WORLD TRADE ORGANIZATION

WT/DS511/R

28 February 2019

(19-1108)

Original: English

CHINA – DOMESTIC SUPPORT FOR AGRICULTURAL PRODUCERS

REPORT OF THE PANEL

TABLE OF CONTENTS

LIST OF ANNEXES

ANNEX A

WORKING PROCEDURES OF THE PANEL

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX D

RAW DATA

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
AAP	Applied Administered Price
ADBC	Agricultural Development Bank of China
AMS	Aggregate Measurement(s) of Support
CDM	Constituent Data and Methodology
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
FERP	Fixed External Reference Price
GATT 1994	General Agreement on Tariffs and Trade 1994
MPS	Market Price Support
QEP	Quantity of Eligible Production
Sinograin	China Grain Reserve Corporation
TPRP	Temporary Purchase and Reserve Policy for corn
USDA	United States Department of Agriculture
Vienna Convention (VCLT)	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

CASES CITED IN THIS REPORT

Short title	Full case title and citation
Argentina – Textiles and Apparel	Panel Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/R, adopted 22 April 1998, as modified by Appellate Body Report WT/DS56/AB/R, DSR 1998:III, p. 1033
Canada – Continued Suspension	Appellate Body Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS321/AB/R, adopted 14 November 2008, DSR 2008:XIV, p. 5373
Canada – Continued Suspension	Panel Report, *Canada – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS321/R and Add.1 to Add.7, adopted 14 November 2008, as modified by Appellate Body Report WT/DS321/AB/R, DSR 2008:XV, p. 5757
Canada – Wheat Exports and Grain Imports	Panel Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/R, adopted 27 September 2004, upheld by Appellate Body Report WT/DS276/AB/R, DSR 2004:VI, p. 2817
Chile – Price Band System	Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/R, adopted 23 October 2002, as modified by Appellate Body Report WT/DS207AB/R, DSR 2002:VIII, p. 3127
China – Electronic Payment Services	Panel Report, *China – Certain Measures Affecting Electronic Payment Services*, WT/DS413/R and Add.1, adopted 31 August 2012, DSR 2012:X, p. 5305
China – HP-SSST (Japan) / China – HP-SSST (EU)	Appellate Body Reports, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union*, WT/DS454/AB/R and Add.1 / WT/DS460/AB/R and Add.1, adopted 28 October 2015, DSR 2015:IX, p. 4573
China – Raw Materials	Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII, p. 3295
Dominican Republic – Import and Sale of Cigarettes	Appellate Body Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/AB/R, adopted 19 May 2005, DSR 2005:XV, p. 7367
EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)	Appellate Body Reports, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/AB/RW2/ECU, adopted 11 December 2008, and Corr.1 / *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States*, WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008, DSR 2008:XVIII, p. 7165
EC – Bananas III (Article 21.5 – US)	Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States*, WT/DS27/RW/USA and Corr.1, adopted 22 December 2008, upheld by Appellate Body Report WT/DS27/AB/RW/USA, DSR 2008:XIX, p. 7761
EC – Approval and Marketing of Biotech Products	Panel Reports, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, Add.1 to Add.9 and Corr.1 / WT/DS292/R, Add.1 to Add.9 and Corr.1 / WT/DS293/R, Add.1 to Add.9 and Corr.1, adopted 21 November 2006, DSR 2006:III, p. 847
EC – Chicken Cuts	Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, p. 9157
EC – Chicken Cuts	Panel Reports, European *Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/R *(Brazil)* / WT/DS286/R *(Thailand)*, adopted 27 September 2005, as modified by Appellate Body Report WT/DS269/AB/R, WT/DS286/AB/R, DSR 2005:XIX, p. 9295 / DSR 2005:XX, p. 9721
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
EC – IT Products	Panel Reports, *European Communities and its member States – Tariff Treatment of Certain Information Technology Products*, WT/DS375/R / WT/DS376/R / WT/DS377/R, adopted 21 September 2010, DSR 2010:III, p. 933
EC – Selected Customs Matters	Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, p. 3791

Short title	Full case title and citation
EC and certain member States – Large Civil Aircraft	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
EU – Biodiesel (Argentina)	Appellate Body Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/AB/R and Add.1, adopted 26 October 2016, DSR 2016:VI, p. 2871
EU – Fatty Alcohols (Indonesia)	Appellate Body Report, *European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia*, WT/DS442/AB/R and Add.1, adopted 29 September 2017
EU – PET (Pakistan)	Appellate Body Report, *European Union – Countervailing Measures on Certain Polyethylene Terephthalate from Pakistan*, WT/DS486/AB/R and Add.1, adopted 28 May 2018
EU – PET (Pakistan)	Panel Report, *European Union – Countervailing Measures on Certain Polyethylene Terephthalate from Pakistan*, WT/DS486/R, Add.1 and Corr.1, adopted 28 May 2018, as modified by Appellate Body Report WT/DS486/AB/R
EU – Poultry Meat (China)	Panel Report, *European Union – Measures Affecting Tariff Concessions on Certain Poultry Meat Products*, WT/DS492/R and Add.1, adopted 19 April 2017
Guatemala – Cement I	Appellate Body Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, p. 3767
India – Additional Import Duties	Panel Report, *India – Additional and Extra-Additional Duties on Imports from the United States*, WT/DS360/R, adopted 17 November 2008, as reversed by Appellate Body Report WT/DS360/AB/R, DSR 2008:XX, p. 8317
Indonesia – Autos	Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, Corr.1 and Corr.2, adopted 23 July 1998, and Corr.3 and Corr.4, DSR 1998:VI, p. 2201
Korea – Various Measures on Beef	Panel Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/R, WT/DS169/R, adopted 10 January 2001, as modified by Appellate Body Report WT/DS161/AB/R, WT/DS169/AB/R, DSR 2001:I, p. 59
Korea – Various Measures on Beef	Panel Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/R, WT/DS169/R, adopted 10 January 2001, as modified by Appellate Body Report WT/DS161/AB/R, WT/DS169/AB/R, DSR 2001:I, p. 59
Turkey – Rice	Panel Report, *Turkey – Measures Affecting the Importation of Rice*, WT/DS334/R, adopted 22 October 2007, DSR 2007:VI, p. 2151
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
US – Continued Suspension	Appellate Body Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/AB/R, adopted 14 November 2008, DSR 2008:X, p. 3507
US – Continued Suspension	Panel Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/R and Add.1 to Add.7, adopted 14 November 2008, as modified by Appellate Body Report WT/DS320/AB/R, DSR 2008:XI, p. 3891
US – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
US – COOL	Panel Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R / WT/DS386/R, adopted 23 July 2012, as modified by Appellate Body Reports WT/DS384/AB/R / WT/DS386/AB/R, DSR 2012:VI, p. 2745
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, p. 3
US – Countervailing and Anti-Dumping Measures (China)	Appellate Body Report, *United States – Countervailing and Anti-Dumping Measures on Certain Products from China*, WT/DS449/AB/R and Corr.1, adopted 22 July 2014, DSR 2014:VIII, p. 3027
US – Countervailing Measures (China)	Appellate Body Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/R, adopted 16 January 2015, DSR 2015:1, p. 7
US – Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, p. 5663 (and Corr.1, DSR 2006:XII, p. 5475)
US – Gambling (Article 22.6 – US)	Decision by the Arbitrator, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Recourse to Arbitration by the United States under Article 22.6 of the DSU*, WT/DS285/ARB, 21 December 2007, DSR 2007:X, p. 4163

Short title	Full case title and citation
US – Gasoline	Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, adopted 20 May 1996, as modified by Appellate Body Report WT/DS2/AB/R, DSR 1996:I, p. 29
US – Large Civil Aircraft (2nd complaint)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012, DSR 2012:I, p. 7
US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)	Panel Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint) – Recourse to Article 21.5 of the DSU by the European Union*, WT/DS353/RW and Add.1, circulated to WTO Members 9 June 2017
US – OCTG (Korea)	Panel Report, *United States – Anti-Dumping Measures on Certain Oil Country Tubular Goods from Korea*, WT/DS488/R and Add.1, adopted 12 January 2018
US – Oil Country Tubular Goods Sunset Reviews	Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, p. 3257
US – Section 301 Trade Act	Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000, DSR 2000:II, p. 815
US – Tuna II (Mexico) (Article 22.6 – US)	Decision by the Arbitrator, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 22.6 of the DSU by the United States*, WT/DS381/ARB, 25 April 2017
US – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, p. 3
US – Upland Cotton	Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, Add.1 to Add.3 and Corr.1, adopted 21 March 2005, as modified by Appellate Body Report WT/DS267/AB/R, DSR 2005:II, p. 299
US – Upland Cotton (Article 21.5 – Brazil)	Panel Report, *United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/RW and Corr.1, adopted 20 June 2008, as modified by Appellate Body Report WT/DS267/AB/RW, DSR 2008:III, p. 997
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323
US – Wool Shirts and Blouses	Panel Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/R, adopted 23 May 1997, upheld by Appellate Body Report WT/DS33/AB/R, DSR 1997:I, p. 343
US – Zeroing (Japan) (Article 21.5 – Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/AB/RW, adopted 31 August 2009, DSR 2009:VIII, p. 3441

LIST OF EXHIBITS FREQUENTLY REFERRED TO IN THIS REPORT

Exhibit No.	Short Title	Title
USA-7	China's Working Party Report	*Report on the Working Party on the Accession of China* WT/ACC/CHN/49 (October 1, 2001).
USA-10/CHN-10B	2004 Grain Opinion	State Council Opinion on the Further Deepening the Reform of Grain Circulation, (State Council Guo Fa [2004] No. 17, issued May 23, 2004). (English Translation)
USA-12/CHN-9B	2004 Grain Distribution Regulation	Regulation on the Administration of Grain Distribution (Order of the State Council No. 407, adopted at the 50th executive meeting of the State Council on May 19, 2004, issued May 26, 2004, first amended July 18, 2013, by Order of the State Council No. 638, further amended on February 6, 2016, by Order of the State Council No. 666). (English Translation)
USA-18	China's Statistical Yearbook, Table 12-10, (2016)	National Bureau of Statistics of China, China's Statistical Yearbook (2016), Table 12-10:Output of Major Farm Products (publishing 2015 data), available: http://www.stats.gov.cn/tjsj/ndsj/2016/indexeh.htm.
USA-20/CHN-18B	2012 Wheat Annual Notice	Notice on Raising the Wheat Minimum Procurement Price for 2012 (Fa Gai Dian [2011] No. 250), 28 September 2011. (English translation)
USA-21/CHN-93B	2013 Wheat Annual Notice	Notice on Raising the Wheat Minimum Purchase Price for 2013 (National Development and Reform Commission, Ministry of Finance, Ministry of Agriculture, State Administration of Grain, Agricultural Development Bank of China, Fa Gai Jia Ge [2012] No. 3171, issued October 16, 2012). (English Translation)
USA-22/CHN-20B	2014 Wheat Annual Notice	Notice on Raising the Wheat Minimum Procurement Price for 2014 (Fa Gai Dian [2013] No. 205), 12 October 2013. (English translation)
USA-23/CHN-21B	2015 Wheat Annual Notice	Notice on Announcing the Minimum Procurement Price for Wheat for 2015 (Fa Gai Jia Ge [2014] No. 2302), 16 October 2014 (English translation) (hereinafter "2015 Wheat MPP Announcement").
USA-24/CHN-29B Revised	2012 Wheat Implementation Plan	Notice on Issuing the Wheat Minimum Procurement Price Implementation Plan for 2012 (Fa Gai Jing Mao [2012] No. 1494), 21 May 2012. (English translation)
USA-25/CHN-19B Revised	2013 Wheat Implementation Plan	Notice on Issuing the Wheat Minimum Procurement Price Implementation Plan for 2013 (Fa Gai Jing Mao [2013] No. 947), 20 May 2013. (English translation)
USA-26/CHN-30B Revised	2014 Wheat and Early-Season Indica Rice Implementation Plan	Notice on Issuing the Wheat and Early-season Indica Rice Minimum Procurement Price Implementation Plan for 2014 (Fa Gai Jing Mao [2014] No. 1026), 20 May 2014 (English translation) (hereinafter "2014 Wheat & Early-season Indica Rice Implementation Plan").
USA-27/CHN-28B Revised	2015 Wheat and Rice Implementation Plan	Notice on Issuing the Wheat and Rice Minimum Procurement Price Implementation Plan for 2015 (Guo Liang Tiao [2015] No. 80), 18 May 2015. (English translation)
USA-35	Funing, *et al.*, *Alternative Approach to Measure Comparative Advantage in China's Grain Sector* (2001)	Zhong Funing, Xu Zhigang, Fu Longbo, *An Alternative Approach to Measure Regional Comparative Advantage in China's Grain Sector*, Conference of Australian Agricultural and Resource Economics Society (January 22-25, 2001).
USA-36	Chen, *Current Situation and Trends in Production of Japonica Rice in China* (2006)	Chen Wen-fu, Pan Wen-bo, Xu Zheng-jin, *Current Situation and Trends in Production of Japonica Rice in China*, Journal of Shenyang Agricultural University, 2006-12, 37(6): 801-805.
USA-39/CHN-23B	2012 Rice Annual Notice	Notice on Raising the Rice Minimum Procurement Price for 2012 (Fa Gai Dian [2012] No. 17), 2 February 2012. (English translation)

Exhibit No.	Short Title	Title
USA-40/CHN-24B	2013 Rice Annual Notice	Notice on Raising the Rice Minimum Procurement Price for 2013 (Fa Gai Jia Ge [2013] No. 193), 30 January 2013. (English translation)
USA-41/CHN-25B	2014 Rice Annual Notice	Notice on Raising the Rice Minimum Procurement Price for 2014 (Fa Gai Dian [2014] No. 34), 11 February 2014. (English translation)
USA-42/CHN-26B	2015 Rice Annual Notice	Notice on Announcing the Rice Minimum Procurement Price for 2015 (Fa Gai Jia Ge [2015] No. 225), 3 February 2015. (English translation)
USA-43	WT/ACC/CHN/38/Rev.3	Communication from China, WT/ACC/CHN/38/Rev.3 (July 19, 2001).
USA-44/CHN-34B Revised	2012 Early-Season Indica Rice Implementation Plan	Notice on Issuing the Early-Season Indica Rice Minimum Procurement Price Implementation Plan for 2012 (Fa Gai Jing Mao [2012] No. 1943, Article 2), 2 July 2012. (English translation)
USA-45/CHN-36B Revised	2012 Mid- to Late-Season Rice Implementation Plan	Notice on Issuing the Mid- to Late-Season Rice Minimum Procurement Price Implementation Plan for 2012 (Fa Gai Jing Mao [2012] No. 2726), 28 August 2012 (English translation) (hereinafter "2012 Mid-to Late-season Rice Implementation Plan").
USA-46/CHN-35B Revised	2013 Early-Season Indica Rice Implementation Plan	Notice on Issuing the Early-Season Indica Rice Minimum Procurement Price Implementation Plan for 2013 (Fa Gai Jing Mao [2013] No. 1281), 2 July 2013 (English translation) (hereinafter "2013 Early-season Indica Rice Implementation Plan").
USA-47/CHN-37B Revised	2013 Mid- to Late-Season Rice Implementation Plan	Notice on Issuing the Mid- to Late-Season Rice Minimum Procurement Price Implementation Plan for 2013 (Fa Gai Jing Mao [2013] No. 1836), 18 September 2013. (English translation)
USA-48/CHN-31B Revised	2014 Mid- to Late-Season Rice Implementation Plan	Notice on Issuing the Mid- to Late-Season Rice Minimum Procurement Price Implementation Plan for 2014 (Fa Gai Jing Mao [2014] No. 2104, Article 2, 15 September 2014. (English translation)
USA-52/CHN-69B	2012 TPRP Notice	Notice on Issues Relating to National Temporary Reserve Purchases of Corn for 2012 (State Administration of Grain and Other Departments, Guo Liang Tiao [2012] No. 212, issued November 15, 2012). (English Translation)
USA-53/CHN-70B	2013 TPRP Notice	Notice on Issues Relating to National Temporary Reserve Purchases of Corn and Soybeans in the Northeast Region for 2013 (National Development and Reform Commission, State Administration of Grain, Ministry of Finance, Agricultural Development Bank of China, Guo Liang Tiao [2013] No. 265, issued November 22, 2013). (English Translation)
USA-54/CHN-71B	2014 TPRP Notice	Notice on Issues Relating to National Temporary Reserve Purchases of Corn in the Northeast Region for 2014 (National Development and Reform Commission, State Administration of Grain, Ministry of Finance, Agricultural Development Bank of China, Guo Liang Tiao [2014] No. 254, issued November 25, 2014). (English Translation)
USA-55/CHN-72B	2015 TPRP Notice	Notice on Issues Relating to National Temporary Reserve Purchases of Corn in the Northeast Region for 2015 (National Development and Reform Commission, State Administration of Grain, Ministry of Finance, Agricultural Development Bank of China, Guo Liang Tiao. (English Translation)
USA-72	2014 China Yearbook of Agricultural Price Survey	China National Bureau of Statistics, China Yearbook of Agricultural Price Survey (2015).
USA-73	China's Statistical Yearbook, Table 12-10 (2015)	National Bureau of Statistics of China, China's Statistical Yearbook (2015), Table 12-10: Output of Major Farm Products (publishing 2014 data), available: http://www.stats.gov.cn/tjsj/ndsj/2015/indexeh.htm.

Exhibit No.	Short Title	Title
USA-74	China's Statistical Yearbook, Table 12-10 (2014)	National Bureau of Statistics of China, China's Statistical Yearbook (2014), Table 12-10: Output of Major Farm Products (publishing 2013 data), available: http://www.stats.gov.cn/tjsj/ndsj/2014/indexeh.htm.
USA-75	China's Statistical Yearbook, Table 13-15 (2013)	National Bureau of Statistics of China, China's Statistical Yearbook (2013), Table 13-15: Output of Major Farm Products (publishing 2012 data), available: http://www.stats.gov.cn/tjsj/ndsj/2013/indexeh.htm.
USA-76/CHN-33	China's Rural Statistical Yearbook (2016)	National Bureau of Statistics of China, China's Rural Statistical Yearbook (2016).
USA-77	China Agricultural Statistical Reports (2011-2014)	Ministry of Agriculture, PRC, China Agricultural Statistical Reports (2011-2014).
USA-78	Yuzhu, *Basic Knowledge about Japonica Rice* (2011)	Pan Yuzhu and Li Jia, *Basic Knowledge about Japonica Rice*, Research and Consulting Department, Changjiang Futures (2011).
USA-79	China's Farm Gate Prices 1995 to 2015	Compilation of China's Farm Gate Prices 1995 to 2015.
USA-80	2014 Compilation of Materials on Agricultural Product Cost and Returns	China National Development and Reform Commission, Compilation of Materials on Agricultural Product Cost and Returns (2014).
USA-81/CHN-67	2016 Compilation of Materials on Agricultural Product Cost and Returns	China National Development and Reform Commission, Compilation of Materials on Agricultural Product Cost and Returns (2016).
USA-87/CHN-80B	2016 Corn Notice	Notice on Proper Handling of Corn Purchase Work in Northeast China This Year (2016) (Guo Liang Tiao [2016] No. 210), 19 September 2016. (English translation)
USA-94	Corn Prices 2012-2017	Corn Prices 2012-2017.
USA-101/CHN-107B	2016 Sinograin Corn Price Announcement	Price Announcement for Corn Purchase (October 16, 2016). (English Translation)
USA-102	2017 Jilin Corn Notice	Jilin Notice on Further Proper Handling of Corn Purchase and Sales Work (February 3, 2017).
USA-104	2016 Heilongjiang Corn Purchase Notice	2016 Heilongjiang Corn Purchase Notice (November 10, 2016).
CHN-43B Revised	2010 National Standards of Grain Quality Notice	Notice on Issuing the Rules on Matters Related to Implementing National Standards of Grain and Oil Quality (Guo Liang Fa [2010] No. 178), 9 November 2010. (English Translation)
CHN-49	China's Rural Statistical Yearbook (2013)	National Bureau of Statistics of China, China's Rural Statistical Yearbook (2013).
CHN-50	China's Rural Statistical Yearbook (2015)	National Bureau of Statistics of China, China's Rural Statistical Yearbook (2015).
CHN-52	China's Total AMS Commitments	Schedule CLII, People's Republic of China, Part IV Section I: Domestic Support: Total AMS Commitments.
CHN-65	OECD 2016 Document on Compositional Considerations for New Varieties of Rice	OECD Environment Directorate, Revised Consensus Document on Compositional Considerations for New Varieties of Rice (Oryza sativa): Key Food and Feed Nutrients, Anti-nutrients and Other Constituents, Paris, 2016.
CHN-84	April 2017 USDA GAIN Report	USDA, Foreign Agricultural Service, "Wheat and Rice Supplants Corn Area", GAIN Report Number: CH 17017, 4 April 2017.
CHN-86B	2016 Heilongjiang Corn Purchase and Sale Work Notice	Notice on Proper Handling of the Corn Purchase and Sale Work in Heilongjiang Province by the General Office of the People's Government of Heilongjiang Province (Hei Zheng Ban Fa [2016] No. 119), 25 October 2016. (English translation)

1 INTRODUCTION

1.1 Complaint by the United States

1.1. On 13 September 2016, the United States requested consultations with China pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article 19 of the Agreement on Agriculture, and Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994) with respect to the measures and claims set out below.[1]

1.2. Consultations were held on 20 October 2016.

1.2 Panel establishment and composition

1.3. On 5 December 2016, the United States requested the establishment of a panel pursuant to Article 6 of the DSU with standard terms of reference.[2] At its meeting on 25 January 2017, the Dispute Settlement Body (DSB) established a panel pursuant to the request of the United States in document WT/DS511/8, in accordance with Article 6 of the DSU.[3]

1.4. The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the United States in document WT/DS511/8 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[4]

1.5. On 24 June 2017, the parties agreed that the Panel would be composed as follows:

Chairperson:	Mr Gudmundur Helgason
Members:	Mr Juan Antonio Dorantes Sánchez Ms Elaine Feldman

1.6. Australia, Brazil, Canada, Colombia, Ecuador, Egypt, El Salvador, the European Union, Guatemala, India, Indonesia, Israel, Japan, Kazakhstan, the Republic of Korea, Norway, Pakistan, Paraguay, the Philippines, the Russian Federation, the Kingdom of Saudi Arabia, Singapore, Chinese Taipei, Thailand, Turkey, Ukraine, and Viet Nam notified their interest in participating in the Panel proceedings as third parties.

1.3 Panel proceedings

1.3.1 General

1.7. After consultation with the parties, the Panel adopted its Working Procedures[5] and timetable on 11 August 2017.

1.8. The Panel held a first substantive meeting with the parties on 22-24 January 2018. A session with the third parties was held on 23 January 2018. The Panel held a second substantive meeting with the parties on 24-25 April 2018. On 21 June 2018, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 2 November 2018. The Panel issued its Final Report to the parties on 12 December 2018.

1.3.2 United States' request for partially open meetings

1.9. At the Panel's organizational meeting held on 25 July 2017, the United States enquired with China whether it would agree to Panel meetings being open to observation by other WTO Members

[1] See WT/DS511/1.
[2] WT/DS511/8.
[3] See WT/DSB/M/391.
[4] WT/DS511/9.
[5] See the Panel's Working Procedures in Annex A.

and the public, either in full or in part. China disagreed with this request. The United States submitted a written request that panel meetings be partially opened to the public.[6] On 5 September 2017, the Panel declined the United States' request.[7] In its communication, the Panel informed the parties that the reasoning supporting the Panel's decision would be communicated to the parties in due course, and in any case, no later than the issuance of the Interim Report.

1.3.3 Terms of reference

1.10. China asserted in its first written submission that one of the measures which it understood the United States was challenging, the Temporary Purchase and Reserve Policy for corn, fell outside the Panel's terms of reference within the meaning of Article 7.1 of the DSU, because it allegedly expired before the United States requested the establishment of the Panel.[8] China did not request a preliminary ruling to be made on this issue.

1.11. In light of this assertion, on 7 November 2017, the Panel invited the United States to provide written comments on the issue by 14 November 2017. China was invited to comment on the United States' comments by 21 November 2017. Additionally, the Panel invited the third parties to present their views, by 14 November 2017.[9]

1.12. Following an extension of the deadline, the United States provided its comments on 12 December 2017.[10] China provided its own comments on the United States' comments on 12 January 2018.[11] The parties continued to address this issue in subsequent communications. No specific action was taken by the Panel regarding this issue prior to the issuance of the Interim Report.

2 FACTUAL ASPECTS

2.1 Measures at issue

2.1. In its panel request, the United States challenged China's provision of domestic support in excess of its product-specific *de minimis* level, provided through market price support (MPS) for producers of each of wheat, Indica rice, Japonica rice and corn in 2012, 2013, 2014, and 2015, as reflected in, but not limited to, the legal instruments listed in the panel request.[12]

2.2. The precise characterization of the measures at issue in this dispute was subject to disagreement between the parties in the context of a discussion of the Panel's terms of reference. We will, therefore, address the nature of the measures in more detail as part of our Findings in Section 7 of this Report.

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. The United States requests that the Panel find that China has acted inconsistently with its obligations under Articles 3.2 and 6.3 of the Agreement on Agriculture because the level of domestic support provided by China exceeds China's commitment level of "nil" specified in Section I of Part IV of China's Schedule CLII. In particular, the United States asserts that China's domestic support in favour of agricultural producers, expressed in terms of its Current Total Aggregate Measurement of Support, exceeds China's final bound commitment level in 2012, 2013, 2014, and 2015 on the basis of domestic support provided through market price support programmes to producers of, *inter alia*, wheat, Indica rice, Japonica rice, and corn.[13] In the alternative, the United States requests that to the extent China's commitment level of "nil" was understood as not setting out any commitment, the Panel find that these measures are inconsistent with China's obligation under Article 7.2(b) of

[6] United States' comments on the draft timetable and working procedures, para. 5-6.
[7] Letter from the Panel to the parties, 5 September 2017.
[8] China's first written submission, paras. 278-342.
[9] Letter from the Panel to the parties, 7 November 2017.
[10] Letter from the United States to the Panel, 12 December 2017.
[11] Letter from the China to the Panel, 12 January 2018.
[12] United States' request for the establishment of a panel, pp. 1-6. See the United States' request for the establishment of a panel.
[13] United States' first written submission, para. 137. See also United States' request for the establishment of a panel, p.6.

the Agreement on Agriculture, because, in 2012, 2013, 2014, and 2015, China provided domestic support for wheat, Indica rice, Japonica rice, and corn in excess of its product-specific *de minimis* level of 8.5% for each product.[14] The United States thus requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that China bring its measures into conformity with its obligations under the Agreement on Agriculture.[15]

3.2. China requests the Panel to find that since the measure relating to corn, as identified by China, expired prior to the United States' request for the establishment of the Panel, it falls outside the Panel's terms of reference. China also requests that the Panel reject the United States' claims in this dispute regarding measures concerning wheat, Indica rice and Japonica rice, in their entirety.[16]

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 19 of the Working Procedures adopted by the Panel (see Annexes B-1 and B-2).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Australia, Brazil, Canada, Colombia, Ecuador, the European Union, India, Indonesia, Japan, Kazakhstan, and the Russian Federation are reflected in their executive summaries, provided in accordance with paragraph 20 of the Working Procedures adopted by the Panel (see Annexes C-1, C-2, C-3, C-4, C-5, C-6, C-7, C-8, C-9, C-10, C-11). Indonesia, Japan, Kazakhstan, and the Russian Federation did not submit written arguments to the Panel. Colombia and Ecuador did not submit oral arguments to the Panel. Egypt, El Salvador, Guatemala, Israel, the Republic of Korea, Norway, Pakistan, Paraguay, the Philippines, the Kingdom of Saudi Arabia, Singapore, Chinese Taipei, Thailand, Turkey, Ukraine, and Viet Nam submitted neither written nor oral arguments to the Panel.

6 INTERIM REVIEW

6.1. On 2 November 2018, the Panel issued its Interim Report to the parties. On 16 November 2018, China and the United States each submitted written requests for the Panel to review aspects of the Interim Report.[17] On 30 November 2018, each party submitted comments on the other's requests for review.[18] Neither party requested an interim review meeting.

6.2. In accordance with Article 15.3 of the DSU, this section of the Panel's Report addresses the parties' requests for review made at the interim review stage. We discuss the parties' requests for substantive modifications below, in sequence according to the sections and paragraphs to which the requests pertain. The Panel modified aspects of its Report in the light of the parties' comments where it considered it appropriate, as explained below. In addition to the substantive requests discussed below, various editorial and non-substantive revisions were made to the Report, including those identified by the parties. This section of the Panel's Report constitutes an integral part of the Panel's findings.

6.3. In addressing the parties' requests for substantive modifications below, we are mindful of the specific scope, nature and purpose of interim review. With respect to the scope of our review, we observe that Article 15.2 of the DSU, and paragraph 21 of the Panel's Working Procedures, provide parties with an opportunity to request the Panel "to review precise aspects of the interim report". In light of the considerations stated above, we will review our Interim Report only in light of the parties' requests that relate to its "precise aspects". We will not accept requests amounting to a party's attempt to re-argue its case.

[14] United States' first written submission, fn 251.
[15] United States' first written submission, para. 138.
[16] China's first written submission, para. 343.
[17] China's comments on the Interim Report of the Panel; United States' comments on the Interim Report of the Panel.
[18] China's comments on the United States' comments on the Interim Report of the Panel; United States' comments on China's comments on the Interim Report of the Panel.

6.4. As an additional observation of a general nature, we would like to note that, in the "Findings" section of the Report, we summarize the parties' arguments in the manner and to the extent necessary and appropriate to capture our understanding for the purposes of our own assessment and reasoning. We underline that we have done this on the basis of a comprehensive and holistic reading of the parties' submissions. The parties' arguments are summarized in their own words in the executive summaries annexed to the Final Report.

6.5. The numbering of some of the paragraphs and footnotes in the Final Report may have changed from the numbering in the Interim Report. The discussion below refers to the numbering in the Interim Report.

6.6. The United States requests that heading 7.2 be changed to reflect that China's Temporary Purchase and Reserve Policy (TPRP) for corn is "at the heart of the dispute between the parties". China objects to this request and considers the text in the heading to be accurate. The Panel has decided to keep the original wording, as the Panel's conclusions on the nature and characterization of the measures at issue follow later on in the Report.

6.7. The United States requests to amend the wording of paragraph 7.32 to describe more accurately the United States' views on the measures at issue in this dispute. China submits that the United States' arguments are reflected accurately in the report and that such modifications are not necessary. The Panel has made textual clarifications aligning the content of the paragraph more closely with the language of the United States' submission referenced in this paragraph.

6.8. The United States asks the Panel to indicate in paragraph 7.33 that, in light of the findings regarding a breach of China's AMS commitments, "it is not necessary for the Panel to examine whether support for corn provided a further basis to conclude that China breached its AMS commitment." China objects to the request by the United States. The Panel has rejected this request, as the reasoning provided by the United States does not correspond with the Panel's rationale for refraining from ruling on the corn measure. The Panel's reasoning is set out in section 7.2.2 of the Report.

6.9. The United States requests that citations to further panel and Appellate Body reports be added in para. 7.46 to reflect the United States' position more accurately. China opposes the United States' request. The Panel has rejected this request on the grounds that paragraph 7.46 contains the Panel's reasoning rather than a restatement of the parties' arguments. The Panel has also clarified in the last three sentences of that paragraph its reasoning with regard to one Appellate Body report relied on by the United States.

6.10. China seeks to remove the references in paragraphs 7.66, 7.90 and 7.95 to the so-called No. 1 Documents being implemented by more specific legal instruments. China explains that No. 1 Documents "provide only general guidance on a broad range of many hundreds of policy issues". In a similar vein, China seeks to remove a reference in paragraphs 7.90 and 7.95 suggesting that the 2004 Grain Opinion and the 2004 Grain Distribution Regulation contain an authorization for adoption or maintenance of the TPRP for corn. The United States opposes China's request. The Panel has made textual modifications in these paragraphs and the related footnotes to clarify its understanding of the relevant regulatory framework and, in particular, the relation between No. 1 Documents, the 2004 Grain Opinion and the 2004 Grain Distribution Regulation on the one hand, and more specific legal instruments, on the other hand.

6.11. Further to the United States' request, the Panel has clarified in footnote 155 to paragraph 7.67 its understanding of the word "decoupling" used in Exhibit CHN-79B.

6.12. China requests the Panel to modify the wording of the first sentence of paragraph 7.69 and delete the second sentence of that paragraph, because Exhibit USA-102 cited in that paragraph does not support, in China's view, the finding that China continued purchases of corn at significant levels for stock reserve purposes past 2016. The United States objects to China's request. The Panel's findings in paragraph 7.69 are not based solely on exhibit USA-102, but rather on the totality of evidence on the record. Therefore, the Panel has modified the language of these two sentences and added a footnote to reflect that understanding more clearly.

6.13. The Panel has made clarifying modifications to the language of footnote 188 to paragraph 7.78 and corrected references in that paragraph, following China's request. However, in line with the United States' request, the Panel has rejected China's suggestion to remove the last sentence in that footnote.

6.14. Following China's request, the Panel has added in paragraph 7.88 a reference to statements mentioned in China's submissions and concerning the risk of reintroduction of the corn measure. With regard to the same paragraph, the Panel has rejected the United States' request to refer to the lack of formal termination of the TPRP for corn, as, in the Panel's view, this argument concerns the expiry of the corn measure, rather than the risk of its reintroduction.

6.15. Regarding paragraph 7.102, China requests that the Panel combine items c. and d. such that the combined item would be read as follows: "c. Mid- to late-season Indica rice and Japonica rice: Liaoning, Jilin, Heilongjiang, Jiangsu, Anhui, Jiangxi, Henan, Hubei, Hunan, Guangxi, Sichuan." We have accepted China's suggested revision.

6.16. Regarding paragraphs 7.130 and 7.132, the United States notes that Article 1 of the Agreement on Agriculture contains a number of definitions, many of which are unrelated to the present dispute. Consequently, the United States requests a more specific reference to Article 1(a) and 1(h) be utilized in the mentioned paragraphs. We agree and have introduced the mentioned revisions. China notes that the concurrent application of Annex 3 and the CDM in the tables of supporting material is not limited to Article 1(a) and 1(h) and discusses some examples. For China, the Panel is correct in making a general reference to Article 1 in both instances and for this reason, it requests that the Panel reject the proposed change. After assessing both parties' comments, the Panel decided to deny the United States' request for paragraph 7.130, but grant it for paragraph 7.132.

6.17. Regarding paragraph 7.157, the United States notes that the language used appears to identify the two-step calculation process established by Article 1(a) and 1(h) of the Agreement on Agriculture in an imprecise manner and, therefore, suggests revising it. China argues that as the Panel noted in paragraph 7.157, Article 1(a)(ii) concerns the calculation of Current AMS, while Article 1(h)(ii) defines Current Total AMS. For this reason, China submits that the United States' suggestion is imprecise, and proposes a different language. The Panel introduced some modifications to improve the overall clarity of the paragraph.

6.18. Regarding paragraph 7.193, the United States requests modification in order to clarify that the Panel is comparing the external reference price used to calculate the AMS or value of market price support in the base period and the FERP used in subsequent calculations. We note that. in this paragraph, particularly in small romans (i), the Panel is drawing a comparison between the base period and the FERP. We have introduced some revisions to enhance the clarity of the paragraph.

6.19. Regarding paragraph 7.204, China suggests that the Panel replace "construct" with "source" in the last sentence of this paragraph, as China's FERP based on an average of the period 1996-1998 can be sourced from China's tables of supporting materials, and need not be constructed from them. We have accepted this suggestion, and modified the wording accordingly.

6.20. Regarding paragraph 7.213, the United States suggests deleting a particular sentence regarding the base periods used by Members. We agree with the United States and have removed the sentence. Consequently, there is no need to address China's comment on the same sentence.

6.21. Regarding paragraph 7.219, China suggests the deletion of the entirety of this paragraph as it considers it repetitive. The Panel notes that this paragraph is meant to provide a brief summary of the parties' arguments and it serves as an introduction before entering into the Panel's analysis. For this reason, we decline China's suggestion.

6.22. Regarding paragraph 7.220, the United States suggests revisions to clarify the Panel's assessment of the connection between CDM and the calculations made during the base period. Since the Panel's statement regarding Article 1(a)(i) is correct, according to China, China requests that the Panel not accept the United States' suggestion. We have introduced some modifications to the mentioned paragraph.

6.23. Regarding paragraph 7.248, China suggests changing the word "interpreted" in the first sentence of this paragraph, with "considered". We agree with China's suggestion. China also requests that the Panel modifies the text of the fourth sentence by replacing "China's domestic support commitment level" with "a WTO Member's domestic support commitment level". We observe that the proposed modification would have the effect of turning the Panel's analysis into a general statement, not necessarily limited to the case at hand. For this reason, we decline China's suggestion. Finally, China suggests that some revisions are introduced to the last sentence of this paragraph to improve its clarity. The United States objects to China's request that the Panel delete the final sentence as it is helpful to retain this language. The Panel introduced some modifications to this sentence.

6.24. Regarding paragraph 7.249, China suggests a correction for what appears to be a typographical error in the first sentence of this paragraph 7.249. Specifically, China suggest deleting the term "figure" at the end of line 3. The United States made no comments on this request. We note that the term "figure" is not a typographical error. It is meant to replace the term "the side of the hypothetical equation representing the Base Total AMS" in the first part of this sentence, which is a numerical value and not a mathematical expression. For this reason, we decline China's suggestion.

6.25. Regarding paragraph 7.299, China requests that the Panel replace "state-owned enterprises" with "designated enterprises". The United States objects to China's proposed change to this paragraph. The original phrase is, in fact, a quotation from the United States and the relevant sentence has been modified to reflect this.

6.26. Regarding paragraphs 7.349 and 7.350, the United States requested the inclusion of a footnote in order to more accurately reflect the arguments of the parties, particularly its own. China does not consider it necessary that the Panel insert the new footnote proposed by the United States. Should the Panel wish to consider the United States' request, China opposes the change proposed by the United States. We agree with the United States that additional information regarding its arguments was appropriate and have therefore included the relevant information in the text of paragraph 7.349 and in a footnote within paragraph 7.350.

