union refers to the relevant sections of the United States' Second Written Submission, which it endorses.

V. CHINA'S EXPORT QUOTA ON Bauxite IS NOT JUSTIFIED BY ARTICLE XI:2(A) OF THE GATT

173. China acknowledges that it subjects to a single export quota of 930,000 tons the goods under HS number 25083000 and HS number 26060000.120 These goods are generally referred to as "refractory grade clay" and "aluminium ores and concentrates", respectively. China draws a distinction between, on the one hand, one of the goods falling under HS number 25083000 and, on the other hand, all other goods falling under HS number 25083000 and HS number 26060000. China acknowledges that the export quota is inconsistent with the covered agreements as far as all goods are concerned, except for that one good under HS number 25083000.121 China argues that the export quota imposed on that particular good is justified by Article XI:2(a) of the GATT.

120 See China's Reply to Question 8, in paragraph 32.

121 See China's Reply to Question 8, in paragraphs 35 and 36.
174. China uses different names to identify that particular good, some of which seem to be incompatible with others: "refractory bauxite, in crude and calcined form";\textsuperscript{122} "Chinese refractory bauxite, being the calcined form of refractory grade bauxite"; and "high alumina clay".\textsuperscript{123} China suggests that it is easier to identify that good on the basis of its chemical and physical characteristics: aluminium oxide exceeding 80%, iron oxide less than 2.5% and few other impurities; high density, at more than 3.25 grams per cubic centimetre.\textsuperscript{124} To avoid confusion, the European Union will use the terms "\textbf{Refractory-grade Bauxite}" and "\textbf{High Alumina Clay}" interchangeably in this submission to denote the good defended by China.

175. There are a number of factual assertions made by China in its first written submission, in its replies to the Panel's questions and in the reports it has submitted as Exhibits, which are open to challenge for their accuracy. The European Union refers the Panel to the product report submitted by the complainants as a Joint Exhibit, where China's assertions on the good's terminology, uses and substitutability are called into question.

176. One point which is not disputed is China's worldwide monopoly over the production of that good. China acknowledges that, outside China, the only country that produces the good is Guyana and that even there the production is owned by a Chinese company. This means that the entire world production of that good is currently controlled by China.\textsuperscript{125}

\textit{A. General issues of interpretation}

\textsuperscript{122} See China's Reply to Question 8, in the table at in paragraph 31.

\textsuperscript{123} See China's Reply to Question 8, in paragraph 33.

\textsuperscript{124} See China's Reply to Question 8, in paragraph 34.

\textsuperscript{125} See the document submitted by China as Exhibit CHN-126, on page 20.
Before discussing the provisions of Article XI:2(a) and their proper application on the facts of the present case, the European Union will briefly address the points raised by China in paragraphs 404 to 429 of its first written submission.

In these paragraphs, China purports to present the "complainants' interpretation" of Article XI:2(a) of the GATT. In reality, China is presenting a list of export restrictions applied by various complainants on various goods and at various times over the last 60 years. With these examples, China probably tries to create the impression that the complainants should not complain about China's export restrictions, because they had applied similar restrictions in the past.

It is doubtful whether this list of examples creates the impression that China seeks to achieve. For example, in paragraphs 421 and 422, China refers to a waiver from the GATT obligations requested by the ECSC (one of the predecessors of the European Union) in 1953 for the creation of the ECSC itself. Some provisions of the ECSC Treaty apparently resembled the provisions of Article XI:2(a) of the GATT. The GATT Secretariat note, to which China refers in paragraph 422, simply mentions these similarities on the texts of the two provisions. It does not say anything about the actual implementation of these provisions in specific cases and the compatibility of such implementation with Article XI:2(a) of the GATT.

Moreover, in paragraph 425, China lists various old ECSC measures, which were taken before the creation of the WTO. One would need to examine the specific facts pertaining to each such measure to confirm whether each measure did indeed fall within the scope of Article XI:2(a) of the GATT. No GATT panel examined those measures and, therefore, nobody knows whether they met the conditions for the application of Article XI:2(a) or not. Therefore, these examples cannot offer any guidance to the Panel either on the legal "tests" that must be met for the application of Article XI:2(a), or on the facts that should be present in order to pass these "tests".
181. In any event, from a WTO law point of view, these lists of examples are completely irrelevant. Article XI:2(a) of the GATT must be interpreted in accordance with customary rules of interpretation of public international law. These rules do not provide that measures adopted by the complaining parties in the past have any bearing on the interpretation of a particular provision of an international agreement.

182. This does not mean that the subsequent practice of the signatories to an international agreement can never be taken into consideration when interpreting the agreement. The Vienna Convention expressly provides in Article 31(3)(b) that, together with the context of a treaty, it shall be taken into account the "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation". This is not the case here.

183. First, there is no "agreement regarding the interpretation" of Article XI:2(a) of the GATT between the WTO Members, or even between the parties to this dispute. This is evidenced by the fact that the complainants and China are vigorously debating diametrically opposite opinions on that provision's meaning and scope.

184. Second, there is no "subsequent practice" on the application of Article XI:2(a). As China acknowledges, this provision has not been interpreted by the GATT or the WTO dispute settlement system so far. Moreover, there is no official statement issued by the WTO membership evidencing the membership's view on the consistent application of this provision.

185. Third, WTO panels have generally refused to take into consideration lists of prior examples (even where they involve the complaining parties), submitted by the defending party in support of its interpretation of a particular provision. For example, in EC – Bananas III (Article 21.5 – US) the defending party submitted a long list of examples (including measures taken by the complaining party) as

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126 See the Dispute Settlement Understanding, in Article 3.2.
"subsequent practice in the application" of Article XIII of the GATT. Neither the Panel, nor the Appellate Body considered that such lists constituted evidence of "subsequent practice in the application" of, or were in any other way relevant for the interpretation of the GATT. There is no reason for the Panel to depart from that interpretation in the present dispute.

186. In conclusion, the Panel should simply disregard in paragraphs 404 to 429 of China's first written submission and interpret Article XI:2(a) of the GATT in accordance with the rules provided for in the DSU.

B. **The interpretation of Article XI:2(a) and its application on China's export quota**

187. An export restriction falls within the scope of Article XI:2(a) when it meets all of the following conditions: (a) it must be applied on "foodstuffs or other products essential to the exporting" country; (b) it must "prevent or relieve critical shortages" of the restricted good; and (c) it must be "temporarily applied". If an export restriction fails to meet one of these conditions, then it is not covered by the exception of Article XI:2(a) and is inconsistent with Article XI:1 of the GATT. The European Union considers that China's export quota on Bauxite, including High Alumina Clay fails to meet these conditions and, consequently, falls outside the scope of the Article XI:2(a) exception, for the following reasons.

1. **"Foodstuffs or other products essential to the exporting country"**

188. China argues that Refractory Grade Bauxite/High Alumina Clay is "essential" in the sense of Article XI:2(a) of the GATT for three reasons: (a) Because China considers it to be essential. China takes the view that the designation of a product as essential is a matter which each country has the right to decide for itself and that such product does not need to be essential for other WTO

\[127 \] See the report of the panel in *EC – Bananas III (Article 21.5 – US)*, in paragraphs 7.630 and 7.631.
Members. (b) Because the *Understanding on the Balance of payments provisions* provides that the "term essential products" shall be understood to include products of basic consumption needs, capital goods or inputs needed for production. (c) Because the good is used as an input in facilitating the production of *inter alia* iron and steel and, therefore, China wishes to keep it for its own economic growth and development.

189. On the basis of China's assertions, it is difficult to see which product would not be "essential" for purposes of Article XI:2(a) of the GATT. The list submitted by China includes foodstuffs, basic consumer goods, capital goods and inputs needed for production. It is difficult to think of any other type of products that exist in the world (perhaps "non-basic consumer goods"?). But, even if other types of products do exist, China would still be able to call them "essential", given that it considers that it is the prerogative of the country imposing the export restriction to determine the restricted product's "essentialness".

190. Such an all-encompassing definition of the term "essential" does not seem to be correct, for a number of reasons.

191. First, the prohibition on quantitative restrictions on both exports and imports contained in Article XI:1 of the GATT is one of the most important principles of the entire structure of world trade regulation. Given that Article XI:2(a) introduces an exception to this fundamental principle of WTO law, its terms must be interpreted narrowly. An interpretation of the term "essential products" that would allow the imposition of export restrictions on practically any and all products would not be consistent with the principle of narrow interpretation of exceptions.

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128 See China's first written submission, in paragraph 383. See also China's Reply to Question 17, in paragraph 72.

129 See China's first written submission, in paragraph 389. See also China's Reply to Question 17, in paragraphs 74 and 76.

130 See China's first written submission, in paragraph 461. See also China's Reply to Question 17, in paragraphs 86 to 89.
192. Moreover, such a broad definition of the term "essential products" in Article XI:2(a) would render other provisions of the GATT redundant. For example, if a WTO Member could impose export restrictions on any product that it would deem "essential" for itself, there would be no need for including in the GATT the provisions of Article XX(i). The latter allows export restrictions on "domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry, during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan", but under quite strict conditions. If China's interpretation of the term "essential products" was to be accepted, then Article XX(i) would never be applied: a WTO Member would impose an export restriction on the "domestic materials" on the basis of Article XI:2(a), even where the other conditions of Article XX(i) are not met. It is difficult to reconcile this result with the structure of the GATT and the customary rule of interpretation of public international law which dictates that meaning must be given to all the provisions of an international agreement.

193. These considerations lead to the conclusion that, contrary to China's views, (a) the determination of whether a product is "essential" should be based on an objective assessment of the facts and cannot be left to be decided by the country imposing the export restriction; and (b) the threshold of the legal test that a product should satisfy in order to be called "essential", must be quite high.

194. Second, the provisions of the Understanding on the balance of payments provisions cannot help the interpretation of the term "essential" product in Article XI:2(a) of the GATT. That Understanding clarifies the terms of Article XII and Article XVIII of the GATT. The express limitation of the scope of the Understanding only to those exceptions from the general principle of Article XI:1 of the GATT, indicates the intention of its drafters not to expand the

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131 See, for example, the report of the Appellate Body in EC – Bananas III, in paragraph 185, which confirms the principle of a strict interpretation of the exceptions to the basic GATT obligations.

132 It is noted that the text of Article XII of the GATT begins with the words: "Notwithstanding the provisions of in paragraph 1 of Article XI".
definition of the term "essential" products to the other exceptions of Article XI:1, such as Article XI:2(a).

195. Moreover, the relevant provisions of Articles XII:3(b) and XVIII:10 (where the term "essential" is used) address more the issue of Most Favoured Nation treatment, than the issue of quantitative restrictions. These two provisions allow countries facing balance of payments difficulties the flexibility to impose different restrictions on the importation of different goods.\(^{133}\) This may result in a restriction on the importation of goods from some WTO Members and to no restriction on the importation of goods from some other countries. To protect the measures from claims of discriminatory treatment and Article I violations, these specific provisions (together with the Understanding) allow the countries imposing the restrictions to prioritize the free importation of more essential products. In contrast, Article XI:2(a) is an exception from the general prohibition of quantitative restrictions on exports and is not related to the issue of MFN treatment of other WTO Members. The differences between the scope of these provisions and the scope of Article XI:2(a) indicate that there is probably also a difference in the use and meaning of the term "essential" product between Article XI:2(a) of the GATT and the other provisions and the Understanding.

196. These considerations indicate (a) that the notion of "essential products" should be defined narrowly; and (b) that China's suggested definition is too broad. However, the European Union considers that the Panel does not need to proceed with a detailed analysis and definition of the term "essential products" in the context of the present dispute, because China's measure fails to meet the other conditions for the application of Article XI:2(a).

2. "Prevent or relieve critical shortages"

\(^{133}\) In the words of Article XII:3(b), countries "may determine the incidence of the restrictions on imports of different products or classes of products" on the basis of their own priorities.
197. China argues that there is a risk that it may experience a critical shortage of the good at some point in time and, therefore, Article XI:2(a) allows it to take anticipatory measures to ensure that such risk does not materialise.\textsuperscript{134} China argues that the elements creating this risk are the following: (a) there is a very short remaining life span of that good: China estimates that its reserves last for about 16 years and that its reserves are at an alarming declining trend;\textsuperscript{135} (b) China's own measures restricting the production of the good (purportedly in the context of its conservation policy). These limitations significantly constrain the supply of the good;\textsuperscript{136} (c) China's regulatory framework, which imposes a number of obligations on the good's producers,\textsuperscript{137} as well as the risk of technological\textsuperscript{138} or social difficulties\textsuperscript{139} that could arise in relation to the production of the good; (d) the global demand for the good,\textsuperscript{140} in combination with the fact that there are no sources of supply outside China, or outside China's ownership and control.\textsuperscript{141}

198. China argues that it does not have to wait for these elements to produce the critical shortage, nor does the critical shortage must be the result of a sudden and unforeseen event.\textsuperscript{142} China also argues that the country that imposes the export restriction enjoys the prerogative to determine whether the risk of the critical shortage is important enough to justify the imposition of the export restriction.\textsuperscript{143} China also asserts that the question of whether the good is

\textsuperscript{134} See China's Reply to Question 18, in paragraph 96.

\textsuperscript{135} See China's first written submission, in paragraph 472.

\textsuperscript{136} See China's first written submission, in paragraph 476.

\textsuperscript{137} See China's first written submission, in paragraph 480.

\textsuperscript{138} See China's first written submission, in paragraph 483.

\textsuperscript{139} See China's first written submission, in paragraph 484.

\textsuperscript{140} See China's first written submission, in paragraph 485.

\textsuperscript{141} See China's first written submission, in paragraph 486.

\textsuperscript{142} See China's Reply to Question 18, in paragraph 97.

\textsuperscript{143} See China's Reply to Question 18, in paragraph 102.
"essential" may also inform the determination of whether there is a risk of critical shortage.  

199. If China's interpretation is accepted, it will probably be difficult to identify any good which is not in "critical shortage". Moreover, according to China, the country imposing the export restriction would have the right to determine unilaterally whether a good is in "critical shortage", including through taking into consideration domestic measures which itself has imposed, limiting the good's production. And, if even then there is no actual "critical shortage", the country imposing the export restriction could act simply on the basis of its own determination that there is a "risk" of it. China's assertions should be rejected, for a number of reasons.

200. First, as mentioned above in the section discussing China's interpretation of the term "essential products", Article XI:2(a) introduces an exception from one of the fundamental principles of the GATT and the WTO, i.e., the prohibition of quantitative restrictions on export. Consequently, the terms of this exception should be interpreted narrowly. China's extremely broad definition of "critical shortage" and of its "risk" is strongly at odds with this principle and should be rejected. This is particularly true for China's assertions in relation to a country's right to set its own "level of acceptable risk" and determine unilaterally that it faces a situation which warrants the imposition of export restrictions. The exercise of a WTO Member's sovereignty over its trade policy should be subject to scrutiny by the WTO dispute settlement system, on the basis of objective and transparent legal principles.

201. Second, the words "critical shortage" must be read within the context of the entire provision of Article XI:2(a). It is noted that Article XI:2(a) provides that the measures taken (a) must be "temporarily applied"; and (b) must be "relieving" the critical shortage, or "preventing" its occurrence.

202. This text shows that for a "shortage" to be "critical" in the sense of Article XI:2(a), the shortage must be, *inter alia*, "temporal", i.e., limited in duration.

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144  See China's Reply to Question 18, in paragraph 103.
There should be a point in time where the shortage would cease to exist and the availability of the good would return to normal. This conclusion is supported by the fact that Article XI:2(a) requires the "export restrictions" to be "temporarily applied" in order to "relieve or prevent" the shortage. If there is no possibility for the shortage ever to cease to exist, it will not be possible to "relieve or prevent" it through an export restriction applied only for a limited period of time.

203. This could be the case, for example, where an extended drought combined with widespread wildfires severely decreases the crops of grain or cereal in a particular country. The ensuing shortage would be "critical" in the sense of Article XI:2(a), because it could be relieved or prevented with measures applied for the time needed until, e.g., the crops of the following year help the market situation return to normal. Another example could be a big mining accident, severely decreasing the quantity of a mineral produced for a period of time. The ensuing shortage of the mineral would be "critical" in the sense of Article XI:2(a), because it could be relieved or prevented with measures applied for the time needed to bring the mine back into operation.

204. The application of these considerations on the facts of the present case shows that China is not facing a "critical shortage" of High Alumina Clay/Refractory Grade Bauxite, in the sense of Article XI:2(a) of the GATT.

205. China's first argument is that the "critical shortage" of Refractory Grade Bauxite is based on the good's reserves limited life span. However, the limited life span of the reserves of a good is not, by itself, an element that can support a finding of "critical shortage" in the sense of Article XI:2(a). The exhaustion of a good's natural reserves is not a temporal shortage that can be relieved or prevented with

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145 China has prominently referred to the discussions relating to Australia's export restriction on live Merino sheep. That export restriction was never examined by the GATT or WTO dispute settlement system and, therefore, nobody knows whether it complied with Article XI:2(a) of the GATT or not. However, it is noted that, as China acknowledges, the event triggering the alleged shortage was "the devastating impact of a drought on the stock of Merino sheep" in Australia (see China's first written submission, in paragraph 385). Therefore, even this example does not contradict the interpretation suggested by the European Union in the present submission.
temporal measures. This type of shortages does not fall within the ambit of Article XI:2(a).

206. If China’s interpretation was accepted, then Article XX(g) of the GATT would be redundant. Article XX(g) provides for stricter conditions (such as caps on domestic production or consumption) that must be met in order to allow derogations from the GATT obligations, including Article XI:1, where the reserves of the relevant good have a limited life span. If China's interpretation of "critical shortage" was accepted, Article XI:2(a) would pre-empt the application of Article XX(g) in the field of export restrictions (for example, a WTO Member would be allowed to impose export restrictions even in the absence of caps on domestic production or consumption). Such a result would not be consistent with the customary rules of interpretation of public international law.

