

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

Notification of an Appeal by China under Article 16.4 and Article 17  
of the Understanding on Rules and Procedures Governing the  
Settlement of Disputes (DSU), and under Rule 20(1)  
of the Working Procedures for Appellate Review

The following notification, dated 31 August 2011, from the Delegation of the People's Republic of China, is being circulated to Members.

1. Pursuant to Articles 16.4 and 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the *Working Procedures for Appellate Review* (WT/AB/WP/6, 16 August 2010), the People's Republic of China ("China") hereby notifies the Dispute Settlement Body ("DSB") of its decision to appeal certain issues of law and legal interpretations in the Panel Reports in *China – Measures Related to the Exportation of Various Raw Materials* (WT/DS394, WT/DS395, WT/DS398) ("Panel Report"). As set out in this notice of appeal, and pursuant to Article 17.13 of the DSU, China requests that the Appellate Body reverse or modify various legal findings and conclusions of the Panel, as a result of the errors identified below.

2. Pursuant to Rule 20(2)(d)(iii) of the *Working Procedures for Appellate Review*, this notice of appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to China's ability to refer to other paragraphs of the Panel Report in the context of its appeal.

**I. APPEAL OF THE PANEL'S FINDING THAT SECTION III OF THE COMPLAINANTS' PANEL REQUESTS "PRESENTS THE PROBLEM CLEARLY" BY PROVIDING SUFFICIENT CONNECTIONS BETWEEN THE 37 LISTED MEASURES AND THE 13 LISTED TREATY PROVISIONS**

3. The Panel erred in its interpretation and application of Article 6.2 of the DSU, in finding, in paragraph 77 of its Second Preliminary Ruling of 1 October 2010 and paragraph 7.3(b) of the Panel Report, that Section III of the Complainants' Panel Requests<sup>1</sup> complies with the requirement to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly".

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<sup>1</sup>*China – Measures Related to the Exportation of Various Raw Materials* – Request for the Establishment of a Panel by the European Communities, WT/DS395/7 (9 November 2009); *China – Measures Related to the Exportation of Various Raw Materials* – Request for the Establishment of a Panel by Mexico, WT/DS398/6 (9 November 2009); *China – Measures Related to the Exportation of Various Raw Materials* – Request for the Establishment of a Panel by the United States, WT/DS394/7 (9 November 2009).

4. China requests that the Appellate Body reverse this finding, and find that Section III of the Panel Requests does not comply with Article 6.2 of the DSU, with the exception of the Complainants' claims under Article X:1 of the GATT 1994 regarding non-publication of measures concerning zinc.

5. As a consequence of this reversal, China also requests that the Appellate Body reverse the Panel findings regarding claims purportedly made by the Complainants on the basis of Section III of the Panel Requests, including the findings in paragraphs 7.669; 7.670; 7.678; 7.756; 7.807; 7.958; 7.1082; 7.1102; 7.1103; 8.4(a)-(b); 8.5(b); 8.6 (a)-(b); 8.11(a), (c), (e) and (f); 8.12(b); 8.13(a)-(b); 8.18(a)-(b); 8.19(b) and 8.20(a)-(b) of the Panel Report.

## **II. APPEAL OF THE PANEL'S DECISION TO MAKE RECOMMENDATIONS WITH RESPECT TO THE "SERIES OF MEASURES" THAT HAVE AN ONGOING EFFECT THROUGH ANNUAL REPLACEMENT MEASURES**

6. China appeals the Panel's recommendations in paragraphs 8.8; 8.15 and 8.22 of the Panel Report that China must bring its export duty and quota measures into conformity with its WTO obligations, to the extent that the Panel's recommendations apply to annual replacement measures regarding export quotas and export duties on products at issue in these disputes.

7. In making recommendations extending to measures excluded from the dispute, the Panel acted inconsistently with Article 7.1 of the DSU; failed to make an objective assessment of the matter under Article 11 of the DSU; and, made recommendations on measures that are not part of the matter, inconsistently with Article 19.1 of the DSU.