6.27. Regarding paragraphs 7.385, 7.394, 7.395 and 7.400, China believes that it is inaccurate to state that certain data regarding the volume of production of various types of rice nationally, and in the covered provinces, is "provided exclusively by the United States". China thus requests the Panel revise the relevant sentences to remove references to data "provided exclusively by the United States". We have declined to do so. The data being used by the Panel in those particular contexts was in fact provided exclusively by the United States, as China did not present its own data which the Panel could use in this regard, as an alternative. Additionally, the fact that only the United States presented such data resulted in the calculation of separate MPS values for rice, based on each party's separate breakdown − a fact which is clearly stated before each relevant table.

6.28. Regarding paragraphs 7.412, 7.413 and 8.1, the United States requests that the Panel's articulations of its legal conclusions reflect the findings that show that China exceeded its commitment level of "nil" with respect to each of the three products for which the Panel has made findings. China made no comments on this request. We have introduced some modifications to reflect this request, except when dealing with Current Total AMS as this calculation is not product-specific.

7 FINDINGS

7.1 United States' request for partially open Panel meetings with the parties

7.1.1 Procedural background

7.1. At the Panel's organizational meeting, the United States enquired with China whether it would agree to the Panel meetings being open to observation by other WTO Members and the public, either in full or in part. China disagreed with this request, resulting in the United States submitting a written request that the Panel meetings be partially open.[19] The parties submitted written comments on this request and on 5 September 2017, the Panel declined the United States' request. In its

[19] United States' comments on the draft timetable and working procedures, paras. 5-6.

communication, the Panel informed the parties that the reasoning supporting the Panel's decision would be communicated to the parties in due course, and in any case, no later than the issuance of the Interim Report.

7.1.2 Introduction

7.2. The United States argues that, under Article 18.2 of the DSU, it has the right to disclose its own statements to the public.[20] As a result, the United States suggests that the Panel adopt procedures to allow WTO Members and the public access to United States' statements made during the Panel meetings.[21] Additionally, the United States argues, on the basis of the reasoning in previous disputes[22], that parties who wish to disclose their statements made during the Panel meetings may do so, regardless of the opposing party's decision to keep its own statements confidential, and that the right of confidentiality of other parties would not be prejudiced by the United States' decision to disclose its own statements.[23]

7.3. The United States asserts that the Appellate Body had previously decided it could grant each party or third party's request to disclose its own statements and answers at the oral hearing and that it would not affect the rights of others to maintain the confidentiality of their statements.[24] Thus, the United States argues that the Panel in this dispute is able to grant the United States' request to disclose its own statements at the Panel meeting without affecting China's right to maintain the confidentiality of its submissions.[25] The United States notes that three recent proceedings "have assisted one party requesting to make its statements publicly by partially opening the relevant meeting": *US – OCTG (Korea)*; *US – Tuna II (Mexico) (Article 22.6 – US)* and *US – Tuna II (Mexico) (Article 21.5 – Mexico)*.[26]

7.4. China asks that the Panel reject the United States' request for a partial opening to the public of the Panel meetings with the parties and third parties in these proceedings.[27] To support its request, China argues that under the DSU, the general rule is that submissions to panels and the Appellate Body are confidential and that their meetings with the parties and third parties are closed to the public.[28] Despite these general rules, China notes that panels and the Appellate Body have at times considered and granted requests to open their meetings with the parties and third parties where *both* parties waived their right to confidentiality and requested that a WTO adjudicator's meeting be open to the public.[29] China discusses a number of cases where adjudicators have refused to open, or partially open, meetings where one party has opposed such opening.[30] For China, the correct approach to a WTO adjudicator's disposition of requests to open its meeting to the public is to agree to such openings only where both parties agree that a meeting should be opened, and to provide for appropriate protection for the statements and interventions of third parties that invoke

[20] United States' comments on the draft timetable and working procedures, para. 6.
[21] United States' comments on the draft timetable and working procedures, para. 6.
[22] United States' comments on the draft timetable and working procedures, para. 6 (referring to Appellate Body Report, *US – Continued Suspension*, Annex IV, para. 6).
[23] United States' comments on the draft timetable and working procedures, para. 7.
[24] United States' comments on the draft timetable and working procedures, para. 6 (referring to Appellate Body Report, *US – Continued Suspension*, Annex IV, para. 6).
[25] United States' comments on the draft timetable and working procedures, para. 7.
[26] United States' comments on the draft timetable and working procedures, para. 7.
[27] China's comments on the United States' comments on the draft timetable and working procedures, para. 65.
[28] China's comments on the United States' comments on the draft timetable and working procedures, para. 25.
[29] China's comments on the United States' comments on the draft timetable and working procedures, para. 34.
[30] China's comments on the United States' comments on the draft timetable and working procedures, para. 36 (referring to Appellate Body Report, *EU – Biodiesel (Argentina)*, Annex D-2, paras. 2-3, 7; Decision by the Arbitrator, *US – Gambling (Article 22.6 – US)*, para. 2.29 and; Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 8.16-8.20).

their right to preserve the confidentiality of their statements and observations.[31] Exceptions to this general approach should, if allowed at all, be limited to very particular circumstances.[32]

7.5. In addition, China contends that the Appellate Body has previously considered "whether the request of the participants to forego confidentiality protection satisfies the requirements of *fairness* and *integrity* that are the essential attributes of the appellate process and define the relationship between the Appellate Body and the participants".[33] China refers to *US − Tuna II (Mexico)* and argues that the arbitrator in that dispute recognized potential due process implications.[34] Finally, China argues that partially open meetings in these proceedings would have to be limited not only to the United States' statements of its own positions that do not disclose China's position, but it would also likely have to be limited by the existence of certain information that is designated as confidential. China contends that in these circumstances, it is likely that there would be very little of the United States' statements and interventions that could be shown to the public in a partially open meeting, and that what little there is may not be comprehensible. China thus claims that the complexity of the factual questions involved, and the fact that certain information would likely have to be designated as confidential, means that there would be very little by way of enhanced transparency from a partially open meeting.

7.6. For China, balancing the requirements for confidentiality and the integrity of the dispute settlement process against any enhanced transparency, therefore, strongly suggests that the Panel should decline the United States' request for a partially open meeting.[35] Finally, China claims that none of the special considerations that have exceptionally supported a request by only one party for a partial opening to the public of a WTO adjudicator's meeting is present in these proceedings.[36]

7.1.3 Panel's analysis

7.1.3.1 Introduction

7.7. The United States' request is based on two main components: (i) the proposition that under Article 18.2 of the DSU, the United States has the right to disclose its statements to the public[37], and (ii) the proposition that, in previous instances, panels and the Appellate Body have agreed to hold open meetings, either in full or in part. This last component, in turn, is divided into two arguments: the "underlying rationale" for previous decisions by panels and the Appellate Body to open their meetings to observation by other WTO Members and the public[38] and the claim that in three recent proceedings, the adjudicators have "assisted one party requesting to make its statements publicly by partially opening the relevant meeting", namely, the panel in *US − OCTG (Korea)*, the arbitrator in the DSU Article 22.6 proceedings in *US − Tuna II (Mexico)* and the compliance panels in the same dispute.[39]

7.1.3.2 Article 18.2 of the DSU

7.8. We begin by noting that the United States contends that Article 18.2 of the DSU confers a right on the United States, as a party to the dispute, to disclose statements of its own position to the public.[40] The United States suggests that the Panel adopt procedures to allow WTO Members and

[31] China's comments on the United States' comments on the draft timetable and working procedures, para. 38.
[32] China's comments on the United States' comments on the draft timetable and working procedures, para. 39.
[33] China's comments on the United States' comments on the draft timetable and working procedures, para. 32 (referring to Appellate Body Report, *US − Continued Suspension/Canada − Continued Suspension*, Annex IV, para. 6 (emphasis and underlining added)).
[34] China's comments on the United States' comments on the draft timetable and working procedures, para. 33 (referring to Decision by the Arbitrator, *US − Tuna II Mexico (Article 22.6 − US)*, para. 2.26).
[35] China's comments on the United States' comments on the draft timetable and working procedures, para. 53.
[36] China's comments on the United States' comments on the draft timetable and working procedures, para. 56.
[37] United States' comments on the draft timetable and working procedures, para. 6.
[38] United States' comments on the draft timetable and working procedures, para. 6.
[39] United States' comments on the draft timetable and working procedures, para. 7.
[40] United States' comments on the draft timetable and working procedures, para. 6.

the public access to the United States' statements during the Panel meetings.[41] China argues that under the DSU, the general rule is that submissions to panels and the Appellate Body are confidential, that their meetings with the parties and third parties are closed to the public, and that this general rule should be upheld in this case.[42] China also contends that the particularly sensitive matters that will arise in this dispute make it imperative that the Panel apply the general rule that meetings are opened to the public only where there is agreement by both parties.[43]

7.9. We observe that in principle there is nothing in the text of the DSU establishing an explicit right for WTO Members to have fully or partially open meetings. On the contrary, the Working Procedures in Appendix 3 of the DSU foresee that panels meet in closed session[44], suggesting that the default situation is that panel meetings are closed to the public. We are nonetheless mindful that pursuant to Article 12.1 of the DSU, a panel may depart from the Working Procedures in Appendix 3, provided that the panel consults the parties to the dispute. In our view, this provision grants panels the power to adopt procedural rules that depart from or complement those already contained in Appendix 3. Thus, a panel can depart from the default situation where panel meetings are held in closed session and consequently grant a request from a party to hold an open meeting, in full or in part. However, the text of the DSU leaves this decision to the discretion of the panel and does not present it as an absolute right of the parties to a dispute.

7.10. Article 18.2 provides as follows:

> Article 18
>
> Communications with the Panel or Appellate Body
>
> ...
>
> 2. Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential. A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public.

7.11. We agree with the United States that this provision sets out that nothing in the DSU "shall preclude a party to a dispute from disclosing statements of its own positions to the public". However, it does not follow that because a Member has this right, a panel is compelled to open its meetings to the public, in full or in part. In our view, by denying this request the Panel would not be *prohibiting* the United States from disclosing statements of its own positions to the public. Neither is the Panel *depriving* the United States of the right conferred in the second sentence of Article 18.2. We do not see how, by declining this request, the Panel would be unreasonably impinging on the mentioned right as the United States would remain free to exercise its right in a variety of ways.

7.12. In this connection, we observe that statements of the United States' position made in Panel meetings could be disclosed by the United States in ways that do not require the Panel to take an active role.[45] Indeed, we do not read the second sentence of Article 18.2 of the DSU as necessarily involving panels in a Member's exercise of this right or directing panels to assist Members in

[41] United States' comments on the draft timetable and working procedures, para. 6.

[42] China's comments on the United States' comments on the draft timetable and working procedures, para. 25.

[43] China's comments on the United States' comments on the draft timetable and working procedures, para. 49.

[44] Appendix 3 to the DSU, para. 2 states that: "The panel shall meet in closed session. The parties to the dispute, and interested parties, shall be present at the meetings only when invited by the panel to appear before it."

[45] We note that the arbitrator in *US − Tuna II (Mexico) (Article 22.6 − US)* reached a similar conclusion in this regard: "Indeed, we recall in this respect that even if we were to deny the United States' request, the United States could still exercise its right to disclose statements of its own positions in a different form or on a different occasion". Decision by the Arbitrator, *US − Tuna II (Mexico) (Article 22.6 − US)*, fn 28.

disclosing their position to the public. In addition, we observe that as a matter of practice, some Members in certain disputes use the right set forth in Article 18.2 and routinely publish submissions made to panels, including their oral statements, on publicly available sites, regardless of whether the meetings were open to the public.[46] Thus, we do not perceive Article 18.2 of the DSU to be dispositive of our assessment of the United States' request. In this vein, to the extent that the United States argues that Article 18.2 of the DSU indicates that the Panel should grant the mentioned request, we find the United States' reliance on this provision to be misplaced.

7.1.3.3 Prior disputes addressing open or partially open hearings

7.13. We now move to assess the United States' arguments regarding previous instances where WTO adjudicators have authorized open or partially open hearings. The United States contends that when the Appellate Body in *US − Continued Suspension* was presented with a request by the parties to open the meeting to viewing by the public, it had concluded that each party has a right to maintain confidentiality of its own statements, and therefore also the ability to request that the confidentiality of the proceeding be lifted for its statements.[47] Further, the United States submits that the Appellate Body went on to reason that such a request by one party does not affect another Member's right to confidentiality.[48] According to the United States, the Appellate Body in that dispute held that "oral statements and responses to questions by third participants wishing to maintain the confidentiality of their submissions will not be subject to public observation".[49] For the United States, as the Appellate Body decided it could grant each party or third party's request to disclose its own statements and answers at the oral hearing and that it would not affect the rights of others to maintain the confidentiality of their statements, the Panel here can grant the United States' request.

7.14. China submits that the Appellate Body in that case considered that, as a general matter, WTO adjudicators would require requests from both parties to open to the public their meetings with the parties or third parties because the relationship of confidentiality concerns both parties collectively. China thus submits that the United States is wrong when it implies that the Appellate Body's reasoning provided for a party-by-party and third party-by-third party assessment.[50] Regarding the integrity of the dispute settlement proceedings, China contends that the Appellate Body considered "whether the request of the participants to forego confidentiality protection satisfies the requirements of *fairness* and *integrity* that are the essential attributes of the appellate process and define the relationship between the Appellate Body and the participants".[51] China also refers to *US − COOL*, and submits that the panel opened its meeting with the parties to the public following a joint request by the United States and Canada, a request to which Mexico, as a co-complainant, did not object.[52] China further refers to the compliance panel in *US − Large Civil Aircraft (2nd complaint) (Article 21.5 − EU)*, which according to China adopted, at the request of both parties, procedures for viewing by the public of those parts of its meetings with the parties and third parties that did not concern confidential information.[53]

7.15. We begin by noting that in *US − Continued Suspension*, all three participants in the appeal, namely, Canada, the European Communities and the United States, presented a request to allow public observation of the oral hearing and only some of the third participants opposed this request. In other words, there was agreement among all of the parties to the original panel proceedings − the participants in the appeal process − to have a fully open hearing. This stands in stark contrast

[46] The Panel does not express any view on the consistency of this practice with the DSU.

[47] United States' comments on the draft timetable and working procedures, para. 6 (referring to Appellate Body Report, *US − Continued Suspension*, Annex IV, para. 6).

[48] United States' comments on the draft timetable and working procedures, para. 6.

[49] United States' comments on the draft timetable and working procedures, para. 6 (referring to Appellate Body Report, *US − Continued Suspension*, Annex IV, para. 11(b)).

[50] China's comments on the United States' comments on the draft timetable and working procedures, para. 29.

[51] China's comments on the United States' comments on the draft timetable and working procedures, para. 32 (referring to Appellate Body Report, *US − Continued Suspension/Canada − Continued Suspension*, Annex IV, para. 6 (emphasis and underlining added)).

[52] China's comments on the United States' comments on the draft timetable and working procedures, para. 35 (referring to Panel Report, *US − COOL*, paras. 1.11-13).

[53] China's comments on the United States' comments on the draft timetable and working procedures, para. 35 (referring to Panel Report, *US − Large Civil Aircraft (Article 21.5 − EU)*, para. 1.20 and Annex A-3, para. 6. *See similarly* Appellate Body Report, *US − Zeroing (Japan) (Article 21.5 − Japan)*, paras. 17-19, Annex II, paras. 1, 4, 6-8).

to the present case where there is no agreement between the two parties to the dispute to open the meetings to the public. In our view, this difference is significant. It goes to the nature of the request itself: in US – *Continued Suspension* the Appellate Body was facing a request to have a fully open meeting while in this case we are confronted with a request for partially open meetings. While the issue before the Appellate Body there was how to accommodate such request in the light of the opposition of some third participants, in this case the issue is whether to grant a similar request when one party does not consent to opening the meetings even partially. Indeed, the Appellate Body emphasized the fact that it was a joint request of the participants that led to the request being granted.[54]

7.16. The Appellate Body stated there that the confidentiality requirement in Article 17.10 of the DSU is more properly understood as operating in a relational manner as there are different sets of relationships that are implicated in appellate proceedings, including (i) a relationship between the participants and the Appellate Body and (ii) a relationship between the third participants and the Appellate Body.[55] The Appellate Body reasoned that the confidentiality requirement was intended to foster the system of dispute settlement under conditions of fairness, impartiality, independence and integrity and that in that case, as the participants had jointly requested authorization to forego confidentiality protection for their communications with the Appellate Body at the oral hearing, such request did not extend to any communications, nor touch upon the relationship, between the third participants and the Appellate Body, and thus, the right to confidentiality of third participants *vis-à-vis* the Appellate Body was not implicated by the joint request.[56] The Appellate Body ultimately concluded that it had the power to exercise control over the conduct of the oral hearing, including authorizing the lifting of confidentiality at the joint request of the participants as long as this did not adversely affect the rights and interests of the third participants or the integrity of the appellate process.[57]

7.17. We thus do not agree with the United States' interpretation of the Appellate Body's statements. Unlike this dispute, the request before the Appellate Body was a joint request. We therefore fail to see how the cited precedent lends the support the United States claims it does. To us, the Appellate Body's assessment in that case can also be interpreted as buttressing China's argument that meetings have been opened to the public whenever the request was accepted by all parties.

7.18. In any event, the Appellate Body concluded that it had the power to authorize such a request, a conclusion that, by analogy, goes in line with our reading of Article 12.1 of the DSU. In our view, this provision similarly grants us the power to depart from the default situation where panel meetings are held in closed session and consequently allows us to grant a request from a party to hold an open meeting, in full or in part. However, and importantly, the Appellate Body did not conclude that it was or could be compelled to grant such a request by virtue of the parties' right to disclose statements of their own position.

7.19. We now move to assess the United States' arguments regarding previous instances where partially open hearings have been authorized. The United States argues that three recent proceedings have "assisted one party requesting to make its statements publicly by partially opening the relevant meeting", namely, the panel in *US – OCTG (Korea)*, the arbitrator in the DSU Article 22.6 proceedings in *US – Tuna II (Mexico)* and the compliance panels in the same dispute.[58] In *US – OCTG (Korea)*, the United States argues that the panel agreed that it may open its meetings with

[54] "In this case, the participants have jointly requested authorization to forego confidentiality protection for their communications with the appellate body at the oral hearing"; "Thus, the Appellate Body has the power to exercise control over the conduct of the oral hearing, including authorizing the lifting of confidentiality at the joint request of the participants as long as this does not adversely affect the rights and interests of the third participants or the integrity of the appellate process"; and "The request for public observation of the oral hearing has been made jointly by the three participants, Canada, the European Communities, and the United States. As we explained earlier, the Appellate Body has the power to authorize a joint request by the participants to lift confidentiality, provided that this does not affect the confidentiality of the relationship between the third participants and the Appellate Body, or impair the integrity of the appellate process." Appellate Body Report, *US – Continued Suspension*, Annex IV, paras 6, 7 and 10 (emphasis added).

[55] Appellate Body Report, *US – Continued Suspension*, Annex IV, para. 6.

[56] Appellate Body Report, *US – Continued Suspension*, Annex IV, para. 6.

[57] Appellate Body Report, *US – Continued Suspension*, Annex IV, para. 7.

[58] United States' comments on the draft timetable and working procedures, para. 7.

the parties and third parties to the public, either in whole or in part, subject to appropriate procedures to be adopted by the panel after consulting with the parties and third parties.[59] In *US − Tuna II (Mexico) (Article 22.6 − US)*, the United States asserts that the arbitrator held that it "may, upon request by a party, authorize that party to lift the confidentiality, by way of delayed viewing, of its own statements made during the Arbitrator's meeting with the parties".[60] Finally, the United States refers to the compliance panels in the *US − Tuna II (Mexico) (Article 21.5 - Mexico)* and *US − Tuna II (Mexico) (Article 21.5 − United States)* proceedings, where the United States notes that it was agreed that panels "may, upon request by a party or third party, authorize that party, or third party, to lift the confidentiality [of the proceedings], by way of delayed viewing, of its own statements made during the Panel's meeting with the parties, or the special session for third parties".[61]

7.20. China, on the other hand, refers to several cases in which, it alleges, panels and the Appellate Body have generally rejected the open hearing requests where only one party requested the opening of a meeting to the public, and the other party objected to that request. China argues that in *EU − Biodiesel (Argentina)*, the Appellate Body rejected an EU request to open its meeting with the participants and third participants, *inter alia*, because the other participant, Argentina, had objected to the request.[62] Similarly, China contends that in *US − Gambling (Article 22.6 − US)*, the arbitrator declined a request by the United States to open its meeting with the parties, because Antigua, the other party to those proceedings, had opposed opening the meeting.[63] China also refers to *US − Upland Cotton (Article 21.5 − Brazil)* noting that the compliance panel rejected a US request that only those parts of the panel meeting be open to the public during which the United States presented its position.[64] These disputes, their reasoning and their findings have been taken into consideration by the Panel, and have helped to formulate the conclusions below.

7.21. When the United States submitted its request for a partially open meeting, and the Panel took its decision to deny the United States' request, two of three of the panel reports the United States relies on, i.e. the panel report in *US − OCTG (Korea)* and the second compliance panel reports in *US − Tuna II (Mexico)*, had not yet been circulated to Members. In this regard, we note China's contention that for these reasons, it was not in a position to address the reasoning of those panels.[65] We had similar difficulties because of the confidential nature of those disputes at the time we took our decision. In this connection, we find it problematic that a party refers to proceedings in which reports are still confidential and to which that party may have access but neither the other party nor the Panel has. This hampers the other party's, in this case China's, right of defence and the Panel's ability to conduct an objective assessment of the matter. Consequently, our decision to deny the United States' request was not informed by the United States' arguments regarding these disputes.[66]

7.22. According to the United States, the arbitrator in *US − Tuna II (Mexico) (Article 22.6 − US)* held that it "may, upon request by a party, authorize that party to lift the confidentiality, by way of delayed viewing, of its own statements made during the Arbitrator's meeting with the parties".[67] We

[59] United States' comments on the draft timetable and working procedures, para. 7.

[60] United States' comments on the draft timetable and working procedures, para. 7 (referring to *US − Tuna II (Mexico) (Article 22.6 − US)* Annex A-1 para. 3).

[61] United States' comments on the draft timetable and working procedures, para. 7.

[62] China's comments on the United States' comments on the draft timetable and working procedures, para. 36 (referring to Appellate Body Report, *EU − Biodiesel (Argentina)*, Annex D-2, paras. 2-3, 7).

[63] China's comments on the United States' comments on the draft timetable and working procedures, para. 36 (referring to Decision by the Arbitrator, *US − Gambling (Article 22.6 − US)*, para. 2.29).

[64] China's comments on the United States' comments on the draft timetable and working procedures, para. 36 (referring to Panel Report, *US − Upland Cotton (Article 21.5 − Brazil)*, paras. 8.16-8.20).

[65] China's comments on the United States' comments on the draft timetable and working procedures, para. 57.

[66] We do note, however, in issuing our supporting reasoning to the parties in this Report, that the reports in those proceedings have now been circulated to Members. In reviewing them, we were able to confirm our reasoning as they did not, in our view, support the United States' contentions. In particular, we observe that the panel in *US − OCTG (Korea)* did not grant the United States' request to hold a partially open meeting, contrary to what the United States' seemed to have suggested. Thus, at the time we took our decision to the decline the United States' request, there had only been one dispute in which a partially open meeting had been authorized: *US − Tuna II (Mexico) (Article 22.6 − US)* and the second compliance panels in this same dispute.

[67] United States' comments on the draft timetable and working procedures, para. 7 (referring to Decision by the Arbitrator, *US − Tuna II (Mexico) (Article 22.6 − US)* Annex A-1 para. 3).

note that these were the first proceedings where a partially open meeting has ever been authorized, as before, panels only agreed to open their meetings to the public whenever there was consent by all the parties, or at least, no opposition to such request.[68] In its reasoning, the arbitrator considered that in principle, it had the power to authorize the United States to disclose statements of its own positions (but not those of Mexico) to the public through a partially open arbitrator's meeting, even if Mexico opposed the United States' request. The arbitrator elaborated and stated that one party cannot simply veto another party's request that it be authorized to disclose statements of its own positions.[69] However, we also observe that the arbitrator stated that it did not follow that it must *automatically* grant the United States' request.[70] Notably, it stated that although the United States has an autonomous right to disclose statements of its own positions to the public, that right is not absolute. Rather, that right found limitation in Mexico's right not to have statements of its own positions disclosed by the United States during any public parts of the arbitrator's meeting.

7.23. From the above statements, we observe that the arbitrator's reasoning gave an important role to the right that each Member has to disclose statements of its own position pursuant to Article 18.2 of the DSU. By framing the legal question as one predominantly dealing with the right of the United States to disclose statements of its own position, the arbitrator was able to address the fact that Mexico expressly opposed such request being granted. According to the arbitrator, a party cannot "simply veto another party's request that it be authorized to disclose statements of its own positions".[71] However, and as we explained in paragraph 7.11 above, we do not find that a party's right to disclose statements of its own position is dispositive for our decision not to open our meetings to the public. This is even more so in a situation where one party directly opposes the request. In our view, this right can be exercised autonomously by each Member and should not be confused or conflated with the question of whether a panel should hold an open meeting, in full or in part. Consent from the parties whose statements could be made public if a panel decides to hold open meetings may well be a necessary condition to do so, but it may not be a sufficient condition, as it remains within the discretion of the panel to grant such a request.

7.24. In this vein, we agree with the arbitrator that a party cannot simply veto another party's *decision* to disclose statements of its own position to the public. Article 18.2 of the DSU does not condition a Member's right to disclose its statements on the approval of another Member. However, we do not fully understand why the arbitrator framed this issue as being about whether a party can veto another party *seeking authorization from the panel* to disclose statements of its own position. As discussed earlier, Article 18.2 of the DSU does not require that a party *seek authorization* from a panel to disclose its statements. To us, the nature of the United States' request in that case was that of a partial opening of the arbitrator's meeting, a decision which *required* authorization from the arbitrator. We see this as different from merely requesting that it be allowed to disclose its own statements, a matter that did not need the arbitrator's authorization. For these reasons, we are unable to fully agree with the arbitrator's approach in current assessment of the United States' request.

7.25. We are nonetheless mindful that Members' rights to confidentiality and to disclose statements of their own position under the DSU play an important role in our assessment of the United States' request. However, this is merely a part of the legal issue before us. The overarching issue we face is whether a panel should use its discretion and open its meeting for public observation, even partially, in the light of one party opposing such opening.

7.1.3.4 Concluding considerations

7.26. We recall that the Appellate Body in *US – Continued Suspension* stated that the confidentiality requirement was intended to foster the system of dispute settlement under conditions of fairness,

[68] In this regard, we recall *US – Continued Suspension/Canada – Continued Suspension*, at both the Panel and Appellate Body stage, the panel in *US – COOL*, and the *US – Large Civil Aircraft (Article 21.5 – EU)* compliance panel, where meetings were opened with the consent of both parties. In contrast, the Appellate Body in *EU – Biodiesel (Argentina)*, the compliance panel in *US – Upland Cotton (Article 21.5 – Brazil)*, the arbitrator in *US – Gambling (Article 22.6 US)* and the panel in *US – OCTG (Korea)* all rejected the request for open hearings where one party did not consent.

[69] Decision by the Arbitrator, *US – Tuna II (Mexico) (Article 22.6 – US)*, para. 2.21.

[70] Decision by the Arbitrator, *US – Tuna II (Mexico) (Article 22.6 – US)*, para. 2.24.

[71] Decision by the Arbitrator, *US – Tuna II (Mexico) (Article 22.6 – US)*, para. 2.21.

impartiality, independence and integrity[72], and that it had the power to authorize requests for holding fully open hearings, provided that this does not affect the confidentiality in the relations between the third participants and the Appellate Body, or impair the integrity of the appellate process.[73] We thus are of the view that in the process of exercising our discretion and deciding whether to grant or not the United States' request we should weigh and balance several factors, including fairness, independence, due process, the rights and interests of the parties to the dispute, and the integrity of the panel process.[74]

7.27. In this connection, we note that the United States argues that the opening of panel meetings to observation serves both to heighten public confidence in the WTO and to build familiarity in those Members that do not participate often in the dispute settlement system by letting them observe the high-quality work of panels. According to the United States, numerous WTO panels have opened their proceedings to the public and those experiences have been beneficial for Members and the public, and thus ultimately for the WTO.[75] It thus seems that the United States has a general interest in the transparency of the dispute settlement mechanism so as to heighten the public confidence in the WTO system and to help other Members build familiarity with it.

7.28. On the other hand, China submits that a proper balancing of the requirements for confidentiality and the integrity of the dispute settlement process, against any potential enhanced transparency, strongly suggests that the Panel should decline the United States' request for a partially open meeting.[76] For China, this dispute involves complex factual questions, and China states that it anticipates that certain of the evidence it provides will have to be designated confidential. China contends that in these circumstances, it is likely that there would be very little of the United States' statements and interventions that could be shown to the public in a partially open meeting, and that what little there is may not be comprehensible.[77]

7.29. We are thus required to balance the possible enhanced transparency of the dispute settlement mechanism that could heighten public confidence in the WTO system and help other Members build familiarity with it, on the one hand, and China's confidentiality rights and the integrity of the panel process, on the other. In this connection, we are mindful of China's arguments that the complexity of the factual questions involved, and the fact that certain information would likely have to be designated confidential, may mean that any transparency resulting from partially open meetings might actually be limited.[78]

7.30. Regarding the integrity of the panel process, and, in particular, the due process considerations arising from the divergent interests of the parties, we believe that not having consent from all the parties is a factor that should be heavily weighed by the Panel. Although we are well aware that partially open meetings might be an option in situations where one party does not agree to hold a

[72] Appellate Body Report, *US − Continued Suspension*, Annex IV, para. 6.

[73] Appellate Body Report, *US − Continued Suspension*, Annex IV, para. 7.

[74] We note that the arbitrator in *US − Tuna II (Mexico) (Article 22.6 − US)* also mentioned some similar factors that may be of use in this process: namely (i) a non-disclosing party's right to confidentiality protection of statements of its own position; (ii) due process; (iii) the prompt settlement of disputes; (iv) and the careful and efficient discharge, or the integrity, of the adjudicative function. Decision by the Arbitrator, *US − Tuna II (Mexico) (Article 22.6 − US)*, para. 2.31.

[75] United States' comments on the draft timetable and working procedures, para. 5.

[76] China's comments on the United States' comments on the draft timetable and working procedures, para. 53.

[77] China's comments on the United States' comments on the draft timetable and working procedures, para. 52. We note that during the organizational meeting, the United States expressed its opinion that it does not agree with China's characterization that this matter is particularly complex.

[78] We understand that this is so because if the Panel decides to partially open its meetings, it would most likely have to follow an approach similar to that chosen by the arbitrator in *US − Tuna II (Mexico) (Article 22.6 − US)* and adopt procedures that guarantee that China's confidentiality rights are duly protected. In particular, we note that those procedures would most likely envisage having a delayed public broadcast of the Panel's meeting so as to be able to perform a redaction process of the United States' statements to avoid any inadvertent disclosure of China's arguments and position. We are mindful that in implementing such redaction procedures, the possibility exists that the resulting recording which is to be shown to the public may be fragmented and discontinuous. This result could make the arguments of the United States difficult to follow and ultimately defeat the purpose of opening the hearing to the public. In other words, guaranteeing China's confidentiality rights might require a redaction process following which the United States' interventions at the meetings could be difficult for the public audience to understand. We can thus see that, in practice, a partially open meeting may not be conducive to enhance the transparency of the dispute settlement mechanism.

fully open meeting, as was signalled by the arbitrator in *US − Tuna II (Mexico) (Article 22.6 − US)*, we do not necessarily agree with the reasoning presented by the arbitrator in those proceedings, as discussed previously.[79] In our view, if the Panel is going to exercise its discretionary powers to adopt procedural rules, consent by the parties involved in the dispute should be an important factor to weigh in its decision.

7.31. For the foregoing reasons, and especially (i) because the potential enhanced transparency resulting from the Panel opening its meeting partially to the public might be limited in practice, and (ii) due to China's express opposition to such request, we find that the balance weighs against granting the United States' request. We thus decline to exercise our discretion to grant the request to deviate from the standard working procedures in order to hold partially open meetings in this dispute.

7.2 The measures challenged in this dispute and China's claim relating to the expiry of one of the measures

7.32. In its first written submission, China asserts that one of the measures which China understood the United States was challenging − the Temporary Purchase and Reserve Policy (TPRP) for corn − expired prior to the panel request and, as a result, it falls outside the Panel's terms of reference.[80] The United States disputes that the measure expired and argues, among other things, that China incorrectly identified the TPRP for corn as one of the measures challenged in this dispute.[81] The United States maintains that it "has challenged in its panel request the domestic support provided to agricultural producers in China during the years 2012, 2013, 2014 and 2015, including support provided to producers of wheat, Indica rice, Japonica rice and corn."[82] The United States considers the TPRP for corn to constitute a series of legal instruments, rather than a measure.[83] As a result, in the United States' view, a modification or expiry of the TPRP for corn "would not necessarily bring a Member's domestic support in conformity with its commitments", if the level of domestic support exceeds the commitment level.[84] In addition, the United States maintains that, in any event, the corn measure did not expire and that the Panel should make findings and recommendations with regard to that measure.

7.33. As a result, a disagreement ensued between the parties on the nature and characterization of the measures challenged by the United States and the alleged expiry of the measure relating to corn. These are two preliminary issues which the Panel must address before turning to the substance of the United States' claims. Accordingly, we will first consider the parties' arguments relating to the measures at issue in this dispute. Depending on the outcome of this analysis, we will turn to the question of whether the Panel should refrain from ruling on any of the challenged measures. We then outline the main characteristics of the measures that will be subject to the Panel's assessment.

7.2.1 The measures challenged by the United States

7.34. The United States refers to its panel request, arguing that it "describes four measures at issue: the 'domestic support provided by China' (or 'China's domestic support in favour of agricultural producers') in each of the years 2012, 2013, 2014 and 2015".[85] In that regard, the United States distinguishes between the measures it is challenging and the arguments it makes to support its claims.[86] The United States explains that the reference to "China's domestic support in favour of agricultural producers" in the panel request relates to the challenged measures and the reference to

[79] See paragraph 1.22. above.
[80] China's first written submission, paras. 278-282.
[81] United States' opening statement at the first meeting of the Panel, para. 48; United States' comments on China's challenge to the Panel's terms of reference, para. 15.
[82] United States' comments on China's challenge to the Panel's terms of reference, para. 8.
[83] United States' opening statement at the first meeting of the Panel, para. 50; United States' comments on China's challenge to the Panel's terms of reference, para. 26.
[84] United States' opening statement at the first meeting of the Panel, para. 50; United States' comments on China's challenge to the Panel's terms of reference, para. 26.
[85] United States' comments on China's challenge to the Panel's terms of reference, para. 14; United States' second written submission, para. 14.
[86] United States' second written submission, paras. 15-16. United States' response to Panel question No. 23, paras. 95-99.

"domestic support provided to producers of, *inter alia*, wheat, Indica rice, Japonica rice and corn" is a preview of the United States' arguments.[87]

7.35. China submits that the United States' challenge in this dispute is limited to the provision of market price support to wheat, rice and the TPRP for corn.[88] China refers in that regard to the United States' panel request listing legal instruments which establish market price support for wheat, Indica rice, Japonica rice and corn.[89] China also quotes the United States' first written submission, which mentions market price support programmes in the context of the challenged measures and the object of the dispute.[90]

7.36. China further contends that the United States' characterization of the measures at issue as the "level of domestic support" or "China's provision of domestic support" to agricultural producers, is contradicted by the language of the panel request.[91] In addition, China claims that if the measures were indeed identified by the United States in such broad terms, it would fail to meet the specificity requirement in Article 6.2 of the DSU.[92] In China's view, the term "provision of domestic support to Chinese agricultural producers" would cover various types of measures that constitute domestic support, such as "amber box", "blue box" and "green box" measures, with regard to which the United States has not presented substantive arguments.[93] This, according to China, would raise serious due process concerns, as China considers itself unable to defend domestic support measures for products other than those covered by the United States' panel request and arguments put forward by the United States.[94] China also states that, under these circumstances, it would be inappropriate for the Panel to issue recommendations with regard to such broadly defined measures, because the responding Member would not know what steps to take in order to bring them into compliance.[95]

7.37. In response to China's arguments alleging lack of precision in the identification of the measures at issue, the United States maintains that it identified a specific measure challenged in the dispute, which meets the requirement of an act or an omission of a Member.[96] The United States further explains its characterization of the measure at issue with the fact that the Agreement on Agriculture seeks to limit the amount of domestic support a Member may provide, without prohibiting any specific form of domestic support.[97]

7.38. Article 11 of the DSU requires a panel to make an objective assessment of the matter referred to it for adjudication by the DSB.[98] This matter consists of two elements: the specific measures at issue and the legal basis of a complaint, both of which have to be identified in the request for the establishment of a panel.[99] It is the panel request that must sufficiently precisely identify the

[87] United States' second written submission, paras. 18-19 (quoting United Sates' request for the establishment of a panel, p. 6).

[88] China's first written submission, paras. 62 and 281; China's comments on the United States' comments on China's challenge to the Panel's terms of reference, para. 28.

[89] China's comments on the United States' comments on China's challenge to the Panel's terms of reference, paras. 15-21; China's second written submission, paras. 26-33.

[90] China's comments on the United States' comments on China's challenge to the Panel's terms of reference, paras. 8-12; China's second written submission, paras. 34-37.

[91] China's comments on the United States' comments on China's challenge to the Panel's terms of reference, paras. 13-14.

[92] China's comments on the United States' comments on China's challenge to the Panel's terms of reference, para. 24 (citing Appellate Body Reports, *US − Zeroing (Japan) (Article 21.5 − Japan)*, para. 116; and *EC and certain member States − Large Civil Aircraft*, para. 645); China's opening statement at the first meeting of the Panel, para. 87; China's second written submission, para. 45.

[93] China's comments on the United States' comments on China's challenge to the Panel's terms of reference, para. 24; China's comments on the United States' response to Panel question No. 59 (second substantive meeting). Due to an anomaly in the numbering of the Panel's questions to the parties at the Panel's second substantive meeting with the parties (where a small number of questions inadvertently overlapped those of the first meeting), references to question Nos. 52-74 will include a reference to the substantive meeting at which they were put to the parties, as demonstrated above.