207. This does not mean that Article XI:2(a) can never cover goods with a limited life span of reserves. It could, if the conditions of Article XI:2(a) were satisfied, i.e., there is a shortage which is limited in time and could be "relieved or prevented" through measures with a duration limited to the time needed for market conditions to return to normal. This could be the case, for example, in the event of a mining accident, as discussed above.

208. China also argues that the "critical shortage" of Refractory Grade Bauxite is based on various domestic measures it has taken, such as production caps, environmental regulations, etc. There is something inherently problematic in accepting that a WTO Member can avoid its obligations under the GATT in order to remedy allegedly problematic situations which itself has created through its own domestic measures.

209. In any event, the facts presented by China do not support a finding of "critical shortage" in the sense of Article XI:2(a). China acknowledges that it has imposed the production caps in order to deal with the problem of the limited life span of the reserves of Refractory Grade Bauxite. Therefore, those production caps do not constitute a temporal shortage that can be relieved or prevented with
temporal measures, as required by Article XI:2(a). They are part of the broader problem created by the fact that the good's reserves are exhaustible. The comments made above on China's assertions in relation to the limited life span of the good's reserves apply here too.

210. China also refers to potential technological and social risks and to its environmental and other regulations as elements that could support the finding of a "risk" of "critical shortage". It is noted that the evidence provided by China does not show that China lacks the technology to produce Refractory Grade Bauxite, or that there has been social unrest which has impacted the production of the good. Likewise, there is no evidence that any type of shortage ("critical", or other) results from the Chinese mining companies' compliance with China's regulatory framework. In addition, accepting that the elements that could justify a finding of "critical shortage" in the sense of Article XI:2(a) include compliance with the legislative and regulatory framework, or potential, but unrealised, technological and social risks, would lead to an excessively broad scope of application of Article XI:2(a), which would not be consistent with the principle that exceptions to the fundamental rules of the GATT should be interpreted narrowly.

211. These considerations lead to the conclusion that China does not face a "critical shortage" of Refractory Grade Bauxite and, consequently, that the challenged export restrictions do not fall within the scope of Article XI:2(a) of the GATT.

3. "Temporarily applied to prevent or relieve"

212. China argues that a measure is "temporarily applied" when it is "applied so long as it continues to prevent or relieve a critical shortage of an essential product".146

213. China's interpretation of the notion of the "temporal application" of the measure confirms the views expressed by the European Union in the preceding section of

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146 See China's first written submission, in paragraph 375.
this Submission, i.e., that a shortage can be "critical" for purposes of Article XI:2(a) of the GATT only if it is limited in time and, therefore, is capable of being "relieved or prevented" with measures applied for the duration of the time needed until the shortage ceases to exist and the market situation returns to normal.

214. In contrast, measures applied in circumstances where the shortage is not "temporal", but permanent, are not "temporarily applied" for purposes of Article XI:2(a). This would be the case where the shortage is caused solely by the limited life span of the product's reserves. Given that the availability of such a good would keep decreasing until the exhaustion of the good's reserves, the shortage would not be temporal: as of the exhaustion of the reserves the shortage of the good would become permanent. This type of shortage would not be apt to be remedied or prevented with measures of limited time duration. Therefore, in such situations the measures would not be “temporarily applied”.

215. These considerations make clear that China's reliance on Article XI:2(a) of the GATT in order to justify the export quota on High Alumina Clay is erroneous. They also support the conclusion that this export quota falls outside the scope of Article XI:2(a) of the GATT and, therefore, is inconsistent with China's obligations under the covered agreements.

VI. **CHINA'S EXPORT DUTIES CANNOT BE JUSTIFIED BY ART. XX GATT 1994**

216. China claims that it can justify violations of its obligations flowing from Paragraph 11.3 of China's Accession Protocol with the help of Art. XX GATT 1994.

217. In its first written submission China does not explain on the basis of which considerations it wants to apply Art XX(b) and (g) GATT 1994 to breaches of obligations of a WTO Member undertaken outside of the GATT 1994. Rather, it takes it apparently as a given that Art. XX GATT 1994 is applicable to violations of Paragraph 11.3 of the Accession Protocol. China addresses this
issue for the first time in the course of the First Panel Meeting by invoking nebulous and undefined sovereign rights of WTO Members to regulate trade and to exploit its natural resources to achieve sustainable development through economic diversification.\footnote{Paras 6 et seq. of China's opening statement.}

218. These nebulous references to a mingle-mangle of political instruments and statements made outside of the WTO are of little, if any, relevance for the analysis of a strictly legal question concerning China's WTO Accession Protocol.

219. To start with the very text of Article XX GATT 1994: The wording "... nothing in this Agreement ..." (emphasis added) leaves no doubt that Article XX only applies to commitments undertaken under the GATT 1994.

220. This said, WTO Members are of course free to incorporate Art. XX GATT 1994 into other legal agreements they enter into, if they so wish, be this in the context of the WTO or outside of it. However, the legal basis for applying exceptions to such other agreements is then the very text of the incorporation, not Art. XX GATT 1994 itself. Article XX GATT 1994 itself is limited to the GATT 1994.

221. WTO Members have so far preferred to draft exception rules for the other covered agreements tailored to the specific characteristics of each such agreement. For example, the GATS Agreement contains its own exceptions, notably in Articles XIV and XIV bis, which are inspired by the corresponding GATT exceptions. Also the TRIPS Agreement has its own set of exceptions, notably Articles 13, 17, 24 and 30, which are tailored to the particular objectives of the protection of intellectual property rights and follow a completely different logic as compared to the GATT and the GATS exceptions.

222. As far as China's Accession Protocol obligations are concerned, the issue of the applicability of Article XX GATT 1994 to Paragraph 5.1 of China's Accession Protocol was before the Panel and Appellate Body in DS363 China – Audiovisual Products. The Appellate Body interpreted the language contained
in the introductory clause of Paragraph 5.1 of the Accession Protocol ("without prejudice to China's right to regulate trade in a manner consistent with the WTO Agreement") to mean that Article XX GATT 1994 was incorporated by way of reference as a constituent part of this specific accession commitment. China could rely on this incorporation as a defence for its violation of obligations under Article 5.1 of its Accession Protocol. Eventually the Appellate Body rejected China's defence because the conditions set out in Article XX GATT 1994 as incorporated into this specific accession commitment were not met.

223. Contrary to Paragraph 5.1, Paragraph 11.3 of China's Accession Protocol, which is at stake in this dispute, does not contain an incorporation by way of an introductory phrase like the one in Paragraph 5.1, nor does it contain any other express reference to the GATT 1994.

224. Instead, Paragraph 11.3 has its own specific exception clause in Annex 6 of the Accession Protocol, where numerous precise exceptions form the obligations pursuant to Paragraph 11.3 of the Accession Protocol are stipulated to which China can have recourse if it so wishes. Furthermore, a 'Note' at the end of Annex 6 gives China the further flexibility to increase the applied export duties in Annex 6 to changed circumstances up to the maximum rate referred to in Annex 6.

225. Also China's attempt to argue that Paragraph 170 of the Working Party Report would have to be equated with the introductory language in Paragraph 5.1 of China's Accession Protocol must fail, because of the fundamental textual difference between the two provisions. Indeed Paragraph 170 of the Working Party Report neither explicitly nor implicitly refers to any exceptions or GATT 1994 flexibilities in relation to China's obligations under Paragraph 11.1 of the Accession Protocol. Paragraph 170 in fact does not even contain China's accession obligation on export duties at issue in this dispute, it is a repetitive commitment of obligations already existing under standard GATT rules, and

149  AB Report, para 230.

150  AB Report, para 337
therefore cannot add anything to the obligations set out in the WTO Agreement, including China's Protocol of Accession.

226. In its reply to Question 36\textsuperscript{151} of the Panel's Written Questions, China has furthermore asserted that WTO panels and the Appellate Body have repeatedly allowed GATT exceptions to be invoked for violations outside GATT. This assertion has been exhaustively rebutted by the US Comments on China's Answers to the First Set of Panel Questions\textsuperscript{152} as wholly inaccurate. This has most recently been confirmed by the panel in DS392 US-Poultry (China), when it ruled that Article XX(b) GATT 1994 cannot be invoked to excuse a violation of obligations contained in the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).\textsuperscript{153}

227. In conclusion it can be said that there exists no textual or other basis whatsoever to allow the application of Article XX GATT (1994) to China's obligations stemming from Paragraph 11.1 of the Accession Protocol. The system of the WTO covered agreements has been negotiated as a finely knit web of rights and obligations balanced by an equally finely knit web of explicit exceptions. To allow exceptions which are foreseen in one agreement to justify a violation in another agreement would, in the absence of an explicit incorporation of this exception in that latter agreement, change the content and balance of the system and create a serious threat to the predictability and legal security of the international trading system. To cite only one example, it would appear manifestly bereft of any basis and therefore absurd to permit a WTO Member to justify a violation of its TRIPS patent obligations by reference to Article XX GATT 1994.

228. Allowing "inherent" or "unwritten" exceptions to justify violations of WTO covered agreements would, a fortiori, modify the existing content and balance

\textsuperscript{151} Para 183.

\textsuperscript{152} Para 52.

of covered agreements and severely threaten the predictability and security of the international trading system.

VII. CHINA’S EXPORT DUTIES ON FLUORSPAR AND ITS EXPORT QUOTAS ON BAYXITE ARE NOT JUSTIFIED BY ARTICLE XX (G) GATT


230. In its First written submission China asserts that these export duties and quotas are justified pursuant to Article XX(g) of the GATT 1994. As previously discussed, the European Union maintains that the exceptions in Article XX of the GATT 1994 are not available as a defence for a breach of the obligations in paragraph 11.3 of China’s Accession Protocol. However, even assuming arguendo that Article XX(g) is available as a defence, China has not demonstrated that its export duties satisfy the criteria set out in Article XX(g) of the GATT 1994. Similarly, China has not demonstrated that its export quotas on bauxite satisfy the criteria under Article XX(g) of the GATT Agreement.

231. China is defending the export duty it applies on fluorspar (both on met-spar and on acid-spar) by claiming that it is "justified pursuant to Article XX (g) of the GATT 1994 because it is a measure relating to the conservation of exhaustible non-renewable mineral resource, and it is applied together with restrictions on domestic production and consumption".154

232. China is also trying to justify the export quota it applies on what it calls "refractory-grade bauxite" by also using the GATT Article XX(g) defence.155

233. In its first written submission, China provides its views on the meaning of GATT Article XX(g) and whilst it attempts to do so, it subsequently delves into

154 China's first written submission, in paragraph. 94.
155 China's first written submission, in paragraph. 496.
issues and subjects that are totally irrelevant to the correct application of this sub-article.\textsuperscript{156}

234. The European Union will set forth its views on the correct interpretation of GATT Article XX (g) and will also explain why the explanation on the interpretation of GATT Article XX (g) provided by China in its First written submission is misleading.

A. \textit{An analysis of the interpretation of GATT Art XX(g) in WTO case-law}

235. GATT Article XX(g) provides that:

"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures.

\textit{g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;"}

1. \textbf{The meaning of "relating to the conservation of exhaustible resources"}

236. The legal benchmark for the consistency of a measure with Article XX (g) of the GATT 1994 is that the measure is "relating to the conservation of exhaustible natural resources."

237. In \textit{Canada – Herring and Salmon},\textsuperscript{157} a GATT Panel interpreted "relating to" to mean that a measure must be "primarily aimed at" conservation:

"The Panel concluded for these reasons that, while a trade measure did not have to be necessary or essential to the conservation of an exhaustible natural resource, it had to be \textbf{primarily aimed at} the conservation of an exhaustible natural resource to be considered as "relating to" conservation within the meaning of Article XX(g)."

\footnote{156}{China's first written submission, in paragraphs. 97-153.}

\footnote{157}{See the report of the GATT Panel in \textit{Canada – Herring and Salmon}, in paragraph.4. Emphasis added.}
238. In *US – Gasoline*,\(^{158}\) the Appellate Body referred to the interpretation previously given by the GATT Panel in *Canada – Herring and Salmon* and re-iterated the view that a measure had to be "primarily aimed at" the conservation of natural resources in order to fall within the meaning of Article XX(g). In fact, the Appellate Body stated that:

"All the participants and the third participants in this appeal accept the propriety and applicability of the view of the *Herring and Salmon* report and the Panel Report that a measure must be "primarily aimed at" the conservation of exhaustible natural resources in order to fall within the scope of Article XX(g). Accordingly, we see no need to examine this point further, save, perhaps, to note that the phrase "primarily aimed at" is not itself treaty language and was not designed as a simple litmus test for inclusion or exclusion from Article XX(g)."

239. Consequently, in *US – Shrimp*, the Appellate Body held that Article XX(g) requires a "close and real" relationship between the "means" (that is - the measure which is being challenged) and the "ends" (that is - the policy objective being pursued). The means employed, i.e. the measure, must be reasonably related to the end pursued, i.e. in that case, the conservation of sea turtles. The measure at issue in that dispute (Section 609) was also found by the Appellate Body not to have been "disproportionately wide" in its scope or reach in relation to the policy objective pursued. As the Appellate Body stated in *US – Shrimp*:

"Article XX(g) requires that the measure sought to be justified be one which "relat[es] to" the conservation of exhaustible natural resources. In making this determination, the treaty interpreter essentially looks into the relationship between the measure at stake and the legitimate policy of conserving exhaustible natural resources."

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\(^{158}\) See the report of the Appellate Body in *US – Gasoline*, on page 18. Emphasis added.

\(^{159}\) See the report of the Appellate Body in *US – Shrimp*, in paragraph 135.
"In its general design and structure, therefore, Section 609 is not a simple, blanket prohibition of the importation of shrimp imposed without regard to the consequences (or lack thereof) of the mode of harvesting employed upon the incidental capture and mortality of sea turtles. Focusing on the design of the measure here at stake, it appears to us that Section 609, cum implementing guidelines, is not disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation of sea turtle species. The means are, in principle, reasonably related to the ends. The means and ends relationship between Section 609 and the legitimate policy of conserving an exhaustible, and, in fact, endangered species, is observably a close and real one, a relationship that is every bit as substantial as that which we found in United States - Gasoline between the EPA baseline establishment rules and the conservation of clean air in the United States.

In our view, therefore, Section 609 is a measure "relating to" the conservation of an exhaustible natural resource within the meaning of Article XX(g) of the GATT 1994."\(^{160}\)

240. The European Union would also like to comment on the references made by China in its first written submission when it makes comments on the ordinary meaning of the phrase "relating to conservation" in GATT Article XX(g). After it gives various dictionary meanings defining the term "conservation" China then goes to present as "Context" other issues which have absolutely no relevance to the correct interpretation of GATT Article XX (g).\(^{161}\)

241. China goes into some detail by referring to the WTO Preamble\(^{162}\) and specifically to the attainment of the objective of the goal of sustainable development. It refers to the text of the Preamble of the WTO Agreement which represents the importance of the social and economic benefits of trade, the optimal use of the world’s resources, sustainable development, the protection and preservation of the environment, as well as the needs and concerns of WTO Members at different levels of economic development. None of these WTO objectives indicate in any way that any WTO Member should be exempted from complying with the terms of Article XX(g) of the GATT in order to be able to

\(^{160}\) See the report of the Appellate Body in US – Shrimp, in paragraphs. 141 and 142. Emphasis added.

\(^{161}\) China's first written submission, in paragraphs. 112-148.

\(^{162}\) China's first written submission, in paragraphs. 115-116.
discriminate in favour of its domestic users of raw materials against users in every other WTO Member. Indeed, the Preamble calls for the optimal use of the world’s resources, and the same Preamble expresses the desire of WTO Members to contribute to the objectives of the WTO by entering into reciprocal and mutually advantageous arrangements directed at the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment international trade relations.

242. China also goes into some detail in explaining its view on the international law principle of sovereignty over natural resources (a principle which is certainly not being disputed, nor even relevant to the resolution of this dispute).\(^\text{163}\)

243. China also makes various statements explaining the fact that "conservation is a pillar of sustainable development", which again is not being disputed before this Panel\(^\text{164}\). In fact, in this regard China quotes from the 1972 Stockholm Declaration, the 1982 World Charter for Nature, the 1987 "Experts Group on Environmental Law by the World Commission on Environment and Development" (also known as the "Brundtland Commission") and the list goes on. The European Union is not questioning the validity or importance of the environmental or developmental goals that all these documents contain. Yet one cannot substitute a clear interpretation of Art. XX(g) GATT 1994 with cloudy references to international instruments pertaining to the protection of the environment.

244. The European Union does question China's assertion contained in paragraph 142 of its First written submission that:

"To summarize this discussion, Article XX(g) must be interpreted in a manner that recognizes WTO Members' sovereign rights over their own natural resources."

245. In the opinion of the European Union, GATT Article XX(g) does not call into question this sovereign right of all WTO Members. In fact, Article XX(g) of the

\(^{163}\) China's first written submission, in paragraphs 120-130.

\(^{164}\) China's first written submission, in paragraphs 131-148
GATT 1994 allows WTO Members to take measures which are "relating to the conservation of exhaustible natural resources" which provide them with an exception to their commitments in the WTO, also if they satisfy the conditions set out by this sub-article and also by those set out in the Article XX chapeau.

246. What is really at issue under Article XX(g) GATT 1994 is whether a measure that is otherwise inconsistent with the GATT 1994 fits within the plain terms of the Article XX(g) exception: that is, whether it (1) relates to the conservation of an exhaustible natural resource, (2) it is made effective in conjunction with domestic restrictions on production or consumption, and (3) is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

2. The meaning of "made effective in conjunction with domestic restrictions on production or consumption"

247. One requirement of GATT Article XX(g) is that the measure in question has to be "made effective in conjunction with restrictions on domestic production or consumption".