8. China requests that the Appellate Body reverse the Panel's recommendations in paragraphs 8.8; 8.15 and 8.22 of the Panel Report to the extent that they apply to annual replacement measures.

## **III. APPEAL OF THE PANEL'S FINDING THAT CHINA DOES NOT HAVE THE RIGHT TO INVOKE ARTICLE XX OF THE GATT 1994 IN DEFENSE OF A CLAIM UNDER PARAGRAPH 11.3 OF CHINA'S *ACCESSION PROTOCOL***

9. China appeals the Panel's erroneous interpretation and application of Paragraphs 1.2 and 11.3 of China's *Accession Protocol*<sup>2</sup> and Paragraphs 170 and 342 of China's *Working Party Report*<sup>3</sup> as not according China the right to invoke Article XX of the GATT 1994 in defense of a claim under Paragraph 11.3 of China's *Accession Protocol* and Paragraph 170 of China's *Working Party Report*.

10. As a result of these errors, China requests that the Appellate Body reverse the Panel's findings, in paragraphs 7.158; 7.159; 8.2 (b)-(c); 8.9 (b)-(c) and 8.16 (b)-(c) of the Panel Report, that China may not seek to justify export duties pursuant to Article XX of the GATT 1994.

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<sup>2</sup>*Protocol on the Accession of the People's Republic of China*, WT/L/432 (23 November 2001) ("*Accession Protocol*").

<sup>3</sup>*Report of the Working Party on the Accession of China*, WT/MIN(01)/3 (10 November 2001) ("*Working Party Report*").

**IV. APPEAL OF THE PANEL'S INTERPRETATION AND APPLICATION OF THE TERM "TEMPORARILY" AND THE PANEL'S INTERPRETATION OF THE TERM "CRITICAL SHORTAGES" IN ARTICLE XI:2(A) OF THE GATT 1994, AND THE PANEL'S ASSESSMENT OF THE MATTER, UNDER ARTICLE 11 OF THE DSU**

11. China appeals the Panel's erroneous interpretation and application of the term "temporarily" and the Panel's erroneous interpretation of the term "critical shortages", in Article XI:2(a) of the GATT 1994. The Panel also failed to make an objective assessment of the matter, as required under Article 11 of the DSU. Specifically, the Panel failed to assess properly evidence that China's export restriction is annually reviewed and renewed, and employed internally inconsistent and incoherent reasoning in its assessment of the possibility to prevent or relieve critical shortages of exhaustible natural resources through the temporary application of export restrictions.

12. As a result of these errors, China requests that the Appellate Body reverse the Panel's interpretation and application of the term "temporarily" and the Panel's interpretation of the term "critical shortages", as set out in paragraphs 7.257-7.258; 7.297-7.302; 7.305; 7.306; 7.346; 7.349; 7.351; 7.354 and 7.355 of the Panel Report.

**V. APPEAL OF THE PANEL'S INTERPRETATION OF THE PHRASE "MADE EFFECTIVE IN CONJUNCTION WITH" IN ARTICLE XX(G) OF THE GATT 1994**

13. China appeals the Panel's erroneous interpretation of the phrase "... made effective in conjunction with ...", in Article XX(g) of the GATT 1994. Specifically, the Panel erred in interpreting this phrase to require a showing that the "purpose" of a challenged measure is to make effective restrictions on domestic production or consumption. As a result of this error, China requests that the Appellate Body reverse the Panel's finding in paragraph 7.397 of the Panel Report.

**VI. APPEAL OF THE PANEL'S INTERPRETATION AND APPLICATION OF PARAGRAPHS 1.2 AND 5.1 OF CHINA'S ACCESSION PROTOCOL AND PARAGRAPHS 83 AND 84 OF THE WORKING PARTY REPORT IN CONNECTION WITH THE PRIOR EXPORT PERFORMANCE AND MINIMUM CAPITAL REQUIREMENTS**

14. China appeals the Panel's erroneous interpretation and application of Paragraphs 1.2 and 5.1 of China's *Accession Protocol*, read in combination with Paragraphs 83(a), 83(b), 83(d), 84(a), and 84(b) of China's *Working Party Report*, to prohibit *any* "examination and approval system" for WTO-consistent export quotas operated subsequent to 11 December 2004, including elimination of "export performance" and "prior experience requirements" and minimum registered capital requirements. As a result of these errors, China requests that the Appellate Body reverse the Panel's findings in paragraphs 7.655; 7.665; 7.669; 7.670; 7.678; 8.4(a)-(b); 8.11(a); 8.11(c) and 8.18(a)-(b) of the Panel Report.