[94] China's second written submission, para. 65.

[95] China's second written submission, para. 66.

[96] United States' second written submission, paras. 23-24.

[97] United States' second written submission, para. 25; United States' response to Panel question No. 1.

[98] See also Article 7.1 of the DSU.

[99] Article 6.2 of the DSU. Appellate Body Report, *Guatemala − Cement I*, para. 72.

measure at issue in a dispute.[100] Without an adequate identification in a panel request, a measure will not form part of the matter covered by the panel's terms of reference.[101]

7.39. The panel request, and the identification of the challenged measures in particular, fulfil an important due process role. As the Appellate Body noted in *EC − Selected Customs Matters*, "[t]he word 'specific' in Article 6.2 establishes a specificity requirement regarding the identification of the measures that serves the due process objective of notifying the parties and the third parties of the measure(s) that constitute the object of the complaint."[102] The content of a panel request should thus allow the respondent to discern the matter that is referred for adjudication.[103]

7.40. In light of the parties' disagreement over the measures at issue in this dispute, the Panel has to examine the content of the panel request and determine the measures identified therein. In doing so, the Panel has to carefully analyse the language of the panel request read as a whole and taking into account the attendant circumstances.[104] We recall in this connection that while a party's subsequent submissions during the panel proceedings cannot cure a defect in a panel request, they may be consulted to confirm or clarify the meaning of the words used in the panel request.[105]

7.41. The United States' panel request reads, in relevant part:

> China provides domestic support in favor of its agricultural producers. The level of domestic support China provides is in excess of its commitment level of "nil" specified in Section I of Part IV of its Schedule CLII because, for example, China provides domestic support in excess of its product-specific *de minimis* level of 8.5 percent for each of wheat, Indica rice, Japonica rice, and corn.[106]

7.42. The request goes on to list a number of legal instruments "through which China provides domestic support in favour of agricultural producers, including support in favour of producers of wheat, Indica rice, Japonica rice, and corn, operating collectively or separately."[107] The listed instruments are grouped in five categories: general legal instruments concerning China's grain policies and those relating more specifically to market price support for producers of wheat, Indica rice, Japonica rice and corn.[108] The panel request further reads that such legal instruments "include but [are] not limited to" the ones listed in the request.[109]

7.43. Finally, following a reference to Articles 3.2 and 6.3 Agreement on Agriculture, the panel request contains the following statement:

> In particular, China's domestic support in favor of agricultural producers, expressed in terms of its current Total Aggregate Measurement of Support ("Total AMS"), exceeds China's final bound commitment level in 2012, 2013, 2014, and 2015 on the basis of domestic support provided to producers of, inter alia, wheat, Indica rice, Japonica rice, and corn. The United States further considers that, to the extent applicable, these measures are inconsistent with China's obligation under Article 7.2(b) of the Agriculture Agreement, because in 2012, 2013, 2014 and 2015, China provides domestic support

[100] Appellate Body Report, *Dominican Republic − Import and Sale of Cigarettes*, para. 120; Panel Report, *Canada − Wheat Exports and Grain Imports*, para. 6.10.
[101] Appellate Body Report, *Dominican Republic − Import and Sale of Cigarettes*, para. 120.
[102] Appellate Body Reports, *EC − Selected Customs Matters*, para. 152; and *US − Carbon Steel*, para. 126.
[103] Appellate Body Report, *US − Continued Zeroing*, para. 168.
[104] Appellate Body Reports, *China − HP-SSST (Japan)*, para. 5.13; *EC and certain member States − Large Civil Aircraft*, para. 787; *US − Carbon Steel*, para. 127; *US − Oil Country Tubular Goods Sunset Reviews*, paras. 164 and 169; *US − Continued Zeroing*, para. 161; and *US − Zeroing (Japan) (Article 21.5 − Japan)*, para. 108.
[105] Appellate Body Reports *US − Carbon Steel*, para. 127; *China − Raw Materials*, para. 220; *US − Countervailing and Anti-Dumping Measures (China)*, para. 4.9; *US − Countervailing Measures (China)*, para. 4.20.
[106] United States' request for the establishment of a panel, p. 1. (footnote omitted)
[107] United States' request for the establishment of a panel, p. 1.
[108] United States' request for the establishment of a panel, pp. 1-6.
[109] United States' request for the establishment of a panel, p. 1.

> for wheat, Indica rice, Japonica rice, and corn in excess of its product-specific *de minimis* level of 8.5 per cent for each product.[110]

7.44. Looking at the above relevant excerpts of the United States' panel request, we note the claim that China's provision of domestic support exceeds China's 8.5% *de minimis* level and, as a result, China's commitment level of nil, relates to four separate products, namely wheat, Indica rice, Japonica rice and corn. While the panel request contains the terms "for example" and "*inter alia*" in describing the product scope of the United States claims, the request is silent on any other products for which China might have provided domestic support and whether the level of such support exceeded the *de minimis* limit with regard to those products. In a similar vein, we find the reference to "any amendments, or successor, or replacement, or implementing measures" vague and not allowing the identification of other specific measures that could be challenged in this dispute.[111] As a result, an objective reading of the panel request suggests that the United States was not challenging China's provision of domestic support with regard to agricultural products other than wheat, Indica rice, Japonica rice and corn.

7.45. Further, with the exception of six general policy documents, the panel request refers exclusively to legal instruments concerning China's market price support for producers of wheat, Indica rice, Japonica rice and corn. We note in that regard that market price support is only one type of mechanism, which a Member can avail itself of to provide domestic support to agricultural producers, another being, for example, direct payments. Yet, the United States does not refer to any other kind of domestic support. This is in stark contrast to the total of 40 specific legal instruments listed in the panel request concerning market price support and excluding the numerous implementing regulations mentioned in the footnotes.

7.46. Against that backdrop, we are not persuaded by the United States' argument that the references in the panel request to legal instruments concerning market price support for wheat, Indica rice, Japonica rice and corn merely "preview" the United States' arguments, rather than identify the measures at issue. We agree with the United States that a panel request may include anticipation of complainant's arguments and that such arguments should not be interpreted to narrow the scope of the measures or claims.[112] However, whether references to legal instruments could be read as a preview of the complainant's arguments largely depends on the language of the panel request and the context in which they are mentioned. In particular, we bear in mind that the parties' disagreement pertains to the fundamental question of the measures at issue in the dispute. In this sense, the question before us is different from the one raised in *EC − Selected Customs Matters* and relied on by the United States.[113] In that case, the findings relied on by the United States did not relate to the identification of the measures at issue.[114] Rather, they addressed the respondent's argument that listing certain areas of application of the measures resulted in limiting the matter to only such areas.[115]

7.47. In our view, the specific legal instruments listed in the panel request do not merely constitute an anticipation of the United States' arguments, but inform the nature and content of the challenged measures. This is because, taken together, these legal instruments contain essential elements of the measures and inform other parties to the dispute of the specific type of domestic support that the United States challenges. An objective reading of the panel request thus suggests that the United States' challenge is centred on a single means of domestic support, namely market price support, for producers of four agricultural products − wheat, Indica rice, Japonica rice and corn.

7.48. Our reading of the panel request finds confirmation in the United States' first written submission, which starts with the following words:

> Each year, the People's Republic of China ("China") provides a significant level of domestic support to its agricultural producers through a variety of subsidy programs

[110] United States' request for the establishment of a panel, p. 6.
[111] See Appellate Body Report, *EC − Selected Customs Matters*, para. 152, fn 369.
[112] United States' second written submission, para. 19 (quoting Appellate Body Report, *EC − Selected Customs Matters*, para. 153)
[113] United States' second written submission, para. 19.
[114] Appellate Body Report, *EC − Selected Customs Matters*, paras. 151-152.
[115] Appellate Body Report, *EC − Selected Customs Matters*, para. 153.

> and other measures. This dispute addresses a single means of agricultural support, "market price support," which China utilizes to support farmer incomes and increase production for basic agricultural products, including wheat, Indica rice, Japonica rice, and corn.[116]

7.49. Later, in the same submission the United States explains that:

> This dispute focuses on a single form of agricultural domestic support − market price support − which China provides to basic agricultural products including wheat, Indica rice, Japonica rice, and corn.[117]

7.50. Similarly to the panel request, while the use of the word "including" in the two paragraphs of the United States' first written submission cited above might suggest that the United States' claims could be challenging support provided to other products, the United States uses language that excludes such an interpretation. In particular, the United States' first written submission reads that:

> The United States demonstrates that China has acted inconsistently with its obligations pursuant to Articles 3.2 and 6.3 of the Agriculture Agreement on the basis of the level of domestic support provided through China's market price support measures in favor of wheat, Indica rice, Japonica rice, and corn, viewed separately or collectively.[118]

7.51. China's "market price support measures" referred to in the above statement are described in more detail in three sections of the United States' first written submission, entitled "China's Wheat Market Price Support Program", "China's Indica Rice and Japonica Rice Market Price Support Measures" and "China's Corn Market Price Support Measures". The above unambiguous statements confirm our reading of the panel request as addressing four separate measures, namely domestic support in the form of market price support for each of wheat, Indica rice, Japonica rice and corn.[119] These are thus the measures at issue in this dispute. In the light of this conclusion, the Panel does not need to address China's alternative arguments relating to the alleged lack of specificity of the measure at issue, if it was identified as provision by China of domestic support to agricultural producers.

7.52. The United States is challenging China's measures relating to wheat, Indica rice, Japonica rice and corn on the basis of evidence provided for years 2012, 2013, 2014, and 2015.[120] We will, therefore, conduct our assessment with regard to domestic support provided through market price support to producers of the relevant products in China.[121]

7.2.2 China's terms of reference claim raised with regard to the corn measure

7.53. China claims that the corn measure identified in the panel request by the United States expired prior to the request for the establishment of the Panel, and thus cannot be a measure at issue in this dispute.[122] China maintains that it first announced the termination of the TPRP for corn in March 2016 and put in place new measures consisting of direct payments to farmers and market-

[116] United States' first written submission, para. 1. (footnote omitted) (emphasis added)
[117] United States' first written submission, para. 14.
[118] United States' first written submission, para. 10.
[119] We note that in its submissions subsequent to the first written submission, the United States refers to a different measure, namely China's domestic support to agricultural producers. However, such references may have been influenced by China's claim relating to the expiry of the measure relating to corn, raised in China's first written submission. The Panel thus approaches such references with caution, in line with the Appellate Body's guidance that a panel may consult "in particular the first written submission of the complaining party […] in order to confirm the meaning of the words used in the panel request". Appellate Body Report, *US − Carbon Steel*, para. 127.
[120] The data serving as the basis for our assessment can be found in Annex D.
[121] China submits that it would be appropriate for the Panel to consider the 2016 data in the assessment of consistency of China's measures. However, the United States' claims relate to years 2012, 2013, 2014 and 2015, for which the evidence was available at the time of the request for the establishment of a panel. We will thus limit our assessment to the operation of the measures during these years.
[122] China's first written submission, paras. 337-338.

based purchases of corn shortly thereafter.[123] China contends that the TPRP for corn was last applied during the 2015 harvest season and has not been reintroduced since.[124]

7.54. Relying on the Appellate Body report in *EC − Chicken Cuts*, China goes on to argue that Article 6.2 requires that for a measure to fall within the panel's terms of reference, it must exist at the time of the establishment of the panel.[125] According to China, such a temporal limitation is consistent with Article 3.7 of the DSU, mentioning withdrawal of the measure concerned as "the first objective of the [WTO] dispute settlement system."[126] China further cites several panel and Appellate Body reports, with a view to demonstrating that a panel can only exceptionally make findings on a measure that had expired prior to its establishment and none of these exceptions applies in the case at hand.[127] China also relies on the Appellate Body report in *US − Certain EC Products* to argue that a panel cannot make a recommendation on an expired measure.[128]

7.55. As regards the new measures, allegedly introduced in 2016, China argues that they substantially differ from the TPRP for corn in several important aspects: (i) the direct payments to farmers operate in a fundamentally different manner compared to the TPRP for corn; (ii) they encourage limiting the production of corn; (iii) they do not involve an AAP and do not interfere with price discovery in the market for corn.[129] In particular, the absence of the AAP constitutes, according to China, an essential difference between the TPRP for corn on the one hand and the subsequently introduced subsidies for Chinese farmers and purchases of corn, on the other hand.[130] China further points to fluctuations in the corn market price in China following the alleged termination of the TPRP for corn, as proof that China had ceased to provide market price support to corn farmers.[131]

7.56. In response to China's claim, the United States primarily argues that the TPRP for corn is not the measure identified in the panel request and that its alleged expiry does not affect the United States' case against China.[132] We have already concluded that the United States' panel request identifies four measures, relating to the provision of domestic support in the form of a market price support to producers of each of wheat, Indica rice, Japonica rice and corn. In light of this conclusion, we will focus in this section on the arguments concerning the alleged expiry of the measure related to corn.

7.57. The United States submits that it is for China to demonstrate that the challenged measure ceased to exist and that China failed to do so.[133] In addition, the United States puts forward a number of arguments, to support its contention that the measure relating to corn did not expire. The United States points out that the overarching legal framework authorizing purchases of corn at administered prices, in particular the 2004 Grain Distribution Regulation and the 2004 Grain Opinion, continue to exist.[134] According to the United States, this general legal framework reflects an intention by the Chinese Government to protect interests of domestic farmers and provides for an explicit legal authority to adopt measures relating to market price support for China's agricultural producers.[135]

7.58. Further, the United States contends that the documents submitted by China and relating to China's policy of corn purchases adopted in 2016 "do not state that the TPRP has been terminated or that China will no longer engage in purchase and temporary storage of corn."[136] The United States argues that China continues to store and auction corn purchased under the 2012, 2013, 2014 and

[123] China's first written submission, paras. 290-295; China's comments on the United States' comments on China's challenge to the Panel's terms of reference, paras. 68-75; China's response to Panel question No. 1.
[124] China's first written submission, para. 296.
[125] China's first written submission, paras. 324-327; second written submission, paras. 74-77.
[126] China's first written submission, para. 328 (quoting Article 3.7 of the DSU).
[127] China's first written submission, paras. 330-335.
[128] China's second written submission, para. 97.
[129] China's first written submission, paras. 298-322.
[130] China's comments on the United States' comments on China's challenge to the Panel's terms of reference, paras. 62-65. China's response to Panel question No. 1.
[131] China's second written submission, paras. 127; China's responses to Panel question Nos. 1 and 2.
[132] See section 7.2.1 above.
[133] United States' second written submission, para. 48.
[134] United States' comments on China's challenge to the Panel's terms of reference, paras. 36-37.
[135] United States' first written submission, paras. 17-20, second written submission, paras. 42-43; United States' responses to Panel question Nos. 1, 24, 70.
[136] United States' comments on China's challenge to the Panel's terms of reference, paras. 39-41.

2015 TPRP.[137] For the United States, this shows that the corn measure continues to be applied. The United States also points to the similarities between the objectives and structure of the legal instruments implementing the TPRP policy and the new Chinese measures, as well as the fact that China continues to purchase corn at quantities similar to those in years prior to the alleged expiry of the corn measure.[138] Additionally, the United States contests the market-based nature of corn prices in China, as these have remained above the international prices.[139]

7.59. Moreover, the United States submits evidence allegedly reflecting government-administered purchase prices, at which the China Grain Reserve Corporation (Sinograin) and Chinatex procured corn in the Inner Mongolia province in October 2016.[140] In the United States' view, Exhibits USA-101 and USA-104, read in the light of other evidence reflecting Sinograin's substantial role on the grain market, show that Sinograin, and possibly other Chinese state-owned enterprises, conducted purchases of corn at administered prices on behalf of the government.[141] The United States points to the similarity between the corn purchases taking place prior to and after the alleged expiry of the corn measure. These similarities include the entities involved, the purchasing and pricing requirements, policy objectives, announcement and display requirements, lending and storage requirements.[142] According, to the United States, this evidence, considered together, shows that China has not terminated its provision of domestic support in the form of market price support to corn producers.[143]

7.60. In reaction to the evidence produced by the United States, China maintains that the prices listed in Exhibits USA-101 and USA-104 were communicated internally within the structures of the enterprises, based on market data published by the State Administration of Grain and adjusted in line with fluctuations of the market price.[144] With respect to Sinograin more specifically, China argues that the company has been given no mandate by the government to purchase corn at government-determined prices and that other, private actors active on the Chinese corn market issue similar documents.[145] To that end, China submits a number of notices by Sinograin and other grain-purchasing companies, which, in China's view, show that passing on pricing information by a company to its local branches is a common business practice.[146]

[137] United States' comments on China's challenge to the Panel's terms of reference, para. 38.
[138] United States' comments on China's challenge to the Panel's terms of reference, paras. 42-48; United States' second written submission, paras. 50-52; United States' response to Panel question No. 2
[139] United States' second written submission, para. 54.
[140] 2016 Sinograin Corn Price Announcement, (Exhibit USA-101/CHN-107B); 2016 Heilongjiang Corn Purchase Notice, (Exhibit USA-104).
[141] United States' comments on China's responses to Panel question Nos. 52 and 56 (second substantive meeting).
[142] United States' response to Panel question No. 55 (second substantive meeting).
[143] United States' opening statement at the first meeting of the Panel, paras. 59-62; United States' response to Panel question No. 52 (second substantive meeting).
[144] China's response to Panel question No. 52 (second substantive meeting).
[145] China's response to Panel question No. 52 (second substantive meeting).
[146] 2016 New Corn Purchase Guidance Price Notice, by SinoGrain headquarter, 3 November 2016 (English translation), (Exhibit CHN-111B); 2016 New Corn Purchase Guidance Price Notice, by SinoGrain headquarter, 15 November 2016 (English translation), (Exhibit CHN-112B); 2016 New Corn Purchase Guidance Price Notice, by SinoGrain headquarter, 16 November 2016 (English translation), (Exhibit CHN-113B); 2016 New Corn Purchase Guidance Price Notice, by SinoGrain headquarter, 22 November 2016 (English translation), (Exhibit CHN-114B); 2016 New Corn Purchase Guidance Price Notice, by SinoGrain headquarter, 30 November 2016 (English translation), (Exhibit CHN-115B); 2016 New Corn Purchase Guidance Price Notice, by SinoGrain headquarter, 7 December 2016 (English translation), (Exhibit CHN-116B); 2016 New Corn Purchase Guidance Price Notice, by SinoGrain headquarter, 14 December 2016 (English translation), (Exhibit CHN-117B); 2016 New Corn Purchase Guidance Price Notice, by SinoGrain headquarter, 21 December 2016 (English translation), (Exhibit CHN-118B); 2016 New Corn Purchase Guidance Price Notice, by SinoGrain headquarter, 28 December 2016 (English translation), (Exhibit 119B); 2016 New Corn Purchase Guidance Price Notice, by SinoGrain Inner Mongolia branch, 16 November 2016 (English translation), (Exhibit CHN-120B); 2016 New Corn Purchase Guidance Price Notice, by SinoGrain Inner Mongolia branch, 22 November 2016 (English translation), (Exhibit CHN-121B); 2016 New Corn Purchase Guidance Price Notice, by SinoGrain Inner Mongolia branch, 30 November 2016 (English translation), (Exhibit CHN-122B); 2016 New Corn Purchase Guidance Price Notice, by SinoGrain Heilongjiang branch, 7 December 2016 (English translation), (Exhibit CHN-123B); 2016 New Corn Purchase Guidance Price Notice, by SinoGrain Heilongjiang branch, 14 December 2016 (English translation), (Exhibit CHN-124B); 2016 New Corn Purchase Guidance Price Notice, by SinoGrain Heilongjiang branch, 21 December 2016 (English translation), (Exhibit CHN-125B); 2016 New Corn Purchase Guidance Price Notice, by SinoGrain Heilongjiang branch, 29 December 2016 (English translation), (Exhibit CHN-126B); 2016 New Corn

7.61. Additionally, the United States argues that China's claim regarding the expiry of the corn measure overlooks the context of a dispute involving calculation of the AMS. This is because an assessment of Members' compliance with domestic support commitments involves a retrospective examination of the levels of support.[147] According to the United States, a panel considering such claims should focus its assessment on the operation of the measures during the period for which the measures were challenged and for which the relevant data is available.[148] Otherwise a dispute over domestic support would turn into a constantly moving target, where a panel would need to update its assessment with the most recent numbers becoming available.[149] The United States relies in that regard on the report in *Korea − Various Measures on Beef*, in which the panel and the Appellate Body addressed domestic support provided prior to the establishment of the panel.[150] In a similar vein, the United States relies on the Appellate Body report in *China − Raw Materials* to argue that a panel should make findings on a recurring measure evidenced in annual legal instruments that may have ceased to exist prior to the establishment of a panel.[151]

7.62. Finally, the United States submits that, in any event, the alleged expiry of the corn measure should not prevent the panel from making findings and recommendations with regard to that measure. This is because the measure has been identified in the panel request and, as such, forms part of the matter referred to the Panel by the DSB for adjudication.[152] All the more so, as domestic support claims are necessarily based on historical data and findings with regard to such information are necessary in order to fulfil the objective of securing a positive solution to a dispute, as enshrined in Article 3.7 of the DSU.[153]

7.63. In their arguments, the parties raise two distinct, albeit related, issues. First, the parties disagree on the factual question of whether the corn measure expired in 2016, as claimed by China. Second, they have different views on whether the Panel should make findings and recommendations with regard to a measure that has ceased to exist. We will, therefore, start by addressing the factual question relating to the alleged expiry of the corn measure. Should we find that the measure did indeed expire, we will then determine whether to make findings and, eventually, a recommendation on that measure.

7.2.2.1 Whether the corn measure has expired

7.64. Both parties have submitted extensive facts and arguments relating to the alleged expiry of the corn measure. Under these circumstances, our task will essentially be to balance all evidence on record and decide whether the said measure has expired, as claimed by China, recalling that the original burden of establishing inconsistency of a measure rests on the United States.[154] In particular, we will compare China's new corn policy with the challenged corn measure to determine whether they have the same essence and, by implication, whether we can address the new measure in our findings.

7.65. Our review of the record evidence supports China's assertion that it reformed its corn policy by terminating the provision of market price support to corn producers following the 2015 corn harvest and replacing it with direct payments and purchases that do not involve an AAP. The reform

Purchase Guidance Price Notice, by SinoGrain headquarter, 26 October 2016 (English translation), (Exhibit CHN-127B); Corn Purchase Price of Cargill Biochemical Limited, 12 December 2016 (English translation), (Exhibit CHN-128B); Corn Purchase Price of Cargill Biochemical Limited, 14 December 2016 (English translation), (Exhibit CHN-129B); Corn Purchase Price of Cargill Biochemical Limited, 19 December 2016 (English translation), (Exhibit CHN-130B); Corn Purchase Price of Cargill Biochemical Limited, 20 December 2016 (English translation), (Exhibit CHN-131B).

[147] United States' comments on China's challenge to the Panel's terms of reference, paras. 17-29; United States' second written submission, paras. 30-32; United States' responses to Panel questions Nos. 4, 5 and 7.

[148] United States' second written submission, para. 31.

[149] United States' response to Panel question No. 10.

[150] United States' second written submission, para. 33; United States' response to Panel question No. 4.

[151] United States' second written submission, paras. 39-45; United States' response to Panel question No. 4.

[152] United States' responses to Panel question Nos. 5 and 11.

[153] United States' response to Panel question No. 11.

[154] Panel Report, *US − Section 301 Trade Act*, para. 7.14.

was announced in the 2016 No. 1 Document setting forth the priorities for China's agricultural policy in 2016. According to this document, the reform of support for corn farmers would follow:

> [T]he principle of letting the market determine prices and delinking subsidies from prices, reform in an active yet prudent way the system of corn purchase and storage; while allowing corn prices to reflect the relationship between market supply and demand, comprehensively take into account factors including adequate incomes for farmers, fiscal carrying capacity, and the coordinated development of the industry supply chain, and establish a corn producer subsidy system.[155]

7.66. A press release dated 28 March 2016 further reports that the corn procurement and reserve system would be reformed in that the "price [would be] formed by the market and decoupling of price and subsidy."[156] China's Ministry of Finance Opinions on Establishing the Subsidy System for Corn Producers, a document which was adopted "following the requirements" of the 2016 No. 1 Document, also refers to the reform of the corn purchase and reserve system, according to which it is for "the market to form the corn price."[157]

7.67. We further note that a 2016 notice on implementing the corn policy in the Heilongjiang province states expressly that the "temporary purchase and reserve system has been removed, and the new mechanism of 'market-oriented purchase' plus 'direct subsidy' is established".[158] The departure from corn procurement based on AAP is also reflected in a document from the Chinese Ministry of Finance, dated 20 May 2016.[159]

7.68. The United States Department of Agriculture (USDA) GAIN Reports also provide evidence of a fundamental change in China's policy of supporting corn producers. The documents, which do not necessarily reflect the position of the United States Government, state that in 2016, China's "government announced an end to the floor price for corn"[160] and that "China removed price support for corn producers".[161] They also summarize the new forms of support measures, which replaced the market price support for corn.[162] While it is true that one of the GAIN reports, dated April 2016, expressed some uncertainty about how the reform would unfold[163], none of the documents question China's efforts to move away from AAP-based purchases of corn. In particular, and contrary to the United States' assertion, the April 2017 GAIN Report does not seem to suggest a "significant uncertainty regarding China's continued provision of corn support prices".[164] The document refers to interventions by local, provincial, and central governments to compensate for, among others, "support prices".[165] We do not read this language as implying that purchases at minimum prices continued. To the contrary, the document seems to be referring to the difficulties in the agricultural

[155] Communist Party of China Central Committee and State Council Several Opinions on Strengthening Reform and Innovation and Accelerating Agricultural Modernization (Communist Party of China Central Committee, State Council, Zhong Fa [2015] No. 1, issued February 1, 2015), (Exhibit USA-91), p. 15.

[156] The State Council, News Report "Corn Temporary Purchase and Reserve System will be Shifted to a 'Market-oriented Purchase' and 'Direct Subsidies'", available at: http://www.gov.cn/xinwen/2016-03/28/content_5059171.htm (last viewed 26 October 2017) (English translation), (Exhibit CHN-74B), p. 1.

[157] Ministry of Finance Opinions on Establishing the Subsidy System for Corn Producers (Cai Jian [2016] No. 278), 20 May 2016 (English translation), (Exhibit CHN-73B), p. 3.

[158] 2016 Heilongjiang Corn Purchase and Sale Work Notice, (Exhibit CHN-86B), p. 1.

[159] The document refers to the same "Price formed by market and decoupling of price and subsidy" and states that "it is required to actively and steadily pursue the corn purchase and reserve system reform, and let the market to form the corn price." Notice on Issuing the Implementation Plan for the Establishment of Subsidy System for Corn Producers in Liaoning Province (Liao Cai Liu [2016] No.476), 1 August 2016 (English translation), (Exhibit CHN-79), p. 3. The Panel does not understand the term "decoupling" used in the document to connote the concept of decoupling within the meaning of Annex 2 of the Agreement on Agriculture.

[160] USDA, Foreign Agricultural Service, "China's Decision to End Corn Floor Price Shakes Grain and Feed Market", China Grain and Feed Update, GAIN Report Number: CH16027, 8 April 2016, (Exhibit CHN-83), p. 1.

[161] April 2017 USDA GAIN Report, (Exhibit CHN-84), p. 1.

[162] United States Department of Agriculture, Foreign Agricultural Service, "Everything Must Go, State Corn Reserves Begin Liquidation", China Grain and Feed Update GAIN Report Number: CH16058, 12 November 2016, (Exhibit CHN-75), pp. 4-5.

[163] See United States' response to Panel question No. 60 (second substantive meeting).

[164] See United States' response to Panel question No. 60 (second substantive meeting).

[165] April 2017 USDA GAIN Report, (Exhibit CHN-84), p. 2.

sector resulting from the elimination of the market price support for corn.[166] We conclude on this basis that the GAIN Reports corroborate the evidence submitted by China.

7.69. This is not to say that state-owned and private entities ceased to buy corn under the guidance of Chinese authorities.[167] In fact, the data available to the Panel shows that corn purchases reached significant levels in 2016 and 2017.[168] Fundamentally, however, the evidence reviewed by the Panel indicates that such purchases were not made at an AAP.[169] The 2016 Notice on Proper Handling of Corn Purchase Work in Northeast China This Year, which sets forth the objectives and modalities of the new corn policy, refers to the market nature of corn purchases.[170] This document encourages both state and private actors to engage in corn purchases at the prevailing prices.[171]

7.70. It is true that many of the above-referenced documents do not expressly mention the "termination" of China's provision of market price support to corn producers.[172] However, the covered agreements do not contain a requirement that measures be expressly terminated for them to be deemed to have expired. We note in this regard that prior adjudicators emphasized the importance of making such a determination by looking at "the content and substance of the instrument" to consider whether it constitutes a measure "and not merely [...] its form or nomenclature."[173] In our view, similar logic applies to claims concerning expiry of a measure – instead of assessing whether the underlying legal instruments were formally terminated, a panel has to examine whether the challenged measure still affects the operation of the covered agreements. In any event, the content of the official documents put on the record by the parties reflects efforts of the Chinese authorities to modify the corn purchase policy, so as to abolish the AAP.

7.71. Regarding the structure and content of the documents relating to the new corn measure, we note that they resemble, in some aspects, the annual TPRP Notices issued in years 2012-2015, i.e. under the old corn policy. In particular, the 2016 Corn Notice is addressed to a similar set of entities, including the local authorities of the major corn producing provinces, the Agricultural Development Bank of China (ADBC) and its local branches, Sinograin, COFCO, Chinatex and Aviation Industry Corporation of China.[174] Similarly to the TPRP Notices, the document requires the relevant entities to secure appropriate financing and storage space for corn purchases.[175] Fundamentally, however, unlike the TPRP Notices, the 2016 Corn Notice refers to the reform of China's corn purchase and reserve system, based on "market-oriented purchase" and the fact that "the price of corn will be

[166] The document states, among others, that "In 2016, China removed price support for corn producers" and that "China's corn producers struggle to respond to the elimination of the temporary reserve program." April 2017 USDA GAIN Report, (Exhibit CHN-84), pp. 1 and 19.

[167] The 2016 Corn Notice requires the relevant regions "to take effective measures and coordinate and organize the branches of central and major local grain enterprises within the areas to actively purchase the corn, encourage and guide the multiple market players to enter the market". The Panel understands that among the main enterprises that should "carry out the market-oriented purchase" were Sinograin, COFCO and Aviation Industry Corporation of China. 2016 Corn Notice, (Exhibit USA-87/CHN-80B), pp. 1-2.

[168] For instance, in the Jilin province 31.4 billion jin of corn had been purchased up until spring 2017. 2017 Jilin Corn Notice, (Exhibit USA-102), p.1.

[169] The Notice of Further Proper Handling of Corn Purchase and Sales Work refers to such purchases being made at market prices, which had been decreasing immediately prior to the release of the document. 2017 Jilin Corn Notice, (Exhibit USA-102), p.1.

[170] 2016 Corn Notice, (Exhibit USA-87/CHN-80B). The Panel is not assessing the extent to which market mechanisms determine corn prices prevailing in China, but rather notes that Chinese authorities did not set an AAP for corn.

[171] In the relevant part, the document reads that "Associated central enterprises [...] shall make full use of their own advantages and channels to carry out the market-oriented purchase, work harder to ensure the purchase volume no less than that of the policy-based purchase last year and play a leading role." 2016 Corn Notice, (Exhibit USA-87/CHN-80B), p. 2.

[172] We recall, however, that the 2016 notice on implementing the corn policy in the Heilongjiang province states expressly that the "temporary purchase and reserve system has been removed". 2016 Heilongjiang Corn Purchase and Sale Work Notice, (Exhibit CHN-86B), p. 1.

[173] Panel Report, *EC – IT Products*, para. 7.1167; and Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, fn 87.

[174] 2016 Corn Notice, (Exhibit USA-87/CHN-80B), p. 1; 2012 TPRP Notice, (Exhibit USA-52/CHN-69B), p. 1; 2013 TPRP Notice, (Exhibit USA-53/CHN-70B), p. 1; 2014 TPRP Notice, (Exhibit USA-54/CHN-71B), p. 1; and 2015 TPRP Notice, (Exhibit USA-55/CHN-72B), p.1.

[175] 2016 Corn Notice, (Exhibit USA-87/CHN-80B), pp. 2-3; 2012 TPRP Notice, (Exhibit USA-52/CHN-69B), pp. 2-3; 2013 TPRP Notice, (Exhibit USA-53/CHN-70B), pp. 2-5; 2014 TPRP Notice, (Exhibit USA-54/CHN-71B), pp. 4-6; 2015 TPRP Notice, (Exhibit USA-55/CHN-72B), pp. 2-7.

formed by the market and reflects the supply and demand relation in the market".[176] In a similar vein, other official documents state that "the corn price will be formed by the market" or that "corn prices are based on the market".[177] The relevant documents do not mention thus any price imposed by the central or local governments. This is in stark contrast to the content of the legal instruments implementing China's policy of supporting corn price during the years 2012-2015, which invoke "stabilizing market prices" and set forth in detail the AAP.[178]

7.72. In that connection, the United States argues that China does not publish the AAP and, as a result of this lack of transparency, the United States is not in a position to identify it.[179] At the same time, the United States submits two documents, one issued by Sinograin and the other one by Chinatex, which, in the United States' view, reveal the AAP and, read together with other evidence[180], constitute proof of China's continuing provision of market price support to corn farmers.[181]

7.73. Looking at the content of these documents, we note that the Notice on Activating 2016 Autumn Grains Corn Purchase Work directs all affiliated depots of the Inner Mongolia branch of Sinograin to purchase corn offered for sale by farmers. The document states that "in order to better serve grain-selling farmers and to safeguard the smooth execution of 2016 autumn grains corn purchase work" the depots will advertise and "activate autumn grains corn purchases".[182] The document further lists different purchase prices, ranging from 0.65 to 0.71 yuan per jin, depending on the region.[183] Similar information can be found in an analogous notice issued by the Heilongjiang branch of Chinatex.[184]

7.74. We note that the prices listed in the two documents submitted by the United States broadly correspond to the level of prices issued by other players on the corn market in China, such as Cargill, Jilin Boda Biochemical and Liaoning Yihai Kerry Starch Factory.[185] They also seem to be in line with or slightly lower than the average prices prevailing during the relevant time-period and in the relevant provinces, submitted by China in response to a question from the Panel.[186] Because the prices mentioned in the two documents do not differ significantly from the prices used by other market players and the average prices prevailing in the relevant Chinese provinces, these documents, read in the light of other record evidence, do not allow a conclusion that the figures listed therein constitute government-administered prices.

7.75. As regards the average corn prices provided by China, the United States contests their reliability, arguing that China's exhibits do not identify the sources of the data nor which entities provided the data, and that the documents contained very limited amounts of information, were not available online or to the public and did not contain any official seal, letterhead or other marking reflecting their status or nature.[187] The United States also explains that it was unable to provide such information due to China's lack of transparency.[188] Yet, we note that certain publicly available

[176] 2016 Corn Notice, (Exhibit USA-87/CHN-80B), p. 1.

[177] 2016 Heilongjiang Corn Purchase and Sale Work Notice, (Exhibit CHN-86B), p. 1; National Development and Reform Commission, News Release, "The Reform of the Corn Purchase and Reserve System Achieved Remarkable Effect", 23 June 2016 (English translation), (Exhibit CHN-87), p. 1.

[178] "In order to conscientiously protect the interest of farmers, stabilize market prices and promote stable development of grain production, the State will implement national temporary reserve purchase of corn". 2012 TPRP Notice, (Exhibit USA-52/CHN-69B), p. 1. See also 2013 TPRP Notice, (Exhibit USA-53/CHN-70B), p. 1; 2014 TPRP Notice, (Exhibit USA-54/CHN-71B), p. 1; and 2015 TPRP Notice, (Exhibit USA-55/CHN-72B), p.1.

[179] United States' responses to Panel questions Nos. 2 and 3.

[180] United States' response to Panel question No. 52 (second substantive meeting).

[181] United States' opening statement at the second meeting of the Panel, paras. 59-62; United States' response to Panel question No. 52 (second substantive meeting); United States' comments on China's response to Panel question No. 52 (second substantive meeting).

[182] 2016 Sinograin Corn Price Announcement, (Exhibit USA-101/CHN-107B), p. 1.

[183] 2016 Sinograin Corn Price Announcement, (Exhibit USA-101 CHN-107B), p. 1.

[184] 2016 Heilongjiang Corn Purchase Notice, (Exhibit USA-104), p. 1.

[185] The prices differ based on the origin (province and region), quality grade and moisture level. Corn Purchase Price of Cargill Biochemical Limited, 12 December 2016, (Exhibit CHN-128B), p.1; Purchase Information of Jilin Boda Biochemical Limited, 13 December 2016 (English translation and original), (Exhibit CHN-133), p. 1; Yihai Kerry Starch, "Liaoning Yihai Kerry Starch Factory Will Lower the New Corn Purchase Price by 20 yuan/ton at 11 a.m., October 29", 29 October 2017 (English translation), (Exhibit CHN-134), p. 1.

[186] China's response to Panel question No. 53 (second substantive meeting).

[187] United States' comments on China's responses to Panel question Nos. 52 and 53.

[188] United States' response to Panel question No. 53 (second substantive meeting).

documents contain corn spot prices for the relevant period of time, even if it is not a complete average monthly data for particular provinces. For example, the November 2016 GAIN Report by the USDA states that "30-day average spot prices in early December 2016 are at 1,681 RMB per ton".[189] This document shows not only that foreign actors have access to pricing data in China, but also that the prices specified in Exhibit USA-101 generally correspond to corn prices prevailing in the major corn-producing provinces.

7.76. Turning to the corn price itself, the record evidence shows a significant price drop coinciding with the alleged expiry of the measure relating to corn.[190] As demonstrated in Figures 1 and 2, one submitted by China and the other by the United States, the average price of corn significantly decreased in China in early 2016 and then fluctuated between 65 and 82 yuan per jin, depending on the province.

Figure 1: Corn prices, January 2012 – February 2018

Source: China's second written submission, Figure 1.

Figure 2: Corn prices, 2012 – 2017

Source: Corn Prices 2012-2017, (Exhibit USA-94).