248. The GATT Panel in Canada – Herring and Salmon\(^\text{165}\) interpreted the meaning of the term "in conjunction with" which could be said to be the operative term of this phrase, as follows:

"The Panel, similarly, considered that the terms "in conjunction with" in Article XX (g) had to be interpreted in a way that ensures that the scope of possible actions under that provisions corresponds to the purpose for which it was included in the General Agreement. A trade measure could therefore in the view of the Panel only be considered to be made effective "in conjunction with" production restrictions if it was primarily aimed at rendering effective these restrictions."

249. Later on, it was the Appellate Body in US – Gasoline\(^\text{166}\) which gave the definitive interpretation of this phrase:

\(^{165}\) See report of the GATT Panel in Canada – Herring and Salmon, in paragraph. 4.6. Emphasis added.

\(^{166}\) See the report of the Appellate Body in US – Gasoline, on pages 20 and 21. Emphasis added.
"The ordinary or natural meaning of "made effective" when used in connection with a measure - a governmental act or regulation - may be seen to refer to such measure being "operative", as "in force", or as having "come into effect." Similarly, the phrase "in conjunction with" may be read quite plainly as "together with" or "jointly with." Taken together, the second clause of Article XX(g) appears to us to refer to governmental measures like the baseline establishment rules being promulgated or brought into effect together with restrictions on domestic production or consumption of natural resources. Put in a slightly different manner we believe that the clause "if such measures are made effective in conjunction with restrictions on domestic product or consumption" is appropriately read as a requirement that the measures concerned impose restrictions, not just in respect of imported gasoline but also with respect to domestic gasoline. The clause is a requirement of even-handedness in the imposition of restrictions, in the name of conservation, upon the production or consumption of exhaustible natural resources."

250. Thus, when interpreting GATT Article XX(g) the Appellate Body made clear that it understood that this clause is actually "a requirement of even-handedness in the imposition of restrictions, in the name of conservation". The Appellate Body in US – Gasoline then continued to expand further the meaning it gave to the requirement of "even-handedness" in this case and stated as follows:

"There is, of course, no textual basis for requiring identical treatment of domestic and imported products. Indeed, where there is identity of treatment - constituting real, not merely formal, equality of treatment - it is difficult to see how inconsistency with Article III:4 would have arisen in the first place. On the other hand, if no restrictions on domestically-produced like products are imposed at all, and all limitations are placed upon imported products alone, the measure cannot be accepted as primarily or even substantially designed for implementing conservationist goals. The measure would simply be naked discrimination for protecting locally-produced goods."167

251. In US – Gasoline, the Appellate Body also referred (in its footnote 42) to in Canada – Herring and Salmon, 168 which related to a prohibition of exports of unprocessed herring and salmon by Canada. In the footnote the Appellate Body commented that:

167 See the report of the Appellate Body in US – Gasoline, on page 21.
168 See the report of the GATT Panel in Canada – Herring and Salmon, in paragraph 5.1.
"This prohibition effectively constituted a ban on purchases of certain unprocessed fish by foreign processors and consumers while imposing no corresponding ban on purchase of unprocessed fish by domestic processors and consumers. The prohibitions appeared to be designed to protect domestic processors by giving them exclusive access to fresh fish and at the same time denying such raw material to foreign processors. The Panel concluded that these export prohibitions were not justified by Article XX(g)."

252. In the opinion of the European Union, the correct interpretation of Article XX(g) does not necessarily require that the domestic and foreign users of Chinese raw materials are to be treated in an identical manner, but it does require them to be treated in an even-handed or an equitable manner. Both domestic and foreign users need to be treated in a way which would not place fewer burdens on one set of users and more burdens on the other.

253. The European Union would also like to add that it believes that Article XX(j) of the GATT 1994 can also provide useful context for interpreting the “even-handedness” requirement of Article XX(g).

254. Article XX(j) provides an exception for measures that are otherwise inconsistent with the GATT that are “essential to the acquisition or distribution of products in general or local short supply,” subject to the proviso that “any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products.” (Emphasis added). Article XX(j) therefore affirms the principle of equitable access that is addressed by the requirement in Article XX(g) that a measure that relates to conservation must be “made effective in conjunction with restrictions on domestic production or consumption.”

255. In US - Gasoline, the Appellate Body also stated that it did not believe that the clause "if made effective in conjunction with restrictions on domestic production or consumption" was intended to establish an empirical "effects test" for the availability of the Article XX(g) exception. It explained that causation is always difficult to determine (both in domestic and international law) and a substantial time may have to elapse before any effects can be observed. The Appellate Body continued to expand on this statement by saying that:
"The legal characterization of such a measure is not reasonably made contingent upon occurrence of subsequent events. We are not, however, suggesting that consideration of the predictable effects of a measure is never relevant. In a particular case, should it become clear that realistically, a specific measure cannot in any possible situation have any positive effect on conservation goals, it would very probably be because that measure was not designed as a conservation regulation to begin with. In other words, it would not have been "primarily aimed at" conservation of natural resources at all."\(^{169}\)

B. **China’s export duties on fluorspar are not justified by Article XX (g) GATT**

1. **China's export duties on fluorspar are not “related to the conservation of an exhaustible natural resource”**

256. In its first written submission, China asserts that the export duties that it imposes on fluorspar are measures that are related to the conservation of an exhaustible natural resource.\(^{170}\) China in fact imposes a 15% export duty on both acid-spar (HS Code No. 25292100) and met-spar (HS Code No. 25292200), which are raw materials both falling under the broader description of fluorspar.\(^{171}\)

257. Beyond this assertion, however, China provides no argument or support for the proposition that these export restraints “relate to” the conservation of these raw materials.\(^{172}\)

258. In fact, as the European Union will explain hereunder, the export duties on fluorspar do not even appear to bear any inherent relationship to conservation. Indeed, the export duties on fluorspar do not even come close to satisfying the “relating to” requirement as envisaged in the text of Article XX(g), which has been interpreted by GATT Panels and the WTO Appellate Body as meaning

\(^{169}\) See the report of the Appellate Body in *US – Gasoline*, on pages 21 and 22. Emphasis added.

\(^{170}\) See China’s first written submission, in paragraphs 154-192.

\(^{171}\) See the EU’s first written submission, in paragraphs 136 and 137.

\(^{172}\) See China’s first written submission, in paragraphs 154-192.
“primarily aimed at” the conservation of a natural resource,\textsuperscript{173} and also as having a “close and substantial relationship of means and ends” between the "means" (that is the measure at issue) and the "ends" (that is the conservation of an exhaustible natural resource).\textsuperscript{174}

259. The European Union asserts that the Chinese measure imposing the export duties on fluorspar (as well as on many other products, which are not only raw materials) has no discernable relationship with the objective of that China is claiming it does, that is the objective of the "conservation of natural resources".

260. The measure which imposes the export duties on fluorspar for the period between the 1st January and 31st December 2009 is that entitled "Notice Regarding the 2009 Tariff Implementation Program (State Council Customs Tariff Commission, shuiweihui (2008) No 40, January 1, 2009)".\textsuperscript{175}

261. When one examines this Notice, it is immediately obvious that it is mostly related to "Import Duty Adjustments", and its Section 1, (which actually is the longest part of the Notice), relates to different import duty rates on a variety of products (mostly agricultural) entering China from different counties.

262. The only part which relates to export duties at all is Part II of the Notice which is appropriately entitled "Export Duty Adjustments". The second in paragraph under Part II of the Notice reads as follows:

"For eel fry and certain export products, implement a temporary duty rate; for certain raw fertilizers as well as their raw materials and other products, continue to impose the special export duty (See Schedule 7)."

263. It is specifically this Schedule 7 which then lists a number of products, indicating the type of export duty which is being imposed on fluorspar, which is

\textsuperscript{173} See the report of the GATT Panel in Canada – Herring and Salmon, in paragraph 4.6; and the report of the Appellate Body in US – Gasoline, on page 19.

\textsuperscript{174} See the report of the Appellate Body in US – Shrimp, in paragraph 141.

\textsuperscript{175} Submitted by the Co-Complainants as JE-21.
actually the measure being challenged by the co-complainants in this WTO Panel.

264. There is no reference, direct or indirect, to the fact that the export duty imposed by China on fluorspar is in any way "relating to" the objective of the conservation of "exhaustible natural resources". The "Notice Regarding the 2009 Tariff Implementation Program" contains no evident causal link to the desired objective of conservation. In the opinion of the European Union, the link to the conservation of an exhaustible natural resource has only been argued by China, long after the actual Notice was enacted.

2. China's export duties on fluorspar do not form part of a "comprehensive set of measures relating to the conservation of fluorspar"

265. In its first written submission, China attempts to defend the export duties on fluorspar by claiming that it has adopted a "comprehensive set of measures relating to the conservation of fluorspar". It continues to explain these "conservation measures" by referring to its own "Mineral Resources Policy", which does not seem to be related to conservation at all. It mostly refers to the economic and developmental gains that China can make through the exploitation of its mineral resources. It actually refers to the "supply of large quantities of energy and raw and processed materials for economic construction" as well as the promotion of the "rise and growth of mining cities (townships) with mineral resources exploitation as their pillar industry". China's Mineral Resources Policy seems to be aimed at many objectives, however it is definitely not primarily or specifically aimed at the "conservation of fluorspar".

266. In fact, China continues in this vein also by explaining in some detail "the importance of fluorspar to the development of an industrialized value-added

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176 See China's first written submission, in paragraph 156.
177 See China's first written submission, in paragraphs 157-158.
It also makes specific reference to a Report prepared by its own adviser Dr. David Humphries. Dr. Humphries helpfully provides a diagram of the value-chain of the downstream usages of fluorspar in China's economy which China also reproduces in its First written submission. China actually admits that the "forecast is that China's need for fluorspar will increase" and that "another strategic sector that is fully dependant on the availability of fluorspar is China's aluminium industry – the largest and fastest growing in the world". Again, there is no mention of the need for "conservation".

In paragraph 167 of its First written submission, China provides a list of thirteen laws, regulations, provisions and other measures (listed hereunder for ease of reference) which it claims were adopted to "manage the supply, production, and use of fluorspar". China also provided in the list a brief explanation (reproduced hereunder in italics and placed in brackets) as to what each law, regulation or provisions was about. These are the following:

1) 1986 Mineral Resources Law of the People’s Republic of China, (establishing the principle of rational development and use of mineral resources and setting out the requirements that mining enterprises must satisfy);

2) 1989 Environmental Protection Law of the People’s Republic of China, (subjecting mining enterprises to environmental requirements and standards);

3) 1994 Provisional Regulations of the People’s Republic of China on Resource Tax, and 1994 Detailed Rules for the Implementation of the Provisional Regulations of the People’s Republic of China on...
Resource Tax,\textsuperscript{185} (subjecting the extraction of fluorspar ore to a mineral resource tax);

4) \textit{1997 Provisions on the Administration of Collection of the Mineral Resources Compensation Fees},\textsuperscript{186} (subjecting processing of fluorspar ore to a fee of 2 percent calculated as a ratio of the sales income from beneficiated fluorspar);

5) \textit{1998 Measures for the Administration of Registration of Mining of Mineral Resources},\textsuperscript{187} (providing for monitoring and enforcement of mining enterprises’ compliance with requirements relating to the “rational development and utilization of mineral resources, environmental protection”);

6) \textit{2001 National Mineral Resources Plan},\textsuperscript{188} (further defining the policy objectives of optimal exploitation and use of mineral resources);

7) \textit{2006 Notice of the General Office of the State Council on Forwarding the Opinions of the Ministry of Land and Resources and other Authorities on the Integration of Exploitation of Mineral Resources},\textsuperscript{189} (obliging small mining enterprises to consolidate, in an effort to improve efficiency and compliance with environmental regulations and standards);

8) \textit{2008 National Mineral Resources Plan (2008-2015)},\textsuperscript{190} (strengthening China’s sustainable mineral resources policy);

9) \textit{2010 Circular of the General Office of the State Council on Taking Comprehensive Measures to Control the Extraction and Production of Refractory-Grade Bauxite and Fluorspar},\textsuperscript{191} (setting out the policy for managing the exploitation and production of fluorspar);

10) \textit{2010 Public Notice on Fluorspar Industry Entrance Standards},\textsuperscript{192} (subjecting new mining enterprises to industry entrance requirements, including social, technical, and environmental requirements);

\textsuperscript{185} Exhibit CHN-91.
\textsuperscript{186} Exhibit CHN-92.
\textsuperscript{187} Exhibit CHN-93.
\textsuperscript{188} Exhibit CHN-94.
\textsuperscript{189} Exhibit CHN-95.
\textsuperscript{190} Exhibit CHN-80.
\textsuperscript{191} Exhibit CHN-87.
\textsuperscript{192} Exhibit CHN-96.
11) **2010 Circular of the Ministry of Land and Resources on Passing Down the 2010 Controlling Quota of Total Extraction Quantity of High-alumina Bauxite Ores and Fluorspar Ores**,\(^{193}\) (subjecting the extraction of fluorspar to a quantitative limit or cap);

12) **2010 Circular on Passing Down the Controlling Quota of the 2010 Total Production Quantity of High-alumina Refractory-Grade Bauxite and Fluorspar**,\(^{194}\) (subjecting the initial processing of fluorspar ore to a quantitative limit or cap); and,

13) **2010 Tariff Implementation Plan**,\(^{195}\) (subjecting exports of fluorspar to an export duty of 15 percent).

268. As an initial comment, when one looks at this list it is immediately obvious that only the measures enacted in 2010 relate specifically to fluorspar (as well as to "high alumina refractory-grade bauxite"). These are "Circulars" which were issued earlier in 2010 by different entities in the Chinese government (well after the present dispute before this Panel had started), which are attempts to justify the export restrictions on fluorspar and high alumina refractory-grade bauxite, by imposing *post-facto* some restrictions on the extraction and processing of these two materials.

269. The "2009 Tariff Implementation Plan"\(^{196}\), which is the actual measure that the co-complainants identified as the one which imposed the export duties for fluorspar for 2009, is not even mentioned in this list, however China does in fact refer to the "2010 Tariff Implementation Plan", and then proceeds to place it as the last item in this list of thirteen.

270. The other measures that China has listed, seem to be of a general regulatory or fiscal nature, (for example those imposing a "Resource Tax" that seems to be applicable to any raw material which is mined), as well as general plans setting out specific policies for China in a mineral resources policy for China. These

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\(^{193}\) Exhibit CHN-97.

\(^{194}\) Exhibit CHN-98.

\(^{195}\) Exhibit CHN-5.

\(^{196}\) JE-21 submitted by the Co-complainants.
measures are not linked to the export duties that China imposes on fluorspar in any way.

271. To cite a specific example of this, China refers to the "1994 Provisional Regulations on Resource Tax"\(^{197}\) and the "1994 Detailed Rules for the Implementation of the Provisional Regulations of Resource Tax"\(^{198}\) and in its explanation (reproduced in italics under point (3) in the list of the (13) measures cited), China states that these measures are: "subjecting the extraction of fluorspar ore to a mineral resource tax". It possibly does so in order to give the impression that a special resource tax on fluorspar had been in place in China since 1994.

272. The reality is rather different than the impression which is being given. When one actually examines the text of the 1994 Provisional Regulations and Detailed Rules it is immediately obvious that these "Resource Taxes" where introduced on many natural resources, (including crude oil, natural gas, coal, ferrous metal ores, non-ferrous metal ores, other non-metal ores, as well as salt). These are merely Chinese tax laws, imposing "resource taxes", on all natural resources in China, which have no link at all to the objective of the "conservation of exhaustible natural resources". In fact, the term "conservation" is not even mentioned once in both the texts of the 1994 Rules to which China is referring.

273. However, if one looks carefully at footnote 194 provided by China in its First written submission, one sees a reference to "Exhibit CHN-90", entitled "Notice of the Ministry of Finance and the General Administration of Taxation on Adjusting the Applicable Tax Rates of the Mineral Resource Taxes on High-Alumina Bauxite and Fluorspar." This Notice, which is only three in paragraphs long, was issued on the 11 May 2010 and entered into force on the 1 June 2010. It does make a specific reference to fluorspar (as well as to "refractory-grade bauxite") however it does so only in order to adjust the applicable resources tax

\(^{197}\) Exhibit CHN-89.

\(^{198}\) Exhibit CHN-91.
rate on these materials. (In fact the resource tax rate imposed on fluorspar is now of RMB20 per ton).

274. Another measure listed by China in its "list of thirteen" measures is that referred to as the "Mineral Resources Compensation Fee". When referring to this Tax in its first written submission China states as follows:

"The mineral resources compensation fee is 2 percent of the sales income of processed fluorspar multiplied by a coefficient representing the mining recovery rate. When paying the mineral resources compensation fee, the concessionaire must provide the following data: the name of the mineral, the output, the sales volume, the sales price, and the actual mining recovery rate of fluorspar and other mineral products mined and processed. Revenue generated from this fee is used mainly to finance exploration and exploitation of new reserves that will relieve supply pressures, while also increasing awareness of the finite character of minerals."

275. In the opinion of the European Union, it is evident from what China itself is stating that this "Mineral Resources Compensation Fee", (which amounts to 2% of the sales income from processed fluorspar) is actually put in place to finance the "exploration and exploitation of new reserves that will relieve supply pressures." This is a tax on processed fluorspar which had been imposed by the Chinese government with an objective which definitely seems not to be that of the "conservation of an exhaustible natural resource", but that of the generation of income through taxation on mining in order "to finance the exploration and exploitation of new reserves"- and therefore to mine even further. It is hard to understand that China now is boldly stating that this fiscal measure is actually part of its "conservation policy for fluorspar."