**VII. APPEAL OF THE PANEL'S INTERPRETATION AND APPLICATION OF ARTICLE XI:1 OF THE GATT 1994, AND ITS ASSESSMENT OF THE MATTER UNDER ARTICLE 11 OF THE DSU, IN CONNECTION WITH CHINA'S EXPORT LICENSING REGIME**

15. China appeals various elements of the Panel's findings under Article XI:1 of the GATT 1994 in connection with China's export licensing requirement.

16. First, the Panel erred in interpreting Article XI:1 to prohibit a measure *as such*, even where, as a matter of municipal law, the measure can always be—and has always been—interpreted and applied in a WTO-consistent manner.

17. Second, the Panel also erred in applying its erroneous interpretation of Article XI:1 to China's export licensing requirement. Specifically, the Panel erroneously found that Article 11(7) of China's *Measures for the Administration of License for the Export of Goods* and Articles 5(5) and 8(4) of China's *Working Rules on Issuing Export Licenses*, *as such*, are inconsistent with Article XI:1, because they accord discretion to request undefined or unspecified documents or materials of applicants for export licenses.

18. Third, the Panel erred in its assessment of the matter, under Article 11 of the DSU. Specifically, the Panel had no evidentiary basis on which to find that any documents requested of an applicant pursuant to Article 11(7) of China's *Measures for the Administration of License for the Export of Goods* and Articles 5(5) and 8(4) of China's *Working Rules on Issuing Export Licenses* would be of such a nature as to impose an export restriction.

19. As a result of these errors, China requests that the Appellate Body reverse the Panel's findings and recommendations, at paragraphs 7.921; 7.946; 7.948; 7.958; 8.5(b); 8.8; 8.12(b); 8.15; 8.19(b) and 8.22 of the Panel Report.

**VIII. APPEAL OF THE PANEL'S INTERPRETATION AND APPLICATION OF ARTICLE X:3(A) OF THE GATT 1994, AND ITS ASSESSMENT OF THE MATTER UNDER ARTICLE 11 OF THE DSU, IN CONNECTION WITH THE "OPERATION CAPACITY" CRITERION FOR EXPORT QUOTA ADMINISTRATION**

20. China appeals various elements of the Panel's findings under Article X:3(a) of the GATT 1994 in connection with the "operation capacity" criterion for export quota administration, under Article 19 of China's *Measures for the Administration of Export Commodities Quotas*.

21. First, the Panel erred in interpreting Article X:3(a) to prohibit a measure *as such*, even where, as a matter of municipal law, the measure can always be—and has always been—interpreted and applied in such a way as to avoid WTO-inconsistent administration.

22. Second, the Panel also erred in applying its erroneous interpretation of Article X:3(a) to China's "operation capacity" criterion. Specifically, the Panel erroneously found that Article 19 of China's *Measures for the Administration of Export Commodities Quotas*, *as such*, is inconsistent with Article X:3(a), because the term "operation capacity" is undefined, thus reserving the discretion for China to interpret and apply the term in such a manner as to constitute WTO-inconsistent administration.

23. Third, the Panel erred in its assessment of the matter, under Article 11 of the DSU. Specifically, the Panel had no evidentiary basis on which to find that the term "operation capacity" would be interpreted and applied in a manner that would constitute WTO-inconsistent administration.

24. As a result of these errors, China requests that the Appellate Body reverse the Panel's findings and recommendations, at paragraphs 7.708; 7.742-7.746; 7.748-7.752; 7.756; 8.11(e) and 8.15 of the Panel Report.

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