7.77. In the Panel's view, the significant drop in corn price following the harvest period of the 2015 corn, as shown in Figure 2, would support the view that past that period, central or local governments, or other entities affiliated with the government, no longer set the AAP for corn in the

[189] United States Department of Agriculture, Foreign Agricultural Service, "Everything Must Go, State Corn Reserves Begin Liquidation", China Grain and Feed Update GAIN Report Number: CH16058, 12 November 2016, (Exhibit CHN-75), p. 11. We note that the United States refers to the price information provided in the GAIN reports in its second written submission, para. 54.

[190] China's second written submission, paras. 132-133; China's response to Panel question No. 2; Corn Prices 2012-2017, (Exhibit USA-94), p.1.

major corn-producing Chinese provinces. If such a practice had been maintained, one would have expected the price of corn not to fall so significantly.

7.78. According to the United States, higher domestic corn prices, compared to international prices, indicate that "the lack of an applied administered price communicated to private market actors and farmers does not mean that the domestic price is market-based, or that the purchases made by state-owned enterprises were not done at support prices."[191] We recall, however, that this dispute is not about the price of corn in China being free from any type of government intervention, or higher than international prices. As the United States notes in its first written submission, this dispute focuses on a single form of domestic support, namely market price support.[192] Where a measure takes the form of a market price support, the AAP is a constituent element of that measure.[193] Many factors other than a government setting specific prices can influence a product price in a specific market, including customs tariffs, quantitative restrictions, as well as other non-tariff measures and other factors.[194] Therefore, showing a difference between domestic and international prices is, in light of the claims raised by the United States in this case, not enough to conclude that China continued to purchase corn at an AAP.

7.79. Turning to the United States' argument that China continues to store and auction corn purchased as part of the 2012, 2013, 2014 and 2015 TPRP, we fail to see the relation between these activities and the alleged violations of Articles 3.2 and 6.3 of the Agreement on Agriculture.[195] The United States' claims under these provisions relate to China providing domestic support in the form of market price support to producers of corn. In light of Paragraph 8 of Annex 3 to the Agreement on Agriculture, this specific form of domestic support consists of purchases of agricultural products at an AAP. This provision does not seem to attach any legal relevance to auctioning and storing of previously purchased corn. Indeed, the last sentence of Paragraph 8 expressly excludes from its scope payments relating to, among others, buying in or storage of agricultural products.

7.80. Therefore, based on the totality of evidence before the Panel, we conclude that the reform of China's corn policy removed an essential element of the challenged corn measure, the AAP. To us, this reform thus marks the expiry of China's domestic support provided to the producers of corn in years 2012 through 2015 in the form of market price support. We base our conclusion on the documentary evidence, which reflects China's departure from the market price support policy through purchases of corn at an AAP, as well as record evidence of corn prices prevailing in China. In particular, the balance of the evidence does not support the United States' contention that China continued to purchase corn at an AAP following the expiry of the 2015 TPRP Notice and the announcement of the new corn policy. As a result, we find that the measure relating to corn expired prior to the initiation of the dispute by the United States, including its request for consultations and the request for the establishment of a panel.

7.2.2.2 Whether the Panel should make findings on the otherwise expired corn measure

7.81. Having concluded that the measure relating to corn expired, we will now address China's assertion that, due to its termination, the measure falls outside the Panel's terms of reference and the Panel should not make findings and issue recommendations with regard to that measure.

7.82. Pursuant to Article 7.1 of the DSU, a panel has to examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to it by the complainant. This matter consists of the claims and the specific measures at issue identified in a panel request.[196] It is the same matter that a panel "should make an objective assessment of" pursuant to Article 11 of the DSU. In *EU – PET (Pakistan)*, the Appellate Body explained that in the exercise of its inherent adjudicative powers, a panel has the authority "to assess objectively whether

[191] United States' second written submission, para. 54.
[192] United States' first written submission, para. 14.
[193] Annex 3 AoA, para. 8; United States' first written submission, para. 93.
[194] Indeed, the continued efforts by Chinese state and private actors to purchase corn, as well as other measures that China may have in place, may have resulted in corn prices in China being higher than international prices. Both parties produced documents reflecting these efforts. See paras 7.68, 7.69 and 7.71 above.
[195] United States' comments on China's challenge to the Panel's terms of reference, para. 38; United States' response to Panel question No. 8.
[196] Appellate Body Report, *Guatemala – Cement I*, para. 72.

the 'matter' before it, within the meaning of Article 7.1 and Article 11 of the DSU, has been fully resolved or still requires to be examined following the expiry of the measure at issue".[197] China argues that this rationale does not apply in the case at hand, because the measure falls outside the Panel's jurisdiction as a result of its expiry prior to the request for the establishment of a panel.[198] We disagree. The distinction between measures that expired prior to the establishment of a panel and those that expired after that date is a factor relevant for a panel's decision whether to rule on an expired measure or not. It does not, however, determine the jurisdiction of a panel with regard to that measure.[199] We find further contextual support for the proposition that measures that expired prior to the establishment of a panel are not *a priori* excluded from the scope of the term "measures at issue" in Article 3.3 of the DSU, which refers to "measures taken" and not, for example, to measures in force.[200]

7.83. For similar reasons, we also find unconvincing China's reliance on the Appellate Body report in *EC − Chicken Cuts* as support for the proposition that panels are precluded from ruling on measures that did not exist at the time when the establishment of a panel was requested.[201] In that case, the Appellate Body addressed subsequent measures not mentioned in the panel request, which amended the original measures.[202] In this case however, the measure relating to market price support for corn was identified in the United States' panel request.[203] Therefore, the due process considerations that underpinned the Appellate Body findings in *EC − Chicken Cuts* do not arise in the case at hand. In addition, China's reading of the report in *EC − Chicken Cuts* would be inconsistent with the Appellate Body ruling that whether or not a measure is still in force "is not, however, dispositive of the preliminary question whether a panel can address claims in respect of that measure."[204]

7.84. China also submits that the expiry of the measure relating to corn achieves the first objective of WTO dispute settlement, i.e. securing a positive resolution to the dispute, and ruling on such measure would be but an advisory opinion of the Panel.[205] We thus move on to assess whether the expiry of the market price support measure relating to corn has fully resolved the dispute between the parties with regard to that measure, or whether it still requires examination.

7.85. Article 3.7 of the DSU sets as the aim of the dispute settlement mechanism "securing a positive resolution to the dispute". The same provision also states that: "[i]n the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements." We note in that regard that neither panels nor the Appellate Body should "'make law' by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute."[206] Guided by Article 3.7 of the DSU, prior panels looked at specific circumstances of a given case to determine whether it was appropriate to address claims relating to expired measures.[207] These circumstances included, among others, the timing of the expiry of a measure[208], whether a measure is included in the terms of reference[209], the possibility of

[197] Appellate Body Report, *EU − PET (Pakistan)*, para. 5.19.
[198] China's comments on United States' response to Panel question No. 70 (second substantive meeting), fn 167 (citing Appellate Body Report, *EU − PET (Pakistan)*, para. 5.38).
[199] As noted by the Appellate Body, "the DSU nowhere provides that the jurisdiction of a panel terminates or is limited by the expiry of the measure at issue". Appellate Body Report, *EC − Bananas III (Article 21.5 − Ecuador II)/EC − Bananas III (Article 21.5 − US)*, para. 270; See also Panel Reports, *EC − Approval and Marketing of Biotech Products*, para. 7.1650; and *Chile − Price Band System* para. 7.514, fn 683.
[200] See Appellate Body Report, *EU − Fatty Alcohols (Indonesia)*, para. 5.182.
[201] China's first written submission, paras. 324-327; second written submission, paras. 74-77, citing the Appellate Body Report, *EC − Chicken Cuts*, para. 156.
[202] Appellate Body Report, *EC − Chicken Cuts*, para. 151; Panel Report, *EC − Chicken Cuts*, para. 7.25.
[203] See section 7.2.1 above.
[204] Appellate Body Report, *US − Upland Cotton*, para. 272.
[205] China's response to Panel question No. 22.
[206] Appellate Body Report, *US − Wool Shirts and Blouses*, p. 19.
[207] Panel Report, *China − Electronic Payment Services*, para. 7.224.
[208] Panel Report, *EU − PET (Pakistan)*, para. 7.13 and fn 35.
[209] Panel Reports, *Turkey − Rice*, para. 7.180; *US − Wool Shirts and Blouses*, para. 6.2; and *Indonesia − Autos*, para. 14.9.

reintroducing a measure[210], whether the effects of a measure continued to impair the benefits for a Member under a covered agreement.[211]

7.86. We should read the dispute settlement system's objective of "securing a positive resolution to the dispute" in light of other provisions of the DSU. In that connection, we agree with the panel in *EC − Bananas III (Article 21.5 − United States)* that a particular solution to a WTO dispute "can lead to a positive resolution of a dispute only if the solution provides an overall satisfactory and effective settlement to the dispute in question in the sense of Article 3.4 of the DSU."[212] In addition, we note that Article 4.2 of the DSU, governing DSU consultations, refers to measures "affecting the operation of any covered agreement". Therefore, in considering whether to rule on an expired measure, we need to examine whether that measure affects the operation of the covered agreements, despite its termination.[213]

7.87. Turning to the facts of this case, we note that the measure relating to corn expired prior to the United States' request for the establishment of a panel and the United States' request for consultations.[214] In the absence of circumstances weighing in favour of making findings, past panels declined to address measures that had expired before the complainant requested the establishment of a panel.[215]

7.88. As regards the risk of reintroducing the market price support for corn, the United States contends that "there is no impediment to China continuing to maintain a market price support [...] program for corn".[216] However, apart from mentioning the general authority to provide market price support to grain producers, the United States does not point to any evidence supporting this contention. China, on the other hand, refers to official statements underscoring the need to move away from the TPRP for corn and, by implication, limiting the probability of its reintroduction.[217] We consider, therefore, that there is no compelling evidence showing that the market price support for corn might be reintroduced.[218]

7.89. We now turn to the United States' argument that the Panel should rule on the measure relating to corn, due to the retrospective nature of a panel's analysis under Articles 3.2 and 6.3 of the Agreement on Agriculture. The United States points out that "a breach of a domestic support commitment must include the presentation of evidence comparing the product-specific AMS for a basic agricultural product to the total value of production for that agricultural product in a given year".[219] We agree with the United States that demonstrating a violation of a domestic support commitment requires presenting evidence, which would typically consist of historical data. However, one has to draw a distinction between measures and evidence produced in support of a claim of inconsistency. The evidence reflects the operation of the measures within a given time-period. It does not, however, necessarily suggest that the matter remains unsolved despite expiry of a measure and the panel needs to rule on that measure. It follows that the fact that a panel may need to look at historical evidence, does not imply, without more, that it must rule on measures that have

[210] Panel Reports, *India − Additional Import Duties*, paras. 7.69-7.70; *Argentina − Textiles and Apparel*, para 6.14; *China − Electronic Payment Services*, para. 7.228.

[211] Panel Reports, *Indonesia − Autos*, para. 14.206, *US − Upland Cotton*, para. 7.1201.

[212] Panel Report, *EC − Bananas III (Article 21.5 − United States)*, para. 7.105.

[213] Appellate Body Report, *US − Upland Cotton*, paras. 261-262.

[214] As noted in section 7.2.2.1 above, the measure relating to provision of domestic support in form of market price support for producers of corn expired following the last day of application of the 2015 TPRP notice, i.e. on 1 May 2016. The United States requested consultations with China on 13 September 2016 and filed a request for the establishment of a panel on 5 December 2016.

[215] Panel Reports, *US − Gasoline*, para. 6.19; *Argentina − Textiles and Apparel*, paras. 6.4 and 6.13; *EC − Approval and Marketing of Biotech Products*, para. 7.1653; *China − Electronic Payment Services*, para. 7.228; *EU − Poultry Meat (China)*, para. 7.167.

[216] United States' response to Panel question No. 1. The United States argues that the market price support for corn was adopted on a temporary or *ad hoc* basis and no new regulation could limit that possibility. The United States also points out that Article 27 of the 2004 Grain Distribution Regulation authorizes the implementation of a market price support for corn.

[217] China's comments on the United States' comments on China's challenge to the Panel's terms of reference, para. 70; China's response to Panel question No. 1.

[218] We find support for our conclusion in *Argentina − Textiles and Apparel*, where the panel found that "in the absence of clear evidence to the contrary" it could not assume that Argentina would reintroduce the terminated measure. Panel Report, *Argentina − Textiles and Apparel*, para. 6.14.

[219] United States' comments on China's challenge to the Panel's terms of reference, para. 24.

expired.[220] We note in that regard that the panel in *Korea − Various Measures on Beef*, while looking at evidence dating from before the establishment of the panel, ruled on a measure which had been identified as Korea's "current domestic support for its beef industry in the context of Korea's scheduled commitment levels of domestic support".[221]

7.90. In a similar vein, we are not persuaded by the United States' reliance on the panel and Appellate Body reports in *China − Raw Materials*. In that case, the Appellate Body found that the expiry of annually renewed legal instruments did not affect the panel's power to make findings and recommendations, because they formed part of a group or a series of measures, comprised of basic framework legislation and implementing regulations.[222] Similarly, China's policy of providing market price support to producers of corn was also reflected in the general legal framework, including the 2004 Grain Distribution Regulation, the 2004 Grain Opinion and No. 1 Documents and the TPRP Notices, taken together.[223] However, unlike in *China − Raw Materials*, it is not the expiry of the 2015 TPRP Notice alone, but rather the policy of providing market price support for producers of corn, implemented through TPRP Notices, that marks the expiry of the corn measure.[224]

7.91. Finally, as noted above, the price of corn fell sharply in China following the decision to discontinue the market price support for corn, and have fluctuated ever since.[225] To us, this is an indication that upon its expiry, the measure relating to corn ceased to produce effects on the market that could impact the operation of the provisions of the Agreement on Agriculture invoked by the United States. This is not to say that China does not have in place other measures that could affect the operation of the same provisions of the Agreement on Agriculture. We recall, however, that these measures have not been challenged by the United States in this dispute and the Panel has no mandate to address them. This applies, in particular, to the new corn policy, which has a different essence compared to the corn measure challenged by the United States. In sum, we do not see how the measure relating to corn, despite its expiry, could continue to affect the operation of Articles 3.2 and 6.3 of the Agreement on Agriculture, as argued by the United States.

7.92. In light of the above, and given the Panel's jurisdiction over the corn measure, we consider that the essential element of that measure − the AAP − has been removed, as the government no longer sets the purchase price in this way. The challenged corn measure has thus expired. Having analysed considerations that could potentially weigh in favour of making findings with regard to the

[220] The Appellate Body has recognized a distinction between measures and evidence presented to substantiate of a claim in the context of temporal limitations. See Appellate Body Reports, *EC − Selected Customs Matters*, para. 188; and *US − Large Civil Aircraft (2nd Complaint)*, paras. 7.685-7.686.

[221] Panel Report, *Korea − Various Measures on Beef*, paras. 800, 845 (i) and (j). (emphasis added)

[222] Appellate Body Report, *China − Raw Materials*, para. 264.

[223] See paras. 7.94-7.95 below. The Panel notes that the 2004 Grain Opinion and the 2004 Grain Distribution Regulation instruct the relevant Chinese authorities to "implement minimum purchase prices in the main grain producing regions", while Article 2 of the 2004 Grain Distribution Regulation defines grain as, among others, "wheat, rice, corn". See 2004 Grain Opinion, (Exhibit USA-10/CHN-10B), p. 2; Articles 2, 24 and 26-27, 2004 Grain Distribution Regulation, (Exhibit USA-12/CHN-9B), pp. 1 and 5. As regards the 2012-2015 No. 1 Documents, the Panel notes that they contained, among its numerous objectives "initiat[ing] temporary purchasing and storage for [products including] corn". See Communist Party of China Central Committee and State Council Several Opinions on Accelerating the Promotion of Agricultural Science and Technology Innovation and Continuing to Strengthen the Capacity to Guarantee Agricultural Product Supplies (Communist Party of China Central Committee, State Council, Zhong Fa [2012] No. 1, issued December 31, 2011), (Exhibit USA-13), p. 14; Communist Party of China Central Committee and State Council Several Opinions on Accelerating Development of Modern Agriculture and Further Increasing Rural Development Dynamism (Communist Party of China Central Committee, State Council, Zhong Fa [2013] No. 1, issued December 31, 2012), (Exhibit USA-14), p. 4; Communist Party of China Central Committee and State Council Publication of "Several Opinions on Comprehensively Deepening Rural Reform and Accelerating the Promotion of Agricultural Modernization" (Communist Party of China Central Committee, State Council, Zhong Fa [2014] No. 1, issued January 19, 2014), (Exhibit USA-15), p. 3; Communist Party of China Central Committee and State Council Several Opinions on Strengthening Reform and Innovation and Accelerating Agricultural Modernization (Communist Party of China Central Committee, State Council, Zhong Fa [2015] No. 1, issued February 1, 2015), (Exhibit USA-16), p. 7.

[224] In a response to a question from the Panel, the United States noted that while support to agricultural producers, such as market price support, is typically provided on a yearly basis, "it would be accurate to characterize the measures challenged by the United States as continuing policies applied through annual legal instruments." United States' response to Panel question No. 71 (second substantive meeting).

[225] See para. 7.76 above.

expired corn measure, we did not find that any of them require the Panel to rule on that measure. We therefore decline to do so.

7.2.3 Main characteristics of the wheat and rice measures

7.93. Having discerned the relevant measures identified in the United States' panel request, we will briefly summarize their main characteristics and how they operate. In light of our decision not to rule on the corn measure, we will only address the wheat and rice measures.

7.2.3.1 General framework

7.94. The overarching instruments establishing China's market price support policy for various types of grain are the 2004 Grain Opinion and the 2004 Grain Distribution Regulation.[226] Both documents invoke the objectives of liberalizing and reforming the grain market in China.[227] They also empower the State Council, China's highest executive body, to implement the minimum procurement price policy "in the main grain producing regions for the key grain varieties that are in short supply".[228]

7.95. The objective of raising the minimum procurement price for wheat and rice is also expressed in several Opinions of the Central Committee of the Chinese Communist Party and the State Council (so-called "No. 1 Documents").[229] These documents indicate that while China may have been envisaging transitioning its agricultural policies with respect to wheat and rice to more market-based mechanisms, the highest Chinese authorities endorsed maintaining a minimum procurement price for these products during the years 2012-2015. While the No. 1 Documents cover a wide array of agricultural policy issues, the evidence shows that Chinese authorities were "following the requirements of the No. 1 Central Document"[230] and sought to "effectively implement" such documents when adopting more specific legal instruments.[231] Within this general framework, various bodies adopted more specific annual instruments establishing minimum procurement price requirements, as discussed below.

7.2.3.2 Market price support programmes for wheat and rice

7.96. Pursuant to the 2004 Grain Opinion and the 2004 Grain Distribution Regulation, China's National Development and Reform Commission (NDRC), the Ministry of Finance, the Ministry of Agriculture and the State Administration of Grain (SAG) adopt jointly Annual Notices setting forth or increasing the minimum procurement price for wheat and rice in a given year.[232] While the 2004 Grain Distribution Regulation appears to limit the State Council's discretion in implementing the minimum procurement price policy to cases when such actions are "necessary",[233] the Chinese

[226] 2004 Grain Opinion, (Exhibit USA-10/CHN-10B); 2004 Grain Distribution Regulation, (Exhibit USA-12/CHN-9B).

[227] 2004 Grain Opinion, (Exhibit USA-10/CHN-10B), p. 2; Article 4, 2004 Grain Distribution Regulation, (Exhibit USA-12/CHN-9B), p. 1.

[228] 2004 Grain Opinion, (Exhibit USA-10/CHN-10B), para. 5. See also Articles 24 and 26-27, 2004 Grain Distribution Regulation, (Exhibit USA-12/CHN-9B), p. 5.

[229] Communist Party of China Central Committee and State Council Several Opinions on Accelerating the Promotion of Agricultural Science and Technology Innovation and Continuing to Strengthen the Capacity to Guarantee Agricultural Product Supplies (Communist Party of China Central Committee, State Council, Zhong Fa [2012] No. 1, issued December 31, 2011), (Exhibit USA-13), p. 14; Communist Party of China Central Committee and State Council Several Opinions on Accelerating Development of Modern Agriculture and Further Increasing Rural Development Dynamism (Communist Party of China Central Committee, State Council, Zhong Fa [2013] No. 1, issued December 31, 2012), (Exhibit USA-14), p. 4; Communist Party of China Central Committee and State Council Publication of "Several Opinions on Comprehensively Deepening Rural Reform and Accelerating the Promotion of Agricultural Modernization" (Communist Party of China Central Committee, State Council, Zhong Fa [2014] No. 1, issued January 19, 2014), (Exhibit USA-15), p. 3; Communist Party of China Central Committee and State Council Several Opinions on Strengthening Reform and Innovation and Accelerating Agricultural Modernization (Communist Party of China Central Committee, State Council, Zhong Fa [2015] No. 1, issued February 1, 2015), (Exhibit USA-16), p. 7.

[230] Ministry of Finance Opinions on Establishing the Subsidy System for Corn Producers (Cai Jian [2016] No. 278), 20 May 2016 (English translation) (hereinafter "MOF Opinions, May 2016"), (Exhibit CHN-73B), p. 1.

[231] 2016 Corn Notice, (Exhibit USA-87/CHN-80B), p. 1.

[232] China's first written submission, para. 66.

[233] Article 27, 2004 Grain Distribution Regulation, (Exhibit USA-12/CHN-9B), p. 5.

authorities issued the Annual Notices on a yearly basis between 2012 and 2015.[234] This suggests a degree of continuity in China's policy of providing market price support to producers of wheat and rice. The references in Annual Notices to prices announced in previous years could also suggest a degree of continuity in the operation of the measures.[235]

7.97. The Annual Notices set the minimum procurement price applicable to a particular grain type in a given year in the "major producing regions". The minimum procurement price is defined in China's legal instruments as "the price offered at the purchasing and storage depots responsible for purchasing grain directly from farmers according to the minimum procurement price policy."[236] Table 2 in section 7.4.5.1 below lists the minimum procurement prices for each of the relevant products in years 2012-2015.

7.98. The minimum procurement prices are typically announced in advance of the harvesting year and prior to the planting season. For wheat, this is typically October of the year preceding the harvest; for rice, it is January or February of the harvest year.[237] The competent authorities are required to publicize information about the minimum procurement price, to "raise the farmers' enthusiasm for production"[238] and "guide the farmers to plan their sowing reasonably in order to propel stable development of grain production".[239] This or similar language is repeated across notices for different years and types of grain. We thus understand that each of the measures relating to wheat, Indica rice and Japonica rice endeavours to make the minimum purchase price known to farmers prior to the planting season.

7.99. Further details of the measures relating to wheat, Indica rice and Japonica rice − such as the exact periods of operation, the competent entities and modalities of the administrative purchase of agricultural products − are set forth in the Implementation Plans.[240] The Implementation Plans are adopted annually around the time of the harvesting season by the same entities that adopt the Annual Notices.[241] The Implementation Plans relating to wheat, Indica rice and Japonica rice follow

[234] 2012 Wheat Annual Notice, (Exhibit USA-20/CHN-18B); 2012 Rice Annual Notice, (Exhibit USA-39/CHN-23B); 2013 Rice Annual Notice (USA-40/CHN-24B); 2013 Wheat Annual Notice (Exhibit USA-21/CHN-93B); 2014 Wheat Annual Notice, (Exhibit USA-22/CHN-20B); 2014 Rice Annual Notice, (Exhibit USA-41/CHN-25B); 2015 Wheat Annual Notice (Exhibit USA-23/CHN-21B); 2015 Rice Annual Notice (Exhibit USA-42/CHN-26B).

[235] While some notices refer in the title to "announcing" the minimum price for a certain year, others mention "raising". See 2012 Wheat Annual Notice (Exhibit USA-20/CHN-18B), p.1; 2014 Wheat Annual Notice, (Exhibit USA-22/CHN-20B), p. 1; 2012 Rice Annual Notice (Exhibit USA-39/CHN-23B), p.1; 2013 Rice Annual Notice, (Exhibit USA-40/CHN-24B), p. 1; 2014 Rice Annual Notice, (Exhibit USA-41/CHN-25B), p.1.

[236] Article 3, 2012 Early-Season Indica Rice Implementation Plan, (Exhibit USA-44/CHN-34B Revised), p. 2; Article 3, 2012 Wheat Implementation Plan, (Exhibit USA-24/CHN-29B Revised), p. 2; Article 3, 2013 Wheat Implementation Plan, (Exhibit USA-25/CHN-19B Revised), p. 2; Article 3, 2014 Mid- to Late-Season Rice Implementation Plan, (Exhibit USA-48/CHN-31B Revised), p. 3; Article 4, 2015 Wheat and Rice Implementation Plan, (Exhibit USA-27/CHN-28B Revised), p. 3; Article 3, 2014 Wheat and Early-Season Indica Rice Implementation Plan, (Exhibit USA-26/CHN-30B Revised); pp. 3 and 11.

[237] 2014 Wheat Annual Notice, (Exhibit USA-22/CHN-20B); 2015 Wheat Annual Notice, (Exhibit USA-23/CHN-21B); 2012 Rice Annual Notice, (Exhibit USA-39/CHN-23B); 2013 Rice Annual Notice, (Exhibit USA-40/CHN-24B); 2014 Rice Annual Notice, (Exhibit USA-41/CHN-25B); 2015 Rice Annual Notice, (Exhibit USA-42/CHN-26B).

[238] 2012 Wheat Annual Notice, (Exhibit USA-20/CHN-18B), p. 1; 2014 Wheat Annual Notice, (Exhibit USA-22/CHN-20B), p. 1; 2012 Rice Annual Notice, (Exhibit USA-39/CHN-23B), p. 1; 2013 Rice Annual Notice, (Exhibit USA-40/CHN-24B), p. 1; 2014 Rice Annual Notice, (Exhibit USA-41/CHN-25B), p. 1.

[239] 2015 Rice Annual Notice, (Exhibit USA-42/CHN-26B), p. 1; 2015 Wheat Annual Notice, (Exhibit USA-23/CHN-21B), p. 1.

[240] 2012 Wheat Implementation Plan (Exhibit USA-24/CHN-29B Revised); 2012 Early-Season Indica Rice Implementation Plan, (Exhibit USA-44/CHN-34B Revised); 2012 Mid- to Late-Season Rice Implementation Plan, (Exhibit USA-45/CHN-36B Revised); 2013 Wheat Implementation Plan, (Exhibit USA-25/CHN-19B Revised); 2013 Early-Season Indica Rice Implementation Plan, (Exhibit USA-46/CHN-35B Revised); 2013 Mid- to Late-Season Rice Implementation Plan, (Exhibit USA-47/CHN-37B Revised); 2014 Wheat and Early-Season Indica Rice Implementation Plan, (Exhibit USA-26/CHN-30B Revised); 2014 Mid- to Late-Season Rice Implementation Plan, (Exhibit USA-48/CHN-31B Revised); 2015 Wheat and Rice Implementation Plan, (Exhibit USA-27/CHN-28B Revised).

[241] See 2012 Wheat Implementation Plan (Exhibit USA-24/CHN-29B Revised), p. 1; 2012 Early-Season Indica Rice Implementation Plan, (Exhibit USA-45/CHN-36B Revised), p. 1; 2012 Mid- to Late-Season Rice Implementation Plan, (Exhibit USA-44/CHN-34B Revised), p. 1; 2013 Wheat Implementation Plan, (Exhibit USA-25/CHN-19B Revised), p. 1; 2013 Early-Season Indica Rice Implementation Plan, (Exhibit USA-46/CHN-35B Revised), p. 1; 2013 Mid- to Late-Season Rice Implementation Plan, (Exhibit USA-47/CHN-37B Revised),

a similar structure and use a similar language, allowing analogous conclusions about the operation of the wheat and rice measures. Therefore, we consider below jointly various aspects of the measures relating to these two products.

7.2.3.3 Entities involved

7.100. The Implementation Plans are addressed to the regional branches and departments of Sinograin and the ADBC, which, in turn, designate the appropriate local depots responsible for purchase and storage of grain.[242] Such depots must have sufficient capacity to accommodate "the expected amount of grain purchased at the minimum procurement price."[243] In addition, local authorities are instructed to "guide and encourage various grain operation, and processing enterprises to actively enter the market and purchase new grains."[244] We, therefore, understand that the entities implementing the minimum procurement price policy are either part of the state administration or act under guidance and direction of the state administration, which was not disputed by the parties.

7.101. The purchase of wheat, Indica rice and Japonica rice is financed through loans issued to the entities responsible for grain purchase "in full amount ... pursuant to the minimum purchase price".[245] The legal instruments cited by China and the United States do not refer to any limitations on the amount of funds available to finance the purchase of grain. In fact, China confirmed during the first substantive meeting with the Panel that there are no limitations on the amounts of loans that the ADBC can issue to finance the purchase of wheat, Indica rice and Japonica rice under the market price support programmes.[246] Likewise, the Implementation Plans do not explicitly mention any limits on the amount of grain that the designated entities should purchase, if the market price falls below the minimum level. Indeed, the Implementation Plans require storage capacity to "match with the expected amount of grain purchased at the minimum price."[247] They further instruct Sinograin

p. 1; 2014 Wheat and Early-Season Indica Rice Implementation Plan, (Exhibit USA-26/CHN-30B Revised), p. 1; 2014 Mid- to Late-Season Rice Implementation Plan, (Exhibit USA-48/CHN-31B Revised), p. 1; 2015 Wheat and Rice Implementation Plan, (Exhibit USA-27/CHN-28B Revised), p. 1.

[242] Article 5, 2015 Wheat and Rice Implementation Plan, (Exhibit USA-27/CHN-28B Revised), p. 3; Article 5, 2012 Wheat Implementation Plan (Exhibit USA-24/CHN-29B Revised), p. 3; Article 5, 2013 Wheat Implementation Plan, (Exhibit USA-25/CHN-19B Revised), p. 3; Article 5, 2014 Mid- to Late-Season Rice Implementation Plan, (Exhibit USA-48/CHN-31B Revised), p. 4; Article 5, 2014 Wheat and Early-Season Indica Rice Implementation Plan, (Exhibit USA-26/CHN-30B Revised), p. 4; Article 5, 2012 Early -Season Indica Rice Implementation Plan, (Exhibit USA-44/CHN-34B Revised), p. 3.

[243] Article 5, 2014 Wheat and Early-Season Indica Rice Implementation Plan, (Exhibit USA-26/CHN-30B Revised), p. 4; Article 5, 2012 Early -Season Indica Rice Implementation Plan, (Exhibit USA-44/CHN-34B Revised), p. 3; Article 5, 2012 Wheat Implementation Plan (Exhibit USA-24/CHN-29B Revised), p. 3; Article 5, 2013 Wheat Implementation Plan, (Exhibit USA-25/CHN-19B Revised), p. 3; Article 5, 2014 Mid- to Late-Season Rice Implementation Plan, (Exhibit USA-48/CHN-31B Revised), p. 4; Article 5, 2015 Wheat and Rice Implementation Plan, (Exhibit USA-27/CHN-28B Revised), p. 4; Article 5, 2014 Wheat and Early-Season Indica Rice Implementation Plan, (Exhibit USA-26/CHN-30B Revised), pp. 4 and 12.

[244] Article 9, 2012 Wheat Implementation Plan, (Exhibit USA-24/CHN-29B Revised), p. 5. See also Article 9, 2015 Wheat and Rice Implementation Plan, (Exhibit USA-27/CHN-28B Revised), p. 6; Article 9, 2013 Wheat Implementation Plan, (Exhibit USA-25/CHN-19B Revised), p.5; Article 9, 2012 Early-Season Indica Rice Implementation Plan, (Exhibit USA-44/CHN-34B Revised), p. 5; Article 9, 2014 Wheat and Early-Season Indica Rice Implementation Plan, (Exhibit USA-26/CHN-30B Revised), p. 6; Article 9, 2014 Mid- to Late-Season Rice Implementation Plan, (Exhibit USA-48/CHN-31B Revised), p. 6.

[245] Article 11, 2012 Early-Season Indica Rice Implementation Plan, (Exhibit USA-44/CHN-34B Revised), p. 6; See also Article 10, 2012 Wheat Implementation Plan, (Exhibit USA-24/CHN-29B Revised), p. 6; Article 10, 2013 Wheat Implementation Plan, (Exhibit USA-25/CHN-19B Revised), p. 6; Article 10, 2014 Mid- to Late-Season Rice Implementation Plan, (Exhibit USA-48/CHN-31B Revised); Article 10, 2015 Wheat and Rice Implementation Plan, (Exhibit USA-27/CHN-28B Revised), p. 7; Article 10, 2014 Wheat and Early-Season Indica Rice Implementation Plan, (Exhibit USA-26/CHN-30B Revised), pp. 6-7.

[246] See also China's response to Panel question No. 43.

[247] Article 5, 2012 Wheat Implementation Plan, (Exhibit USA-24/CHN-29B Revised), p. 3; Article 5, 2015 Wheat and Rice Implementation Plan, (Exhibit USA-27/CHN-28B Revised), p. 4; Article 5, 2013 Wheat Implementation Plan, (Exhibit USA-25/CHN-19B Revised), p. 3; Article 5, 2014 Mid- to Late-Season Rice Implementation Plan, (Exhibit USA-48/CHN-31B Revised), p. 4; Article 5, 2012 Early-Season Indica Rice Implementation Plan, (Exhibit USA-44/CHN-34B Revised), p. 3; Article 5, , 2014 Wheat and Early-Season Indica Rice Implementation Plan, (Exhibit USA-26/CHN-30B Revised), p. 4.

and local authorities to use the available storage space, or procure new space in order to "meet farmer's needs for grain selling".[248]

7.2.3.4 Geographical scope

7.102. The geographical scope of the measures relating to wheat, Indica rice and Japonica rice is essentially confined to "the major producing regions". These regions are further specified in the Implementation Plans. In the years 2012-2015, they included:[249]

a. Wheat: Hebei, Jiangsu, Anhui, Shandong, Henan and Hubei.

b. Early-season Indica rice: Anhui, Jiangxi, Hubei, Hunan and Guangxi.

c. Mid- to late-season Indica and Japonica rice: Liaoning, Jilin, Heilongjiang, Jiangsu, Anhui, Jiangxi, Henan, Hubei, Hunan, Guangxi, Sichuan.

7.103. Local governments in these regions have to implement the minimum procurement price policy, while governments in other provinces can decide, at their discretion, whether to do so. This follows from the imperative language of Article 2 of the Implementation Plan for a given year with respect to the major producing regions, as opposed to the discretionary language used in respect of other regions.[250]

7.2.3.5 Temporal scope

7.104. The Implementation Plans specify time-periods, during which the relevant entities have to purchase grains at the specified minimum price, should the market price fall below that level.[251] The table below outlines the implementation periods for wheat and rice during the years 2012 through 2015.

Table 1: Implementation periods of minimum procurement price for wheat and rice

Year	Wheat	Early-season Indica rice	Mid- and late-season Indica/Japonica rice
2012	21/05/2012-30/09/2012	16/07/2012-30/09/2012	16/09/2012-31/12/2012 (8 provinces[252]); 16/11/2012-31/03/2013 (3 provinces[253])
2013	21/05/2013-30/09/2013	16/07/2013-30/09/2013	18/09/2013-31/01/2014 (8 provinces); 16/11/2013-31/03/2014 (3 provinces)
2014	21/05/2014-30/09/2014	16/07/2014-30/09/2014	16/09/2014-31/01/2015 (8 provinces); 01/11/2014-31/03/2015 (3 provinces)
2015	21/05/2015-30/09/2015	16/07/2015-30/09/2015	16/09/2015-31/01/2016 (8 provinces); 10/10/2015-29/02/2016 (3 provinces)

7.105. Generally, these time-periods immediately follow the annual harvest in the major wheat and rice producing provinces.[254] During that time, the relevant authorities have to supervise the designated grain depots and encourage other entities' involvement in implementing the minimum

[248] Article 5, 2015 Wheat and Rice Implementation Plan, (Exhibit USA-27/CHN-28B Revised), p. 5; Article 5, 2012 Wheat Implementation Plan, (Exhibit USA-24/CHN-29B Revised), p. 3; Article 5, 2014 Wheat and Early-Season Indica Rice Implementation Plan, (Exhibit USA-26/CHN-30B Revised), pp. 5 and 13. See also Article 5, 2012 Early-Season Indica Rice Implementation Plan, (Exhibit USA-44/CHN-34B Revised), p.3 (referring to "actual needs").

[249] See Article 2 of the Implementation Plan for a given year.

[250] Article 2 of the Implementation Plans. We note in that regard that there is no disagreement between the parties concerning the provinces covered by the challenged measures. See para. 7.301 below.

[251] Article 6 of the Implementation Plans.

[252] Jiangsu, Anhui, Jiangxi, Henan, Hubei, Hunan, Guangxi, Sichuan Provinces.

[253] Liaoning, Jilin, Heilongjiang Provinces.

[254] United States' first written submission, para. 54.

procurement price policy after the relevant type of grain enters the market.[255] As such, the implementation periods of the measures seem to coincide with the time period when the supply of a particular type of grain is at its highest (as is the risk of the price falling below the desired minimum level).

7.106. The purchases of wheat, Indica rice and Japonica rice at minimum prices are "activated" when the market price of a particular type of grain drops below the minimum procurement price and "deactivated" once the grain price climbs back above the minimum level.[256] The Implementation Plans state that during the implementation periods, the relevant entities "shall actively enter the market and purchase new grains for rotation, and the procurement price for grain rotation shall not be lower than the national minimum procurement price."[257] The measures thus ensure a price floor for each type of grain, as intervention on the grain market depends on whether the market price falls below the minimum procurement price.