276. It is hard to understand how China can now pick and choose a set of Chinese laws and regulations (some of which were in force since the early 1990s), then enact some more rules in the first half of 2010 (well after the present dispute was under way before this Panel), put them together in a list, and then proceeds

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200 See China's first written submission, in paragraph 175. Footnotes omitted. Emphasis added.
to name this list of disparate and previously unconnected measures a "Conservation Policy for Fluorspar", all in order to convince this Panel that it satisfies the criteria of the Article XX(g) defence.

In the opinion of the European Union, one important fact that the Panel needs to consider is that all the measures included by China in this list, when it puts forward the claim that the measures in this "list of thirteen" form part of its "conservation policy on fluorspar", do not appear anywhere else together except in China's first written submission. They do not appear together in any other list which can be traced in any document, notice or regulation published in China before the present dispute. This "conservation policy for fluorspar" seems only to have come into existence on the 4th August 2010, the day that China filed its first written submission before this Panel.

China has done all this even when it is obvious that most of the measures concerned do not specifically deal with fluorspar at all, let alone with the "conservation of fluorspar". Is also conveniently omits to place in this list of thirteen, the actual Chinese measure imposing the export duties on fluorspar for 2009, the "Tariff Implementation Program for 2009"201, which is the actual measure imposing the export duties on fluorspar which are being challenged by the co-complainants in this dispute.

China's export duties on fluorspar are not “Made Effective in Conjunction with Restrictions on Domestic Production or Consumption”

In the opinion of the European Union, China's export duties are not "made effective in conjunction with restrictions on domestic production or consumption" and thus do not satisfy the requirement of Article XX(g) of the GATT.

The European Union has already commented in the previous section on China’s assertion that it has “adopted a comprehensive set of measures relating to the

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201 Co-complainants Exhibit JE-21.
conservation” of fluorspar. As just explained, China has provided a list of thirteen (13) measures that it considers “manage the supply, production and use” of fluorspar. According to China, the measures mentioned in this list, form part of China's "comprehensive policy for fluorspar". Beyond doing this, however, China offers no explanation in its first written submission regarding how the export restraint measures operate in relation to the other measures in the same list.

(a) The "timing" of the measures taken by China

281. First, the European Union would like to comment on the timing of the Chinese measures in question.

282. China submits to this Panel that the export duties it imposes on fluorspar are somehow a part of its "comprehensive policy for fluorspar". In fact, in its first written submission, it referred to the "2010 Circular of the General Office of the State Council on Taking Comprehensive Measures to Control the Extraction and Production of Refractory-grade Bauxite and Fluorspar", and actually cited its Preamble as a kind of "explanation" or "introduction" to this "comprehensive policy for fluorspar". One initial and very interesting fact to note about this Circular is its timing. This Circular was issued on January 2, 2010, which is a date subsequent to the establishment of this Panel, - and also subsequent to most of the other measures in the "list of 13" mentioned by China.

283. In fact the "Preamble" of the State Circular enacted by China on January 2, 2010 states the following:

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202 See China’s first written submission, Title of Section V.B.3.b.
203 See China’s first written submission, in paragraph 167.
204 See China’s first written submission, in paragraph 166.
"Refractory-Grade Bauxite and fluorspar are valuable resources that are exhaustible and non-renewable. In recent years, some enterprises have been over-exploiting, producing and processing refractory-grade bauxite and fluorspar, leading to the rapid reduction in the reserve of resources and severe environmental pollution. For the purposes of fully implementing the Scientific Outlook on Development and protecting resources and the environment, it is necessary to take comprehensive measures in such aspects as mining, administration on the production planning, taxation, environmental protection, industry entrance requirements and administration on export to control and reduce the exploitation and production quantity of fireclay and fluorspar."

284. When one looks at the wording of this Preamble, referring to both fluorspar and Refractory-grade Bauxite - (which also happen to be the only two raw materials that China has chosen to defend through Article XX(g) of the GATT1994 before this Panel) - one immediately notices its reference to the past, as it states that: "In recent years, some enterprises have been over-exploiting, producing and processing Refractory-grade Bauxite and fluorspar, leading to the rapid reduction in the reserve of resources and severe environmental pollution".

285. In the view of the European Union, the Chinese "State Circular" issued on January 2, 2010, is obviously trying to justify - (years after the event) - the imposition of the export duties on fluorspar, and at the same time it was preparing the ground for the two measures that China was to introduce later on in 2010, that is the actual measures imposing caps on the mining and production of fluorspar (as well as of "refractory-grade bauxite").

286. In fact, the mining and production caps on fluorspar (as well as on "refractory-grade bauxite") were imposed by China only as recently as April and May 2010, well into the commencement of the proceedings before this Panel, and at a much later date from when the original measures imposing the export duties were enacted. This could even be interpreted as a very obvious and direct response by the Chinese government in order to try to justify the export duties it has been imposing on fluorspar for a number of years. China has now decided to control
the extraction and production of fluorspar, possibly as a reaction to these very Panel proceedings.

287. The specific restrictions on the extraction of fluorspar (and refractory-grade bauxite) were issued in one "Circular" issued by the Chinese Ministry of Land and Resources on the 20 April 2010. The restriction limiting the extraction of fluorspar in China, is set at 11 million tons for the year 2010 (of which only 10 million tons will actually be allocated)206. As China has explained in its first written submission,207 this: "was judged necessary in light of fluorspar’s “important role in the development of the national economy”, a judgment which is actually not even remotely related to the conservation of fluorspar, as China is trying to make the Panel believe.

288. Consequent to the extraction restrictions, specific restrictions were also introduced by China on the fluorspar production (as well as on refractory-grade bauxite production). These restrictions were enacted on the 19 May 2010, (a mere twelve days prior to filing of the First written submission by the co-complainants in this Dispute), by the MIIT which published the "Circular on Passing Down the Controlling Quota of the 2010 Total Production Quantity of High-Alumina Refractory-Grade Bauxite and Fluorspar"208. The Circular restricts the volume of fluorspar production to 4.71 million tons for fluorspar blocks and 2.44 million tons for fluorspar powder209.

289. In the opinion of the European Union, the timing of the Chinese domestic restrictions on the extraction and restriction of fluorspar and bauxite is a clear indicative proof that these were definitely not measures taken "in conjunction"


207  See China's first written submission, in paragraph 182.

208  Exhibit CHN-98:  "Circular on Passing Down the Controlling Quota of the 2010 Total Production Quantity of High-Alumina Refractory-Grade Bauxite and Fluorspar", dated 19 May 2010, as stated in China's First written submission, in paragraph. 184.

209  Exhibit CHN-98: "Circular on Passing Down the Controlling Quota of the 2010 Total Production Quantity of High-alumina Refractory-Grade Bauxite and Fluorspar", Article II.
with the export duties imposed by China on fluorspar which had been in force long before April and May 2010. Thus, China cannot claim that its export duties on fluorspar, which are the measures at issue in this dispute, where taken "in conjunction with restrictions on domestic production and consumption", and as such the criteria established by Article XX(g) of the GATT 1994 are definitely not met by China.

(b) The "even-handedness" of the measures taken by China

290. China addresses the interpretation of the "even-handedness" requirement of Article XX(g) GATT 1994 in paragraphs 149 to 153 of its first written submission. While it acknowledges that the clause “if such measures are made effective in conjunction with restrictions on domestic production or consumption” is meant to “ensure […] that the burden of conservation-related measures is not imposed solely on foreign trade, but applies also to domestic trade,”210 in the opinion of the European Union, China’s further interpretation is flawed and misleading.

291. In paragraph 153 of its first written submission, China also makes a reference to the Appellate Body Decision in US – Gasoline, however China provides a slightly different meaning to the requirement of "even-handedness". In fact China states as follows:

210 See China’s first written submission, in paragraph 152.
"However, as the Appellate Body has said, and consistent with the principle of sovereignty over natural resources, Article XX(g) does not require that the restrictions on domestic and foreign supply of natural resources be identical. Pursuant to the principle of sovereignty over natural resources, resource-endowed countries, including developing countries, must manage the supply and use of those resources through conservation-related measures that foster the sustainable development of their own peoples. Provided that restrictions are imposed on domestic supply, Article XX (g) does not oblige resource-endowed countries to ensure that the economic development of other user-countries benefits equally or identically from the exploitation of their resources.\(^{211}\)

292. By basing its argumentation on this quote, China is clearly attempting to interpret Article XX(g) GATT 1994 in a way to permit the severely unequal treatment of domestic and foreign interests which is in direct contradiction with the requirements of Article XX(g) of the GATT 1994. China's highly misleading references to the principles of "sovereignty over natural resources" and "sustainable development" are not relevant in any way to this dispute.\(^{212}\)

293. China’s reasoning leads it to conclude that Article XX(g) GATT requires WTO Members invoking it to “manage the supply and use of [] resources through conservation-related measures that foster the sustainable development of their own peoples.”\(^{212}\) However the phrase “fostering the sustainable development of their own peoples” does not appear in text of Article XX (g). The premise being put forward by China, is that otherwise GATT-inconsistent measures may be maintained in order to advantage a WTO Member’s own interests at the expense of other WTO Members’ interests, is plainly contrary to the purpose of the multilateral trading system and the basic principles of the WTO itself.

294. Additionally, in paragraph 187 of its First written submission, China also states that:

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211  China’s First written submission, in paragraph. 153 - Emphasis added.

212  Ibid.
"In managing the supply and use of fluorspar, China has imposed an export duty on the product. In view of the limited quantities of the product that are made available through the extraction and production caps, this duty seeks, in turn, to restrict the quantities of fluorspar that are made available to foreign fluorspar users: all fluorspar users, including foreign users, must accept limitations on supply".

295. With this statement, China is trying to justify the export duty that it is imposing on fluorspar exported out of China, by the assertion that the extraction and domestic caps that it has introduced in 2010 (long after the imposition of the export duties on fluorspar) will impact all fluorspar users, both those located in China and those located out of China. Basically, according to China, all these users must "accept limitations on supply".

296. However the export duties which are imposed on fluorspar, only affect those users who are located outside of China. Naturally, no export duties are paid by Chinese domestic users of fluorspar. The export duties are thus an added burden on the foreign users, a burden that is not imposed on Chinese domestic users of fluorspar. This is a very clear, stark, example of the manner in which China is not treating domestic and foreign users of the raw materials in an "even-handed" manner, thus failing to meet the requirements of Article XX(g) of the GATT 1994.

297. The closest China comes to addressing the question of "even-handedness" in its First written submission is its declaration that, in relation to the export duties on fluorspar: “[w]ithout China’s export restrictions, the burden of China’s supply limitations would be borne unduly by China’s domestic users, which would undermine China’s development.”213 However, China fails to explain what these “supply limitations” consist of, and how they are unduly borne by China’s domestic users.

298. Thus, in the opinion of the European Union, the Panel should interpret the "even-handedness" requirement of Article XX(g) GATT in line with the reasoning of previous panels and the Appellate Body in US – Gasoline and US –
Shrimp. Therefore, in the opinion of the European Union, China does not meet the burden of proving that its export duties on fluorspar were made effective in conjunction with domestic restrictions, in order for them to be justified under Article XX(g) GATT.

(c) China is not "conserving " fluorspar but actively increasing the exploitation of fluorspar

299. With its first written submission, China submitted a report on fluorspar written by Dr David Humphreys. In it Dr. Humphreys makes the following statement, when commenting on the increase in China’s fluorspar reserves between 2007 and 2008.

"...data supplied by MOLAR shows China's reserves of fluorspar in the region of 29-31 million tonnes between 2001 and 2007 before rising to 43 million tonnes at the end of 2008. The figure given for 2009 is 42 million tonnes. The increase between 2007 and 2008 reflects the result of efforts to boost China's reserves through exploration but also the rise in the price of fluorspar which has had the effect of pushing fluorspar occurrences previously considered to be sub-economic into the reserves category."

300. Effectively, this statement is saying that the effect of the rise in the price of fluorspar, (which could also have been due to the imposition of the export duties on fluorspar by China), had the effect of increasing China's reserves of fluorspar. According to Dr. Humphries, this increase in Chinese fluorspar reserves is a result of efforts to boost China’s reserves through exploration and also due to the increase in the price of fluorspar. Therefore, and as a direct result of an increase in price, those "fluorspar occurrences" which previously were not classified as "reserves" (as it was not economically feasible to mine them), have now been placed into the "reserves category".

301. Is essence, the increase in the price of fluorspar is ensuring that it is now economically feasible to mine those reserves which a few years ago were

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214  Exhibit CHN-9.
215  Page 33, 2nd in paragraph.
considered to be not economically viable, as there was no profit to be made through their exploitation. This fact proves that China is not imposing export restrictions on fluorspar merely in order to conserve it is as a natural resource, as it is claiming to do in its First written submission. It is doing so as it is part of an economic strategy to restrict the world supply of fluorspar, and therefore push up its market price. With fluorspar now becoming a more profitable commodity, China will increase its fluorspar (and the world's) reserves, which would definitely encourage further mining, at least in the longer term. This is directly contrary to what China is claiming, that is that the export duties it imposes on fluorspar are part of its so-called "conservation policy for fluorspar".

4. Conclusion

302. In the opinion of the European Union, China has therefore not established that the export duties it imposes on fluorspar satisfy this requirements of ArticleXX(g) GATT.

C. China’s export quotas on bauxite are not justified by Article XX(g) GATT

303. China claims that the export quota it applies to what it calls "refractory grade bauxite" is justified by Article XX(g) of the GATT. It also states that this material is an "exhaustible natural resource with qualities that make it essential to the production of, inter alia, iron and steel".

304. Before proceeding to its arguments which challenge China's attempts to justify its export quotas on bauxite through the Article XX(g) GATT defence, the European Union would like to clarify that the claims that it is bringing against China do not only relate to the raw material which China describes as "refractory-grade bauxite", but that its claims also refer to other forms of bauxite.

216 China’s first written submission in paragraph. 496.

217 Ibid. In paragraph. 498.
In its first written submission, the European Union provided a list of raw materials (in a table form) on which China imposes export quotas. When referring to bauxite, the European Union listed two product names which fall under the heading of bauxite namely: refractory clay (Chinese Commodity No: 2508300000) and aluminium ores and concentrates (Chinese Commodity No: 2606000000). Collectively, the total quota amount imposed by China in 2009 for bauxite was of 930,000 tons. Consequently, in its claim that the export quotas that China imposes on bauxite are inconsistent with Article XI of the GATT, the European Union again refers to bauxite as including "refractory clay and aluminium ores, concentrates".

Throughout its first written submission, China refers in a consistent manner only to the material to which it refers as "refractory-grade bauxite", seemingly ignoring "aluminium ores and concentrates" which also are part of the claim made by the European Union in this dispute.

1. China's export quotas on bauxite are not “related to the conservation of an exhaustible natural resource”

The European Union asserts that the Chinese measures imposing the export quota on bauxite do not relate in any way to the "conservation of exhaustible resources".

In its first written submission, China provides no argument or support for the proposition that these export quotas “relate to” the conservation of bauxite. In fact, as the European Union will explain hereunder, the export quotas on bauxite do not even appear to bear any inherent relationship to conservation. Indeed, the export quotas on bauxite do not even come close to satisfying the “relating to” requirement as envisaged in the text of Article XX(g), which has been interpreted by GATT Panels and the WTO Appellate Body as meaning

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218 First written submission of the EU, in paragraph. 70.
219 Ibid. in paragraph. 199.
220 See China’s First written submission, in paragraphs. 496-527.
primarily aimed at the conservation of a natural resource and also as having a “close and substantial relationship of means and ends” between the "means" (that is the measure at issue) and the "ends" (that is the conservation of an exhaustible natural resource).

309. The European Union asserts that the Chinese measures imposing the export quotas on bauxite (as well as on many other products, which are not only raw materials) have no discernable relationship with the objective that China is claiming they do, that is the objective of the "conservation of natural resources".

310. The specific Chinese measure which sets the export quotas for bauxite for 2009, is that entitled "Ministry of Commerce Announcement Regarding 2009 Agricultural and Industrial Products Export Quota Amounts (Announcement No. 83 of 2008)".

311. This Announcement consists of just one in paragraph of text and announces the fact that the 2009 quota figures for agricultural and industrial product exports have been released, and that MOFCOM will accept applications for these quotas between 1 November and 15 November 2008. The in paragraph is then followed by an Attachment which lists the quota amounts for each product in the list. The entry for bauxite indicates the amount of the quota as that of 930,000 tons.

312. There is no reference, direct or indirect, to the fact that the export quota imposed by China on bauxite is in any way "relating to" the objective of the conservation of "exhaustible natural resources". The "Ministry of Commerce Announcement Regarding 2009 Agricultural and Industrial Products Export Quota Amounts (Announcement No. 83 of 2008)" contains no evident causal link to the desired objective of conservation. In the opinion of the European

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223 Submitted by the Co-Complainants as JE-79.
Union, the link to the conservation of an exhaustible natural resource, has only been argued by China, long after the actual quotas on bauxite were published.

(a) China's Export Quotas on Bauxite do not form part of a "comprehensive set of measures relating to the conservation of bauxite"

313. In its first written submission, China attempts to defend the export quotas on what it designates "refractory-grade bauxite", by claiming that it has adopted a "comprehensive set of measures relating to the conservation of refractory-grade bauxite" 224

314. In paragraph 498 of its first written submission, China states as follows:

"..... China must conserve its own refractory-grade bauxite to enable the unique benefits of this natural resource to be preserved and enjoyed for future generations. As a result, China has adopted a comprehensive conservation policy for refractory-grade bauxite, comprising closely inter-twined measures." 225

315. It continues to explain this comprehensive conservation policy by quoting extracts from the 2002 State Council Policy on Mineral Resources which mostly refers to the economic and developmental gains that China can make through the exploitation of its mineral resources. 226 It refers to the "supply of large quantities of energy and raw and processed materials for economic construction" as well as the promotion of the "rise and growth of mining cities (townships) with mineral resources exploitation as their pillar industry". 227 China's Mineral Resources Policy seems to be aimed at many objectives, however it is definitely not primarily or specifically aimed at the "conservation of bauxite".