7.2.3.6 Quality requirements

7.107. China maintains that only grain meeting specific national quality standards is eligible for purchase under the measures relating to wheat, Indica rice and Japonica rice.[258] These requirements are specified in the Implementation Plans, which reference "National Standard No. 3 Grade" as the standard quality product (with grain quality grades ranging from 1 to 5).[259] We understand from these documents that grain of a lower or higher quality grade[260] would still be subject to government procurement, albeit at slightly different prices.[261] China would not procure inferior quality "out-of-grade" grain at minimum prices set forth in the measures.[262]

7.3 Claims brought by the United States and Panel's order of analysis

7.108. As stated in Section 3, the United States requests the Panel to find that China has acted inconsistently with its obligations pursuant to Articles 3.2 and 6.3 of the Agreement on Agriculture because the level of domestic support provided by China exceeds China's commitment level of "nil" specified in Section I of Part IV of China's Schedule CLII. In the alternative, and to the extent China's commitment level of "nil" was understood as not setting out any commitment, the United States requests the Panel to find that these measures are inconsistent with China's obligation under Article 7.2(b) of the Agreement on Agriculture.[263]

[255] Article 9, 2012 Wheat Implementation Plan, (Exhibit USA-24/CHN-29B Revised), p. 5; Article 9, 2014 Mid- to Late-Season Rice Implementation Plan, (Exhibit USA-48/CHN-31B Revised), p. 6; Article 9, 2015 Wheat and Rice Implementation Plan, (Exhibit USA-27/CHN-28B Revised), p. 6; Article 9, 2013 Wheat Implementation Plan, (Exhibit USA-25/CHN-19B Revised), p.5; Article 9, 2012 Early-Season Indica Rice Implementation Plan, (Exhibit USA-44/CHN-34B Revised), p. 5; Article 9, 2014 Wheat and Early-Season Indica Rice Implementation Plan, (Exhibit USA-26/CHN-30B Revised), pp. 6 and 14.

[256] China's first written submission, paras. 75 and 76.

[257] Article 8 of the Implementation Plans. See for example the 2013 Wheat Implementation Plan, (Exhibit USA-25/CHN-19B Revised), p. 5.

[258] China's first written submission, para. 82.

[259] Article 3, 2014 Wheat and Early-Season Indica Rice Implementation Plan, (Exhibit USA-26/CHN-30B Revised), pp. 3 and 12; Article 3, 2012 Early-Season Indica Rice Implementation Plan, (Exhibit USA-44/CHN-34B Revised), p. 2; Article 3, 2014 Mid- to Late-Season Rice Implementation Plan, (Exhibit USA-48/CHN-31B Revised), p.3; Article 3, 2013 Wheat Implementation Plan, (Exhibit USA-25/CHN-19B Revised), p. 2; Article 4, 2015 Wheat and Rice Implementation Plan, (Exhibit USA-27/CHN-28B Revised), pp. 2-3; Article 3, 2012 Wheat Implementation Plan, (Exhibit USA-24/CHN-29B Revised), pp. 2-3.

[260] 2010 National Standards of Grain Quality Notice, (Exhibit CHN-43B Revised), p. 2.

[261] China's response to Panel question No. 26. Article 3, 2014 Wheat and Early-Season Indica Rice Implementation Plan, (Exhibit USA-26/CHN-30B Revised), pp. 3 and 11; Article 3, 2012 Early-Season Indica Rice Implementation Plan, (Exhibit USA-44/CHN-34B Revised), p. 2; Article 3, 2014 Mid- to Late-Season Rice Implementation Plan, (Exhibit USA-48/CHN-31B Revised), p.3; Article 3, 2013 Wheat Implementation Plan, (Exhibit USA-25/CHN-19B Revised), p. 2; Article 4, 2015 Wheat and Rice Implementation Plan, (Exhibit USA-27/CHN-28B Revised), p. 3; Article 3, 2012 Wheat Implementation Plan, (Exhibit USA-22/CHN-29B Revised), p. 2.

[262] China's response to Panel question No. 26.

[263] United States' first written submission, para. 137 and fn 251.

7.109. We will thus begin by assessing the United States' claims under Articles 3.2 and 6.3 of the Agreement on Agriculture and then proceed to the alternative claim under Article 7.2(b) of the Agreement on Agriculture, if necessary.

7.4 Claims under Articles 6.3 and 3.2 of the Agreement on Agriculture

7.4.1 Introduction

7.110. As framed by the United States in its panel request and subsequent submissions, this dispute relates to the assessment of China's compliance with its domestic support commitments in the form of "a single means of agricultural support, 'market price support'".[264] The United States contends that China has provided market price support to its agricultural producers of wheat and rice[265] in excess of its commitments under the Agreement on Agriculture.

7.111. The United States claims that the level of domestic support China provided in 2012, 2013, 2014, and 2015, the most recent years for which, according to the United States, full annual production and pricing data is available, is in excess of China's *de minimis* level of 8.5% for each of the products at issue and thus of its commitment level of "nil". According to the United States, China is breaching its WTO commitments solely through its market price support programmes for wheat, Indica rice, and Japonica rice, when calculated in accordance with the provisions of the Agreement on Agriculture.[266]

7.112. In response, China contends that its 2012-2015 market price support for both wheat and rice was below China's negotiated *de minimis* commitment level of 8.5% of the total value of production of these basic agricultural products and, accordingly, that there is no measurement of support to be included in China's Current Total AMS.[267] China submits that the calculations of China's AMS presented by the United States suffer from various fundamental errors, in particular, because they are based solely on what the United States terms the "methodology" established in Annex 3 of the Agreement on Agriculture.[268] China argues that the key methodologies at issue in this dispute are those found in China's constituent data and methodology (CDM) used in the tables of supporting material incorporated by reference in Part IV of China's Schedule.[269]

7.113. In what follows, we will address the parties' arguments regarding China's compliance with its domestic support commitments under the Agreement on Agriculture for the products at issue, namely, wheat and rice, and in the years brought forward by the United States, namely 2012 to 2015.[270] Our assessment will be organized as follows: We will first discuss China's domestic support obligations as set out in the relevant provisions in the Agreement on Agriculture, and the method of calculating the AMS for each product at issue, including the market price support formula. We then move to an examination of the issues relating to the definition and calculation of the variables of the market price support formula. This includes an examination of the AAP, the FERP and the QEP, as well as a determination of the most appropriate adjustment rate to the processing level for certain rice products. We will then perform the calculations based on the conclusions arrived at with respect to each variable, and compare the results to China's *de minimis* level of 8.5%. Finally we address the United States' claim under Article 7.2(b) of the Agreement on Agriculture.

[264] United States' first written submission, para. 1.
[265] We recall that as discussed in Section 7.2.2.2 above, the Panel has decided not to assess the corn measures.
[266] United States' first written submission, para. 9.
[267] China's first written submission, para. 89.
[268] China's first written submission, para. 89 (referring to United States' first written submission, para. 93).
[269] China's first written submission, para. 89.
[270] We recall that China has requested that the Panel should additionally examine market price support for these products for 2016 (even though support in 2016 was not challenged by the United States) alleging that this will also be found to be below the 8.5% *de minimis* level (China's first written submission, para. 89). For the reasons set out in paragraph 7.52 above, we will limit our analysis to the years 2012-2015.

7.4.2 Domestic support obligations as set out in Articles 3.2 and 6.3 of the Agreement on Agriculture

7.114. At the outset, we note that there is no substantial disagreement between the parties on the interpretation of Articles 3.2 and 6.3 of the Agreement on Agriculture. As will be seen below, the parties seem largely to agree on the nature and scope of China's obligations. The main source of disagreement relates to how to calculate China's domestic support provided through the challenged measures.

7.115. The United States argues that the domestic support obligations set forth in Articles 3 and 6 of the Agreement on Agriculture are specifically tied to commitments made by each Member in Part IV of their Schedule of Concessions.[271] The United States contends that under Article 3.2 of the Agreement on Agriculture, China shall not provide support in favour of domestic producers in excess of the commitment levels specified in Section I of Part IV of its Schedule and that to evaluate China's compliance with its domestic support obligations in 2012, 2013, 2014, and 2015, it is necessary to determine whether China's Current Total AMS for each year exceeded "nil".[272]

7.116. The United States expands on its arguments and submits that pursuant to Articles 3 and 6 of the Agreement on Agriculture, each Member commits to limit its domestic support to the "commitment levels specified in Section I of Part IV of [the Member's] Schedule"[273] and that Members individually specify their commitments in the form of "Annual and Final Bound Commitment Levels" in Part IV of their Schedules of Concessions on Goods.[274] For the United States, it is to this commitment that a Member's Current Total AMS is compared for a given year to determine whether the Member's level of domestic support is consistent with its WTO commitments.[275] The United States also submits that under Articles 1(h) and 3.2 of the Agreement on Agriculture, Current Total AMS is to be calculated "in accordance with the provisions of Article 6" and "subject to Article 6". The United States notes that Article 6.4 of the Agreement on Agriculture directs Members to exclude *de minimis* levels of support from the calculation of Current Total AMS and that product-specific domestic support that is less than or equal to the *de minimis* level is excluded from the calculation of a Member's Current Total AMS.[276] The United States submits that, conversely, when a Member's product-specific support for a basic agricultural product exceeds the *de minimis* level, then the total value of that support must be included in the Member's Current Total AMS calculation.[277]

7.117. Regarding the *de minimis* threshold, the United States maintains that China's Working Party Report states that, in implementing Article 6.4 of the Agreement on Agriculture, China will "have recourse to a *de minimis* exemption for product-specific support equivalent to 8.5 per cent of the total value of production of a basic agricultural product during the relevant year".[278] The United States argues that thus, consistent with its accession commitment, China may provide support up to a *de minimis* level for each basic agricultural product of 8.5% of the respective value of production in each year without counting that product-specific support towards its Current Total AMS.

7.118. China submits that Article 3.2 of the Agreement on Agriculture contains Members' core obligations with respect to domestic support and that Article 6 elaborates on these obligations. For China, Article 6.3 stipulates that compliance with the obligation in Article 3.2 is to be assessed on the basis of an annual comparison between (i) negotiated, Member-specific commitment levels and (ii) a calculation of that Member's annual levels of domestic support in the year at issue, expressed "in terms of Current Total [Aggregate Measurement of Support or] AMS".[279] China also contends

[271] United States' first written submission, para. 78.
[272] United States' first written submission, para. 70.
[273] United States' first written submission, para. 80 (referring to Agreement on Agriculture, Article 3.2).
[274] United States' first written submission, para. 80 (referring to Agreement on Agriculture, Article 1(h)(i)).
[275] Agreement on Agriculture, Article 6.3.
[276] Pursuant to Article 6.4, a similar calculation is completed for non-product specific domestic support. In the event that non-product specific domestic support is less than or equal to a Member's *de minimis* level when compared to the total value of agricultural production, is not required to be included in the Current Total AMS calculation.
[277] United States' first written submission, para. 82.
[278] United States' first written submission, para. 83 (referring to China's Working Party Report, paragraph 235, (Exhibit USA-7)).
[279] China's first written submission, paras. 96-98.

that Part IV of China's Schedule establishes a Base Total AMS of "zero" and a final bound commitment level of "nil"[280] and that, in these circumstances, Article 7.2(b) of the Agreement on Agriculture applies. China argues that pursuant to Articles 3.2, 6.3 and 7.2(b), read together with Part IV of China's Schedule, China may not provide non-exempt domestic support in excess of its applicable *de minimis* commitment levels.[281]

7.119. Regarding the *de minimis* level, China refers to Article 6.4 and argues that it would have permitted China, as a developing country, to provide product-specific domestic support that does not exceed 10% of the total value of production of the basic agricultural product during the relevant year. However, China explains that paragraph 235 of China's Working Party Report, which according to China is incorporated into China's Accession Protocol pursuant to paragraph 1.2 of this Accession Protocol and paragraph 342 of China's Working Party Report, limits China's *de minimis* level at only "8.5 per cent of the total value of production of a basic agricultural product during the relevant year".[282] For China, as long as it provides product-specific domestic support for a basic agricultural product equivalent to, or less than, 8.5% of the value of that product, China is not required to include such support in its Current Total AMS under Articles 3.2 and 6.3.[283]

7.120. Having presented the parties' arguments in this respect, we now set out our interpretation of the mentioned provisions. We begin by noting the text of the provisions invoked by the United States. Article 3.2 of the Agreement on Agriculture provides:

> Article 3
>
> Incorporation of Concessions and Commitments
>
> 2. Subject to the provisions of Article 6, a Member shall not provide support in favour of domestic producers in excess of the commitment levels specified in Section I of Part IV of its Schedule.

7.121. Article 6.3 of the Agreement on Agriculture provides:

> Article 6
>
> Domestic Support Commitments
>
> A Member shall be considered to be in compliance with its domestic support reduction commitments in any year in which its domestic support in favour of agricultural producers expressed in terms of Current Total AMS does not exceed the corresponding annual or final bound commitment level specified in Part IV of the Member's Schedule.

7.122. We also note that China's Base Total AMS is set at zero and that the "Final Bound Commitment Level" is specified as "nil" in Section I of Part IV of China's Schedule CLII, which provides as follows:[284]

SECTION I - Domestic Support: Total AMS Commitments

BASE TOTAL AMS	Final bound commitment levels
- 0 -	Nil

7.123. From the above, we observe that pursuant to Article 3.2 of the Agreement on Agriculture, Members can provide domestic support in favour of domestic producers as long as it is not in excess of the commitments undertaken by each Member, as contained in Part IV of its Schedule. In turn, Article 6.3 sets out that in assessing a Member's compliance with its domestic support reduction

[280] China's first written submission, para. 108 (referring to China's Total AMS Commitments, (Exhibit CHN-52)).
[281] China's first written submission, para. 100.
[282] China's first written submission, para. 102 (referring to paragraph 1.2 of China's Accession Protocol).
[283] China's first written submission, para. 102.
[284] China's Total AMS Commitments, (Exhibit CHN-52).

commitments, it is necessary to compare the Current Total AMS and the corresponding domestic support commitment. In the context of this particular dispute, these provisions indicate that, when assessing China's compliance with its domestic support commitments, the Panel must calculate China's Current Total AMS. The Panel is then called upon to compare the resulting values with China's "nil" commitment.

7.124. We also observe that pursuant to Article 6.4 of the Agreement on Agriculture, a Member's Current Total AMS does not include any product-specific AMS values that are below or equal to the *de minimis* level of support, which, in China's case, is 8.5%.[285] In practical terms, this means that China's compliance with its domestic support commitments will be contingent on whether the AMS for each product and each of the years at issue remains below or equal to the 8.5% of the total value of production of the product in question. Therefore, in assessing the obligations contained in Article 3.2 and 6.3 of the Agreement on Agriculture, the Panel will need first to calculate China's AMS in order to arrive at a calculation of China's Current Total AMS.

7.125. In this regard, Article 1 of the Agreement on Agriculture defines AMS and Total AMS. The relevant part of Article 1(a) defines "Aggregate Measurement of Support" and "AMS" as:

> [T]he annual level of support, expressed in monetary terms, provided for an agricultural product in favour of the producers of the basic agricultural product or non-product specific support provided in favour of agricultural producers in general, other than support provided under programmes that qualify as exempt from reduction under Annex 2 to this Agreement, which is:
>
> ...
>
> (ii) with respect to support provided during any year of the implementation period and thereafter, calculated in accordance with the provisions of Annex 3 of this Agreement and taking into account the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule

7.126. Similarly, Article 1(h) defines "Total Aggregate Measurement of Support" and "Total AMS" as:

> [T]he sum of all domestic support provided in favour of agricultural producers, calculated as the sum of all aggregate measurements of support for basic agricultural products, all non-product-specific aggregate measurements of support and all equivalent measurements of support for agricultural products, and which is:
>
> ...
>
> (ii) with respect to the level of support actually provided during any year of the implementation period and thereafter (i.e. the "Current Total AMS"), calculated in accordance with the provisions of this Agreement, including Article 6, and with the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule

7.127. From the above definitions, we note that both AMS and Total AMS relate to a monetary value of the support granted to producers of basic agricultural products. AMS generally may be product- or non-product specific and in this case refers to the amount of support provided to a number of specified products, i.e. wheat and rice. Total AMS is the sum of all of the separate product-specific AMS, as well as any non-product specific AMS and equivalent measurements of support, using the exclusionary rules contained in Article 6.4 regarding AMS levels below the *de minimis* level and in Article 6.5 regarding direct payments under production-limiting programmes. When calculated for a specific year, it becomes the Current Total AMS.

[285] China's Working Party Report, para. 235, incorporated into China's Accession Protocol by para. 342 (Exhibit USA-7).

7.128. We therefore note that in assessing China's compliance with the obligations contained in Articles 3.2 and 6.3 of the Agreement on Agriculture, the Panel will need to calculate China's product-specific AMS provided through market price support for rice and wheat for each year, as defined in Article 1 of the Agreement on Agriculture, and compare it to China's *de minimis* level. If the amount of any such product-specific AMS is above the 8.5% *de minimis* level, the Panel will include that amount in China's Current Total AMS for that year. The Panel will then compare the resulting Current Total AMS against China's final bound commitment of "nil". In this connection, the actual calculation of the Current Total AMS is a crucial component of the Panel's assessment. We explore this notion in the next section.

7.4.3 Calculation of AMS and Current Total AMS under the Agreement on Agriculture

7.129. As discussed in the previous section, Article 1 of the Agreement on Agriculture sets out the definitions of AMS, Total AMS and Current Total AMS. This same provision also establishes the manner in which these measurements of domestic support should be calculated. In particular, Article 1(a)(ii) states that AMS is to be "calculated in accordance with the provisions of Annex 3 of this Agreement and taking into account the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule". Similarly, Article 1(h)(ii) establishes that Current Total AMS is to be "calculated in accordance with the provisions of this Agreement, including Article 6, and with the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule". From the text of Article 1, and as noted in paragraph 7.124 above, we note that the calculation of Current Total AMS follows a sequential process where the AMS for each specific product needs to be calculated before a corresponding Current Total AMS can be arrived at. We also observe that the Agreement on Agriculture establishes other important rules to follow when calculating both AMS and Current Total AMS.

7.130. As a starting point in our analysis, we note that Article 1 sets out that both the provisions of Agreement on Agriculture, including Annex 3, and the CDM contained in the tables of supporting material, have to be used when calculating AMS and Current Total AMS.

7.131. This understanding is also shared by the parties. In this connection, China argues that the starting point to calculate AMS and Total AMS are Articles 1(a)(ii) and 1(h)(ii) and that the definitions of AMS and Total AMS found in each of these Articles require the calculation of AMS on the basis of two sources of input: (i) the provisions of Annex 3 and (ii) "the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule".[286] For China, the CDM incorporated by reference in Part IV of a Member's Schedule is a Member-specific additional source of treaty text that is relevant to the calculation of AMS, including in the context of market price support under the general framework provided by Paragraphs 8 and 9 of Annex 3.[287]The United States argues that Article 1(a)(ii) specifies that AMS is to be "calculated in accordance with the provisions of Annex 3 of this Agreement", and that it is to be calculated "taking into account the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule."[288]

7.132. We have established that Article 1(a) and (h) direct us to use both the provisions of the Agreement on Agriculture, including Annex 3, and China's CDM, when calculating AMS and Current Total AMS, and that AMS has to be calculated first. We now move to address the provisions of the Agreement on Agriculture that are directly relevant for this task.

7.133. Annex 3[289] elaborates on some essential parameters that inform the calculation of AMS from domestic support provided through market price support.

7.134. First, Paragraph 1 sets out that AMS shall be calculated on a product-specific basis for each basic agricultural product receiving market price support, non-exempt direct payments, or any other

[286] China's first written submission, para. 112.
[287] China's first written submission, para. 115.
[288] United States' first written submission, para. 87 (referring to Article 1(a)(ii) of the Agreement on Agriculture).
[289] We note that this Annex is titled "Domestic support – Calculation of Aggregate Measurement of Support".

subsidy not exempted from the reduction commitment. This provision also states that support which is non-product specific shall be totalled into one non-product-specific AMS in total monetary terms.

7.135. Second, Paragraph 7 mandates that "AMS shall be calculated as close as practicable to the point of first sale of the basic agricultural product concerned".

7.136. Third, Paragraph 8 provides the formula that is to be used when calculating AMS from market price support (the MPS formula): "market price support shall be calculated using the gap between a fixed external reference price and the applied administered price multiplied by the quantity of production eligible to receive the applied administered price":

$$Market\ Price\ Support\ = (P_{Applied\ Administered} - P_{Fixed\ External}) \cdot Q_{Eligible\ production}$$

Where:

$$P_{Applied\ Administered} = Applied\ Administered\ Price$$

$$P_{Fixed\ External} = Fixed\ External\ Reference\ Price$$

$$Q_{Eligible\ producion} = Quantity\ of\ Eligible\ Production$$

7.137. Fourth, Paragraph 9 states that the FERP "shall be based on the years 1986 to 1988 and shall generally be the average f.o.b. unit value for the basic agricultural product concerned in a net exporting country and the average c.i.f. unit value for the basic agricultural product concerned in a net importing country in the base period".

7.138. Having noted the most important provisions in the Agreement on Agriculture that define how AMS from market price support should be calculated, we move to discuss the second element that is to be used in this calculation, namely, the CDM. In this regard, we recall that Articles 1(a)(ii) and 1(h)(ii) both direct the Panel to use "the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule". China's CDM is found in the tables of supporting material contained in document WT/ACC/CHN/38/Rev.3 (Rev.3).[290] We note, however, that the manner in which China's CDM should directly inform the Panel's calculation of AMS is less clear. This is so mainly because (i) the tables of supporting material do not identify what comprises the *constituent data and methodology* that should be used to calculate AMS, and (ii) the difference in language of Articles 1(a)(ii) and 1(h)(ii) when referring to the usage of the CDM.

7.139. Regarding the first issue mentioned above, we must differentiate between the elements that should inform the calculation of China's AMS, (i.e. the CDM), and where these elements are found, (i.e. in the tables of supporting material incorporated by reference into Part IV of China's Schedule). In this connection, we recall that the definitions contained in Article 1 of the Agreement on Agriculture only direct the Panel to use the CDM, and not the entirety of the tables of supporting material, when calculating AMS and Current Total AMS. For this reason, although Rev.3 contains China's tables of supporting material, and the mentioned tables contain the CDM, the Panel would need to discern which of the elements contained in these tables are CDM. In other words, the text of Article 1 suggests that not everything that is contained in the tables of supporting material and Rev.3 should inform the calculation of AMS, but only the *constituent data and methodology* found in those tables.

7.140. In this regard, we observe that the Agreement on Agriculture does not provide a precise definition of "constituent data and methodology".

7.141. China argues that the phrase "constituent data and methodology", means "those data and methodologies in a Member's Supporting Tables that are characteristic, formative, essential, and integral for the calculation of both Base and Current AMS and Base Total AMS and Current Total

[290] WT/ACC/CHN/38/Rev.3, (Exhibit USA-43).

AMS."[291] According to China, the dictionary meaning of "data" refers to "an item of information"[292] and that in the context of calculating AMS, Total AMS and market price support, the term "data" encompasses any numbers and figures used and may include, for example, the numerical values of the FERP, the AAP, and eligible production.[293] China also argues that the dictionary meaning of "methodology" refers to any "method or body of methods used in a particular field of study or activity"[294], and that in the context of calculating AMS and Total AMS, this term may include the types of calculations to be performed in calculating AMS (i.e. the relevant formulae), and the methods to be used to determine relevant input data.[295]

7.142. The United States argues that the ordinary meaning of the terms "the constituent data and methodology" includes the country-specific facts, information, modes, or procedures that are characteristic of domestic support and the agriculture sector of the Member at the time of accession.[296] For the United States, this information is found in tables of supporting material used to support or explain the basis for a Member's proposed Final Bound Commitment Level. The United States also argues that "data" is defined as "[f]acts, *esp*. numerical facts, collected together for reference or information..."[297], "method," is defined as "[a] mode of procedure; a (defined or systematic) way of doing things;"[298] "methodology" is defined as "[a] body of methods used in a particular branch of study or activity;" and "constituent" is defined as "[t]hat makes a thing what it is," or is "characteristic."[299]

7.143. We turn to the ordinary meaning of "constituent". As an adjective, it means "that constitutes or makes a thing what it is; formative, essential; characteristic".[300] "Data" is defined as "related items of (chiefly numerical) information considered collectively ... used for reference, analysis, or calculation."[301] Finally, "methodology" is defined generally as "a method or body of methods used in a particular field of study or activity".[302] Similarly, a "method" is defined generally as "a mode of procedure in any activity" or particularly as "a special form of procedure or characteristic set of procedures employed (more or less systematically) in an intellectual discipline or field of study as a mode of investigation and inquiry".[303] We also understand that due to the grammatical construction of the phrase, the adjective "constituent" modifies both the words "data" and "methodology" such that the phrase can be said to refer to 'constituent data' and 'constituent methodology'.[304] This implies that each of the relevant data and methodologies referred to must be in some way formative or characteristic of the tables of supporting material.

---

[291] China's response to Panel question No. 73 (second substantive meeting).

[292] China's response to Panel question No. 73 (second substantive meeting) (referring to Oxford English Dictionary, OED Online, "data, n", available at: http://www.oed.com/view/Entry/296948? (last viewed 26 October 2017) (Exhibit CHN-56)).

[293] China's first written submission, para. 143; China's response to Panel question No. 73 (second substantive meeting).

[294] China's response to Panel question No. 73 (second substantive meeting) (referring to Oxford English Dictionary, OED Online, "methodology, n", available at: http://www.oed.com/view/Entry/117578? (last viewed 26 October 2017) (Exhibit CHN-55)).

[295] China's response to Panel question No. 73 (second substantive meeting).

[296] United States' response to Panel question No. 73 (second substantive meeting).

[297] United States' response to Panel question No. 73 (second substantive meeting) (referring to *Shorter Oxford English Dictionary*, "data," vol. I, p. 594 (ed. 1993)).

[298] United States' response to Panel question No. 73 (second substantive meeting) (referring to *Shorter Oxford English Dictionary*, "method", "methodology," vol. I, p. 1759 (ed. 1993)).

[299] United States' response to Panel question No. 73 (second substantive meeting) (referring to *Shorter Oxford English Dictionary*, "constituent," vol. I, p. 488 (ed. 1993)).

[300] Oxford English Dictionary Online, definition of "constituent", available at: <http://www.oed.com/view/Entry/39840>, accessed 8 June 2018.

[301] Oxford English Dictionary Online, definition of "data", available at: <http://www.oed.com/view/Entry/296948>, accessed 8 June 2018.

[302] Oxford English Dictionary Online, definition of "methodology", available at: <http://www.oed.com/view/Entry/117578>, accessed 8 June 2018.

[303] Oxford English Dictionary Online, definition of "method", available at: <http://www.oed.com/view/Entry/117560>, accessed 8 June 2018.

[304] The United States noted that, given the grammatical construction of the phrase, the adjective "constituent" modifies both nouns, "data" and "methodology". United States' response to Panel question No. 73 (second substantive meeting). China similarly noted its understanding that the term "constituent" qualifies both the terms "data" and "methodology". China's response to Panel question No. 73 (second substantive meeting).

7.144. As a whole, taken in the context of Articles 1(a) and 1(h) of the Agreement on Agriculture, the Panel understands the phrase "constituent data and methodology" to mean those pieces of (chiefly numerical) information and/or modes of procedure which are characteristic of and essential for the understanding and calculation of a Member's AMS, as found in that Member's tables of supporting material.

7.145. We now turn to the second issue, that is, the different language in Articles 1(a)(ii) and 1(h)(ii) when referring to the use of the CDM. We observe that the term CDM is mentioned three times in the Agreement on Agriculture: in the definition of "AMS" of Article 1(a)(ii), in the definition of "Equivalent Measurement of Support" of Article 1(d)(ii), and in the definition of "Current Total AMS" of Article 1(h)(ii). In all three of these provisions, CDM is used in the context of how these measurements of domestic support are to be calculated. We also note that while the first two provisions use the language "calculated ... *taking into account* the constituent data and methodology" (emphasis added), the third provision uses different language: "calculated *in accordance with* ... the constituent data and methodology" (emphasis added).

7.146. The parties have also noted the different language of Articles 1(a)(ii) and 1(h)(ii), particularly of the words "taking into account the [CDM]" and "calculated in accordance with ... the [CDM]".

7.147. Regarding Article 1(a)(ii), China contends that it uses the phrase "taking into account" when referring to "the constituent data and methodology ... incorporated by reference in Part IV of the Member's Schedule". China submits that the dictionary meaning of "to take into account" is "to include something in an account or reckoning, to take into consideration, especially as a contributory factor; to notice".[305] According to China, similarly to Article 1(h)(ii), Article 1(a)(ii) emphasizes the role of "the constituent data and methodology ... incorporated by reference in Part IV of the Member's Schedule" in calculating AMS.[306] China, however, contends that the dictionary meanings of the terms (i) "in accordance with" in Article 1(h)(ii); and (ii) "in accordance with" and "taking into account" in Article 1(a)(ii) do not fully address the relationship between (i) the terms of Annex 3 and (ii) "the constituent data and methodology ... incorporated by reference in Part IV of the Member's Schedule".[307]

7.148. China claims that the context that Articles 1(a) and 1(h) provide for one another calls for AMS and Current Total AMS calculations on the basis of an approach that gives meaning to both Annex 3 and the CDM. For China, this is achieved by using a holistic approach and a harmonious reading of (i) Annex 3 as providing the general framework for the calculation of AMS and (ii) a Member's "[CDM] used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule", as providing additional detail to fill in that framework for the calculation of AMS.[308]

7.149. In this connection, China argues that Articles 1(a)(ii) and 1(h)(ii) provide relevant context for each other's interpretation, as both concern the calculation of domestic support, and claims that the Appellate Body in *Korea – Various Measures on Beef* speculated that Article 1(a)(ii) could be read to attribute "higher priority to 'the provisions of Annex 3' than to [a Member's] 'constituent data and methodology'",[309] based on the use of "in accordance with" and "taking into account". China notes, however, that the Appellate Body also recognized that "this difference is not reflected in [the] wording of the definition of Current Total AMS in Article 1(h)".[310] China contends this is because by using the phrase "in accordance with" for both (i) "the provisions of this Agreement", including Annex 3, and (ii) "the [CDM] used in the tables of supporting material incorporated by

[305] China's first written submission, para. 126 (referring to *Oxford English Dictionary*, OED Online, "to take account of, n.", pp. 21-22, available at: http://www.oed.com/view/Entry/1194? (last viewed 26 October 2017), (Exhibit CHN-54)).

[306] China's first written submission, para. 126.

[307] China's first written submission, para. 128.

[308] China's first written submission, para. 131.

[309] China's first written submission, para. 129 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 112).

[310] China's first written submission, para. 129 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, footnote [48] (underlining added)).

reference in Part IV of the Member's Schedule", Article 1(h)(ii) attributes equal importance to both provisions.[311]

7.150. China further argues that the panel in *Korea − Various Measures on Beef* also highlighted the "complementary"[312] nature of Articles 1(a)(ii) and 1(h)(ii) in providing guidance for the calculation of AMS and Current Total AMS, respectively. China claims that it follows that the calculations must be undertaken in a parallel manner, and the calculation of AMS cannot be undertaken on a basis that differs from that applicable to the calculation of Total AMS. China contends that the panel in *Korea − Various Measures on Beef* properly identified the reason for the complementary nature of these provisions in the following terms: "all these concepts, e.g. domestic support, AMS, Current Total AMS, and total domestic support and the provisions of Articles 1(a), 1(h), 3.2, 6.4, […] are organically and inextricably linked".[313] China claims that in these circumstances, to ensure coherent calculations, the same data and methodology must be applied for the calculations of AMS and its sum as Current Total AMS.[314]

7.151. The United States disagrees with China's interpretation. Key to its contention is the notion that Articles 1(a)(ii) and 1(h)(ii) each address a different stage of the AMS calculation. In this vein, the United States argues that the product-specific AMS calculation in Article 1(a)(ii) addresses the evaluation of domestic support provided on a product-by-product basis, and that the Current Total AMS described in Article 1(h)(ii) is the summing of all product-specific AMS, after considering whether relevant *de minimis* criteria and other considerations set out in Article 6 have been met.[315]

7.152. For the United States, Article 1(a)(ii) specifies that for support provided in any year after implementation, product-specific AMS is "calculated *in accordance* with the provisions of Annex 3 of this Agreement" and that Article 1(a)(ii) continues by stating that, in addition to complying with Annex 3, AMS is calculated "taking into account the constituent data and methodology used in the tables of support material". According to the United States, the inclusion of the phrase "in accordance with" in Article 1(a)(ii) indicates that a product-specific AMS calculation must be conducted in "conformity" with the methodology provided in Annex 3, and that conversely, the use of the phrase "taking into account" in reference to constituent data and methodology requires a panel to "take into consideration, [or] notice" that information.[316] The United States submits that this indicates that a lesser degree of consideration is accorded to any constituent data and methodology.[317]

7.153. The United States further submits that after a panel has calculated the various product-specific AMS for a particular year as set out in Article 1(a)(ii), it is directed to turn to aggregating these constituent parts to calculate the Current Total AMS for each of these years. For the United States, the first phrase of Article 1(h)(ii), "in accordance with the provisions of this Agreement, including Article 6," indicates that the calculation must be consistent with the binding commitments in the Agreement on Agriculture, and highlights Article 6, which provides information on *de minimis* levels and other exemptions as relevant, and that the second direction in Article 1(h)(ii) states that Current Total AMS is "calculated… with the constituent data and methodology." The United States claims that "with" in this context can mean "by use of (a thing) as an instrument or means … by means of"[318] and that this is a less demanding requirement than "in accordance with."[319]

7.154. Responding to China's arguments regarding Article 1(h)(ii), the United States submits that the phrase "in accordance with," which is applicable to the first phrase, does not extend to the second phrase, as grammatically, "in accordance with" and "with" are separate and distinct

[311] China's first written submission, para. 129.
[312] China's first written submission, para. 130 (referring to Panel Report, *Korea − Various Measures on Beef*, para. 812).
[313] China's first written submission, para. 130 (referring to Panel Report, *Korea − Various Measures on Beef*, para. 813).
[314] China's first written submission, para. 130.
[315] United States' response to Panel question No. 62 (second substantive meeting).
[316] United States' response to Panel question No. 62 (second substantive meeting) (referring to Appellate Body Report, *Korea − Various Measures on Beef*, para. 111 (*citing* The New Shorter Oxford English Dictionary, (Clarendon Press, 1993), Vol. I, p. 15)).
[317] United States' response to Panel question No. 62 (second substantive meeting).
[318] United States' response to Panel question No. 62 (second substantive meeting) (referring to *Shorter Oxford English Dictionary*, "with," vol. II, p. 3703-04 (ed. 1993)).
[319] United States' response to Panel question No. 62 (second substantive meeting).

prepositions. The United States claims that if "in accordance with" was intended to apply to both objects (the Agreement and the constituent data and methodology), the second "with" would be superfluous. The United States argues that even if this phrase were to be understood as "in accordance with" the constituent data and methodology, this would refer to constituent data and methodology for purposes of Article 1(h)(ii), that is, calculation of Current Total AMS. For the United States, the "constituent" data and methodology would only be that relevant to the operation in question, i.e. the consideration of *de minimis* levels and summing of current product-specific AMS and non-product-specific AMS, as appropriate.[320]

7.155. The United States also responds to China's arguments that "context" and proximity suggest that these terms should be interpreted to provide the same direction with regard to calculation of AMS and Current Total AMS[321], and claims that this interpretation is not supported by the text of Articles 1(a) and 1(h) as understood applying customary rules of interpretation (Articles 31-32 of the VCLT).[322]

7.156. We begin by noting that while the parties recognize the difference in the language in Articles 1(a)(ii) and 1(h)(ii) when referring to the usage of the CDM, they both extract different conclusions on how the Panel should interpret them. While China contends that AMS must be calculated consistently for purposes of both AMS and Total AMS calculations[323], and that the calculations must be undertaken in a parallel manner, implying that the calculation of AMS cannot be undertaken on a basis that differs from that applicable to the calculation of Total AMS[324], the United States emphasises that Articles 1(a)(ii) and 1(h)(ii) each address a different stage of the calculation of AMS, thereby implying that the differences in the language should be applied to the respective stage of the calculation.

7.157. We recall that, as stated in paragraph 7.129 above, the calculation of Current Total AMS follows a two-step process where product-specific AMS, as defined in Article 1(a)(ii), has to be calculated first. The resulting AMS for different products would then need to be subjected to Article 6.4 of the Agreement on Agriculture and the support exceeding the *de minimis* level aggregated in order to obtain the Current Total AMS, as defined in Article 1(h)(ii). This Current Total AMS would then be compared to a Member's domestic support commitments. Therefore, although Articles 1(a)(ii) and 1(h)(ii) can be said to be organically and inextricably linked[325], they each relate to a different stage of the overall calculation of AMS. These conceptual differences, in turn, are reflected in the language of the two provisions. For these reasons, we consider that the calculations must be undertaken sequentially. Furthermore, the concrete application of the CDM may vary depending on whether AMS or Current Total AMS is being calculated.

7.158. We generally agree with China that the calculation of Current Total AMS should be done on the basis of an approach that gives meaning to both Annex 3 and the CDM, by using a holistic approach and a harmonious interpretation of the different provisions of the Agreement on Agriculture.[326] However, such an interpretation should not lead to a result where the textual differences in either provision are read out, without more, especially in a situation where there appear to be important differences in the manner in which AMS and Current Total AMS are to be calculated.

7.159. We note that the Appellate Body has already addressed some of these issues in the past. Indeed, in *Korea − Various Measures on Beef* it noted that:

> Article 1(a)(ii) contains two express requirements for calculating Current AMS. First, Current AMS is to be "calculated *in accordance with* the provisions of Annex 3 of this Agreement". The ordinary meaning of "accordance" is "agreement, conformity,

[320] United States' response to Panel question No. 62 (second substantive meeting).
[321] United States' response to Panel question No. 62 (second substantive meeting) (referring to China's second written submission, paras. 296-305; China's first written submission, paras. 135-139).
[322] United States' response to Panel question No. 62 (second substantive meeting).
[323] China's comments on United States' response to Panel question No. 62 (second substantive meeting).
[324] China's first written submission, para. 130.
[325] Panel Report, *Korea − Various Measures on Beef*, para. 813.
[326] China's first written submission, para. 131.