224 China's First written submission, in paragraph 498.
225 Emphasis added.
226 China's First written submission, in paragraphs 498 and 499.
227 Ibid.
China then proceeds to present its "conservation policy for refractory-grade" bauxite as follows.\textsuperscript{228}

317. In paragraph 501 of China's FWS states that:

"The State Council has adopted a policy for the sustainable use of refractory-grade bauxite that is similar to that for fluorspar, discussed at in paragraphs 166 to 190 above. The objective identified in the 2010 Circular of the General Office of the State Council on Taking Comprehensive Measures to Control the Extraction and Production of Refractory-Grade Bauxite and Fluorspar, cited at in paragraph 166 above, is reflected in the following measures to manage the supply, production, and use of refractory-grade bauxite:"

318. This is then followed by a list of thirteen measures (listed from 1 to 13 hereunder) which are almost completely identical to the other list of thirteen measures which comprise China’s "conservation policy for fluorspar", with one exception. This is the last measure in the list which actually is the one setting the quotas for bauxite (as well as a number of other industrial materials for 2010). The measures identified by China are the following:

1) \textit{1986 Mineral Resources Law of the People's Republic of China},\textsuperscript{229} (establishing the principle of rational development and use of mineral resources and setting out the requirements that mining enterprises must satisfy);

2) \textit{1989 Environmental Protection Law of the People’s Republic of China},\textsuperscript{230} (subjecting mining enterprises to environmental requirements and standards);

3) \textit{1994 Provisional Regulations of the People’s Republic of China on Resource Tax},\textsuperscript{231} and \textit{1994 Detailed Rules for the Implementation of the Provisional Regulations of the People’s Republic of China on Resource Tax},\textsuperscript{232} (subjecting the extraction of refractory-grade bauxite ore to a mineral resource tax);

\textsuperscript{228} China’s First written submission, in paragraph. 501.

\textsuperscript{229} Exhibit CHN-78.

\textsuperscript{230} Exhibit CHN-88.

\textsuperscript{231} Exhibit CHN-89.

\textsuperscript{232} Exhibit CHN-91.
4) **1997 Provisions on the Administration of Collection of the Mineral Resources Compensation Fees**,\(^{233}\) (subjecting processing of refractory-grade bauxite ore to a fee of 2 percent calculated as a ratio of the sales income from beneficiated refractory-grade bauxite);

5) **1998 Measures for the Administration of Registration of Mining of Mineral Resources**,\(^{234}\) (providing for monitoring and enforcement of mining enterprises’ compliance with requirements relating to the “rational development and utilization of mineral resources, environmental protection”);

6) **2001 National Mineral Resources Plan**,\(^{235}\) (further defining the policy objectives of optimal exploitation and use of mineral resources);

7) **2006 Notice of the General Office of the State Council on Forwarding the Opinions of the Ministry of Land and Resources and other Authorities on the Integration of Exploitation of Mineral Resources**,\(^{236}\) (obliging small mining enterprises to consolidate, in an effort to improve efficiency and compliance with environmental regulations and standards);

8) **2008 National Mineral Resources Plan (2008-2015)**,\(^{237}\) (strengthening China’s sustainable mineral resources policy);

9) **2010 Circular of the General Office of the State Council on Taking Comprehensive Measures to Control the Extraction and Production of Refractory-Grade Bauxite and Fluorspar**,\(^{238}\) (setting out the policy for managing the exploitation and production of refractory-grade bauxite);

10) **2010 Public Notice on Fluorspar Industry Entrance Standards**,\(^{239}\) (subjecting new mining enterprises to industry entrance requirements, including social, technical, and environmental requirements);

11) **2010 Circular of the Ministry of Land and Resources on Passing Down the 2010 Controlling Quota of Total Extraction Quantity of High-

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\(^{233}\) Exhibit CHN-92.

\(^{234}\) Exhibit CHN-93.

\(^{235}\) Exhibit CHN-94.

\(^{236}\) Exhibit CHN-95.

\(^{237}\) Exhibit CHN-8.

\(^{238}\) Exhibit CHN-87.

\(^{239}\) Exhibit CHN-96.
alumina Bauxite Ores and Fluorspar Ores,\textsuperscript{240} (subjecting the extraction of refractory-grade bauxite to a quantitative limit or cap);

12) 2010 Circular on Passing Down the Controlling Quota of the 2010 Total Production Quantity of High-alumina Refractory-Grade Bauxite and Fluorspar,\textsuperscript{241} (subjecting the initial processing of fluorspar ore to a quantitative limit or cap); and,

13) 2010 Catalogue of Goods Subject to Export Licensing Administration,\textsuperscript{242} and Notice on Announcement of the 2010 Export Quota Amounts for Agricultural and Industrial Products,\textsuperscript{243} subjecting exports of refractory-grade bauxite to a quota.

319. Again, similar to the previous comments already made by the European Union on the export duties imposed by China on fluorspar, one notices that only the measures enacted by China in 2010 make any specific reference to bauxite, or to be more specific to "high-alumina refractory-grade bauxite".

320. The other measures that China listed are general regulatory or fiscal measures or general plans setting out specific policies and are not linked to the export quotas that China imposes on bauxite.

321. To cite a specific example, in paragraph 508 of its first written submission, China states as follows:

"Pursuant to the Provisions on the Administration of Collection of the Mineral Resources Compensation Fees, the mineral resources compensation fee is 2 percent of the sales income of processed refractory-grade bauxite multiplied by a coefficient representing the mining recovery rate. Revenue generated from this fee is used mainly to finance exploration and exploitation of new reserves that will relieve supply pressures, while also increasing awareness of the finite character of minerals."

322. It is evident from what China itself states that this "Mineral Resources Compensation Fee" (amounting to 2\% of the sales income of refractory-grade bauxite ") is actually put in place to the "exploration and exploitation of new

\textsuperscript{240} Exhibit CHN-97.
\textsuperscript{241} Exhibit CHN-98.
\textsuperscript{242} Exhibit CHN-7.
\textsuperscript{243} Exhibit CHN-8.
"reserves that will relieve supply pressures." This is actually a tax on bauxite which seems to have been imposed by the Chinese government as from 1986 (when the Mineral Resources Law was enacted), and its objective was not that of conservation of an exhaustible natural resource, but that of the generation of income in order to exploit the mining of natural resources even further. However, China now seems to be saying that this fiscal measure is actually part of its "conservation policy for refractory grade bauxite".

323. It is hard to understand how China can now pick and choose a set of Chinese laws and regulations (some of which were in force since the early 1990s), then enact some more rules in the first half of 2010 (well after the present dispute was under way before this Panel), put them together in a list, and then proceed to name this list of disparate and previously unconnected measures a "Conservation Policy for Refractory Grade Bauxite", in an attempt to convince this Panel that it satisfies the criteria of the GATT Article XX(g) defence.

324. In the opinion of the European Union, one important fact that the Panel needs to consider is that all the measures included by China in this list, when it puts forward the claim that the measures in this "list of thirteen" form part of its "conservation policy on refractory grade bauxite", do not appear anywhere else together except in China's first written submission. They do not appear together in any other list which can be traced in any document, notice or regulation published in China before the present dispute. Just like the "conservation policy for fluorspar" the "conservation policy for refractory grade bauxite" seems only to have come into existence on the 4th August 2010, the day that China filed its first written submission before this Panel.

325. China has done all this even when it is so obvious that most of the measures concerned do not specifically deal with bauxite at all, let alone with the "conservation of refractory grade bauxite". It also conveniently omits to place in this list of thirteen, the "Ministry of Commerce Announcement Regarding 2009 Agricultural and Industrial Products Export Quota Amounts
(Announcement No. 83 of 2008)”\(^{244}\), which is the actual measure imposing the export quotas on bauxite for 2009, which are being challenged by the co-complainants in this dispute.

2. China's export quotas on bauxite are not “Made Effective in Conjunction with Restrictions on Domestic Production or Consumption”

326. In the opinion of the European Union, China's export quotas on bauxite are not "made effective in conjunction with restrictions on domestic production or consumption" and thus do not satisfy the requirement of Article XX(g) of the GATT Agreement.

327. As just explained, China has provided a list of thirteen measures that it collectively presents as its "comprehensive policy for refractory grade bauxite".\(^{245}\) Beyond doing this, however, China offers no explanation in its first written submission regarding how the export restraint measures operate in relation to the other measures in the list.

(a) The "timing" of the measures taken by China

328. The European Union would first like to comment on the timing of the Chinese measures in question.

329. China submits to this Panel that the export quotas it imposes on what it calls "refractory-grade bauxite" are somehow a part of its "comprehensive policy for refractory grade bauxite". In fact, in its first written submission\(^{246}\), it referred to the "2010 Circular of the General Office of the State Council on Taking Comprehensive Measures to Control the Extraction and Production of Refractory-Grade Bauxite and Fluorspar", and actually cited its part of its

\(^{244}\) Submitted by the Co-Complainants as JE-79.

\(^{245}\) China’s First written submission, in paragraph. 500.

\(^{246}\) China's First written submission, in paragraph. 513.
Preamble, claiming that the objective of this Circular is to address the rapid reduction in the reserve of resources and severe environmental pollution.

330. One initial and very interesting fact to note about this Circular is its timing. This Circular was issued on January 2, 2010, which is a date subsequent to the establishment of this Panel, - and also subsequent to most of the other measures in the "list of 13" mentioned by China.

331. In fact the "Preamble" of the State Circular enacted by China on January 2, 2010 actually states the following:

"Refractory-Grade Bauxite and fluorspar are valuable resources that are exhaustible and non-renewable. In recent years, some enterprises have been over-exploiting, producing and processing refractory-grade bauxite and fluorspar, leading to the rapid reduction in the reserve of resources and severe environmental pollution. For the purposes of fully implementing the Scientific Outlook on Development and protecting resources and the environment, it is necessary to take comprehensive measures in such aspects as mining, administration on the production planning, taxation, environmental protection, industry entrance requirements and administration on export to control and reduce the exploitation and production quantity of fireclay and fluorspar."

332. When one looks at the wording of this Preamble, referring to both fluorspar and "refractory-grade bauxite" - (which also happen to be the only two raw materials that China has chosen to defend through Article XX(g) of the GATT before this Panel) - one immediately notices its reference to the past, as it states that: "In recent years, some enterprises have been over-exploiting, producing and processing refractory-grade bauxite and fluorspar, leading to the rapid reduction in the reserve of resources and severe environmental pollution."

However China, in its first written submission, chose to present this text (originally a part of a sentence in the Preamble, which was actually referring to past events), as the "objective of this Circular".

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248 China's First written submission, in paragraph. 513.
In the view of the European Union, the Chinese "State Circular" issued on January 2, 2010, is obviously trying to justify - (years after the event) - the imposition of the export quotas on "refractory-grade bauxite", and at the same time it was preparing the ground for the two measures that China was to introduce later on in 2010, that is the actual measures imposing caps on the mining and production on "refractory-grade bauxite" (as well as on fluorspar).

The mining and production caps on "refractory-grade bauxite" (as well as on fluorspar) were imposed by China only as recently as April and May 2010, well into the commencement of the proceedings before this Panel, and at a much later date than the original measures imposing the export quotas. This could even be interpreted as a very obvious and direct response by the Chinese government in order to try to justify the export quotas it has been imposing on bauxite for a number of years. China has now decided to control the extraction and production of refractory grade bauxite, possibly as a reaction to these very Panel proceedings.

The specific restrictions on "refractory-grade bauxite" (as well as fluorspar) were issued in one "Circular" issued by the Chinese Ministry of Land and Resources on the 20 April 2010. The "Circular of the Ministry of Land and Resources on Passing Down the 2010 Controlling Quota of Total Extraction Quantity of High-alumina Bauxite Ores and Fluorspar Ores,"249 limits the extraction of high-alumina bauxite ores to 4.5 million metric tons.250

In its first written submission, China stated that this was judged necessary in light of refractory-grade bauxite’s “important role in the development of national economy”251, (quoting directly from the Ministerial Circular of the 20 April 2010), which is an issue not necessarily related to the objective of the "conservation of bauxite".


250 Ibid. Article 1.

251 China’s First written submission, in paragraph. 514.
337. Consequent to the extraction restrictions, specific restrictions were also introduced by China on the "refractory-grade bauxite" production. These restrictions were enacted on 19 May 2010, (less than two weeks prior to filing of the First written submission by the co-complainants in this Dispute), by the MIIT which published the "Circular on Passing Down the Controlling Quota of the 2010 Total Production Quantity of High-Alumina Refractory-Grade Bauxite and Fluorspar". According to the Circular: The national quota controlling the 2010 production of high-alumina refractory-grade bauxite is 4.5 million tons for ores (raw materials) and 4 million tons for chamotte respectively.

338. In the opinion of the European Union, the timing of the Chinese domestic restrictions on the extraction and production of "refractory-grade bauxite" is a clear indication that these were definitely not measures taken "in conjunction" with the export quotas imposed by China on bauxite which had been in force long before April and May 2010.

(b) The "even-handedness" of the measures taken by China

339. When it comes to its defence on the export quotas on bauxite, China does not even make a reference to the "even-handedness" requirement of Article XX (g). It just simply ignores it. Instead, it includes a quotation from the "Group of Experts on Environmental Law of the World Commission on Environment and Development", (dating back to 1986), regarding the management of human use of a natural resources. This is irrelevant in the present context and has no bearing on the criteria established by Article XX(g) GATT.

252 Exhibit CHN-98: "Circular on Passing Down the Controlling Quota of the 2010 Total Production Quantity of High-alumina Refractory-Grade Bauxite and Fluorspar", dated 19 May 2010, as stated in China's First written submission, in paragraph 516.

253 Exhibit CHN-98: "Circular on Passing Down the Controlling Quota of the 2010 Total Production Quantity of High-alumina Refractory-Grade Bauxite and Fluorspar", dated 19 May 2010, Article 2.
3. Conclusion

340. Thus, in the opinion of the European Union, China cannot claim that its export quotas on bauxite, which are the measures at issue in this dispute, were taken "in conjunction with restrictions on domestic production and consumption", and as such the criteria established by Article XX(g) of the GATT are definitely not met by China.

D. China’s Export Duties on Fluorspar and Export Quotas on Bauxite do not meet the requirements of the chapeau of Article XX of the GATT Agreement

341. In the opinion of the European Union China’s export duties on fluorspar and export quotas on bauxite do not meet the requirements of the chapeau of Article XX of the GATT Agreement. The European Union will present its arguments on this matter at the end of Section VII of this Submission (Please refer to paragraphs 451 - 467 hereunder).

VIII. China’s Export Duties on Coke, Magnesium, Manganese, and Zinc as well as Its Export Quotas on Coke and Silicon Carbide do not Meet the Criteria of Article XX(b) GATT

342. China maintains export duties on various forms of coke, magnesium, manganese, and zinc in contravention of China’s obligations in paragraph 11.3 and Annex 6 of its Accession Protocol. China also maintains export quotas on coke and silicon carbide, which are inconsistent with Article XI:1 of the GATT 1994.

343. In its First written submission China asserts that these export duties and quotas are justified pursuant to Article XX(b) of the GATT 1994. As previously discussed, the European Union maintains that the exceptions in Article XX of the GATT 1994 are not available as a defence for a breach of the obligations in paragraph 11.3 of China’s Accession Protocol. However, even assuming arguendo that Article XX(b) is available as a defence, China has not demonstrated that its export duties satisfy the criteria set out in Article XX(b) of
the GATT 1994. Similarly, China has not demonstrated that its export quotas on coke and silicon carbide satisfy the criteria under Article XX(b) of the GATT Agreement.

A. An analysis on the interpretation of GATT Art XX (b) in WTO case-law

344. In order for a measure to be justified under Article XX(b) of the GATT, the measure must be “necessary to protect human, animal or plant life or health.” Thus a WTO Member who wishes to invoke the exception of Article XX(b) GATT is required to plead and prove that a measure is really intended to protect human, animal, plant life or health, and that the measure taken was "necessary" to achieve such an aim.

345. To show that a measure is aimed “to protect” life or health, the responding party in a WTO Panel must show that firstly, there is a risk to human, animal, or plant life or health; and that secondly the underlying objective of the measure is to reduce that risk. In Brazil-Tyres, the Panel referred to the previous Panel Report in EC-Asbestos and stated as follows:

"To address this question, the Panel in EC – Asbestos considered it necessary first to determine the existence of a health risk, i.e. whether the product at issue posed a risk to in that case, human life or health. Once such a risk is found to exist, the objective of the measure should be assessed to determine whether the policy underlying the measure is to reduce such a risk and thus falls within the range of policies covered by Article XX(b)."

346. Referring to previous WTO jurisprudence the Panel in EC-Tariff Preferences also clearly set out the requirements of Article XX (b) of the GATT.

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"Following this jurisprudence, the Panel considers that, in order to determine whether the Drug Arrangements are justified under Article XX(b), the Panel needs to examine: (i) whether the policy reflected in the measure falls within the range of policies designed to achieve the objective of or, put differently, or whether the policy objective is for the purpose of, "protect[ing] human … life or health". In other words, whether the measure is one designed to achieve that health policy objective; (ii) whether the measure is "necessary" to achieve said objective; and (iii) whether the measure is applied in a manner consistent with the chapeau of Article XX".255

347. In an early WTO Panel, US-Gasoline,256, when examining as to whether the measure was "necessary" in order to achieve the stated policy objectives under Article XX(b), the Panel asserted that it is the necessity of the discriminatory aspect of the measure, not the necessity of the policy goal, that is to be examined under this element.