> harmony".[327] Thus, Current AMS must be calculated in "conformity" with the provisions of Annex 3. Second, Article 1(a)(ii) provides that the calculation of Current AMS is to be made while "taking into account the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule." "Take into account" is defined as "take into consideration, notice".[328] Thus, when Current AMS is calculated, the "constituent data and methodology" in a Member's Schedule must be "taken into account", that is, it must be "considered".[329] (emphasis original)

7.160. Of particular importance in this discussion is a footnote to the above paragraph, where the Appellate Body noted that:

> [T]his difference is not reflected in the wording of the definition of Current Total AMS in Article 1(h). Article 1(h)(ii) provides that Current Total AMS is to be calculated "in accordance with the provisions of this Agreement, including Article 6, and with the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule".[330]

7.161. The Appellate Body also observed that, in the wording of Article 1(a)(ii) itself, a higher priority is attributed to "the provisions of Annex 3" than to the "constituent data and methodology", as the ordinary meaning of the term "in accordance with" reflects a more rigorous standard than the term "taking into account".[331] The Appellate Body then went on to describe this difference as involving an "apparent hierarchy". Therefore, the Appellate Body has already noted the potential differences in the usage of a Member's CDM, depending on whether the current AMS or Current Total AMS is being calculated. [332]

7.162. However, in that dispute, the panel and Appellate Body found that there was no constituent data and methodology for beef[333], and as such, it was not necessary to decide how a conflict between "the provisions of Annex 3" and the "constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule" would have to be resolved.[334] Indeed, the Appellate Body appears to have considered, on an *arguendo* basis, that in spite of the wording of Article 1(a)(ii), there may be circumstances in which a panel could be justified in giving priority to the CDM used in the tables of supporting material over the guidance of Annex 3 for products entering into the calculation of the Base Total AMS.[335] In any event, we note that the facts of *Korea – Various Measures on Beef* stand in contrast to the present case: China's tables of supporting material contain information that may well be deemed to be CDM for wheat and rice.

7.163. For these reasons, these previous statements by the Appellate Body have to be taken with caution, recognizing that the consequences in the difference in wording between Articles 1(a)(ii) and 1(h)(ii) were not directly addressed there.

7.164. We therefore consider that we should take "into account" the CDM, if available, when calculating AMS in line with the wording in Article 1(a)(ii), and to give a higher priority to the wording

---

[327] (footnote original) *The New Shorter Oxford English Dictionary*, (Clarendon Press, 1993), Vol. I, p. 15.
[328] (footnote original) *The New Shorter Oxford English Dictionary*, (Clarendon Press, 1993), Vol. I, p. 15.
[329] Appellate Body Report, *Korea – Various Measures on Beef*, para. 111.
[330] Appellate Body Report, *Korea – Various Measures on Beef*, fn 48.
[331] Appellate Body Report, *Korea – Various Measures on Beef*, para. 112.
[332] We also note that the Appellate Body opined that the panel's reasoning was not based on this "apparent hierarchy", but noted that rather, on the contrary, the panel considered that the constituent data and methodology has an important role to play in ensuring that the calculation of support to any given product is calculated in subsequent years consistently with support calculated in the base period. Appellate Body Report, *Korea – Various Measures on Beef*, para. 113 and fn 49.
[333] Panel Report, *Korea – Various Measures on Beef*, para. 812, Appellate Body Report, *Korea – Various Measures on Beef*, para. 114.
[334] Appellate Body Report, *Korea – Various Measures on Beef*, para. 114.
[335] Appellate Body Report, *Korea – Various Measures on Beef*, para. 114. The Appellate Body went on to state that "giving such priority would seem to be unwarranted when calculating Current AMS for a product which did not enter into the Base Total AMS calculation." This situation does not seem to be present in this dispute.

of Annex 3.[336] In this same vein, we are of the view that both Annex 3 and the CDM should be given equal consideration when calculating the Current Total AMS, as per Article 1(h)(ii).

7.165. We observe, however, that it may not suffice to assess the differences in the language of Articles 1(a)(ii) and 1(h)(ii) and the practical implications arising therefrom solely through the lens of conflict. This may end up improperly reducing the relationship between these provisions to a hierarchical one, where the application of one seems to exclude the application of the other in its entirety. Indeed, this may end up distorting the general conception of the calculation of Current Total AMS under Articles 1(a)(ii) and 1(h)(ii) as being organically and inextricably linked.[337] For these reasons, the differences in the usage of CDM for the purposes of the calculation of AMS and Current Total AMS should not be reduced to a situation where Annex 3 completely precludes the application of the CDM simply because the latter is only to be "taken into account". Assuming the existence of a conflict *ex ante*, without considering the possibility of a concurrent application, seems to us to be unwarranted.

7.4.4 Preliminary considerations in relation to China's domestic support commitments

7.4.4.1 Tables of supporting material and Member-specific domestic support-related commitments

7.166. Before we move to discuss the parties' arguments regarding the variables of the MPS formula, we will first address China's view on whether the tables of supporting material contain Member-specific domestic support-related commitments.

7.167. China submits that while its tables of supporting material, as reflected in Rev.3, contain substantial text and data, it is only those elements in Rev.3 that are implicated in the calculation of Base Total AMS and Current Total AMS under the Agreement on Agriculture that give rise to domestic support-related commitments. For China, this is so because only those elements are part and parcel of the domestic support commitments that China has undertaken under its Accession Protocol.[338] According to China, these elements include the CDM reflected in the tables of supporting material that are referred to in Articles 1(a) and 1(h) of the Agreement on Agriculture, including (i) the base period, (ii) the fixed external reference prices, (iii) a methodology for the determination of eligible production, and (iv) the choice between a price gap methodology or budgetary outlays for non-exempt direct payments in Paragraph 10 of Annex 3 of the Agreement on Agriculture. For China, these elements may also include the identification of the basic agricultural products and the years for which AMS is calculated under Articles 1(b) and 1(i) of the Agreement on Agriculture.[339]

7.168. The United States, on the other hand, contends that China's argument that the Panel can look to information contained in its tables of supporting material to identify China-specific methodologies for identification of the FERP and the quantity of eligible production (QEP), misunderstands the relationship between the Agreement on Agriculture and a Member's Schedule of Concessions and tables of supporting material, as well as the role and status of information contained in these tables under the Agreement on Agriculture.[340] For the United States, the Agreement on Agriculture provides the ways in which the information contained in a Member's tables of supporting material may be used in the calculation of a Member's Current Total AMS, but it does not give rise to domestic-support-related rights and obligations in the calculation of Current Total AMS.[341] The United States contends that the Agreement on Agriculture directs the use of a Member's tables of supporting material to glean Member-specific factual information such as identifying the basic agricultural products in the Member's territory and definition of year for a particular programme but that it does not create independent rights and obligations.[342]

7.169. We begin by recalling that our task in the present dispute is to assess China's compliance with its domestic support commitments under the Agreement on Agriculture. As we have stated

[336] Appellate Body Report, *Korea – Various Measures on Beef*, para. 112.
[337] Panel Report, *Korea – Various Measures on Beef*, para. 813.
[338] China's second written submission, para. 187.
[339] China's second written submission, para. 188.
[340] United States' second written submission, para. 64.
[341] United States' second written submission, para. 65.
[342] United States' second written submission, para. 65; United States' response to Panel question Nos. 19, para. 94 and 65, paras. 70-73 (second substantive meeting).

before, this requires the Panel to calculate domestic support as provided through market price support for rice and wheat, and as measured as Current Total AMS. These calculations are to be done mainly on the basis of the definitions of Article 1 of the Agreement on Agriculture, which in turn direct the Panel to use the provisions of Annex 3 and a Member's CDM. In this regard, we note that Article 1 only mentions the tables of supporting material, which are found in Rev.3 in the case of China, when setting out that it is the constituent data and methodology *contained* in those tables that are relevant for the calculation of AMS. For this reason, we do not see the discussion of whether the tables of supporting material give rise to domestic-support-related commitments as being a central one in this dispute. This is so because the text of the Agreement on Agriculture is clear that the central elements in the calculation of Current Total AMS are Annex 3 and a Member's CDM, and not the tables of supporting material. These tables are only relevant inasmuch as they contain the CDM, the legal status of which is not in question. Article 1 provides clear indications pertaining to its relevance. We are also mindful that the Panel may well complete its task to provide a positive solution to the dispute without having to reach a general and overarching conclusion on the status of the tables of supporting material.

7.170. We also note that China's argument was clarified during the course of the proceedings. Responding to a question by the Panel asking China to address statements made by the United States, China noted that while the United States argued that the Agreement on Agriculture "provides the ways in which the information contained in a Member's Supporting Tables may be used in the calculation of a Member's Current Total AMS", it also stated that this information "does not give rise to domestic-support related rights and obligations".[343] For China, "[t]he [United States'] first statement directly contradicts the second statement. Indeed, if a Member's "constituent data and methodology" are to be used in the calculation of Current (Total) AMS, then they necessarily give rise to domestic-support-related rights and obligations, because they affect the outcome of those calculations."[344]

7.171. In our view, this comment points to the crux of China's concern, namely, that the CDM must inform the calculation of Current Total AMS. China perceives the United States' position as depriving the CDM from having any meaningful and specific value. This comment also allows us to disaggregate China's general position into two components: one relating to the usage of the CDM in the calculations of Current Total AMS and another one relating to this exercise as giving rise to domestic-support-related rights and obligations. Regarding the first component, we have already found in Section 7.4.3 above that CDM plays an important role in these calculations. Thus, to this extent we agree with China. However, it does not follow that because the Agreement on Agriculture provides for the ways in which the information contained in a Member's tables of supporting material is to be used in the calculation of Current Total AMS the CDM or the mentioned tables necessarily give rise to domestic-support-related rights and obligations.

7.172. Therefore, because (i) the role of the CDM in the calculations of Current Total AMS is already clarified in Article 1 and (ii) the issue of whether the tables of supporting material contain Member-specific domestic-support-related commitments is not essential to the resolution of this dispute, we find that it is not necessary to come to a definitive conclusion on whether the tables of supporting material contain Member-specific domestic-support-related commitments.[345]

[343] China's response to Panel question No. 67 (second substantive meeting) (referring to United States' second written submission, para. 65).

[344] China's response to Panel question No. 67 (second substantive meeting).

[345] China also submitted arguments on how, for non-original Members, CDM are not only part and parcel of their domestic support commitments, but also of their "terms of accession" under Article XII:1 of the Marrakesh Agreement (China's second written submission, Sections IV and VIII). In reply, the United States argued that China's Schedule of Concessions, including Part IV, does not form part of China's Accession Protocol, but rather of the Schedule of Concessions and Commitments annexed to the GATT 1994 (United States' second written submission, para. 74). Having already clarified that the role and legal status of the CDM is adequately defined in Article 1 of the Agreement on Agriculture, when calculating Current Total AMS, we do not find it necessary to address these arguments.

7.4.5 Issues relating to the definition and calculation of the variables of the MPS formula

7.4.5.1 Applied Administered Price

7.173. Except for the possible processing-level adjustment (which potentially affects the AAP) in order to utilize data values at the same stage of processing of the products (specifically rice), the parties agree on the basic understanding of this variable. We have discussed the AAP to a limited extent in section 7.2.2.1 above, and as mentioned, we agree with the parties that when a measure takes the form of market price support, the AAP is a constituent element of that measure.[346]

7.174. The United States contends that because the Agreement on Agriculture does not define the term "applied administered price", it is necessary to determine the ordinary meaning of these terms.[347] The United States submits that the AAP is the price a Member dispenses or furnishes to support a particular basic agricultural product and that Paragraph 8 of Annex 3 of the Agreement on Agriculture also refers to "the" AAP, suggesting that this price is known and discernible.[348] The United States claims that the AAP is thus the price the government sets or establishes and is, as such, distinguishable from a prevailing domestic market price.[349]

7.175. The United States alleges that China announces for each market price support programme the "minimum procurement price" at which designated state-owned enterprises will purchase wheat, Indica rice, and Japonica rice.[350] For the United States, this annually announced "minimum procurement price" constitutes an AAP because it is the known or discernible price China dispenses or furnishes for each basic agricultural product, regardless of the price that would be otherwise determined by the market.[351] The United States contends that the AAPs relevant to China's market price support programmes for wheat, Indica rice and Japonica rice are the minimum procurement prices identified in the annual Wheat MPS Notices and Rice MPS Notices.[352]

7.176. China argues that the Agreement on Agriculture does not define "the applied administrative price", nor does it contain any specific guidance concerning the methodology to use to determine this price. As a result, China relies on the dictionary meaning of the elements of the term "applied administered price", coupled with the CDM, as set out in Rev.3.[353] China submits that the dictionary meaning of an "administered price" refers to a price "determined not by market forces but by administrative action (as of a large company or government)"[354] and that the dictionary meaning of "applied" includes "brought to bear, made effective, acting at a point or place".[355]

7.177. The Panel agrees with the parties that it would be valuable to determine the ordinary meaning of the term "applied administered price". "Applied" is defined as "put to practical use" while "apply" means "put to use; employ"[356], which, as the United States suggests, points to an actual, demonstrable action. The Panel concurs with China's characterization of "administered" when referring to a price as being defined as "determined not by market forces but by administrative action (as of a large company or a government)."[357] The AAP, therefore, is the price set by the government at which specified entities will purchase certain basic agricultural products.

---

[346] Annex 3 of the Agreement on Agriculture, para. 8; United States' first written submission, para. 93.
[347] United States' first written submission, para. 96 (referring to *Shorter Oxford English Dictionary*, "applied," p. 100 (ed. 1993), *Shorter Oxford English Dictionary,* "administer," p. 28 (ed. 1993), *Shorter Oxford English Dictionary*, "price," p. 2349 (ed. 1993), (Exhibit USA-64)).
[348] United States' first written submission, para. 97.
[349] United States' first written submission, para. 97.
[350] United States' first written submission, para. 106.
[351] United States' first written submission, para. 106.
[352] United States' first written submission, para. 111.
[353] China's first written submission, para. 190.
[354] China's first written submission, para. 191 (referring to Oxford English Dictionary, OED Online, "administered, adj.", available at: http://www.oed.com/view/Entry/2532? (last viewed 26 October 2017), (Exhibit CHN-60)).
[355] China's first written submission, para. 193 (referring to Oxford English Dictionary, OED Online, "applied, adj.", available at: http://www.oed.com/view/Entry/9713? (last viewed 26 October 2017), (Exhibit CHN-61)).
[356] *The New Shorter Oxford English Dictionary*, definition of "applied", "apply" Vol. 1, 1993, p. 100-101.
[357] Oxford English Dictionary Online, definition of "administered, adj", available at: <http://www.oed.com/view/Entry/2532>, accessed 27 July 2018).

7.178. We note that in the measures themselves, for the years 2012-2015, the AAP is set out for each product and for each year[358, 359]. The AAP is referred to as the "minimum purchase price" within the Chinese measures, and is defined as "x yuan per *jin*" where 1 *jin* equals 0.5 kilograms, for standard Grade 3 product. Certain other prices are also included in the Annual Notices for Grade 1, 2, 4, and 5 product, which are either slightly higher or lower than the standard Grade 3 price, relative to the Grade of the product.[360] Neither party indicated that the Panel should look to any of these other prices when determining an AAP, given that the majority of grain is considered to be "standard" Grade 3 grain.[361] Thus, for the purposes of the Panel's calculations, the price for the standard Grade 3 product will be considered to be an element of China's CDM for each product.

7.179. The following table contains the relevant AAPs which will be used in the Panel's calculations:

Table 2: Wheat, Indica rice and Japonica rice AAP[362]

Unit: RMB/MT	2012	2013	2014	2015
Wheat	2,040	2,240	2,360	2,360
Early Indica rice	2,400	2,640	2,700	2,700
Mid-Late Indica rice	2,500	2,700	2,760	2,760
Japonica rice	2,800	3,000	3,100	3,100

7.4.5.2 Fixed external reference price

7.180. The Panel is presented with a simple choice, surrounded by a number of substantial issues, regarding the time-period to be used to calculate the FERP: using a FERP based on the years 1986-1988, as the United States asserts, or one based on the years 1996-1998, as China asserts.

7.181. The United States notes that pursuant to Paragraph 9 of Annex 3, the FERP "shall be based on the years 1986 to 1988 and shall generally be the average f.o.b. unit value for the basic agricultural product concerned in a net exporting country and the average c.i.f. unit value for the basic agricultural product concerned in a net importing country in the base period." For the United States, this reference to calculation of the average f.o.b. or c.i.f. unit value of the basic agricultural product in the period 1986 through 1988 establishes that the FERP is one, unchanging value.[363] The United States further contends that the ordinary meaning of the terms in "fixed external reference price" suggest that this is an unchanging and definite price, relating to a foreign situation that is used as the basis for comparative measurement.[364] According to the United States, this ordinary meaning corresponds to the elements in Paragraph 9 of Annex 3 and the use of f.o.b. or c.i.f. values relates the reference value to prices in foreign trade, rather than internal prices; the calculation of an average unit value over a base period ensures the reference value is unchanging and definite.[365]

7.182. China, on the other hand, argues that a holistic reading of Annex 3 and Part IV of China's Schedule establishes that, in calculating AMS from China's market price support for wheat and rice,

[358] See 2012 Wheat Annual Notice, (Exhibit USA-20/CHN-18B), p. 1; 2013 Wheat Annual Notice, (Exhibit USA-21/CHN-93B); 2014 Wheat Annual Notice, (Exhibit USA-22/CHN-20B), p. 1; 2015 Wheat Annual Notice, (Exhibit USA-23/CHN-21B), p. 1.

[359] See 2012 Rice Annual Notice, (Exhibit USA-39/CHN-23B), p. 1; 2013 Rice Annual Notice, (Exhibit USA-40/CHN-24B), p. 1; 2014 Rice Annual Notice, (USA-41/CHN-25B), p. 1; 2015 Rice Annual Notice, (Exhibit USA-42/CHN-26B), p. 1.

[360] The 2015 instruments state that "[t]he price difference between adjacent grades will be 0.02 yuan per jin." Article 4, 2015 Wheat and Rice Implementation Plan, (Exhibit USA-27/CHN-28B Revised), p. 3.

[361] United States' response to Panel question No. 25, para. 105; China's response to Panel question No. 25.

[362] The AAPs for wheat, Indica rice and Japonica rice used in the calculation of China's MPS for each product are the minimum procurement prices identified in the annual Wheat MPP Notices and Rice MPP Notices, as we found in paragraph 7.178 above. These figures were multiplied by 20 in order to derive a price per ton.

[363] United States' first written submission, para. 98.

[364] See Panel Report, *Korea – Various Measures on Beef*, para. 830 (which the United States argues states that in instances where no import or export prices are available for a particular Member, Annex 3, paragraph 9 permits a proxy price reflecting import or export prices between 1986 and 1988 in another Member's market).

[365] United States' first written submission, para. 100.

the FERP must be determined using the 1996-1998 period, rather than the 1986-1988 period identified in Paragraph 9 of Annex 3.[366] China argues that the period 1986-1988 in Annex 3 was meant to be used by WTO Members joining the WTO upon the conclusion of the Uruguay Round in 1994. China also claims that its use in its tables of supporting material of the 1996-1998 period to determine China's FERP is consistent with a Technical Note by the WTO Secretariat for acceding Members, which provides that "[i]n order to calculate a product-specific AMS for these products, relevant tables from Supporting Tables DS:5 to DS:7 should be used" and that an "external reference price" is to be calculated from data "normally for each of the last three years".[367] China contends that it is not unique in having applied the Technical Note of the Secretariat and that all of the accessions that have taken place since the establishment of the WTO in 1995 have used base periods other than 1986-1988 for the purposes of Supporting Table DS:5.[368]

7.183. Paragraph 9 of Annex 3 of the Agreement on Agriculture provides as follows:

> The fixed external reference price shall be based on the years 1986 to 1988 and shall generally be the average f.o.b. unit value for the basic agricultural product concerned in a net exporting country and the average c.i.f. unit value for the basic agricultural product concerned in a net importing country in the base period. The fixed reference price may be adjusted for quality differences as necessary.

7.184. The plain text of this provision weighs in favour of the United States' arguments as it provides that the "[t]he fixed external reference price shall be based on the years 1986 to 1988".[369] However, China has pointed to other important issues that the Panel needs to consider regarding how other non-original Members, including China, have determined their FERPs in the context of market price support. In particular, China argues that in its calculations of the Base Total AMS, as reflected in its tables of supporting material, it did not use a FERP based on the period 1986-1988.[370] China also contends that, as a matter of fact, all of the non-original Members have used a FERP that is not based on the period 1986-1988 when calculating their Base Total AMS.[371] In addition to these two factual assertions, China also contends that there must be some sort of consistency or parallelism between the way the Base Total AMS and the Current Total AMS are calculated under the Agreement on Agriculture.[372]

7.185. For China, the fact that (i) its table of supporting material did not use a FERP based on the years set out in Paragraph 9 of Annex 3 for the calculations of its Base Total AMS, and (ii) that all non-original Members have not used FERPs based on the 1986-1988 time-period referred to in this provision, coupled with the claim of an alleged requirement of consistency between Base Total and Current Total AMS imply that Paragraph 9 of Annex 3 should not be read as an inflexible rule. In particular, China argues that all of these considerations imply that while the text of Paragraph 9 is styled as a mandatory rule, the applicable context, relevant subsequent practice and the object and purpose of the Agreement on Agriculture support a more flexible interpretation that gives room for later-acceded Members to agree with the WTO membership, upon their accession, on FERPs from a base period other than 1986-1988.[373]

7.186. We will structure our analysis of China's arguments as follows: we will begin by conducting an assessment of the two factual claims presented by China regarding the FERPs used in the calculation of the Base Total AMS by China and by other non-original Members. We will then move on to assess the argument of the alleged requirement of consistency in the way Base Total and Current Total AMS are calculated. We will then determine the FERP that should be used in the context of this dispute to calculate China's Current Total AMS.

---

[366] China's first written submission, paras. 172-173.

[367] China's first written submission, para. 174 (referring to WTO, Handbook on Accession to the WTO, Chapter 4.6, available at: https://www.wto.org/english/thewto_e/acc_e/cbt_course_e/c4s6p1_e.htm (last viewed 25 October 2017), pp. 3-4 (Exhibit CHN-11) (emphasis added)).

[368] China's first written submission, para. 175.

[369] United States' first written submission, paras. 98-100 (referring to the language of Annex 3 to the Agreement on Agriculture).

[370] China's first written submission, paras. 51-52, 177-178.

[371] China's first written submission, para. 175, Table 6; China's second written submission para. 353.

[372] China's first written submission, para. 138; China's second written submission, paras. 296-302, 345.

[373] China's second written submission, para. 320.

7.4.5.2.1 FERP contained in China's tables of supporting material

7.187. We will now assess China's contention that its tables of supporting material did not use a FERP based on the period 1986-1988 in its calculations of the Base Total AMS. China argues that its tables of supporting material, particularly in Table 1 of Appendix DS 5-4 of Rev.3, provide the data and methodology for separate FERPs for Indica rice and Japonica rice during the base period of 1996-1998.[374] China also argues that its tables of supporting material, particularly Appendix DS 5-3 of Rev.3, provide the data and methodology for the FERP for wheat during the base period of 1996-1998.[375]

7.188. We begin by noting that China's Supporting Table DS: 5, contained in Rev.3, sets out the calculation of product-specific AMS from market price support for wheat, Japonica rice and Indica rice, in the years 1996-1998. For each of the products and the years at issue, the table presents the different elements of the MPS Formula, namely, an "applied administered price", an "external reference price", and an "eligible production", as well as the results arising from the application of the MPS Formula[376]:

Table 3: China's Supporting Table DS: 5 (reproduced from WT/ACC/CHN/38/Rev.3)

Description of Basic Products	Calendar year	"Applied administered price" (RMB yuan/ton)	"External reference price" (RMB yuan/ton)	"Eligible production" (1000 tons)	Total market price support (million RMB yuan)
a) Wheat	1996	1480.0	1885.0	15000	-6075
	1997	1480.0	1629.6	15000	-2244
		1340.0	1629.6	31002	-8979
	1998	1420.0	1579.8	15000	-2397
		1260.0	1579.8	12956	-|44
	average				
b) Japonica Rice	1996	2200.0	3682.9	5250	-7785
	1997	2200.0	2862.1	5250	-3476
		1971.4	2862.1	6452	-5746
	1998	2114.3	3326.9	5250	-6366
		1914.3	3326.9	3290	-4647
	average				
c) Indica Rice	1996	2142.9	3082.1	10500	-9862
	1997	2142.9	2033.0	10500	1153
		1885.7	2033.0	12903	-1901
	1998	1931.4	1913.9	10500	184
		1734.3	1913.9	6580	-1182

7.189. Endnotes 17 and 18 to Supporting Table DS 5 elaborate on the details of the "external reference price" contained therein. The former clarifies that wheat was a net-import product in the 1996-1998 base period, and that therefore, the external reference prices were determined by the c.i.f. prices, on the basis of China's customs statistics. For Japonica rice and Indica rice, the endnote states that these products were net-export products in the 1996-1998 base period, and that therefore, their external reference prices were determined by the f.o.b. prices, on the basis of China's Customs statistics. Endnote 18 also clarifies the exchange rates used in the calculations.

[374] China's first written submission, paras. 221 (referring to United States' first written submission, paras. 113-116) and 269; response to Panel question No. 85.

[375] China's first written submission, paras. 221 (referring to United States' first written submission, paras. 113-116) and 269; response to Panel question No. 85.

[376] WT/ACC/CHN/38/Rev.3, Supporting Table DS: 5, (Exhibit USA-43).

7.190. Endnote 17 refer to Appendices DS 5-3 and DS 5-4. These, in turn, contain further data on the c.i.f. and f.o.b. prices for the mentioned products. Appendix DS 5-3 contains c.i.f. Prices for wheat and provides as follows:

Table 4: Appendix DS 5-3 (reproduced from WT/ACC/CHN/38/Rev.3)

HS Code	Calendar Year	Import Volume (tons)	Import Value (US $)	c.i.f. Price (US $/ton)	c.i.f. Price 1/ (RMB yuan/ton)
10011000 Wheat	1996	4512381	1023059000	226.7	1885.0
	1997	1508909	296653000	196.6	1629.6
	1998	1275384	243373000	190.8	1579.8
	Average of 1996-98			204.7	1698.1

7.191. Appendix DS 5-4 contains f.o.b. Prices for Japonica rice and Indica rice:

Table 5: Appendix DS 5-4 (reproduced from WT/ACC/CHN/38/Rev.3)

HS Code	Calendar Year	Export Volume (tons)	Export Value (US $)	f.o.b. Price (US $/ton)	f.o.b. Price 3/ (RMB yuan/ton)
10063000 Japonica Rice 1/	1996	85933.49	38066000	443.0	3682.9
	1997	184650.79	63758000	345.3	2862.1
	1998	140340.03	56395000	401.9	3326.9
	Average of 1996-98			396.7	3290.6
10063000 Indica Rice 2/	1996	27479.28	10187000	370.7	3082.1
	1997	569058.74	139571000	245.4	2033.0
	1998	2761298.49	638352000	231.2	1913.9
	Average of 1996-98			282.4	2343.0

7.192. From the above, we note that none of the different "external reference prices" mentioned or used in China's tables of supporting material are based on the years 1986-1988, referred to in Paragraph 9 of Annex 3, but rather are based on the years 1996-1998. This is consistent with China's characterization of its tables of supporting material.

7.193. Our above assessment of China's tables of supporting material needs to be nuanced to recognize two important differences: (i) the difference between the *base period* and the *FERP itself*, and (ii) the fact that China's tables of supporting material refer to an "external reference price" and not to a *fixed* external reference price.

7.194. Regarding the first difference, the United States argues that a "base period" describes the period of time for which an acceding or negotiating Member provides information as to its form and level of domestic support to agricultural producers, and that "base period" is distinct from the "fixed external reference price," which is one component of the calculation for market price support as set out in Annex 3. For the United States, the period relevant to the FERP is specifically defined in Paragraph 9 of Annex 3, which provides that this value "shall be based on the years 1986 to 1988"; the language of this provision is mandatory and does not permit deviations. In this vein, the United States maintains that the fact that Uruguay Round Members' typical base period coincided with the period used for the FERP does not alter this assessment.[377]

7.195. The United States also claims that given that no explicit requirement exists with regard to the base period in the context of domestic support, acceding Members can utilize a "base period"

[377] United States' response to Panel question No. 89; United States' comments on China's response to Panel question No. 89.

other than 1986 to 1988 when they provide domestic support information as recorded in Articles 1(a)(i) and 1(h)(i). For the United States, there is similarly no reason to reference the chosen base period in an acceding Member's Working Party Report or Accession Protocol, as this choice would not represent a departure from WTO obligations. The United States also recognizes that in its tables of supporting material, China used a base period for purposes of domestic support of 1996-1998, and that China also used external reference prices based on those years. According to the United States, there is no legal basis to find that these years are appropriate for use in the calculation of China's product-specific AMS.[378]

7.196. China does not believe that there is, or can be, a difference between the three-year period used for the FERP in the calculation of Base Total AMS and the three-year period that should be used for the FERP when calculating Current Total AMS. For China, the United States' position is flawed because it is based on an isolated reading of the terms of Paragraph 9 of Annex 3 of the Agreement on Agriculture and it ignores the other relevant terms of the treaty, including Articles 1(a)(ii), 1(h)(ii) and Rev.3, their context, along with any subsequent practice, and the object and purpose of the Agreement on Agriculture. China argues that the use of different base periods for the calculation of Base Total AMS and Current Total AMS would result in an "apples-to-oranges" comparison, which would mean that domestic support measures' compliance with a Member's reduction commitments could be a function of changes in input data and methodologies used in the calculation of AMS, including in the base period for the FERP, rather than a reflection of the domestic support measures applied.[379]

7.197. We agree with the United States that the concept of a base period can be distinct from the FERP. However, this does not mean that the two bear no connection with each other. In its simplest form, the FERP is a *price* of a given product that is used as an input in the MPS Formula. In particular, it is used to generate a price differential that is then multiplied by the QEP in order to obtain a measurement of domestic support in the form of market price support. As prices for the same product may change throughout the years, it is normal that price-related variables, like the FERP, are linked to a certain time-period, i.e. to a base period in the case of the FERP. Therefore, the *base period* of the FERP is nothing more than the time period for measuring the prices of a given product and is one of the characteristics of the FERP used in the calculation of market price support.

7.198. We also agree with the United States that Paragraph 9 of Annex 3 sets out the relevant base period for the FERP that is to be used in the calculation of Current Total AMS. However, our inquiry should not stop here as this provision by itself does not address or explain why China's tables of supporting material did not base their FERPs on the 1986-1988 period. Most importantly, this provision does not address the question of whether the Panel should attach any legal consequences to the fact that China's tables of supporting material use a FERP that is not based on the years provided for in Paragraph 9 of Annex 3, but on a different base period. The United States suggests that this difference in the base periods is to be expected as there are no rules to calculate the Base Total AMS. According to this position, Paragraph 9 of Annex 3 would only be applicable to the calculation of Current Total AMS and not to the Base Total AMS.

7.199. The above discussion inevitably leads to the question of whether there should be any consistency, as argued by China, between the FERP used in the calculation of Base Total AMS in Member's tables of supporting material, and the Current Total AMS. This will be explored in Section 7.4.5.2.3 below. For the purposes of this Section, it is sufficient for us to say that the main difference between the FERP contained in China's tables of supporting material and the one set out in Paragraph 9 of Annex 3 is the different base period.[380]

7.200. Regarding the second issue, we recall that the United States argues that China's calculation of its Base Total AMS was not based on a fixed external reference price or the values drawn from Appendix DS 5-3 or Appendix DS 5-4 of its tables of supporting material. The United States claims that the fifth column of supporting table DS 5 is labelled "external reference price" and not "fixed"

[378] United States' response to Panel question No. 89.
[379] China's response to Panel question No. 89.
[380] The United States has argued that there is another difference relating to whether the prices are a result of a three-year average. We will address this below.

external reference price; and the values contained in that column reflect three different prices, one for each year.[381]

7.201. We see two dimensions to the United States' argument: one relating to the difference in the terminology between a "fixed" external reference price and an "external reference price" and another one relating to the characteristics of the *prices* contained in China's tables of supporting material, and in particular, to the ones used in the calculations of its Base Total AMS.

7.202. Regarding the first dimension, we fail to see how the difference in the terminology could have any bearing on the substance of the FERP. In this connection, we agree with China that where the data reflects external reference prices that are fixed or anchored in a particular time-frame and are used for the calculation of market price support, it is immaterial whether the label "reference price" or "external reference price" or "fixed external reference price" is used to describe the element of the AMS calculation for market price support that Paragraphs 8 and 9 of Annex 3 identify as the "fixed external reference price".[382]

7.203. As to the second dimension, we note that China's tables of supporting material contain two sets of external reference prices that inform the AMS from market price support calculations set out therein: the ones reflected in China's Supporting Table DS:5, which do not appear to contain an average of the period 1996-1998 but rather yearly prices for each of the already mentioned products, and the ones contained in Appendices DS 5-3 and DS 5-4, which do contain an average of the period 1996-1998. In this regard, we agree with the United States that the "external reference prices" set out in China's Supporting Table DS:5 are not the result of an average of the years 1996-1998, but rather yearly prices for each of those years. However, Appendices DS 5-3 and DS 5-4 do contain "external reference prices" that use an average for that period and that also comport with the f.o.b. or c.i.f. rules set out in Paragraph 9 of Annex 3.

7.204. For these reasons, we observe that China's tables of supporting material *do* contain a three-year average of the "external reference prices" that follow the same guidelines set out in Paragraph 9 of Annex 3 but for the 1996-1998 time-period. Indeed, Appendix DS 5-3 and Appendix DS 5-4, which expand on the information of the "external reference price" used in table DS:5, contain the mentioned data. For these reasons, we conclude that China's tables of supporting material contain the necessary information to source a FERP based on an average of the period 1996-1998.

7.4.5.2.2 Other Members' tables of supporting material

7.205. We now move to assess China's contention that when calculating their Base Total AMS, all of the non-original Members have used base periods other than 1986-1988 for the purposes of Supporting Table DS:5.[383]

7.206. In this regard, China presented a table which purported to provide information on the benchmark period used in calculating product-specific AMS from market price support, and the accompanying WTO documents containing this information.[384]

7.207. The United States argues that while 36 newly acceding Members used alternative base periods, only 10 used alternative FERPs and that this does not amount to a consistent practice.[385] The United States explains that these Members were Saudi Arabia, Jordan, Croatia, Lithuania, China,

[381] United States' opening statement at the second meeting of the Panel, paras. 30-31. We note that the United States' argues that to calculate the value of market price support during its base period, China utilized external reference prices reflecting the annual average f.o.b. or c.i.f. commodity price for 1996, 1997, and 1998, individually, and that, consequently, China's calculation of its Base Total AMS was not based on a "fixed external reference price" or the average values drawn from Appendix DS 5-3 or Appendix DS 5-4 of its Supporting Tables. For the United States, instead, China's market price support calculations for wheat, Indica rice, Japonica rice, and corn in its DS 5 Supporting Table used three different, annual "external reference price[s]" corresponding to each year of the base period, and that China did not establish a single, fixed, reference price that it used in calculating market price support for every year. United States' response to Panel question No. 74 (second substantive meeting).

[382] China's response to Panel question No. 64 (second substantive meeting).

[383] China's first written submission, para. 175.

[384] China's first written submission, para. 175.

[385] United States' first written submission, fn 120.

Chinese Taipei, Viet Nam, Russia, Lao, and Kazakhstan.[386] These Members are listed in bold in Table 6, below.

7.208. The United States further contends that nine of these Members compared AAPs to annual external reference prices for the same year. That is, they did not calculate and apply an average external reference price for a time period to compare to the AAP for a given year. The United States also notes that one acceding Member, Chinese Taipei, used an average external reference price based on years other than 1986-1988 in its Table DS 5. The United States further notes that Bulgaria also maintained market price support at the time of accession, but used an external reference price based on the years 1986 to 1988 in its Total AMS calculations.[387] For the United States, this review provides yet further evidence that there is neither context in Members' Schedules, nor a "practice" that supports the use of a time period other than that set out in Paragraph 9 of Annex 3 for purposes of calculating current AMS and Current Total AMS.[388]

7.209. After carefully reviewing the parties' arguments and evidence and the tables of supporting material of non-original Members, the Panel has produced the following table summarizing its factual findings:

Table 6: Factual findings on non-original Members

Acceded Member (in alphabetical order)	Date of accession	Base period used[389]	Supporting document	Notes
Afghanistan	29 July 2016	2009-2011	WT/ACC/SPEC/AFG/2	
Albania	8 September 2000	1996-1998	WT/ACC/SPEC/ALB/4/Rev.4	
Armenia	5 February 2003	1995-1997	WT/ACC/SPEC/ARM/4/Rev.2	
Bulgaria	1 December 1996	1986-1988	G/AG/AGST/Vol.5	Uses data from the years 1986-88. Although the base period for Bulgaria corresponds to that of the Uruguay Round, Bulgaria's Working Party Report notes that "an earlier period than the most recent three year period was accepted by WTO Members only because the latter was not regarded as representative due to the United Nations embargo applied to the former Republic of Yugoslavia". See WT/ACC/BGR/5, p. 23. Includes MPS for the base period.
Cambodia	13 October 2004	1998-2000	WT/ACC/SPEC/KHM/3/Rev.2	
Cape Verde	23 July 2008	2003-2005	WT/ACC/SPEC/CPV/1/Rev.4	
China	11 December 2001	1996-1998	WT/ACC/CHN/38/Rev.3	Includes MPS for the base period.
Croatia	30 November 2000	1996-1998	WT/ACC/SPEC/HRV/1/Rev.3	Croatia uses a special methodology for calculation of domestic support, as the Danube Region had been occupied during 1996-1997, and thus data for the whole of Croatia was not available until 1998.
Ecuador	21 January 1996	N/A	G/AG/AGST/ECU	Ecuador reports that it was not using domestic support subject to reduction commitments and thus no years are specified.
Estonia	13 November 1999	1995-1997	WT/ACC/SPEC/EST/4	

[386] United States' response to Panel question No. 90.
[387] United States' response to Panel question No. 90 (referring to Bulgaria's Supporting Table, G/AG/AGST/Vol.5, p. 7).
[388] United States' response to Panel question No. 90.
[389] This column describes the time-period used by Members to report information relative to agricultural subsidies. It is not limited to market price support measures.