"…The Panel noted that as the party invoking an exception the United States bore the burden of proof in demonstrating that the inconsistent measures came within its scope. The Panel observed that the United States therefore had to establish the following elements:

(1) that the policy in respect of the measures for which the provision was invoked fell within the range of policies designed to protect human, animal or plant life or health;

(2) that the inconsistent measures for which the exception was being invoked were necessary to fulfil the policy objective; and

(3) that the measures were applied in conformity with the requirements of the introductory clause of Article XX.

In order to justify the application of Article XX(b), all the above elements had to be satisfied."

348. In analyzing the meaning of “necessary” in Article XX GATT, the Appellate Body has stated that:


"an assessment of ‘necessity’ involves ‘weighing and balancing’ a number of distinct factors relating both to the measure sought to be justified as ‘necessary’ and to possible alternative measures that may be reasonably available to the responding Member to achieve its desired objective."\textsuperscript{257}

349. Moreover, in Korea – Beef, the Appellate Body reasoned that in order for a measure to be “necessary,” it must be located significantly closer to the pole of “indispensable” than to the opposite pole of simply “making a contribution to”.\textsuperscript{258}

"...the term "necessary" refers, in our view, to a range of degrees of necessity. At one end of this continuum lies "necessary" understood as "indispensable"; at the other end, is "necessary" taken to mean as "making a contribution to." We consider that a "necessary" measure is, in this continuum, located significantly closer to the pole of "indispensable" than to the opposite pole of simply "making a contribution to".

350. The Appellate Body provided further elaboration in China-Audiovisual by stating that the factors to be weighed and balanced include the contribution of the measure to the realization of the ends pursued by it.\textsuperscript{259}

351. In Brazil-Tyres, the Appellate Body reaffirmed the assessment of necessity which had been previously identified by the Appellate Body in Korea-Beef and US-Gambling.\textsuperscript{260}


\textsuperscript{260} Appellate Body Report, Brazil-Measures Affecting Imports of Retreaded Tyres – WT/DS332/AB/R- 3 December 2007, in paragraphs 142 and 143.
"In Korea – Various Measures on Beef, the Appellate Body explained that determining whether a measure is "necessary" within the meaning of Article XX(d): ... involves in every case a process of weighing and balancing a series of factors which prominently include the contribution made by the compliance measure to the enforcement of the law or regulation at issue, the importance of the common interests or values protected by that law or regulation, and the accompanying impact of the law or regulation on imports or exports.

In US – Gambling, the Appellate Body addressed the "necessity" test in the context of Article XIV of the GATS. The Appellate Body stated that the weighing and balancing process inherent in the necessity analysis "begins with an assessment of the 'relative importance' of the interests or values furthered by the challenged measure", and also involves an assessment of other factors, which will usually include "the contribution of the measure to the realization of the ends pursued by it" and "the restrictive impact of the measure on international commerce".

352. The Appellate Body in Brazil-Tyres also identified a "key element" in the analysis of necessity under Article XX (b) of the GATT. This is the "contribution" that the measure at issue brings for its objective to be achieved.

"Another key element of the analysis of the necessity of a measure under Article XX(b) is the contribution it brings to the achievement of its objective. A contribution exists when there is a genuine relationship of ends and means between the objective pursued and the measure at issue… Thus, the contribution of the measure has to be weighed against its trade restrictiveness, taking into account the importance of the interests or the values underlying the objective pursued by it.261

353. Also in Brazil-Tyres, the Appellate Body commented specifically on how a Panel might conclude that a measure is apt to produce a material contribution and therefore be deemed to be "necessary" within the meaning of Article XX (b) of the GATT 1994. In fact it stated as follows:

"Thus, a panel might conclude that an import ban is necessary on the basis of a demonstration that the import ban at issue is apt to produce a material contribution to the achievement of its objective. This demonstration could consist of quantitative projections in the future, or qualitative reasoning based on a set of

hypotheses that are tested and supported by sufficient evidence.”262

354. However the assertion that a measure which is "apt to produce a material contribution" has to be seen within the meaning that the Appellate Body in the same dispute gave to the term "material contribution". The Appellate Body did in fact state that:

"To be characterized as necessary, a measure does not have to be indispensable. However, its contribution to the achievement of the objective must be material, not merely marginal or insignificant."

355. In the opinion of the European Union, this implies that a Panel should first assess whether the contribution that a measure makes, or that a measure is apt to make, is actually a "material" one or not. The Appellate Body has already defined a material contribution as one which is not "merely marginal or insignificant". This means that a measure needs to contribute in a significant (or non-marginal) way to the achievement of its objective, which in the case of Article XX (b) is the "protection of human, animal, or plant life or health".

356. Finally, the Appellate Body has reasoned that a panel should take into account WTO-consistent, reasonably available alternative measures.264 In Brazil - Tyres, the Appellate Body265 stated that:


"...We recall that, in order to qualify as an alternative, a measure proposed by the complaining Member must be not only less trade restrictive than the measure at issue, but should also "preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued". If the complaining Member has put forward a possible alternative measure, the responding Member may seek to show that the proposed measure does not allow it to achieve the level of protection it has chosen and, therefore, is not a genuine alternative. The responding Member may also seek to demonstrate that the proposed alternative is not, in fact, "reasonably available". As the Appellate Body indicated in US – Gambling, "[a]n alternative measure may be found not to be 'reasonably available' ... where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties." If the responding Member demonstrates that the measure proposed by the complaining Member is not a genuine alternative or is not "reasonably available", taking into account the interests or values being pursued and the responding Member's desired level of protection, it follows that the measure at issue is necessary."

357. It is clear from this decision of the Appellate Body that alternative measures can be found not to be "reasonably available" if they are "merely theoretical" in nature (which means that the responding Member - in this dispute, China - would not be capable of taking them), or if such alternatives would place an "undue burden" on the respondent.

B. The export duties applied by China on zinc scrap, magnesium metal scrap and manganese metal scrap, and to coke, magnesium metal and manganese metal are not justified under Art XX (b) GATT

358. In its First written submission, China raises a defence under Article XX(b) of the GATT 1994 to the claims made in this dispute against export duties it applies to various raw materials. It then proceeds to divide some of the raw materials on which it imposes export duties into two groups. The first one to which it refers to as "non-ferrous metal scrap products" is made up of zinc scrap, magnesium metal scrap and manganese metal scrap, whilst the second group which China calls "EPR products" (energy-intensive, highly-polluting
and resource-based products) consists of coke, magnesium metal and manganese metal.266

C. The export duties applied by China on zinc scrap, magnesium metal scrap and manganese metal scrap are not justified under Art XX (b) GATT

1. The export duties applied by China do not make a material contribution or are apt to make a material contribution to the protection of human, animal or plant life or health.

359. The European Union challenges China's assertions that the export duties applied to what it terms non-ferrous scrap products are justified pursuant to Article XX (b) of the GATT 1994. China claims that these export duties "make a present material contribution, and are apt to contribute to the reduction of health risks related to metal production".267

360. China claims that in the short-term the export duties reduce the pollution levels and energy used in the production from crude ores, and in the medium to long-term they contribute to the development and use of recycling technologies.268

361. According to China, its export duties on scrap will ensure a steady supply of scrap and lead to a shift away from primary production (or production from crude ores) and toward increased secondary production. China argues that secondary production is more environmentally friendly than primary production, and, therefore, increased secondary production will lead to a reduction in health risks associated with primary production. Based on this premise, China concludes that its export duties on the scrap products are “necessary to protect human, animal or plant life or health.”

362. In the opinion of the European Union, the main problem with China’s argument is that there is simply no evidence that proves that China’s objective for the

266 China’s First written submission, in paragraph 197.
267 China’s First written submission, in paragraph 228
268 Ibid.
imposition of the export duties on the raw materials at issue in this dispute was really that of reducing health risks which are associated with pollution.

363. In its First written submission China makes the claim that its "export duties on non-ferrous metal scrap are an integral part of China’s comprehensive policy directed at reducing pollution, energy use, and health risks connected with non-ferrous metals production".269

364. However, China only points to a single statement in one document, the "National Eleventh Five-Year Plan for Environmental Protection for 2006-2010", and from the whole document only refers to the part which says that China will explore the establishment of an environmental taxation system. There is no mention of any export duty, export quota, or any raw material for that matter. However, as China itself states in its Written Submission, its underlying objectives in the imposition of export duties are actually economic ones, as "the export duties guarantee a steady and guaranteed supply of scrap which is essential to the development and use of a strong and sustainable secondary industry".271

365. In the opinion of the European Union, China has failed to establish that the export duties are "contributing to", let alone are "necessary to", accomplishing China’s purported objective. China presents no evidence that any secondary production is actually occurring in China. Instead, it merely provides an estimate that a particular rate of secondary production would result from an export duty on scrap, but provides no basis for the assumptions underlying that estimate.272 Thus, the Panel has no reliable evidence whatsoever that the export duties imposed by China are resulting in any increased secondary production of the material concerned.

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269 China’s First written submission, sub-title before in paragraph. 256.
270 Exhibit CHN-123.
271 China’s First written submission, in paragraph. 258.
272 Exhibit CHN-124, Table 1, p. 2.
366. Even taking China’s economic analysis on its own terms, (an analysis which was developed solely and specifically for the purposes of China’s defence in this dispute), the estimated increase in secondary production that supposedly could result from the export duties is decidedly modest.\textsuperscript{273} China’s economist, Prof. Marcelo Olarreaga estimates that the export duty on magnesium scrap will lead to 963 tons of additional secondary magnesium production,\textsuperscript{274} which represents approximately .002% of China’s 2009 primary magnesium production.\textsuperscript{275} He also estimates that the export duty on zinc scrap will lead to 2,730 tons of additional secondary zinc production\textsuperscript{276}, which represents approximately 6.2 percent of China’s 2009 primary zinc production.\textsuperscript{277} Even if these estimated increases in secondary production had any relationship to reality, the minor increases in secondary production disprove China’s argument that the export duties at issue are making a “material contribution” to China’s health objectives.

367. In generating these estimates, China’s economist also assumes that all scrap goes into secondary production of the metals. China has failed to provide any support for this assumption. Indeed, this assumption is fundamentally flawed as it relates to manganese scrap. As China’s own minerals economist, Dr. David Humphreys, recognized, manganese is not, as a practical matter, recycled from manganese scrap.\textsuperscript{278} The main use of manganese (95%) is in carbon steel production and, consequently, manganese is ‘lost’ and cannot be easily recovered from carbon steel scrap. Thus, secondary production of manganese simply does not occur. As a consequence, China’s defence under Article XX(b) GATT, as it relates to manganese scrap, fails for this simple reason.

\textsuperscript{273} Exhibit CHN-124, Table 4.

\textsuperscript{274} Exhibit CHN-124, Table 1, p. 2.

\textsuperscript{275} See Exhibit CHN-289, p. 7.

\textsuperscript{276} Exhibit CHN-124, Table 1, p. 2.

\textsuperscript{277} See Exhibit CHN-289, p. 10.

\textsuperscript{278} Exhibit CHN-11, n. 26; \textit{Mineral Commodities Summaries 2010}, U.S. Geological Survey, January 2010 at 98 (Exhibit JE-43).
368. As regards magnesium, 50% of its consumption is for casting alloys used in aerospace and other applications, and another significant share of consumption is for alloying additions to aluminium or other metals. This means that magnesium is either ‘lost’ in aluminium scrap or recovered as casting alloy scrap that can only be turned back into casting alloy again if properly sorted. However, casting alloy scrap which contains magnesium would be recycled into casting alloy only, and not into pure magnesium.

369. As regards zinc, some kinds of zinc scrap or residues can be combined with ores for the production of refined metal, but in a certain proportion only. The refining of metal exclusively from scrap and residue involves an entirely different metallurgical process. The main use of zinc is in steel galvanisation (50%) which gives rise to certain kind of production residues (galvanisation dross) whilst the treatment of galvanised steel scrap gives rise to zinc containing steel dust. The recovery of zinc from these residues is mainly in the form of zinc oxide (whose principal uses are in ceramics, agriculture, rubber and certain chemical applications) and a limited volume only can be recovered in the form of metal substitutable to metal produced from ore. The amount of zinc scrap arising from zinc metal applications (e.g. roofing sheets) is also quite limited.

370. In addition, China’s arguments are further contradicted by the fact that China has increased imports of the inputs used for primary production. For example, imports of manganese ores and zinc ores, used for primary manganese and zinc production respectively, have increased significantly in recent years. These facts expose the fallacy of China’s contention that the export duties are contributing to a shift from primary production to secondary production, let alone to reducing health risks. To the contrary, China continues to increase its primary production of these metals, thus knowingly increasing the environmental and health hazards associated with increased production.

371. China also states in its First written submission that: "Another important factor necessitating the imposition of export duties is that the import supply of scrap is

279 Exhibit CHN-289.
unpredictable and international markets for scrap metal volatile. This means that a steady supply of scrap metal into China from abroad cannot be guaranteed." 280

372. However the supply constraints of scrap that China is referring to are actually irrelevant to the analysis under Article XX(b) GATT. China’s statement clearly illustrates that China’s policy is designed to “guarantee” a “steady supply stream” of a raw material281 for the benefit of Chinese downstream producers. Through China’s imposition of export duties on the raw materials, the Chinese downstream producers will have increased access to lower-priced inputs, and therefore gain an advantage over competing downstream producers located in other WTO Members.

2. China’s arguments are based solely on studies by its Advisers

373. China’s economic studies which were presented in their First Submission were developed solely for the purpose of China’s legal defence in this dispute. The economic arguments and assumptions made in Prof. Olarreaga’s Statements or Reports are not in themselves sufficient to prove that the restrictions taken by China are necessary to protect human, animal or plant life or health, which is the legal standard required by Article XX (b) of the GATT Agreement.

374. Prof. Olarreaga’s theories, assumptions, and econometric regressions do not prove that the export restrictions that China imposes make a "material contribution", or that they are "apt to make a material contribution" towards the attainment of China’s supposed objective, - that is the "protection of human, animal or plant life or health".

375. The analysis presented in the Statement written by Prof. Olarreaga (entitled "Simulating the Impact of Certain Export Restrictions on Domestic Production

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280 China’s First written submission, in paragraph. 267
281 Ibid.
and Consumption of Several Materials in China"), \(^{282}\) does not consider the impact of export restrictions on both domestic production and domestic consumption of the two types of goods, (i.e. magnesium and manganese scrap as well as unwrought magnesium and unwrought manganese produced from newly extracted magnesium or manganese ore).

376. It rather chooses to focus on the domestic consumption impact of the export tax on magnesium and manganese scrap, whilst it ignores its impact on production. It considers the domestic production impact of the export restrictions on primary metals produced from newly extracted magnesium or manganese ore, at the same time ignoring the effects on domestic consumption. By doing so, the analysis fails to provide an accurate account of the impact of the exports taxes considered and does not shed any light on the overall correlation and interaction of the export restrictions which in consequence exclude the applicability of the Article XX (b) exception. However one cannot, as China does, draw any conclusions from the introduction of export restrictions for zinc scrap, magnesium metal scrap and manganese metal scrap without taking into account the existing restrictions existing for the primary metals made from newly extracted magnesium or manganese ore.

377. What actually happens is that the imposition of an export restriction for zinc scrap, magnesium metal scrap and manganese metal scrap redirects to the domestic market a part of the supply that was previously exported, thus leading to a reduction of the domestic price of the "taxed" raw material because of a higher availability on the market. This will have a negative impact on the aggregate level of domestic production of the raw material, and at the same time it encourages domestic consumption.

378. Hence, the simultaneous introduction of export restrictions on e.g. magnesium and manganese scrap, as well as on the primary metals made from newly extracted magnesium or manganese ore will increase the domestic consumption

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\(^{282}\) Exhibit CHN-124 - Expert Statement by Prof. M. Olarreaga entitled "Simulating the Impact of Certain Export Restrictions on Domestic Production and Consumption of Several Materials in China".
in China of all these materials. This casts doubts on the efficiency of this policy as a strategy to promote better environmental conditions.

379. In fact, the consumption of newly extracted metals in downstream industries will increase (as prices of the primary metals made from extracted ores will be artificially lowered due to the export tax), which will obviously have an environmental cost in itself. Moreover, insofar as primary metals made from extracted materials and metals made from scrap materials are substitutes (as inputs in downstream productions), the positive impact on domestic consumption of scrap metals may be undetermined. This means that China's stated objective of encouraging a shift from primary production (from extraction) to secondary production (from scrap) for environmental reasons is challenged.

380. In the short run, the exact effect on the domestic consumption of magnesium and manganese scrap will depend on how the relative price of the magnesium and manganese scrap (as well as the metals made by newly extracted magnesium or manganese ore changes in China after the introduction of the export taxes). The two export taxes cannot be analysed in isolation as was the case in the Statement submitted by Prof. Olarreaga.

381. China does not seem to consider the impact of the simultaneous introduction of export taxes on these two groups of goods, which actually ends up undermining its purported environmental objective. China’s real objective rather seems to be the promotion of downstream production via the availability of cheaper inputs (which are coming both from primary and secondary production) to downstream industries, at the expense of its trading partners.