Acceded Member (in alphabetical order)	Date of accession	Base period used[389]	Supporting document	Notes
Georgia	14 June 2000	1996-1998	WT/ACC/SPEC/GEO/2/Rev.1	
Jordan	11 April 2000	1994-1996	WT/ACC/SPEC/JOR/2/Rev.3	Includes MPS for the base period.
Kazakhstan	30 November 2015	2010-2012	WT/ACC/SPEC/KAZ/6/Rev.14	Includes MPS for the base period.
Kyrgyz Republic	20 December 1998	1994-1996	G/AG/AGST/KGZ	
Lao	2 February 2013	2001-2003	WT/ACC/SPEC/LAO/1/Rev.1	Includes MPS for the base period.
Latvia	10 February 1999	1994-1996	WT/ACC/SPEC/LVA/2	
Liberia	14 July 2016	2011/2012-2013/2014	WT/ACC/SPEC/LBR/1/Rev.1	
Lithuania	31 May 2001	1995-1997	WT/ACC/SPEC/LTU/7/Rev.3	Lithuania notes that data from the year 1998 is included for "for information only". 1998 is not listed in the reporting period. Includes MPS for the base period (and for 1998 "only for information").
Macedonia	4 April 2003	1998-2000	WT/ACC/SPEC/807/5/Rev.2	Includes MPS for the base period.
Moldova	26 July 2001	1996-1998	WT/ACC/SPEC/MOL/1/Rev.8	
Mongolia	29 January 1997	N/A	G/AG/AGST/MNG	Only "*de minimis*" is listed under the heading "domestic support". No years are listed.
Montenegro	29 April 2012	2005-2007	WT/ACC/SPEC/CGR/1/Rev.2	
Nepal	23 April 2004	1995/1996-1997/1998	WT/ACC/SPEC/NPL/2/Rev.1	Though Nepal has no market price support measures, it specifies the "External reference price" as corresponding to "(Average 1996-1998)" in Table DS:5.
Oman	9 November 2000	1994-1996	WT/ACC/SPEC/OMN/2/Rev.2	
Panama	6 September 1997	1991-1993	G/AG/AGST/PAN	
Russia	22 August 2012	2006-2008	WT/ACC/SPEC/RUS/39	Includes MPS for 2008 only (using average export prices for the period of 2006-2008).
Samoa	10 May 2012	2005/2006-2008/2009 and 2002/2003-2007/2008 for DS:4	WT/ACC/SPEC/SAM/3/Rev.4	Samoa's reporting period ranges from "2005/2006-2008/2009", (a 4 year period); in its tables of supporting material, DS4 which summarizes the calculation of Total AMS, Samoa reported that it "had no product-specific measures in the reference period" for 2002/2003-2007/2008 (a 6-year period).
Saudi Arabia	11 December 2005	2001-2003	WT/ACC/SPEC/SAU/1/Rev.10	Includes MPS for the base period.
Seychelles	26 April 2015	2010-2012	WT/ACC/SPEC/SYC/4/Rev.2	
Chinese Taipei	1 January 2002	1990-1992	WT/ACC/SPEC/TPKM/4/Rev.3	An apparent deviation from the most recent three-year period principle was agreed for Chinese Taipei (1990-1992). However, Chinese Taipei also agreed to reduce its Total AMS commitments over the period 1995-2000, i.e. prior to accession. Thus, the final bound commitment level (year 2000) is 20 per cent less than the Base Total AMS (1990-1992) for Chinese Taipei. See WT/ACC/10/Rev.4. Includes MPS for the base period (i.e. 1990-1992)

Acceded Member (in alphabetical order)	Date of accession	Base period used[389]	Supporting document	Notes
Tajikistan	2 March 2015	2008-2010	WT/ACC/SPEC/TJK/3/Rev.5	
Tonga	27 July 2007	1996/1997-1998/1999	WT/ACC/SPEC/TON/3/Rev.3	
Ukraine	16 May 2008	2004-2006	WT/ACC/SPEC/UKR/1/Rev.12	Includes MPS for the base period.
Vanuatu	24 August 2012	2006-2008	WT/ACC/SPEC/VUT/6/Rev.3	Uses the term "representative period".
Viet Nam	11 January 2007	1999-2001	WT/ACC/SPEC/VNM/3/Rev.7	Includes MPS for the base period.
Yemen	26 June 2014	2006-2008	WT/ACC/SPEC/YEM/1/Rev.2	

7.210. From the above, we observe that the majority of the 36 non-original Members reported the use of domestic support during the years preceding their accession; only four Members[390] made a reference (direct or indirect) to the years used in their tables of supporting material as the "base period", rather than the "reporting period". This stems from using a standard template to provide factual information on the domestic support actually in place in agriculture, upon which all tables of supporting material submitted as part of a Member's accession are based. Finally, a number of Members have explicitly linked the years used in their tables of supporting material to the (fixed) external reference price (outside of Table DS:5 itself).[391] Out of these 36 Members, only one (Bulgaria) used a period of 1986-88 (see Table 6 above); Bulgaria's Working Party Report notes nevertheless that this "earlier period than the most recent three year period was accepted by WTO Members only because the latter was not regarded as representative due to the United Nations embargo applied to the former Republic of Yugoslavia."[392]

7.211. Following the United States' assertion that "[w]hile 36 newly acceding Members used alternative base periods, only 10 used alternative fixed external reference prices", the Panel asked the United States to list each of the 10 Members who had allegedly used alternative FERPs. The United States responded by listing 10 Members that maintained MPS measures at the time of their accession.[393] The implication of its response is that it is only those Members which maintained MPS measures at the time of their accession which have used an alternative period for the *FERP* specifically, rather than just a different base period. China's argument in this regard was that "all of the accessions that have taken place since the establishment of the WTO in 1995 have used *base periods* other than 1986-88 for the purposes of Supporting Table DS:5"[394] and this is what Table 6 of its first written submission reflects.[395] Implicit in that argument is the notion that the base period specified in a Member's tables of supporting material is always to be used in determining the FERP should a Member decide to use market price support. The United States' position appears to be that there is a fundamental difference between the base period and the years used for determining the FERP, where one does not necessarily directly correspond to the other.

7.212. We note that 12 out of the 36 non-original Members reported the use of market price support during the base period. All these 12 Members also provided annual "external reference prices" for the products benefitting from this support for the very same base period and used them to calculate the base period market price support. The base period averages of the c.i.f. or f.o.b. prices were explicitly reported by all but four Members (Jordan, Lao, Lithuania, Ukraine). Among those explicitly reporting the average prices, six did so in the Supporting Table DS:5 (Bulgaria, FYROM, Kazakhstan, Russia, Saudi Arabia, Viet Nam), and two in an appendix table or in an attachment (China, Chinese Taipei). Hence, while the ways of reporting different components of a FERP have varied, all Members reporting MPS for their base period provided the necessary data to derive the FERP (c.i.f. or f.o.b. prices depending on whether the Member was a net importer or net exporter of the product in question during the base period).

[390] China, Jordan, Lao, Moldova.
[391] China, Croatia, Kazakhstan, Lithuania, Russia, Saudi Arabia, Chinese Taipei, Ukraine.
[392] Bulgaria's working party report, WT/ACC/BGR/5, p. 23.
[393] United States' response to Panel question No. 90.
[394] China's first written submission, para. 175. (emphasis added)
[395] China's first written submission, Table 6.

7.213. As discussed in paragraph 7.197 above, the Panel does not consider the United States' position that the FERP is entirely divorced from the concept of the base period to be accurate. It is clear, and the United States accepts, that where a Member did maintain MPS during its accession, the years used as a base period were the years also used in determining the FERP for the calculation of the base period MPS. Regardless, the fact remains that, with the exception of Bulgaria, Ecuador and Mongolia (see Table 6 above), each acceding Member has explicitly used a base period other than 1986-1988, and where those Members maintained MPS measures, the FERP was based on those same years. In other words, the base period in Paragraph 9 of Annex 3 has not been used to calculate the FERPs reflected in those Members' tables of supporting material.

7.214. For the foregoing reasons, we conclude that none of the 36 Members that have acceded to the WTO since 1995 used a base period of 1986-1988 with the exception of Bulgaria for which "the most recent three year period" was not regarded as representative by WTO Members due to the United Nations embargo applied to the former Republic of Yugoslavia. This fact provides important context in which to interpret China's Schedule, which must be kept in mind throughout the Panel's analysis of the FERP and the appropriate period to use in this case (discussed in detail in Section 7.4.5.2.4 below).

7.4.5.2.3 Consistency in the calculations of Base Total AMS and Current Total AMS

7.215. In this section, we will address China's assertion that there must be consistency in the way Base Total AMS and Current Total AMS are calculated.

7.216. We will structure our analysis in three parts: we will begin by addressing China's contention that a requirement of consistency stems from the provisions of the Agreement on Agriculture. We will then assess China's argument that the existence of this requirement is further supported by the goal of achieving reduction commitments under the Agreement on Agriculture. We will lastly address China's arguments regarding the object and purpose of the Agreement on Agriculture and the consistency requirement.

7.217. China first submits the United States fails to recognize that Articles 1(a) and 1(h) of the Agreement on Agriculture require that Base Total AMS and Current Total AMS be calculated including by reference to the same Member-specific CDM. In particular, China argues that subparagraph (i) of each provision refers to a Member's CDM for the calculation of Base AMS (Article 1(a)(i)) and Base Total AMS (Article 1(h)(i)) during the base period and that subparagraph (ii) of each provision then refers to the same CDM for calculating current AMS (Article 1(a)(ii)) and Current Total AMS (Article 1(h)(ii)) during any subsequent year. For China, the same CDM, including the same FERPs and the same methodology for determining eligible production, must be used to calculate both Base Total AMS and Current Total AMS.[396]

7.218. The United States contends that the Base Total AMS is an historical reflection of the Member's provision of domestic support at the time of the Uruguay Round or accession and notes that for the purpose of domestic support commitments neither the Agreement on Agriculture nor the Marrakesh Agreement defines the "base period" for Uruguay Round or acceding Members.[397] The United States also claims that both Articles 1(a) and 1(h) assign a specific degree of consideration to the text of the Agreement and a Member's CDM. The United States argues that Article 1(a) provides in subparagraph (i) that "with respect to support provided during the base period," AMS is "specified in the relevant tables of supporting material incorporated by reference in Part IV of a Member's Schedule" and that this indicates where country-specific reference information regarding the annual level of support in favour of basic agricultural producers in the base period may be found but it does not prescribe a calculation methodology for either the "base period" or for later years.[398]

[396] China's second written submission, para. 298.
[397] United States' response to Panel question No. 71 (first substantive meeting).
[398] United States' response to Panel question No. 79. Regarding Article 1(h), the United States argues that this provision provides a similar formulation in that subparagraph (i) states that Base Total AMS is the sum of all "support provided during the base period" and that subparagraph (ii) further specifies where information may be found and this language does not propose a particular calculation methodology for either the base period or for a subsequent period. The United States also argues that in both Article 1(a) and 1(h), subparagraph (i) is juxtaposed with subparagraph (ii) which provides specific directions for calculating the

7.219. According to China, the consistency requirement is enshrined in Article 1 of the Agreement on Agriculture. For China, this is so because Articles 1(a) and 1(h) allegedly refer to the same CDM when setting out how the Base total AMS and the Current Total AMS are to be calculated. As a consequence, use of the same CDM in the calculation of both measurements of domestic support brings about the consistency requirement.

7.220. Article 1(a)(i) does not mention how to *calculate* the base AMS nor does it draw any connection to the CDM. It merely refers to: "… support provided during the base period *specified* in the relevant tables of supporting material incorporated by reference in Part IV of a Member's Schedule" (emphasis added).[399] The provision does not refer to the CDM, but only to the tables of supporting material. Similarly, Article 1(h)(i) makes no reference to the CDM but only to Part IV of a Member's Schedule. In particular, it refers to the Base Total AMS that is "specified in Part IV of a Member's Schedule".

7.221. We thus agree with the United States that Article 1 of the Agreement on Agriculture does not set out any rules or calculation methodology for either the "base period" or for later years.[400] As such, Article 1 only indicates that the Base Total AMS is *specified* in the tables of supporting material but does not provide for how this Base Total AMS was meant to be calculated there. Indeed, the Appellate Body has already arrived at the same conclusion.[401] Since this provision does not establish any calculation methodology for the Base Total AMS, we fail to see how it can, by itself, enshrine a consistency requirement as China claims.

7.222. We, however, disagree with the United States' argument that the Agreement on Agriculture sets out no rules or guidance to calculate Base Total AMS.[402] In our view, as we will explain below, there are other provisions relevant in this matter.

7.223. In this connection, we note Paragraph 5 of Annex 3 of the Agreement on Agriculture, which provides as follows:

> The AMS calculated as outlined below for the base period shall constitute the base level for the implementation of the reduction commitment on domestic support. (Underline added)

7.224. Similarly, Articles 1(a)(i) and 1(h)(i) of the Agreement on Agriculture provide respectively as follows:

---

respective components of the domestic support analysis "during any year of the implementation period and thereafter." The United States thus submits that contrary to China's suggestion, Articles 1(a) and 1(h) do not require that Base Total AMS and Current Total AMS be calculated including by reference to the same Member-specific constituent data and methodology, but rather, that the text of the Agreement on Agriculture provides that CDM characteristic of that Member as "used" by the Member in the calculation of Base Total AMS should be taken into account or considered when calculating current product-specific AMS or Current Total AMS.

[399] Agreement on Agriculture, Article 1(a)(i).

[400] United States' response to Panel question No. 79.

[401] "However, with respect to the other side of a hypothetical equation, the relevant treaty provisions do *not* provide for any particular mode of calculation of the 'Base Total AMS', from which figure the commitment levels for particular years of the implementation period are arithmetically derived. Article 1(a)(i) of the *Agreement on Agriculture* dealing with AMS states that 'with respect to support provided during the base period', a treaty interpreter needs only to go to 'the relevant tables of supporting material incorporated by reference *in Part IV of a Member's Schedule* … '. (emphasis added) Similarly, Article 1(h)(i) dealing with Total AMS, states that 'with respect to support provided during the base period (i.e., the 'Base Total AMS') and the maximum support permitted to be provided during any year of the implementation period or thereafter (i.e., the 'Annual and Final Bound Commitment Levels')', a treaty interpreter needs only to go to what is '*specified in Part IV of a Member's Schedule* … '. (emphasis added) Thus, for purposes of determining whether a Member has exceeded its commitment levels, Base Total AMS, and the commitment levels resulting or derived therefrom, are not themselves formulae to be worked out, but simply absolute figures set out in the Schedule of the Member concerned. As a result, Current Total AMS which is calculated according to Annex 3, is compared to the commitment level for a given year that is already specified as a given, absolute, figure in the Member's Schedule." Appellate Body Report, *Korea – Various Measures on Beef*, para. 115.

[402] United States' response to Panel question No. 79.

> [W]ith respect to support provided during the base period, specified in the relevant tables of supporting material incorporated by reference in Part IV of a Member's Schedule… (emphasis added)
>
> [W]ith respect to support provided during the base period (i.e. the "Base Total AMS")… (emphasis added)

7.225. We asked the parties whether the term "base period" in the cited provisions is referring to the same measurement of domestic support, i.e. Base Total AMS, or if not, to what other measurement of domestic support and "base period" each of these provisions would be referring.

7.226. The United States recognizes that indeed, these provisions are referring to the same measurement of domestic support. The United States argues that the "'base period' referred to in Articles 1(a) and 1(h), as well as Annex 3, Paragraph 5, is likely the same or similar base period used by a Member to disclose the types of support provided and calculate the value of support in their tables of supporting material.[403] However, the United States submits that as indicated in the text of those provisions, this is an historical value set out in a Member's supporting material or Schedule.[404] The United States also argues that Paragraph 5 of Annex 3 refers to the base level for implementation of "reduction commitments", but that China did not make any reduction commitments in its Schedule or Accession Protocol, and therefore Paragraph 5 would not appear to have applied to China at any point. For the United States, Paragraph 5 does not contain any ongoing commitment regarding the calculation of the level of domestic support during the base period, and even where an acceding Member should have calculated its Base Total AMS consistent with Annex 3, failure to comply with this requirement is of no consequence during subsequent years.[405]

7.227. In short, the United States argues that the commitments to maintain levels of "domestic support in favour of agricultural producers expressed in terms of Current Total AMS… "[406] and to calculate product-specific AMS and Current Total AMS "in accordance with" the Agreement on Agriculture, including Annex 3 and Article 6[407], apply whether or not the Base Total AMS "contained errors or was calculated inconsistently with Annex 3".[408]

7.228. China claims that this provision explains that Annex 3 also serves as a framework for the calculation of Base AMS in a Member's Supporting Tables, and that as a result, a Member's Base AMS, as calculated in a Member's tables of supporting material, will generally reflect the framework set out in Annex 3.[409] For China, Paragraphs 5-13 of Annex 3 explicitly provide guidance in the form of a framework for a Member to calculate its Base Total AMS and they provide the same guidance for purposes of calculating Current Total AMS.[410]

7.229. In the Panel's view, the text of Paragraph 5 indicates that the AMS calculated as outlined in Paragraphs 5-13 of Annex 3 for the base period, that is, the Base Total AMS, shall constitute the base level for the implementation of the reduction commitment on domestic support. This rebuts the United States' argument that nothing in the Agreement on Agriculture provides guidance for the calculation of the Base Total AMS. Importantly, Paragraphs 6-13 of Annex 3 provide the same guidance for calculating Current Total AMS. This indicates that the methodologies for the calculation of both types of measurements are similar, supporting China's argument of consistency.

[403] United States' response to Panel question No. 102.
[404] United States' response to Panel question No. 102.
[405] United States' response to Panel question No. 102.
[406] United States' response to Panel question No. 102 (referring to Agreement on Agriculture, Article 6.3).
[407] United States' response to Panel question No. 102 (referring to Agreement on Agriculture, Articles 1(a)(ii) and 1(h)(ii)).
[408] United States' response to Panel question No. 102.
[409] China's comments on the United States' response to Panel question No. 62 (second substantive meeting).
[410] China's comments on the United States' response to Panel question No. 62 (second substantive meeting).

7.230. We therefore agree with China that the calculation of Base Total AMS does not occur in a legal vacuum[411], absent any guiding rules, but that the text of the Agreement on Agriculture contains provisions pertaining to this calculation.

7.231. We are nonetheless mindful that concluding the above does not automatically confirm the existence of a consistency requirement in the Agreement on Agriculture. Indeed, the calculation of the Base Total AMS is part of a negotiating process among Members and the acceding candidate. For this reason, even if Paragraphs 5 to 13 seem to equally apply to the calculations of both the Base Total and the Current Total AMS, there might be a difference arising from the negotiation process resulting in a difference in the methodologies for these measurements of domestic support. What can be concluded from the above is that the similar ways in which these measurements are meant to be calculated pursuant to the Agreement on Agriculture lends strong support to the idea that there should be some broad correspondence in methodology used in both calculation processes.

7.232. We note that the United States argues that Paragraph 5 of Annex 3 refers to the base level for implementation of "reduction commitments", and that China did not make any reduction commitments in its Schedule or Accession Protocol.[412] We understand this argument to imply that even if this provision sets out rules on how to calculate the Base Total AMS, it would not apply to China as it did not undertake any reduction commitments. As this argument directly relates to China's second contention, we will examine its merits below when addressing China's second argument.

7.233. In conclusion, we find that while Article 1 does not contain guidance on how to calculate the Base Total AMS, Paragraph 5 of Annex 3 does set out important rules in this regard. Importantly, Paragraphs 6-13 of Annex 3 are also applicable to the calculation of the Current Total AMS. This implies that as per the Agreement on Agriculture, the calculation processes of both the Base Total and current AMS are similar. This similarity gives strong support to the notion that there must be consistency in the way these measurements of domestic support are calculated. Importantly, we are of the view that failing to recognize that the Agreement on Agriculture provides for a similar calculation process for both types of measurements might end up in a comparison between apples and oranges, as China suggests.

7.234. We now assess China's second argument.

7.235. China submits that the United States negates the need for consistency in the CDM used for the calculation of Base Total AMS, and the CDM that needs to be used for the calculation of Current Total AMS, by referring to the calculation of Base Total AMS as being of historical interest only.[413] However, China argues, the goal of achieving "reductions"[414] of domestic support under the domestic support commitments requires consistency in the calculation of Base Total and Current Total AMS because if the data and methodology for the calculation of Current Total AMS differed from those for Base Total AMS, a reduction of domestic support may not flow from reduced support, but from variations in the CDM used for the calculations. China thus submits that both are necessarily and inextricably linked, if AMS calculations are not "destined to become meaningless apples-to-oranges comparisons that reveal nothing about actual reductions in domestic support".[415]

7.236. The United States argues that in determining whether the Member has complied with its reduction commitments, application of the same methodology to the same programme as was calculated during the base period would be appropriate, as the Member's reduction commitments were directly tied to the level of support provided during the base period. The United States submits, however, that the same cannot be said for the calculation of Current Total AMS where no reduction commitments were made or continue to operate. The United States further holds that the methodologies used to calculate a programme during the base period would not be deferred to by a panel where calculation of the Current Total AMS does not involve the same programmes, as is the

[411] China's comments on the United States' response to Panel question No. 62 (second substantive meeting).
[412] United States' response to Panel question No. 102.
[413] China's second written submission, para. 300 (referring to United States' response to Panel question No. 71 (first substantive meeting), paras. 184-188).
[414] China's second written submission, para. 301.
[415] China's second written submission, para. 301.

case in the present dispute.[416] The United States also claims that China has no reduction commitments and has an ongoing Final Bound Commitment Level of nil.[417]

7.237. At the centre of China's argument and the United States' rebuttal is the concept of domestic support reduction commitments and whether China has indeed undertaken such reduction commitments. The United States does not negate the appropriateness of ensuring consistency for assessing compliance with reduction commitments. It, however, maintains that China has no reduction commitments but rather an ongoing Final Bound Commitment Level of nil.[418] It thus follows that the legal issue before the Panel relates to the nature of China's commitments and whether an assessment of its compliance will require calculating the Current Total AMS consistently with how the Base Total AMS was originally calculated.

7.238. Underlying the United States' argument is the notion that the Agreement on Agriculture distinguishes between domestic support reduction commitments, whereby a Member is required to reduce its (non-zero) AMS commitment (starting from the base level) to a final bound total AMS level at the end of the implementation period, and domestic support commitments that from the beginning are set to nil (like in the case of China) and therefore have no reduction implementation period. We agree with the United States that conceptually there is a difference between a commitment that binds a Member to progressively reduce domestic support until it reaches a certain level, and a commitment that binds a Member to limit domestic support to a nil level where a reduction period is not needed. However, we fail to see any express support for this alleged difference in the types of domestic support commitments in the Agreement on Agriculture.

7.239. Article 6.1, which is titled "Domestic Support Commitments", provides that the "domestic support reduction commitments" of each Member contained in Part IV of its Schedule shall apply to all of its domestic support measures (with the exception of domestic measures which are not subject to reduction and in Annex 2 to the Agreement on Agriculture) and that the commitments are expressed in terms of Total Aggregate Measurement of Support and "Annual and Final Bound Commitment Levels". Similarly, Article 6.3 establishes that a Member shall be considered to be in compliance with its "domestic support reduction commitments" in any year in which its domestic support in favour of agricultural producers expressed in terms of Current Total AMS does not exceed the corresponding "annual or final bound commitment level specified in Part IV of the Member's Schedule". We note that the above provision speaks only of one kind of commitment and does not give any basis to argue that there are different types of commitments, as the United States seems to suggest.

7.240. The above provisions do not suggest that a domestic support commitment that from the beginning is set at nil with no reduction period, such as China's, and a commitment that requires a Member to progressively reduce support to a fixed level (which may also be a fixed level of nil) are legally different. Indeed, we note that after the end of the implementation period, there would not be any difference between these two alleged types of commitments except for the level itself, which would have been a result of the negotiation process among Members. This strongly weighs against the United States' proposition.

7.241. We also agree with China that the United States' argument seems to be at odds with its general position in this dispute.[419] If we were to agree with the United States that China's commitment is not a domestic support reduction commitment[420], then it would be difficult to sustain the proposition that the domestic support disciplines under Articles 3.2 and 6.3 would apply to China, resulting in a likely dismissal of the United States' claim under these provisions. This is so because Article 6.3 refers to "reduction commitment" and would potentially not cover an ongoing Final Bound Commitment Level of "nil". Following the United States' logic, as China has not undertaken "reduction commitments", but an ongoing Final Bound Commitment Level of "nil", these provisions would not seem to apply. This result would be in direct opposition to the United States' general claims in this dispute. To us, this indicates that the difference that the United States is drawing is supported neither by the text nor the design of the Agreement on Agriculture.

[416] United States' second written submission, para. 71.
[417] United States' response to Panel question No. 75.
[418] United States' response to Panel question No. 75.
[419] China's comments on the United States' response to Panel question No. 75.
[420] United States' response to Panel question No. 75.

7.242. For these reasons, we reject the United States' characterization of China's domestic support commitments as falling outside the scope of the domestic support commitments that Article 6.1 refers to. We find that China has an ongoing domestic support commitment set at the level of nil.

7.243. Having found this, and noting that the United States also agrees with the necessity of ensuring some consistency in the calculations, we agree with China that the assessment of whether a Member has complied with its reduction commitments seems to presuppose that the Current Total AMS is calculated consistently with the manner in which the Base Total AMS was calculated. This is so because Base and Current Total AMS are meant to provide a measurement of the actual domestic support that Members are granting. If no consistency was kept in this process, any differences between the Base and Current Total AMS when assessing a Member's compliance with its domestic support commitments could be the result of differences in the methodology applied to construct the AMS values and not of the actual domestic support measures applied by a Member. This could lead to a situation where the resulting differences in the values are a result of the dissimilar mathematical process applied, and not in the actual provision of domestic support by Members. This, in turn, could lead to an apples-to-oranges comparison as the AMS values to be compared would be based on different calculation processes.[421] To us, the above runs contrary to the object and purpose of the Agreement on Agriculture of ensuring substantial progressive reductions in agricultural support and protection.[422]

7.244. In this connection, we note that the panel in *Korea − Various Measures on Beef* opined that "[i]n the calculations of product specific support the 'constituent data and methodology' has an important role to play in ensuring that the calculation of support to any given product is calculated in subsequent years consistently with support calculated in the base period".[423] We agree with this statement and note that the existence of the consistency requirement can also be observed in the incorporation of the CDM in the definitions of AMS and Current Total AMS in Article 1. The CDM that is contained in a Member's supporting table, and that reflects parts of the calculation process of the Base Total AMS, is meant to be used when calculating the Current Total AMS as set out by the Agreement on Agriculture. To us, this implies that both measurements of domestic support have certain commonalities in the way they are calculated. The CDM thus appears to be the link between the two of them.

7.245. The United States acknowledges the panel's statement in *Korea − Various Measures on Beef* in this regard, but argues that this statement, and those of the Appellate Body in the same dispute, do not suggest that the role of constituent data and methodology in ensuring consistency could supersede the obligations set out in Annex 3.[424]

7.246. In this connection, we observe that the Appellate Body in that dispute does not seem to have done other than to note the above-mentioned Panel statement in a footnote.[425]. However, it did make other statements that are relevant to the present dispute and have been used by the United States to support its position. In particular, the Appellate Body stated that:

> Thus, for purposes of determining whether a Member has exceeded its commitment levels, Base Total AMS, and the commitment levels resulting or derived therefrom, are not themselves formulae to be worked out, but simply absolute figures set out in the Schedule of the Member concerned. As a result, Current Total AMS which is calculated according to Annex 3, is compared to the commitment level for a given year that is already specified as a given, absolute, figure in the Member's Schedule.[426]

7.247. China argues that the cited passage supports its view that consistency/parallelism is required in the calculation of Base Total AMS, which serves as the basis for domestic support reduction commitments, and Current Total AMS.[427] The United States argues that in the cited paragraph, the

[421] China's response to Panel question No. 75.
[422] Third recital of the Preamble to the Agreement on Agriculture.
[423] Panel Report, *Korea − Various Measures on Beef*, para. 811.
[424] United States' response to Panel question No. 79.
[425] Appellate Body Report, *Korea − Various Measures on Beef*, fn 49. The Appellate Body did not otherwise express concerns with the panel's statement.
[426] Appellate Body Report, *Korea − Various Measures on Beef*, para. 115.
[427] China's response to Panel question No. 114.

Appellate Body concluded that the Final Bound Commitment Level is an absolute value to which "Current Total AMS … calculated according to Annex 3, is compared"[428] and that neither the Agriculture Agreement, nor the findings of the Appellate Body, support the conclusion that Current Total AMS is compared to, or must be calculated consistent with, a Member's Base Total AMS.[429]

7.248. We note that the cited statements have to be considered in the context in which they were made. In particular, these statements were a response to Korea's argument that national schedules on the reduction of subsidies in favour of agricultural products could be understood as multi-year equations, where one side of the equation includes the commitment level for a given year, while the other side of the equation includes the actual AMS for the same year. The Appellate Body's view was that one side of such an equation − the one describing the Base Total AMS - would be an already-specified figure so that there would not be any formula involved on that side of the equation. In other words, when determining whether Current Total AMS exceeds China's domestic support commitment level, the Base Total AMS is not itself a formula that would need to be solved so as to obtain a number; it is a fixed figure that has already been calculated and specified in the tables of supporting material. For these reasons, the Appellate Body rejected Korea's multi-year equation approach to evaluating compliance. We note that adopting Korea's approach would have suggested that consistency is almost of a mathematical exactness. This is so because a direct equivalence was implied by the equal signs of Korea's multi-year equations.

7.249. The Appellate Body also stated, as mentioned before, that with respect to the side of the hypothetical equation representing the Base Total AMS, "the relevant treaty provisions do *not* provide for any particular mode of calculation of the 'Base Total AMS'"[430], from which figure the commitment levels could be arithmetically derived. We note that the context provided by the sentences before and after this statement clarifies that "the relevant treaty provisions" referred therein were Articles 1(a) and 1(h) of the Agreement on Agriculture. This is so because the Appellate Body was drawing a parallel between the Current Total AMS, whose calculation methodology is set out in those provisions, and Base Total AMS, whose calculation methodology is not set out in those provisions. There is no indication in that Appellate Body Report that consideration was given to Paragraph 5 of Annex 3, as we have done above, and which in our view does provide for guidelines in this respect. Nor is there any indication that the Appellate Body believed that there was no guidance to calculate the Base Total AMS, when its statements are placed in the proper context.

7.250. For these reasons, we consider that the statements of the Panel in *Korea − Various Measures on Beef* are relevant to the matter at hand and that the Appellate Body's statements do not oppose the Panel's views on how the CDM guarantees some sort of consistency in the mentioned calculations. While the Appellate Body rejected a strict mathematical equivalence approach to the consistency requirement, it left open the notion of a general consistency, which does not require an exact identity in the calculation methodology.

7.251. The above leads us to conclude that both the text of the Agreement on Agriculture and the goal of achieving domestic support reduction commitments in this same agreement support the notion that there should be a broad correspondence in the methodologies used to calculate the Base Total AMS and the Current Total AMS. Such consistency is in part safeguarded by the usage of the CDM in the calculations. To us, this does not mean that either the data used or the methodologies employed have to be identical in every respect. The actual result will depend on the concrete circumstances of the Member involved.

7.252. Having found this, we do not deem it necessary to address China's third argument that the object and purpose of the Agreement on Agriculture requires consistency between negotiated commitments and an assessment of compliance with these negotiated commitments.[431]

7.4.5.2.4 The FERP that should be used in the present dispute

7.253. We will now set out our understanding of Paragraph 9 of Annex 3 and define the FERP that should be used to calculate China's Current Total AMS in this dispute. As mentioned in paragraph

[428] Appellate Body Report, *Korea − Various Measures on Beef*, para. 115.
[429] United States' comments on China's response to Panel question No. 114.
[430] Appellate Body Report, *Korea − Various Measures on Beef*, para. 115.
[431] China's second written submission, para. 302.

7.180 above, the Panel is presented with what seems to be a simple choice: using a FERP based on the years 1986-1988, as the United States asserts, or one based on the years 1996-1998, as China asserts. In this connection, we note that the parties' disagreement does not pertain to the entirety of Paragraph 9 of Annex 3[432]; it is only the applicability of the 1986-1988 time-period set out therein that is an issue between them.

7.254. We note at the outset that the text of Paragraph 9 explicitly refers to the FERP being based on the years 1986 to 1988. This language must be read in its proper context and in light of the object and purpose of the Agreement on Agriculture. In this connection, we note that this context is provided by other elements of the Agreement on Agriculture, together with the covered agreements, and the object and purpose of this Agreement as reflected *inter alia* in its preamble. In addition, we note that the interpretation that we give to Paragraph 9 should take into account that this provision is organically connected to other rules in the Agreement on Agriculture that set out the manner in which domestic support, in the form of market price support, is meant to be calculated. In other words, Paragraph 9 is part of a set of norms that provide for a mathematical framework in order to arrive at a measurement of domestic support. Therefore, an interpretation of Paragraph 9 should not be done in isolation of the overarching mathematical operation of which it forms a part: the MPS formula. For these reasons, we are of the view that any interpretation given to this provision should recognize that the FERP is meant to interact with the other two variables of the AMS formula, the AAP and the QEP, and should keep some harmony and consistency with the mathematical process envisaged by the Agreement on Agriculture.

7.255. Of particular importance in this interpretative process are the conclusions that we have arrived at in the previous sections. We recall that we concluded that China had not used a FERP based on the 1986-1988 time-period when calculating its Base Total AMS and that China's tables of supporting material contained data on a FERP that used a three-year average for the period 1996-1998.[433] Importantly, we also came to the conclusion that none of the 36 Members who have acceded to the WTO since 1995 used a period of 1986-88 with the exception of Bulgaria.[434] Additionally, we considered that both Annex 3 and China's CDM have to be used in the AMS calculation, in some way. Lastly, we concluded that the Agreement on Agriculture provided the basis for a requirement aimed at guaranteeing some broad correspondence in the process of calculating Base Total and Current Total AMS.[435] In our view, these conclusions should inform our interpretation of Paragraph 9 and the overall functioning of the FERP in the MPS Formula. As we will explain below, this is so because they provide valuable context and clarify how the object and purpose of the Agreement on Agriculture permeates the calculation of domestic support in the form of market price support.

7.256. Before embarking upon this analysis, however, we will address a preliminary issue presented by the parties regarding the framework that should be used to assess the issue of the FERP.

7.257. The parties have submitted extensive arguments on how the decision on the relevant time-period should be made by assessing the hierarchical relationship between the provisions that support each party's position. Under this approach, the applicable time-period to use for the FERP would depend on the legal value of the provisions invoked by each party. For the United States, Paragraph 9 of Annex 3 is the norm with the highest legal value and thus the FERP must strictly conform to all the requirements set out therein, particularly the time-period of 1986-1988.[436] The United States has also argued that the plain meaning of this provision reflects a mandatory obligation to use the specific years indicated.[437] On the other side of the debate, China has argued that Rev.3 and its CDM give rise to domestic-support-related commitments and that the elements contained in the latter are part and parcel of the domestic support commitments that China has undertaken under its Accession Protocol.[438] Under this view, the FERP must be based on the years 1996-1998 as these

[432] The parties seem to agree in the fact that the FERP should be a three-year average of the f.o.b. or c.i.f. unit value for the basic agricultural product at issue.

[433] See para. 7.204.

[434] See para. 7.214.

[435] See para. 7.251.

[436] United States' first written submission, paras. 98-100. The United States argues here that the reference to calculation of the average f.o.b. or c.i.f. unit value of the agricultural product in the period 1986 through 1988 establishes that the "fixed external reference price" is to be one, unchanging value.

[437] United States' first written submission, paras. 98-100; United States' response to Panel question No. 74 (second substantive meeting).

[438] China's second written submission, para. 187.

are the ones used in China's tables of supporting material. Although not expressly stating so, China's position is implicitly grounded on the primacy of its so-called domestic-support-related commitments over Paragraph 9 of Annex 3.[439]

7.258. This hierarchical approach has also been prominent in the discussion of the relevance of the CDM when calculating China's Current Total AMS. As we concluded in Section 7.4.3 above, Annex 3 and the CDM have to be used in the abovementioned calculations. This is set out in a clear fashion in Article 1 of the Agreement on Agriculture. However, the difference in the language in Articles 1(a)(ii) and 1(h)(ii), particularly the words "taking into account" in the former provision, gave the basis for the United States to argue that there is a hierarchy between Annex 3 and the CDM. For the United States, this hierarchy implied that a possible conflict between Annex 3 and the CDM should be resolved in favour of the former. In this vein, even if it was clear that the CDM had to be used in the process of calculating Current Total AMS, any inconsistencies between the CDM and Paragraph 9 would have to be resolved in favour of the latter, as the CDM was only meant to be "taken into account".

7.259. We have expressed our views on the inadequacy of assessing the differences in the language of Articles 1(a)(ii) and 1(h)(ii) through the lens of conflict. This had the potential to distort the general conception of the calculation of Current Total AMS under these provisions as being organically and inextricably linked.[440] We also stressed the importance of not assuming *ex-ante* the existence of a conflict without considering the possibility of concurrent application.[441]

7.260. As explained in Section 7.4.3 above, the Panel considers that the wording of Articles 1(a)(ii) and 1(h)(ii) both require that, in some way, China's CDM should form part of the calculation of AMS. Taking an approach which uses only Annex 3, or one which relies only on the CDM, would not properly incorporate both, as the Agreement on Agriculture requires. In this vein, we consider that the FERP specified within Rev.3, including the time-period used in its determination, is "constituent data" under the purview of the Agreement on Agriculture. Incorporation of this constituent data into the calculation of China's AMS for the relevant basic agricultural products requires that this data be, at a minimum, taken into account.