382. However, there is an impact introducing export restrictions simultaneously on the two type of goods: that is the metals produced from the newly extracted raw materials (e.g. unwrought magnesium and unwrought manganese), and magnesium and manganese metal scraps. As the diversion of supply away from foreign markets depresses domestic prices of both products in China, the impact on the production and consumption becomes uncertain.
383. There is actually a self-defeating purpose in China's strategy of imposing export restrictions in order to encourage a shift to a less polluting economy. The export duties on unwrought metals (imposed since 2006 for manganese and 2008 for magnesium) decreases the domestic price of these products in China. This in turn leads to higher domestic consumption. A reduction in domestic extraction would therefore appear highly unlikely. However, this is not matched by a reduction in domestic consumption of the raw extracted metals in China. In fact, the lower domestic prices of unwrought metals (which can only be produced from ores) due to the higher availability as a result of the export restrictions encourage higher consumption of newly extracted metals at home (using part of the production that was diverted away from foreign markets, and at the expense of trading partners). The consequence of this is an artificial incentive given to downstream producers to use more raw metals ores.

384. Such an increase in domestic consumption of the raw metal ores could lead to less consumption of scrap metals in downstream production. In this case this effect is not straightforward given that China is also imposing export duties on the scrap metals, which also pushes down prices of these materials in the Chinese domestic market.

385. The lower price of scrap metals will eventually lead to a reduction of domestic production of scrap, as in the longer term there are fewer incentives for Chinese domestic firms to invest in the recycling of scrap metal. In fact, one of China’s advisers, Dr. David Humphreys acknowledges the fact that scrap supply is sensitive to prices. According to Dr Humphreys: "Too low prices disincentive scrap collection and have the effect of reducing scrap availability"\(^{283}\). Dr Humphreys also goes on to say that the "...recycling of metal scrap critically depends....ii) the availability of a sufficiently large metal scrap resource base within an economy"\(^{284}\).

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\(^{283}\) Exhibit CHN-443 -Responses to Panel Questions - drafted by Dr. David Humphreys. Page 5, 1st line.

\(^{284}\) Ibid. Page 5, 3rd in paragraph.
386. Basing its arguments on the views expressed by Prof. Olarreaga, China then proceeded to turn the values he provided as a basis for further calculations (reproduced in its First written submission) which are supposed to prove the "total pollution reduction from recycling".

387. In a Table reproduced in its First written submission, China provides different values which had been previously estimated by Prof. Olarreaga, showing in metric tons the "production of secondary metal afforded by export duty". Table 2 provides different values for zinc scrap, magnesium metal scrap and zinc scrap.

388. China then uses these values as a basis for further estimations it makes, in order to obtain what it terms "total pollution reduction from recycling". China provides these calculations reproduced in four different Tables, representing SO₂, CO₂, PM, and NOₓ and provides separate calculations for "pollution saved as a result of the imposition of the export duties at issue".

389. While the European Union does not contest the fact that reduction in harmful air emissions and reduced air pollution have a beneficial effect on human, animal, plant life or health, it fails to understand how China can make the assertions it has made on the "beneficial effects of export duties on health", and then expect this Panel to accept that by providing these estimates based on flawed economic assumptions, it has somehow proven that they are "necessary" within the meaning of Article XX (b) of the GATT Agreement.

390. China also claims that in the export duties it imposes, in the medium to long term "contribute to the development and use of recycling technologies".

285 China’s First written submission, in paragraph. 270, Table 2.

286 Expert Statement submitted as Exhibit CHN-124.

287 China’s First written submission, in paragraph. 272, Tables, 3, 4, 5 and 6.

288 Ibid.

289 China’s First written submission, in paragraph. 228.
391. Some of the essential factors to the development of recycling are: the availability of an economically viable metallurgical technology for recycling, the effectiveness of a scrap collection network, as well as the availability of scrap as a function of the life-cycle of the user products and the usage itself (dissipative or not).

392. These are factors which determine to a large extent the economics of recycling and hence its development. Export restrictions on scrap do not contribute, in fact, to the arising of any of the above mentioned essential factors and are therefore irrelevant to the objective of developing the recycling industry in China.

393. On the contrary, by closing the domestic market for scrap, they dampen its value and therefore reduce the economic interest of supplying scrap to the market, thereby reducing the potential for development of a sound and profitable recycling industry, and creating more risk than benefits to the environment, as scrap would be left aside and land-filled rather than recycled.

394. In sum, China’s theories and estimations lack one important and indeed essential factor. They do not show that there is a "genuine relationship of ends and means between the objective pursued and the measure at issue"\(^\text{290}\), and thus do not contribute in a material way to the achievement of China’s supposed objective—health protection. As such, they cannot be deemed to be "necessary" within the meaning of Article XX (b) of the GATT.

3. **Reasonably available alternatives**

395. In the opinion of the European Union, there are a number of reasonably-available, WTO-consistent alternatives that China could employ to accomplish China’s desired level of health protection. Since China’s stated concerns with life and health relate to the pollution associated with primary production, these

alternatives could include the imposition of more stringent pollution controls on the primary production of the metals.

396. For example, China could invest in more environmentally friendly technologies, which emit less harmful emissions in the atmosphere, in order to further its objective of health protection. In contrast to China’s export duties, these measures would more directly and measurably address the pollution effects of primary production. China could also encourage and promote further the recycling of consumer goods in order to promote the development of a stable supply of scrap domestically.

4. Conclusion

397. For the foregoing reasons, China has failed to demonstrate that its export duties on zinc scrap, magnesium metal scrap and manganese metal scrap satisfy the requirements of subparagraph (b) of Article XX of the GATT 1994.

D. The export duties applied by China on coke, magnesium metal and manganese metal are not justified under Art XX (b) GATT

1. The export duties applied by China do not make a material contribution or are apt to make a material contribution to the protection of human, animal or plant life or health.

398. China asserts that its export duties on magnesium metal, manganese metal and coke, are justified under Article XX(b) of the GATT Agreement. China’s defence is that it imposes export duties on these products in order to bring about reduced production of these products and, therefore, reduced pollution associated with their production. China claims that they are ‘necessary for the protection of human, animal, and plant life or health by virtue of their contribution to the reduction of the polluting and energy-intensive production of coke, magnesium metal, and manganese metal.’

291  China’s First written submission, in paragraph. 285.
However, in the opinion of the European Union, China has failed to establish that the requirements of Article XX(b) are met, and so the export duties it imposes on coke, magnesium metal and manganese metal are not justified by Article XX(b) of the GATT Agreement.

As China itself has stated in its First written submission increased environmental standards can have the effect of reducing the production of some raw materials in some countries. However the stricter environmental standards imposed in these countries did not include the imposition of export duties. China states that: ‘In effect, the pollution standards have forced EU and US miners, refiners and basic manufacturers of basic materials, minerals and metals to ‘price’ the costs of environmental externalities. This has reduced the profit margin of existing manufacturing facilities, and hence decreased the overall production of EPR products in developed countries’.

In its First written submission, China claims that "The export duties on the EPR products are an integral part of China’s comprehensive environmental policy aimed at reducing the health risks related to the production of these products." It then states that they ‘are taken in implementation of the National Eleventh Five-Year Plan for Environmental Protection’. However what the "National Eleventh Five-Year Plan" actually states is that when China will introduce or reform its resource, consumption, import or export taxes environmental protection requirements ‘will be taken into account’. There is no mention in this Plan that China was planning to impose export duties in order to protect health, as it is claiming before this Panel in this dispute.

China would like to convince this Panel that the export duties in place would actually decrease the production of these raw materials in China, thereby decreasing pollution, which would in turn have a beneficial effect on health.

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292 China’s First written submission, in paragraph, 302.
293 China’s First written submission, in paragraph, 308.
294 China’s First written submission, in paragraph, 312.
295 Ibid.
The European Union asserts that this theory is totally fallacious, and in fact the production figures in China over the last years have already proved the contrary i.e. a steady increase in production associated with a commensurate increase in pollution and consequent health hazards.

403. In its First written submission, China claims that "The export duties signal Chinese manufacturers to slow down production and to lower output to sustainable levels. Industries characterized by slack responses to price changes, such a credible signal has a more immediate effect on producers and manufacturers than changes in market prices."296

404. China also alleges that "the export duties on coke, magnesium metal, and manganese metal are an important part of the initial stage of this shift by reducing demand and signaling the need for producers to reduce production of these EPR products."297

405. The European Union rebuts China's assertion that the export duties are in any way signalling the Chinese manufacturers so slow down production. What is actually happening is that production has increased, with the result that Chinese domestic consumers of these raw materials are actually consuming more at a lower price.

406. In reality, the production of all these raw materials has kept increasing, as can be seen in the production figures reproduced in Table 1 reproduced below. Therefore the export duties have not had any 'signalling effect' on Chinese producers of these raw materials to reduce production, as China alleges in its First written submission, but has had as a practical consequence, a significant increase in production.298

296  China’s First written submission, in paragraph, 326.
297  China’s First written submission, in paragraph, 332.
298  Ibid.
407. To the contrary, the development of the downstream industry in China, (e.g. steel) encouraged through various ways by the Chinese authorities has lead to an increase demand and therefore increased production of these raw materials.

408. For example, the production of coke in China has witnessed spectacular developments over the last two decades, and production has more than doubled over the last 10 years. Therefore the European Union would argue that export restrictions imposed by China has led to a decrease in domestic prices of coke, which have led in turn to increased production and consumption of coke.
## TABLE 1

<table>
<thead>
<tr>
<th>Product</th>
<th>Production of the product in China (Sources: CHN-289, USGS for coke)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Coke</td>
<td><em>increase</em> (see figure 1, p. 6, CHN 147)</td>
</tr>
<tr>
<td></td>
<td>Coke, all types</td>
</tr>
<tr>
<td></td>
<td>2004 177,480</td>
</tr>
<tr>
<td></td>
<td>2005 232,820</td>
</tr>
<tr>
<td></td>
<td>2006 280,540</td>
</tr>
<tr>
<td></td>
<td>2007 328,940</td>
</tr>
<tr>
<td></td>
<td>2008 323,590</td>
</tr>
<tr>
<td>Magnesium</td>
<td>Increase</td>
</tr>
<tr>
<td></td>
<td>2004 442,400</td>
</tr>
<tr>
<td></td>
<td>2005 450,800</td>
</tr>
<tr>
<td></td>
<td>2006 519,700</td>
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<tr>
<td></td>
<td>2007 624,700</td>
</tr>
<tr>
<td></td>
<td>2008 630,700</td>
</tr>
<tr>
<td></td>
<td>2009 501,800</td>
</tr>
<tr>
<td>Manganese</td>
<td>Increase</td>
</tr>
<tr>
<td></td>
<td>2006: 422 ktons</td>
</tr>
<tr>
<td></td>
<td>2007: 749 ktons</td>
</tr>
<tr>
<td></td>
<td>2008: 898 ktons</td>
</tr>
<tr>
<td></td>
<td>2009: 1,131 ktons</td>
</tr>
<tr>
<td>Silicon carbide</td>
<td>Increase</td>
</tr>
<tr>
<td></td>
<td>2006 850,000</td>
</tr>
<tr>
<td></td>
<td>2007 1,000,000</td>
</tr>
<tr>
<td></td>
<td>2008 1,450,000</td>
</tr>
<tr>
<td></td>
<td>2009 1,600,000</td>
</tr>
<tr>
<td>Zinc scrap</td>
<td>Increase</td>
</tr>
<tr>
<td></td>
<td>2005 2,776,133</td>
</tr>
<tr>
<td></td>
<td>2006 3,162,732</td>
</tr>
<tr>
<td></td>
<td>2007 3,742,620</td>
</tr>
<tr>
<td></td>
<td>2008 3,913,092</td>
</tr>
<tr>
<td></td>
<td>2009 4,356,674</td>
</tr>
</tbody>
</table>
China’s adviser Prof. Olarreaga, acknowledges the increased consumption of the metals as a result of the export duties. However, he does not account for the fact that the reduced price in China for these industrial inputs will stimulate demand for these inputs by downstream producers. Indeed, the production of steel and aluminium has increased significantly while China has maintained an export duty on the inputs. China addresses the products on which it imposes export duties and the pollution associated with their production in isolation and simply ignores the pollution that would result from increased downstream production. This exposes once more the fallacy of China’s argument that the export duties are making a contribution to a reduction in pollution, let alone that the measures are necessary to accomplish that objective.

Moreover, if China’s theory were correct that increased consumption of scrap promotes cleaner, more environmentally friendly production, the export duties on the metals and coke could only have the opposite effect. They stimulate increased downstream consumption, which itself results in additional pollution.

China’s production of manganese metal, and coke have in fact increased in recent years according to the data China submitted and as Table 1 clearly shows. Magnesium metal production increased steadily until the global economic downturn in 2009. This directly contradicts China’s contention that its export duties contribute to reduced production of the materials. China’s own argument recognizes this as China presents estimates of reduced production based on an economic model, but no evidence of actual decreases in production. Thus, there is no evidence that the production of the products at issue is decreasing, let alone that the export duties are contributing to a reduction of the health risks associated with pollution.

In fact, China significantly downplays the effects of its policies downstream and the environmental damage that results from increased downstream production.

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299 Exhibit CHN-124, p. 8.
300 Exhibit CHN-289.
301 Exhibit CHN-124.
using magnesium, manganese, and coke. Magnesium metal is principally used in the production of aluminium, manganese metal is primarily used in the production of aluminium, steel, and other alloys, and coke is used to make both iron and steel. Because the export duties on magnesium metal, manganese metal, and coke reduces the price of those inputs for downstream producers within China, demand for these inputs increases, resulting increased downstream production. The increased downstream production activity in turn also causes environmental pollution, an issue which China fails to address in its First written submission.

413. China states in its First written submission, that its measures "are apt to make a material contribution to the reduction of health risks connected to the production of EPR products." It continues to explain this concept by making blanket statements about the pollutants, the energy consumed and the choice of technologies. However it also admits that it is "still in the process of shifting how it produces and consumes the materials at issue".

414. Surprisingly China also states that "export duties imposed on EPR products are a WTO-consistent and efficient tool to speed up industry restructuring." According to China this would come about as "only the most efficient producers are able to remain business; small-scale, inefficient, and more polluting manufacturers are forced to exit the market, or must merge to form larger, more efficient entities." China is assuming a false premise, as surely the bigger producers would presumably step in to fill in the gap in the market left by the

302 European Union’s First written submission, in paragraph. 42.
303 Mexico’s First written submission, in paragraphs. 54-56.
304 U.S. First written submission, in paragraph. 40.
305 China’s First written submission, sub-title (iv) before in paragraph. 329.
306 China’s First written submission, in paragraph. 330.
307 China’s First written submission, in paragraph. 331.
308 China’s First written submission, in paragraph. 333.
309 Ibid.
smaller ones. If the new entities would also become more efficient, at the minimum production would remain the same. However the probable result would be an increase in production due to the presumed increase in efficiency.

415. China continues to make blanket unsubstantiated assumptions also about energy use. It states that "export duties can contribute to reducing energy use. Export duties reduce production, and therewith energy consumption in the three industries at issue"\(^{310}\). China is therefore assuming that the effect of duties is a reduction in production, which would in turn lead to a reduced energy use. However this assertion cannot be proven by China. As pointed out above, in fact the contrary happened, production – and commensurate energy consumption - increased significantly since the export restrictions were introduced by China.

2. Reasonably Available Alternatives

416. Finally, China’s measure must be analyzed in light of WTO-consistent, reasonably available alternatives. To the extent that China seeks to control environmental pollution associated with the production of magnesium metal, manganese metal, and coke, China could, for example, require producers of those products to comply with environmental regulations that control the polluting effects of their production processes in China and require producers to shift to less environmentally harmful production processes.

3. Conclusion

417. In the opinion of the European Union, China has not shown that the export duties it imposes on magnesium metal, manganese metal, and coke make a material contribution towards the protection of human, animal or plant life or health. As such the export duties are not "necessary" and are not justified by Article XX(b) of the GATT 1994.

\(^{310}\) China’s First written submission, in paragraph 336.
E. **The export quotas applied by China on coke and silicon carbide are not justified under Art XX (b) GATT**

1. **The export quotas applied by China do not make a material contribution or are apt to make a material contribution to the protection of human, animal or plant life or health.**

418. The European Union submits that China’s export quotas on coke and silicon carbide are also not justified pursuant to Article XX(b) of the GATT 1994.

419. China’s argument in support of this defence is based on the same theory that it uses to argue that its export duties on magnesium metal, manganese metal, and coke are justified pursuant to Article XX(b) of the GATT 1994, that is that they are “necessary” to protect human, animal, plant life or health due to the fact that the export quotas result in less production of these products and, therefore, less pollution.\(^{311}\)

420. For the reasons already discussed in the context of the export duties on magnesium metal, manganese metal, and coke, this line of reasoning does not withstand scrutiny.

421. Indeed in its First written submission China again makes its assertion that "**The objective of the export quotas applied to coke and silicon carbide is to reduce health risks resulting from high levels of pollution and energy use connected with the production of these products.**" \(^{312}\)

422. The only two documents that China refers to in order to support this objective are an "**Assessment on Relevant Issues Regarding Continued Application of Export Quota Administration to Silicon Carbide**"\(^{313}\) prepared by MOFCOM in 2010, years after the imposition of the quotas on coke and silicon carbide, and a

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\(^{311}\) China’s First written submission, in paragraphs 542-558.

\(^{312}\) China's First written submission, in paragraph 539.

\(^{313}\) Exhibit CHN-286 referred in paragraph 540 of China's First written submission.
reference to the "11th Five Year Plan for National Economic and Social Development" 314

423. Then China proceeds to bring arguments 315 based on the econometric studies and simulations 316 which suggest that the quotas imposed by China would result in decreases in domestic production of these materials. These are the entirety of the Chinese arguments in their attempt to prove the "necessity" requirement of Article XX (b).

424. China states in fact that "the export quotas at issue make a material contribution to the reduction of health risks resulting from high levels of pollution and energy is connected with the production of both products. Professor Olarreaga of the University of Geneva estimates the effects of the export quotas on coke and silicon carbide on the domestic production in China" 317

425. According to China the export quotas it imposes on coke and silicon carbide are also "apt to make a material contribution to the reduction of health risks resulting from high levels of pollution and energy use connected with the production of both products". 318

426. The European Union challenges China's assertions that the export quotas on coke and silicon carbide "make a material contribution", or "are apt to make a material contribution" to the objective of health protection in China. It is also of the opinion that they are not based on any hard evidence, but merely on economic hypotheses which can be easily disproven.

427. China also refers to the fact that "Prof. Olarreaga notes several key economic reasons why a government should impose an export quota in addition to an

314 Exhibit CHN 144 referred to in paragraph 541 of China's First written submission.

315 China's First written submission - in paragraphs 542 to 546.

316 Produced by Prof. M. Olarreaga, presented as Exhibits CHN 124 and CHN 147.

317 China's First written submission, in paragraph 545.

318 China's First written submission, in paragraph 555.
export duty that functions as the 'binding constraint', as doing so would allow a "country to protect itself from sudden demand shocks". This objective however is in no way connected to the objective envisaged by Art XX(b) of the GATT Agreement, which is the protection of health. This is, purely and simply, an economic argument, which proves the European Union's assertion that China's export quotas on coke and silicon carbide are definitely not motivated to protect health in China.

428. The European Union would now like to make some more specific comments on the "Econometric Study of the Import of Export Restrictions in China on the Domestic Production of Coke" written by Prof. Marcelo Ollarreaga and submitted by China as "Exhibit CHN-147".

429. The paper shows that while the export duties (taxes) or export quotas on coke may have had a negative effect on domestic production (ceteris paribus), they also encouraged more domestic consumption of this raw material, as a result of lower domestic prices.

430. Furthermore, the reduction in domestic prices due to the introduction of the export duties (taxes) make the former reflect even less the negative environmental externality associated with consumption of coke. Therefore, the export tax fails to promote a more efficient use of this polluting resource, which would be the optimal outcome from a sustainability point of view.

431. The European Union also has some important reservations regarding the empirical methodology that was used in the analysis, which casts doubts on the robustness of the results obtained.

432. Firstly, the specification adopted is not very clear. One can suppose that the two equations were estimated simultaneously but there is not enough explanation on how this was done.

433. Secondly, the specifications of the equations themselves raise some important questions: (1) There is obviously a problem of endogeneity between the

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319 China's First written submission, in paragraph. 548
dependent variable (prod/cons) and the regressors (cons/prod) as both are simultaneously determined. (2) There is also a problem of endogeneity between the trade policy variables and the other regressors (e.g. production and consumption); the two are not independent. (3) There is obviously a problem of missing variables in the regression as both production and consumption depend on many other factors. For example, in the production equation it is difficult to see why there is nothing on export/foreign demand or prices.

434. The chosen sample period (1995 to 2010), also raises concerns with respect to the econometric approach used. Since there are export duties and quotas since 2004, this means that between 1995 and 2004 (the larger part of the sample) what is captured by this specification is an estimation of production on consumption, and consumption on production.

435. The European Union has prepared Graph 1 (see below), which shows that China's export quotas on coke since 2004, followed by export duties since 2006 had no considerable impact on the evolution of domestic consumption and production in China. The only real (and also temporary) reduction of production and consumption of coke in China was triggered by the strong global demand slump that followed the international financial crisis of 2008 and 2009.

436. What Prof. Olarreaga has actually computed is the elasticity of production and consumption on the export restrictions, ceteris paribus. Moreover the estimations are done using a very simple econometric specification that does not take into account many other factors that can affect the impact of the export restrictions on consumption and production.

437. Overall what the figures show is that the strategy of using export restrictions to reduce domestic production of coke in China has not led to any results. In the absence of other more effective policy instruments, the desired effect on production has not been achieved (notably due to the generalised upward pressure on prices due to buoyant global demand). Hence, the policy strategy has failed to reach its purported objective (that is the decrease of coke production in China), while it negatively affected China's trade partners.
438. The European Union also has some additional comments to make on the reply given by Prof. Olarreaga in response to Question 43 of the Panel.\textsuperscript{320} Prof. Olarreaga states as follows:

"The imposition of export restrictions will allow China to develop its economy in the future towards point A\textsuperscript{321} (in the "Environmental Kuznets Curve") and that "Thus, export restrictions are likely to stimulate industrialization and afford a successful transformation of China's productions pattern", and that "as the economy moves towards higher income levels, it shifts down the EKC towards point A, helping China to achieve its long-term environmental goals."\textsuperscript{322}

439. In the opinion of the European Union, the erroneous premise with this line of thought is that it considers that there is a single path for growth and development while totally dismissing the impact of technological change, which has radically changed production processes across all industries and opened up

\textsuperscript{320} Contained in Exhibit CHN-442 (pages 4-7).

\textsuperscript{321} Exhibit CHN-442, in paragraph 19.

\textsuperscript{322} Exhibit CHN-442, in paragraph 20.
an huge array of new possibilities for an economy to prosper while integrating in the world economy, (of which China is probably the best example).

440. The "Environmental Kuznets Curve", to which Prof. Olarreaga refers, may be accurate to depict, from an historical perspective, the development path followed by the advanced economies. But it should be interpreted in the light of the existing framework conditions these countries faced, most notably the available technology.

441. However, technologies are not static, they evolve continuously following a dynamic process that has in fact accelerated quite dramatically over the last decades. Plus, the process of globalisation itself has led to greater and more rapid transfer of technologies across borders. Furthermore, given the mounting environmental concerns new technologies are becoming cleaner and notably more efficient in terms of the use of resources. It would thus be incomprehensible if China did not take advantage of the opportunities that are presented to it to follow a more sustainable and greener path as it approaches higher income levels. Instead it is focusing on giving downstream industries wrong incentives (via artificially low prices) that are actually promoting an over-production and over-consumption of raw materials.

442. China can in fact to a large extent free-ride on the wealth created by the more advanced economies and take advantage of the available technologies to improve the management of its natural resources and to develop alternative production techniques that are more environmentally sustainable in the long-run.

443. Prof. Olarreaga also states that "An export restriction can successfully address both externalities: it counters the negative pollution externality (by bringing down production and therewith pollution), while at the same time capturing the positive externality (by helping the economy to grow,"323 and that "in the short

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323 Exhibit CHN-442, in paragraph. 21
term, export restraints have an immediate effect on pollution by bringing down levels of production in the exporting country.\(^{324}\)

444. In the opinion of the European Union, the greater availability of new greener technologies are the sources of real positive externalities that China should be looking to take advantage of, rather than artificially lowering prices of natural resources for its domestic consumption.

445. Furthermore, the available data for consumption and production of coke in China confirms that export restrictions had no effective impact in reducing China's dependency on coke, and therefore with the pollution associated with its production and consumption in downstream industries. The only visible effect was the diversion of production away from foreign markets and into China's domestic consumption (which benefits from lower prices). It is important to note that when the resources (on which an export restriction is imposed) are consumed domestically (as it is the case in China), the export restriction is equivalent to a subsidy on domestic consumption (in downstream industries).

446. Given this incentive for more resource-intensive production in downstream industries in China, it is difficult to see how this policy can contribute to put in place a credible policy strategy to promote better environmental standards. If there is a negative environmental externality associated with the extraction of some of these raw materials this should be internalised in the price of these goods to moderate their demand and promote more efficient use of these resources. An export restriction does this only partially as it impacts only on foreign consumers, thus creating an unjustified and inefficient discrimination bias in the market place.

447. Moreover, China also seems to completely disregard the issue of negative cross-border environmental spill-over effects. As export restrictions promote excessive consumption of these raw materials in China's domestic market and also increase international prices, China is in fact giving an incentive for further extraction elsewhere. Thus it could be said that China is not really making a

\(^{324}\) Exhibit CHN-442, in paragraph 22.
positive contribution to the environmental challenge but it is in fact aggravating
the problem from a global point of view. Pollution is a global problem that
cannot be solved with beggar-thy-neighbour policies. Shifting polluting
activities from one location to another is not going to lead to a lasting positive
impact on the environment.

China argues that it has an interest in improving environmental protection, an
interest that many WTO Members undoubtedly share. However, the exportation
of the products at issue is, in fact, entirely unrelated to environmental pollution.
As China itself argues, it is the production of these products, not their export,
that causes pollution. Thus, restraints on the export of the products at issue bear
no direct relationship to China’s environmental goals, nor are they, by any
measure, “necessary” to accomplish those goals. The restraints, however, do
have a direct economic effect in terms of meeting China’s economic goals of
providing a competitive advantage to its industrial users of raw materials.
China’s export duties and quotas are part of an effort to secure a steady supply
of important raw materials for its manufacturing industries in order to encourage
their shift to higher, value-added manufacturing.\textsuperscript{325}

2. **Reasonably Available Alternatives**

Finally, China’s measures must be analyzed in light of WTO-consistent,
reasonably available alternatives. To the extent that China seeks to control
environmental pollution associated with the production of coke and silicon
carbide, China could, for example, require producers of those products to
comply with environmental regulations that control the polluting effects of their
production processes in China and require producers to shift to less
environmentally harmful production processes.

3. **Conclusion**

In the opinion of the European Union, China has not shown that the export
quotas it imposes on coke and silicon carbide make a material contribution

\textsuperscript{325} U.S. First written submission, in paragraphs. 29-31.
towards the protection of human, animal or plant life or health. As such the export quotas are not "necessary" and are therefore not justified by Article XX(b) of the GATT 1994.

F. China's defences for its export duties and export quotas on the raw materials at issue do not satisfy the requirements of the Article XX chapeau of the GATT Agreement.

1. Analysis of the interpretation of the GATT Article XX chapeau

451. The chapeau of Article XX of the GATT Agreement states that:

"Subject to the requirements that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:"

452. Thus, in addition to being justified under any of the sub-articles of Article XX of the GATT 1994, any measure which is being defended under this Article, must additionally satisfy the requirements of the chapeau of Article XX, namely that it must not be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.

453. The Appellate Body in US-Shrimp\textsuperscript{326} considered that the Article XX chapeau of the GATT Agreement:

".....embodies the recognition on the part of WTO Members of the need to maintain a balance of rights and obligations between the right of a Member to invoke one or another of the exceptions of Article XX, specified in paragraphs (a) to (j), on the one hand, and the substantive rights of the other Members under the GATT 1994, on the other hand.....thus, a balance must be struck between the right of a Member to invoke an exception under Article XX and the duty of that same Member to respect the treaty rights of the other Members. To permit one Member to abuse or misuse its right to invoke an exception would be effectively to allow that Member to degrade its own treaty obligations as well as to devalue the treaty rights of other Members."

454. It continued by describing the Article XX chapeau as "one expression of the principle of good faith", 327 which is a general principle of law and also a general principle of international law.

455. In Brazil-Tyres, 328 the Appellate Body commented on the requirements of the Article XX chapeau and said that these are two-fold:

"First, a measure provisionally justified under one of the in paragraphs of Article XX must not be applied in a manner that would constitute "arbitrary or unjustifiable discrimination" between countries where the same conditions prevail. Secondly, this measure must not be applied in a manner that would constitute "a disguised restriction on international trade". Through these requirements, the chapeau serves to ensure that Members' rights to avail themselves of exceptions are exercised in good faith to protect interests considered legitimate under Article XX, not as a means to circumvent one Member's obligations towards other WTO Members".

2. "Arbitrary or unjustifiable discrimination between countries where the same conditions prevail"

456. The Appellate Body in US-Shrimp 329 concluded that:

"this discrimination must occur between countries where the same conditions prevail. In United States – Gasoline, we accepted the assumption of the participants in that appeal that such discrimination could occur not only between different exporting Members, but also between exporting Members and the importing Member concerned."

457. In the same dispute, the Appellate Body continued to state that:

"discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries." 330

327  Ibid. in paragraph. 158.
328  Brazil-Tyres Appellate Body, in paragraph. 215.
330  US-Shrimp, Appellate Body Report, in paragraph 165
458. It expanded further on the issues of arbitrary and unjustifiable discrimination in Brazil – Tyres\textsuperscript{331} when it was commenting on the function of the Article XX chapeau as follows:

"…. we are mindful of the function of the chapeau of Article XX, which is to prevent abuse of the exceptions specified in the in paragraphs of that provision. In our view, there is such an abuse, and, therefore, there is arbitrary or unjustifiable discrimination when a measure provisionally justified under a in paragraph of Article XX is applied in a discriminatory manner "between countries where the same conditions prevail", and when the reasons given for this discrimination bear no rational connection to the objective falling within the purview of a in paragraph of Article XX, or would go against that objective. The assessment of whether discrimination is arbitrary or unjustifiable should be made in the light of the objective of the measure."

3. "Disguised restriction on international trade"

459. The Panel in \textit{US-Shrimp (Article 21.5 Malaysia)}\textsuperscript{332} commented as follows on the meaning of the phrase "disguised restriction on international trade" which is the second requirement mentioned in the Article XX chapeau. In short a measure which is provisionally justified under Article XX GATT will be considered to constitute a disguised restriction on international trade if the design, architecture or structure of the measure at issue reveals that this measure does not pursue the legitimate objective which the provisional justification was based, but, in fact, pursues trade-restrictive, i.e. protectionist, objectives.

"The Panel is of the view that there would be an abuse of Article XX(g) "if [the compliance with Article XX(g) was] in fact only a disguise to conceal the pursuit of trade-restrictive objectives", mentioned by the Appellate Body in \textit{Japan – Taxes on Alcoholic Beverages} (p.29), protective application of a measure can most often be discerned from its design, architecture and revealing structure."

\textsuperscript{331} Brazil-Tyres Appellate Body , in paragraph. 227.

\textsuperscript{332} US - Shrimp (Article 21.5 Malaysia) in paragraph. 5.142
460. The Appellate Body in *US-Gasoline* \(^{333}\) gave a very comprehensive and clear interpretation of the meaning of the phrase "disguised restriction" found in the text of the Article XX *chapeau*.

It is clear to us that "disguised restriction" includes disguised *discrimination* international trade. It is equally clear that concealed or unannounced restriction or discrimination international trade does *not* exhaust the meaning of "disguised restriction. We consider that "disguised restriction", whatever else it covers, may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX. Put in a somewhat different manner, the kinds of considerations pertinent in deciding whether the application of a particular measure amounts to "arbitrary or unjustifiable discrimination", may also be taken into account in determining the presence of a "disguised restriction" on international trade. The fundamental theme is to be found in the purpose and object of avoiding abuse or illegitimate use of the exceptions to substantive rules available in Article XX.

461. The Panel in the *EC-Asbestos* \(^{334}\) dispute expanded further on the meaning of the word "disguised" and continued by stating that a trade restriction which could formally be said to meet the requirements of Article XX (b) would in fact "constitute an abuse if such compliance is in fact only a disguise to conceal the pursuit of trade-restrictive objectives".

"……we consider that the key to understanding what is covered by "disguised restriction on international trade" is not so much the word "restriction", inasmuch as, in essence, any measure falling within Article XX is a restriction on international trade, but the word "disguised". In accordance with the approach defined in Article 31 of the Vienna Convention, we note that, as ordinarily understood, the verb "to disguise" implies an *intention*. Thus, "to disguise" (*déguiser*) means, in particular, "conceal beneath deceptive appearances, counterfeit", "alter so as to deceive", "misrepresent", "dissimulate". Accordingly, a restriction which formally meets the requirements of Article XX(b) will constitute an abuse if such compliance is in fact only a disguise to conceal the pursuit of trade-restrictive objectives."

4. **China's lack of arguments on the Article XX *chapeau***


\(^{334}\) *EC-Asbestos* Panel Report in paragraph. 8.236 Emphasis added.
462. In its First written submission, China has failed to demonstrate its compliance with the requirements of the *chapeau* of Article XX of the GATT Agreement\(^{335}\). It did not produce any argumentation or evidence, rather China merely asserted that its measures satisfy the requirements of the *chapeau*, by simply stating that the export duties and quotas do not discriminate between countries where the same conditions prevail.

463. However the reasoning by the Appellate Body in *US-Shrimp*\(^ {336}\) concerning the interpretation of arbitrary and unjustifiable discrimination could also be applied to the present dispute. This means that the arbitrary and unjustifiable discrimination can occur between China on the one hand, and the other WTO Members on the other.

464. China also states in its First written submission that the export duties and quotas do not constitute a disguised restriction on international trade, in the sense of “a concealed or unannounced restriction or discrimination international trade”.\(^ {337}\) However this text is taken from a sentence from the Appellate Body Report in *US-Gasoline*, which when read in its entirety and context would give a totally different meaning to the one that China is trying to present to this Panel in the First written submission.

465. What the Appellate Body had actually stated in the case quoted by China is the following:

"It is clear to us that "disguised restriction" includes disguised discrimination international trade. It is equally clear that concealed or unannounced restriction or discrimination international trade does not exhaust the meaning of "disguised restriction."

466. In the opinion of the European Union, China has failed to meet its burden of establishing how its measures satisfy the requirements of the *chapeau* of Article

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XX of the GATT Agreement. Moreover, China has failed to provide any argumentation in support of its assertions that its measures satisfy the requirements of the chapeau. China has failed to explain how its measures are not applied in a manner that "constitutes arbitrary or unjustifiable discrimination" between China and other Members where the same conditions prevail, or that they are not merely a "disguised restriction on international trade".

5. Conclusion

467. The European Union does not consider that China has substantiated that it meets the criteria for any of the elements of the chapeau and, thus it believes that China has failed to meet its burden under the chapeau of Article XX of the GATT 1994 Agreement.

IX. Conclusion

468. The European Union respectfully requests the Panel to find that the challenged measures are inconsistent with China's obligations under the GATT 1994 and the Accession Protocol and that they are not justified by the various defences raised by China. The European Union also requests that the Panel to recommend that China brings its measures into conformity with its WTO obligations.