7.261. As discussed previously, it is unclear precisely what it would mean to take China's CDM into account, rather than performing the calculation "in accordance with" China's CDM. However, the Panel understands that to ignore this constituent data would run counter to the idea that CDM has a role to play in the calculation of AMS, as set out in Article 1(a) and (h) of the Agreement on Agriculture. To follow the United States' line of argumentation would be to effectively only rely on Annex 3 of the Agreement on Agriculture, rendering the references to CDM within the Agreement superfluous.[442] For these reasons, we disagree with framing the legal issue in this matter as one involving the concepts of conflict and the hierarchical application of norms. To us, the issue is not simply choosing between Paragraph 9 of Annex 3 or China's CDM. It rather involves an interpretation of Paragraph 9, in its context, that recognizes that it is part of the MPS Formula framework. In particular, we believe that the determination of the FERP applicable in the present case needs to carefully take into account all of our previous conclusions mentioned in paragraph 7.255 above. This implies carefully weighing and balancing these different factors before reaching our conclusion. In what follows, we will continue with this interpretative process.[443]

[439] We are mindful that throughout the proceedings, China has advocated for a "harmonious interpretation of Annex 3 and China's constituent data and methodology" and that the Panel need not reach the question of how to resolve any conflict between Annex 3 and Rev.3 (See Section V of China's second written submission). In our view, however, the notion of the so-called domestic-support-related commitments presupposes a hierarchical approach to the issue at hand.

[440] Panel Report, *Korea – Various Measures on Beef*, para. 813.

[441] See paragraph 7.165.

[442] As if one were to follow China's line of argumentation much of Annex 3 would be rendered ineffective.

[443] In this process, we understand that in order to take into account the CDM, the Panel should give due weight to the FERP used in China's tables of supporting material, and in particular the years used to determine that FERP, as constituent data when calculating China's AMS. We note that the Appellate Body has considered that, while not applicable to the factual situation before it at the time, a Member's CDM could potentially be used over the guidance of Annex 3 in certain circumstances. We consider that the circumstances before us are

7.262. We recall that the text of Paragraph 9 of Annex 3 explicitly refers to a particular time period. However, these elements need to be interpreted in the context provided by other provisions of the Agreement on Agriculture. Paragraph 5 of Annex 3, indicating that the Base Total AMS should be calculated using the guidance of Paragraphs 6-13, is of particular relevance here. As we noted in section 7.4.5.2.2 above, we came to the factual conclusion that none of the 36 Members that have acceded to the WTO since 1995 have used a period of 1986-88, with three exceptions.[444] This is important because, as per Paragraph 5 of Annex 3, Paragraph 9 is meant to provide guidance for the calculation of the FERP for the purposes of determining Base Total AMS. However, and even in the face of this explicit guidance in Paragraph 5, the Base Total AMS of the referred Members did not use the time-period set out in Paragraph 9. The context provided by Paragraph 5, in conjunction with the above considerations, suggests that the time-period mentioned in this provision does not necessarily accommodate or envisage situations such as China's in this case, where the FERP used for the Base Total AMS was not anchored in the 1986-1988 period.

7.263. In addition, we note that the fact that the time-period set out in Paragraph 9 has not been used in the tables of supporting material of non-original Members provides useful context, on its own, for the interpretation of Paragraph 9. This is a consequence of the fact that the Base Total AMS, and most of the calculations necessary to produce it, are contained in the Members' tables of supporting material. These, in turn, are an integral part of Member's Schedules, thus being treaty text. In this vein, we recall that the Appellate Body has stated that schedules of commitments of other Members are context when interpreting a Member's own schedule.[445] We find this reasoning to be equally applicable when interpreting China's tables of supporting material, and by extension, Paragraph 9. Having reached this conclusion, we do not find it necessary to address China's argument relating to how this situation can be characterized as subsequent practice under Article 31(3)(b) of the VCLT, nor do we express any view on this matter.[446]

7.264. Indeed, we note that both parties agreed with us in this conclusion and that we could take the tables of supporting material into account in our legal interpretation of the provisions involved.[447] However, the parties disagree as to the actual conclusions that could be extracted from this context.[448]

---

particularly suited to considering the FERP, as constituent data, as having equal importance in the determination of China's AMS for certain products.

[444] See paragraph 7.214.

[445] The Appellate Body has stated the following:

> There is, however, additional context referred to by the Panel and the participants that we must consider, namely: (i) the remainder of the United States' Schedule of specific commitments; (ii) the substantive provisions of the GATS; (iii) the provisions of covered agreements other than the GATS; and (iv) the GATS Schedules of *other* Members.
>
> ...
>
> Both participants, as well as the Panel, accepted that other Members' Schedules constitute relevant context for the interpretation of subsector 10.D of the United States' Schedule. As the Panel pointed out, this is the logical consequence of Article XX:3 of the GATS, which provides that Members' Schedules are "an integral part" of the GATS. We agree. At the same time, as the Panel rightly acknowledged, use of other Members' Schedules as context must be tempered by the recognition that "[e]ach Schedule has its own intrinsic logic, which is different from the US Schedule." (Appellate Body Report, *US – Gambling*, paras. 178 and 182.) (original footnotes omitted)

[446] China, response to Panel Question 46, paras. 196-204; China, first written submission, para. 175. We recall that according to China, if the Panel were to use Members' supporting tables as *context*, the Panel could consider that it would no longer be necessary or appropriate to address its argument on subsequent practice. (China's response to Panel question No. 87).

[447] China's response to Panel question No. 74 (second substantive meeting); United States' response to Panel's question No. 74 (second substantive meeting). In this connection, we note that the Appellate Body has stated that schedules of commitments of other Members are context when interpreting a Member's own schedule, see Appellate Body Report, *US – Gambling*, paras. 178 and 182.

[448] For China, the context provided from original Members' and non-original Members tables of supporting material demonstrates that the relevant provisions of the Agreement on Agriculture establish a single rule that requires each Member to use a three-year base period for establishing its domestic support reduction commitments, including for the identification of the applicable fixed external reference prices to be used in the calculation of Base Total and Current Total AMS. For the United States, the customary rules of interpretation do not permit an interpreter to use context to reach an interpretation inconsistent with the ordinary meaning of the terms of the provision in question, such that they create a derogation or exception from the provisions of the agreement. In addition, it argues that those tables of supporting material do not

7.265. We see that the relevance of the 1986-1988 time-period set out in Paragraph 9 does not appear to be cast in stone in the case of China. The Base Total AMS of none of the non-original Members (with one exception as noted above) have used it, while being mandated to do so by Paragraph 5 of Annex 3. To us, this is an important factor that cannot be dismissed as a negotiation technicality, an historical account or even an error, as suggested by the United States.[449] In addition, and as we have previously noted, the calculation of Current Total and Base Total AMS is not only guided by Paragraph 9 of Annex 3 but also by a number of other provisions, including Paragraph 8 of the same Annex. For this reason, the context provided by non-original Members' tables of supporting material is not only relevant for the interpretation of Paragraph 9 but also for the other provisions involved in the calculation of Base Total AMS and the MPS Formula framework.

7.266. We are mindful, however, that the mentioned context is perhaps more immediately relevant for the calculation of the Base Total AMS than for the Current Total AMS. This is a consequence of the fact that the tables of supporting material only contain information relating to the Base Total AMS and not the Current Total AMS. But even in the face of this, the mentioned context is still relevant for the calculations of the Current Total AMS. This is so because Base Total and Current Total AMS' calculations are not entirely divorced. On the contrary, they are closely connected. This leads us to our next point in our assessment: the consistency requirement.

7.267. We explored the relationship between the Base Total and Current Total AMS in section 7.4.5.2.3 above, where we concluded that the Agreement on Agriculture supports the necessity of maintaining a broad correspondence in the calculation process of these two measurements of domestic support. In particular, we noted that not doing so could lead to an apples-to-oranges comparison where a Member's compliance with its domestic support commitments could be the result of differences in the methodology applied to construct the AMS values and not of the domestic support measures actually being applied by a Member.[450] In this vein, we note that using different time-periods to construct the FERP exacerbates this risk.

7.268. Indeed, we note that of the three components of the MPS formula, the only one that does not measure a contemporaneous feature of the market is the FERP, as it is an *external reference price* that is anchored in a specific time-period. In other words, while the AAP and the QEP are variables that may evolve depending on the regulatory framework and the time-period for which the AMS is being measured, the FERP is the only part of the MPS formula that will remain the same, regardless of the period for which the domestic support is being measured. In this way, the FERP is more akin to a constant than to a variable.

7.269. Recognizing that the FERP will not change regardless of the year takes us to the source of a material incongruence that may arise when comparing Base Total and Current Total AMS in the process of assessing a Member's compliance with its domestic support commitments. Simply put, using one time-period for the FERP used in the Base Total AMS and another for the Current Total AMS would yield two different results in the MPS formula that would be entirely uncorrelated to changes in the actual provision of domestic support by a Member. There would thus be different results in these two measurements, even if the values for the AAP and the QEP were the same.

7.270. For instance, at the end of the negotiations and once a Base Total AMS was calculated and memorialized in the tables of supporting material of a Member, a compliance assessment with the domestic support obligations of that Member, at that same moment in time, would lead to the strange result that there would be two different values of AMS to be compared, but with no changes in the underlying domestic support as neither the AAP nor the QEP would have changed. In other words, the Current Total AMS would yield a value that indicates a change in the provision of domestic support where none has occurred. This change would be an artificial result of not using the same time-period for the FERP. To us, this is precisely why some broad correspondence in the calculation

provide context for the calculation of Current Total AMS, but rather to the calculation of Base Total AMS. China's response to Panel's question No. 74 (second substantive meeting); United States' response to Panel's question No. 74 (second substantive meeting).

[449] "Therefore, the commitment to maintain levels of 'domestic support in favour of agricultural producers expressed in terms of Current Total AMS [that] does not exceed the corresponding annual or final bound commitment level specified in Part IV of the Member's Schedule,' and to calculate product-specific AMS and Current Total AMS 'in accordance with' the Agreement, including Annex 3 and Article 6, apply whether or not its Base Total AMS contained errors or was calculated inconsistently with Annex 3" (original footnotes omitted). United States' response to Panel's Question No. 102.

[450] See para. 7.243.

process of both measurements is needed. This hypothetical scenario also shows that this broad correspondence has a direct relevance in the definition of the FERP.

7.271. The above leads us to conclude that allowing the use of a different time-period in the FERP used to calculate Current Total AMS, as compared to the one used for the Base Total AMS would potentially entail an apples-to-oranges comparison, which would go very much against the broad correspondence that should exist in the calculation process of both measurements.

7.272. We recall that we found that a basis for this consistency requirement was the goal of the Agreement of Agriculture of achieving reduction commitments, as stated in the third recital of the preamble. In our view, this object and purpose of the Agreement on Agriculture should also guide our interpretation of Paragraph 9 and the applicable FERP in the present case. This interpretative tool indicates to us that this provision cannot be read so at to allow this type of incongruent results.

7.273. To finalize our assessment, we observe that our conclusions on how other Members' tables of supporting material provide context for the calculation of the Base Total AMS are also applicable to the Current Total AMS. This is because the broad correspondence in the calculation of both of these measurements makes the fact that none[451] of the non-original Members have used the 1986-1988 time-period when calculating Base Total AMS also relevant to the calculation of the Current Total AMS. This is even more so when due account is taken that Paragraph 9 is applicable in both calculation processes. For these reasons, the context provided by the parameters reflected in tables of supporting material regarding this provision when calculating the Base Total AMS extend also to the Current Total AMS.

7.274. Lastly, we note that both Annex 3 and the CDM have to be used when calculating the Current Total AMS. Even if we assume, for the sake of argument, that the CDM has only to be "taken into account" when calculating a product's AMS, and that this implies a lesser degree of consideration as compared to Annex 3, a decision to use the 1996-1998 time-period is consistent with this approach. This is so because the general framework of Paragraph 9 is still being applied, namely, that the FERP is a three-year average of the f.o.b. or c.i.f. unit value for the basic agricultural product at issue. It is only the different time-period from the CDM which is being taken into account.

7.275. For these reasons, we conclude that the FERP to be used in this case is one that conforms with the requirements of Paragraph 9 of Annex 3, save for the time-period, which should be based on the same years used to calculate China's Base Total AMS, i.e. 1996-1998.

7.4.5.3 Quantity of production eligible to receive the AAP

7.276. We now assess the issues surrounding the third variable needed for the calculation of China's AMS in the form of market price support: the "quantity of production eligible to receive the applied administered price". This variable denotes the proportion of production covered by the challenged market price support measures. The parties differ in their views on what constitutes the quantity of eligible production in the case at hand. Therefore, the Panel must first address the meaning of this term.

7.277. The starting point for the Panel's analysis is the text of Annex 3, Paragraph 8, of the Agreement on Agriculture, which sets forth the guidelines for the calculation of AMS:

> [M]arket price support shall be calculated using the gap between a fixed external reference price and the applied administered price multiplied by the quantity of production eligible to receive the applied administered price.[452] (emphasis added)

7.278. The United States asserts that the ordinary meaning of "eligible" is "[f]it or entitled to be chosen for a position, award, etc."[453], and thus, the "quantity of production eligible" is a portion or amount of the commodity produced that is entitled to receive the AAP. The United States thus argues that "eligible production" within the meaning of Annex 3 is production which is fit or entitled to

[451] With the exceptions mentioned in Table 6 above.
[452] Agreement on Agriculture, Annex 3, para. 8. (emphasis added)
[453] United States' first written submission, para. 102 (referring to *Shorter Oxford English Dictionary*, "eligible," p. 799 (ed. 1993) (Exhibit USA-64).

receive the administered price, whether or not the production was actually purchased.[454] The United States submits that the Appellate Body in *Korea – Various Measures on Beef* considered the meaning of the phrase and reached a similar understanding.[455]

7.279. The United States also claims that where a market price support instrument places no limits on the volume of production that may be purchased, the entirety of the production is "eligible", and that conversely, if a limit such as on the geographic scope or a regulatory maximum is applied, that limit should be accounted for when determining the volume "eligible" to receive the AAP.[456] In this connection, the United States submits that the MPP Implementation Plans for wheat and rice limit eligible production only by geographic scope – and thus the relevant QEP is the entire production in the relevant provinces.[457]

7.280. China notes that the Agreement on Agriculture does not contain a definition of the term "production eligible to receive the applied administered price" in Paragraph 8 of Annex 3, nor does it prescribe a particular methodology for the identification of the amount of production that is eligible to receive the AAP. China claims that the absence of any guidance on how to determine eligible production contrasts with the detailed guidance provided in Paragraph 9 of Annex 3 concerning the characteristics of FERPs[458] and that in this context, the references in Articles 1(a)(ii) and 1(h)(ii) highlight that there is some flexibility for the WTO membership to agree to certain Member-specific methodologies relevant to the calculation of AMS.[459]

7.281. China has argued that the appropriate methodology for the determination of "eligible production" stems from a harmonious interpretation of the provisions of the Agreement on Agriculture which gives meaning to both (i) the terms of Paragraph 8 of Annex 3 and (ii) the definition of "eligible production" set out in Rev.3. China claims that this definition is incorporated in Annex 8 of China's Accession Protocol, and is part of China's "terms of accession", with regard to China's domestic support commitments.[460] For China, since the CDM contained in Rev.3 addresses the methodology for the determination of "eligible production", including for wheat and rice, the Panel must include these in its interpretative exercise.[461]

7.282. We note that the "quantity of production eligible to receive the applied administered price", sometimes referred to as the "quantity of eligible production" or the "QEP" in this report, is one of the variables used in calculating market price support. We agree with the parties that the Agreement on Agriculture does not define this term. In order to discern the ordinary meaning of the term "quantity of eligible production", the Panel must review the language used in Paragraph 8, including the part of the phrase which states "… to receive the applied administered price" in its context and in light of the object and purpose of the provision.

7.283. The ordinary meaning of the words "quantity"[462] and "production"[463] is not disputed here. The operative term in this variable is the word "eligible". Eligible is defined as "fit or entitled to be chosen for a position, award, etc.".[464] These terms must be read in conjunction with the remaining part of the clause, i.e. "to receive the applied administered price." While we have already examined

[454] See Panel Report, *Korea – Various Measures on Beef*, para. 827 (noting that "eligible production for the purposes of calculating the market price support component of current support should comprise the total marketable production of all producers which is eligible to benefit from the market price support, even though the proportion of production which is actually purchased by a governmental agency may be relatively small or even nil").

[455] United States' first written submission, para. 103 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 120).

[456] United States' second written submission, para. 105 (referring to Appellate Body Report, *Korea – Various Measures on Beef*, para. 120).

[457] United States' second written submission, para. 105.

[458] China's second written submission, para. 365.

[459] China's second written submission, para. 366.

[460] China's second written submission, paras. 260 and 359.

[461] China's second written submission, para. 364.

[462] Quantity refers to "an amount, a portion". Oxford English Dictionary Online, defintition of "quantity", available at: <http://www.oed.com/view/Entry/155929>, accessed 11 June 2018.

[463] Production, in this sense, can be defined as "[a] thing produced as a result of an action, process, or effort; a product. Also: produce, products collectively". Oxford English Dictionary Online, definition of "production", available at: <http://www.oed.com/view/Entry/60463>, accessed 11 June 2018.

[464] *The New Shorter Oxford English Dictionary*, definition of "eligible", Vol. 1, 1993, p. 799.

the meaning of "applied administered price"[465], the word "receive" means "to take, accept, regard, hear, etc. (something offered or presented, or to which attention is given) in a specified manner or with a specified expression of feeling".[466] We understand, therefore, that the quantity of production eligible to receive the AAP refers to the amount of production of a product which is fit[467], or able to benefit from the price support provided through the AAP.

7.284. Turning to the context of the provision, we note that Paragraph 8 of Annex 3 specifically links the AAP with the QEP by using the words "eligible to receive the applied administered price". The eligible quantity is thus directly tied to the AAP, in the sense that only that amount of product that can receive the AAP enters the calculation of AMS. As regards the AAP, there is no dispute between the parties that it is a contemporaneous variable that is determined for a particular year for which AMS is being calculated and that Members would typically set out the AAP in the relevant market price support measures themselves.[468] In the Panel's view, a similar consideration applies to the QEP, due to the link drawn between the AAP and the QEP in the text of the Agreement on Agriculture itself. Additionally, were a limit to be placed on the quantity which would be procured at a particular price, that limit would relate specifically to the particular time-period in which the price applies. Such a limitation would need to be defined in the legal framework that regulates the provision of market price support in a given Member. Therefore, we find that similarly to the AAP, the QEP should be determined with reference to the relevant regulatory framework and, in particular, the relevant measures.

7.285. This can be contrasted with our discussion on FERP, which is explained in detail above. By definition, the FERP is not a contemporaneous variable, but is rather a data point that is anchored in a particular time-period – it is *fixed*. This means that this variable (or perhaps *constant*) can be found in one fixed location, for instance in China's tables of supporting material, which does not vary through time. In this regard, the QEP is of a fundamentally different nature as it may vary depending on the prevailing regulatory framework.

7.286. This understanding of the term "quantity of production eligible" as being contemporaneous and related to the relevant measures and their regulatory framework is consistent with the object and purpose of the Agreement on Agriculture, which aims at "correcting and preventing restrictions and distortions in world agricultural markets".[469] Such distortions result from support measures, including market price support, which affect decisions on whether to produce a particular agricultural product. These decisions are influenced not only by the AAP, but also by the extent of production which is covered by the challenged measures. In other words, knowing whether their production could receive market price support could be just as important for agricultural producers as the AAP itself. It follows that in order to consider that there is a limit on eligible production, the market participants would need to be informed that the government would not be willing to pay the AAP for the entire production, but rather only for a subset of it. As noted above, we would typically look for this information in the regulatory framework relevant to the operation of the measures. Otherwise, a panel would be assessing the eligibility of products to receive the AAP in the abstract and disconnected from the operation of the measures.

7.287. China argues in this regard that its tables of supporting material contain a definition of eligible production which must be considered following a holistic and harmonious interpretation of the Agreement on Agriculture, in the context of assessing the compliance of its market price support measures for wheat and rice with its domestic support reduction commitments.[470] According to China, such alleged definition of eligible production forms part of its CDM and thus must be taken into account when calculating its AMS, as referenced in Articles 1(a)(ii) and (h)(ii).[471]

7.288. We agree with China that a panel must consider the CDM in a Member's supporting tables when calculating the AMS. This, however, does not mean that any reference to eligible production

[465] See Section 7.4.5.1 above.
[466] Oxford English Dictionary Online, defintition of "receive", available at: <http://www.oed.com/view/Entry/159411?rskey=Q2we63&result=2#eid>, accessed 22 July 2018.
[467] See *The New Shorter Oxford English Dictionary*, definition of "fit", Vol. 1, 1993, p. 960, which is defined as "be suited to or appropriate for; Meet the requirements of".
[468] China's first written submission, paras. 189-195; United States' first written submission, paras. 96-97.
[469] Second recital of the Preamble to the Agreement on Agriculture.
[470] China's first written submission, paras. 196-203; China's second written submission, para. 358-375.
[471] China's second written submission, para. 362.

contained in the tables of supporting material should necessarily be regarded as the definition of "quantity of production eligible" within the meaning of Paragraph 8 of Annex 3. As noted above, the QEP is informed by the operation of the challenged measures, which would be reflected in the calculation of the AMS. To us, this understanding of the QEP is consistent with Articles 1(a)(ii) and 1(h)(ii) of the Agreement on Agriculture. Contrary to what China appears to be suggesting, the language of these provisions, requiring that AMS be calculated either taking into account, or in accordance with, the CDM, does not imply that all components of the calculation are necessarily determined by the CDM contained in the tables of supporting material.

7.289. In this vein, China argues that the Member-specific CDM may impact the ordinary meaning of "eligible production", depending on the methodology that a Member used for the determination of eligible production as part of its CDM.[472] China argues that the circumstances in this dispute identify a methodology used for the calculation of Base Total AMS whereby "eligible production" is determined on the basis of the "amount purchased" and that same definition in endnote 19 of Rev.3 also provides context for the calculation of Current Total AMS.[473] China's argument in this regard relies on the notion that endnote 19 of its tables of supporting material contains a methodology for the determination of the quantity of eligible production; that China currently uses broadly similar market price support measures to those used during their accession (the State Procurement Price and Protective Price programmes); and that China may continue applying the same methodology for the determination of eligible production when calculating AMS under current measures.[474] China asserts that by explaining how the quantity of eligible production was determined for the measures in place at the time of China's accession to the WTO, endnote 19 sets out a methodology that is capable of being, and should be, applied for purposes of calculating AMS, under Article 1(a)(ii).[475]

7.290. China asserts that Rev.3 defines eligible production for China's calculation of AMS from market price support as follows[476]:

> Eligible Production:
>
> > Eligible Production for State Procurement Price refers to the amount purchased by state-owned enterprises from farmers at state procurement price for the food security purpose (see Endnote 10 of Supporting Table DS 1);
> >
> > Eligible Production for Protective Price refers to the amount purchased by state-owned enterprise from farmers at protective price in order to protect farmer's income.[477]

7.291. Endnote 19 is affixed to the heading "Eligible Production" in Supporting Table DS:5 of China's Rev.3, which provides information on China's MPS for the purposes of determining China's AMS during the years 1996-1998. China argues that this wording reflects that China has made a commitment to apply a methodology that determines eligible production for market price support for wheat and rice as the quantity of wheat and rice purchased under an AAP.[478] This argument seems to be based on the premise that China's MPS measures do not contain an express limitation on the quantity of eligible production in the ordinary sense, and that this 'limitation' as it were, can be found by looking towards Rev.3 and China's CDM.

7.292. In this regard, the United States argues that "China's Supporting Table simply does not include a "definition" of eligible production. Rather it provides a factual description of market price support programs available to Chinese farmers between 1996 and 1998".[479] The United States also argues that China's factual description of its "methodology" does not express an intent to change the "methodology" used in the future, or an agreement by the Members that China could change

[472] China's second written submission, para. 372.
[473] China's second written submission, para. 372.
[474] China's response to Panel question No. 95, para. 280.
[475] China's second written submission, paras. 374-378; China's response to Panel question No. 95, para. 282.
[476] China's first written submission, para. 199.
[477] WT/ACC/CHN/38/Rev.3, endnote 19, (Exhibit USA-43).
[478] China's response to Panel question No. 88, para. 256.
[479] United States' response to Panel question No. 57, paras. 160-161 (first substantive meeting). See also United States' response to Panel question No. 56 (first substantive meeting).

that "methodology" .[480] Finally, the United States argues that, when read together, endnote 10 and endnote 19 indicate that the volume purchased by the state-owned enterprises was the "predetermined" volume. For the United States, this indicates that the "methodology" utilized by China with regard to both programmes is consistent with the "methodology" demanded by Annex 3, paragraph 8, of the Agriculture on Agreement, that is, that the volume of production eligible to receive the AAP is equivalent to the predetermined maximum purchase volume.[481]

7.293. As discussed in Paragraph 7.139 above, not everything included in the tables of supporting material is *constituent data and methodology*. We are unable to see how, in this case, a mere reference to "eligible production" in endnote 19 in Supporting Table DS:5 of China's Rev.3 could be regarded as a binding methodology to be used prospectively in the calculation of China's AMS. Looking at the plain text of endnote 19, the usage of the word "refers" suggests that endnote 19 merely describes the "eligible production" that was used in the tables of supporting material upon China's accession to the WTO. It does not establish a methodology to assess the quantity of eligible production that should be applied when calculating AMS at any other point in time.

7.294. This is all the more significant as the text of endnote 19 only mentions eligible production in the particular context of the "State Procurement Price" and "Protective Price" programmes. These are specific support measures that China had in place at the time of its accession. We thus understand the reference to "eligible production" in endnote 19 to be directly tied to these programmes, which have long since been terminated.[482] In addition, we note that using the description of eligible production contained in China's CDM would lead to calculation of support that is detached from the operation of the measures challenged by the United States. For these reasons, we find that endnote 19 does not contain a methodology that would be relevant to our calculation of China's AMS.

7.295. We find further support for our interpretation of the QEP in the *Korea – Various Measures on Beef* report, where the Appellate Body held that "[p]roduction actually purchased may often be less than eligible production"[483], and reiterated that "production eligible" refers to production that is "fit or entitled" to be purchased rather than production that was actually purchased".[484] Contrary to China's argument, we consider the Appellate Body's reading of the phrase "quantity of production eligible" to apply outside of the specific context of the dispute in *Korea – Various Measures on Beef*; when making that statement, the Appellate Body was determining the ordinary meaning of the term used in Paragraph 8 of Annex 3, rather than limiting it to the facts of that case.

7.296. In sum, the Panel considers that based on the plain meaning of the entire phrase "quantity of production eligible to receive the applied administered price", the QEP should be determined as a current reflection of the amount of product which qualifies to be purchased from producers at the AAP. We do not consider the contents of endnote 19 to constitute a reflection of such an amount, nor to have any bearing on the quantity of production eligible to receive the AAP in the years 2012-2015, the years for which AMS must be calculated for wheat and rice. As a result, the Panel must determine what the QEP actually was in those years, as reflected in China's regulatory framework for market price support. Considering the link between the AAP and the QEP, we understand that the appropriate starting point in this determination is the regulatory framework surrounding China's challenged market price support for wheat, Indica rice and Japonica rice.

7.297. Turning to the content of the challenged measures, we reiterate that the underlying legal instruments do not contain explicit numerical limitations on the quantity of product which could receive the relevant AAP, nor do they contain any methodology which could definitively determine a

[480] United States' comments on China's response to Panel question No. 95, para. 126.

[481] United States' comments on China's response to Panel question No. 95, paras. 123-125.

[482] "In 2004, China terminated the State Procurement System and the Protective Price Policy, in favor of a comprehensive opening of the grain procurement market." China's first written submission, para. 25.

[483] Appellate Body Report, *Korea – Various Measures on Beef*, para. 120.

[484] Appellate Body Report, *Korea – Various Measures on Beef*, para. 120. The Panel understands that this statement, along with other references to that dispute, should be read in the context of the existence of a clearly defined limitation on purchases of beef by Korea. To the Panel, the referenced statement simply highlights that (i) the amount that is eligible can be greater than the amount finally purchased, (ii) the eligible amount may be lower than the amount of total production, and (iii) it is the *eligible* amount which is to be included in the AMS calculation, and not any other amount.

specific numerical limitation.[485] More specifically, neither the Annual Notices nor the Implementation Plans explicitly mention any limits on the amount of grain to be purchased by the designated entities. In fact, the Implementation Plans require the relevant entities to acquire storage capacity to "match with the expected amount of grain purchased at the minimum price."[486] They further instruct SinoGrain, ADBC and local authorities to use the available storage space, or procure new space, in order to "meet farmer's needs for grain selling".[487] Additionally, China has confirmed that "there are no limitations on the number and amounts of loans that the ADBC can provide to SinoGrain for the purchase of grain, except for those relating to the financial stability of the bank."[488] Instructions to accommodate as much grain as is proffered, and the lack of any practical financial restrictions on buying all grain available for purchase run directly contrary to the idea of a limit on purchasing. Finally, in certain of the Implementation Plans (notably those related to rice) the quantity of eligible production is set out: "The [product] eligible to be purchased at the minimum procurement price refers to the in-grade product produced in [the relevant year]."[489] Similar or identical wording appears in many Implementation Plans.[490] To us, this is a clear indication that the legal instruments do not impose any explicit limit on the QEP.

7.298. However, China argues that the regulatory framework underlying the challenged measures reveals five factors implicitly limiting the quantity of production eligible: (i) the geographic scope of application of the measures[491]; (ii) the temporal application of the programmes[492]; (iii) the activation of the programmes only when the market price falls below the AAP and de-activation when the price rises above[493]; (iv) minimum quality requirements on products which may be purchased[494]; and (v) consumption of a "significant portion" of production on small-scale farms.[495] China argues that by building limitations into the operation of the market price support programme, it ensures that only a limited amount of wheat and rice would be purchased at the AAP.

7.299. The United States, for its part, submits that China's wheat and rice Implementation Plans specify the provinces or autonomous regions where farmers are eligible to receive the AAP for their wheat, Indica rice and Japonica rice.[496] This means to the United States that "the production in the designated provinces is eligible for support, and in those provinces the state-owned enterprises will purchase all proffered product."[497] Therefore, in the United States' view, the portion or amount of the agricultural product produced that is entitled to receive the administered price is identified in the

[485] See para. 7.100 above.

[486] Article 5, 2012 Wheat Implementation Plan, (Exhibit USA-24/CHN-29B Revised), p. 3; Article 5, 2015 Wheat and Rice Implementation Plan, (Exhibit USA-27/CHN-28B Revised), p. 4; Article 5, 2013 Wheat Implementation Plan, (Exhibit USA-25/ CHN-19B Revised), p. 3; Article 5, 2014 Mid- to Late-Season Rice Implementation Plan, (Exhibit USA-48/CHN-31B Revised), p. 4; Article 5, 2012 Early-Season Indica Rice Implementation Plan, (Exhibit USA-44/CHN-34B Revised), p. 3; Article 5, 2014 Wheat and Early-Season Indica Rice Implementation Plan, (Exhibit USA-26/CHN-30B Revised), p. 4.

[487] Article 5, 2015 Wheat and Rice Implementation Plan, (Exhibit USA-27/CHN-28B Revised), p. 5; Article 5, 2012 Wheat Implementation Plan, (Exhibit USA-24/CHN-29B Revised), p. 3; Article 5, 2014 Wheat and Early-Season Indica Rice Implementation Plan, (Exhibit USA-26/CHN-30B Revised), pp. 5 and 13 See also Article 5, 2012 Early-Season Indica Rice Implementation Plan, (Exhibit USA-44/CHN-34B Revised), p. 3 (referring to "actual needs").

[488] China's response to Panel question Nos. 43 and 44, paras. 189 and 191.

[489] 2012 Early-Season Indica Rice Implementation Plan, (Exhibit USA-44/CHN-34B Revised), p. 2. We note that the United States' translated version of the same document uses the language "[t]he early-season Indica rice for which minimum purchase prices will be implemented comprises within grade-standard products that are produced in 2012". The Panel considers that these two translations are substantively the same in content.

[490] See, for example, 2013 Wheat Implementation Plan, (Exhibit USA-25/CHN-19B Revised), p. 2; 2014 Wheat and Early-Season Indica Rice Implementation Plan, (Exhibit USA-26/CHN-30B Revised), p. 3; 2014 Mid-to Late-Season Rice Implementation Plan, (Exhibit USA-48/CHN-31B Revised), p. 3; 2012 Early-Season Indica Rice Implementation Plan, (Exhibit USA-44/CHN-34B Revised), p. 2; 2013 Early-Season Indica Rice Implementation Plan, (Exhibit USA-46/CHN-35B Revised), p. 2; 2012 Mid-to Late-Season Rice Implementation Plan, (Exhibit USA-45/CHN-36B Revised), pp. 2-3; 2013 Mid-to Late-season Rice Implementation Plan, (Exhibit USA-47/CHN-37B Revised), p. 4.

[491] China's first written submission, para. 208.

[492] China's first written submission, para. 209.

[493] China's first written submission, para. 210.

[494] China's first written submission, para. 211.

[495] China's first written submission, para. 212.

[496] United States' first written submission, para. 111.

[497] United States' first written submission, para. 107.

measures as all production produced in the identified provinces.[498] China's quantity of production eligible to receive the AAP is therefore the volume of wheat, Indica rice, and Japonica rice grown in covered provinces or autonomous regions in the relevant year.[499]

7.300. We will now consider each of the factors raised by China to determine whether any of them in fact limits the quantity of production eligible to receive the AAP.

7.4.5.3.1 Geographical scope of the programme

7.301. Regarding the first factor, China claims that each Implementation Plan expressly limits the provinces in which the measures can operate and that for the years 2012 to 2015 they covered (i) six wheat-producing provinces; (ii) five early-season Indica rice-producing provinces; and (iii) eleven mid- to-late season Indica and Japonica rice producing provinces.[500] According to China, the six wheat-producing provinces, which accounted for 79.2% of China's total wheat production in 2015, are Hebei, Jiangsu, Anhui, Shandong, Henan and Hubei.[501] The five rice-producing provinces covered by the measures for early-season Indica rice are Anhui, Jiangxi, Hubei, Hunan and Guangxi.[502] Finally, the eleven rice-producing provinces covered by the measures for mid- to late-season Indica rice and Japonica rice are Liaoning, Jilin, Heilongjiang, Jiangsu, Anhui, Jiangxi, Henan, Hubei, Hunan, Guangxi and Sichuan.[503] Together, the rice-producing provinces covered by the Implementation Plans account for around 79% of China's total rice production in 2015.[504] We note that the parties agree on the geographical coverage of the challenged measures.[505] The Panel shares this understanding.

7.302. As a result, the data submitted by the parties, and the data being used by the Panel in its calculations, is already limited geographically.[506] The values designated as the QEP, by both the United States and China, are not the total amount of production of the relevant product throughout the whole of China, nor was that considered to be the case at any point. They only include data from the regions specified in the measures, and thus this limitation has inherently been taken into account. As stated by China, this limitation on geographical scope means that the QEP will initially be limited to approximately 79% of total national production for wheat and rice (in 2015).[507]

7.4.5.3.2 Temporal scope of the programme

7.303. As for the second factor, China argues that each Implementation Plan establishes limits on the time period in which the purchases at minimum prices may be implemented for the applicable year. The following table presented by China summarizes these temporal limits:[508]

Table 7: Implementation periods of minimum procurement price for wheat and rice

Year	Wheat	Early Indica rice	Mid- and late-season Indica/Japonica rice
2012	21/05/2012-30/09/2012	16/07/2012-30/09/2012	16/09/2012-31/12/2012 (8 provinces); 16/11/2012-31/03/2013 (3 provinces)

[498] United States' first written submission, para. 107.
[499] United States' first written submission, para. 117.
[500] China's first written submission, paras 68-69 (referring to Article 2, 2012 Wheat Implementation Plan, (Exhibit USA-24/CHN-29B Revised), p. 2; Article 2, 2013 Wheat Implementation Plan, (Exhibit USA-25/CHN-19B Revised), p. 2; Article 2, 2014 Wheat & Early-season Indica Rice Implementation Plan, (Exhibit USA-26/CHN-30B Revised), p. 3; Article 2, 2015 Wheat & Rice Implementation Plan, (Exhibit USA-27/CHN-28B Revised), p. 2.
[501] China's first written submission, para. 70. For production data, see: China's Rural Statistical Yearbook (2016), (Exhibit USA-76/CHN-33), p. 168.
[502] China's first written submission, para. 71.
[503] China's first written submission, para. 71.
[504] China's first written submission, paras. 72 and 208.
[505] The United States lists the same wheat- and rice-producing Chinese provinces that are covered by the challenged measures. United States' first written submission, paras. 33 and 52.
[506] See United States' answer to Panel question No. 94; United States' first written submission, paras. 117-121; China's first written submission, paras. 68-72.
[507] China's first written submission, para. 208.
[508] China's first written submission, paras. 73-74.

2013	21/05/2013-30/09/2013	16/07/2013-30/09/2013	18/09/2013-31/01/2014 (8 provinces); 16/11/2013-31/03/2014 (3 provinces)
2014	21/05/2014-30/09/2014	16/07/2014-30/09/2014	16/09/2014-31/01/2015 (8 provinces); 01/11/2014-31/03/2015 (3 provinces)
2015	21/05/2015-30/09/2015	16/07/2015-30/09/2015	16/09/2015-31/01/2016 (8 provinces); 10/10/2015-29/02/2016 (3 provinces)

7.304. The Panel notes, as in paragraph 7.105 above, that generally, these time-periods immediately follow the annual harvest period in the major wheat and rice producing provinces.[509] Therefore, the measures are operating at the times during which the vast majority of relevant products are being sold on the market.[510] Indeed, it is during those periods that the supply will be at its highest as most farmers are seeking to sell their crops and the prices are most likely to fall below the minimum level. In addition, there is nothing in the measures that would prevent producers from timing the sale of their harvests at the AAP during the implementation periods. Therefore, the Panel finds that restricting the availability of the AAP to certain time-periods does not affect the eligibility of products to receive the AAP, nor can it lower the quantity of production eligible to receive the AAP.

7.4.5.3.3 Activation and de-activation of the programme

7.305. Regarding the third factor, China submits that the Implementation Plans also provide that purchases at minimum procurement prices are activated only "when the grain market price drops to the minimum procurement price stipulated by the government"[511], and that in addition to the "switching-on" of the programme when prices fall below the minimum price, there is also a "switching-off" of the programme in a city/county when the market price rises again above the minimum price.[512]

7.306. In this regard, we note that this is simply how market price support operates in this case. It is inherent to market price support measures that support will only be provided when the market price falls below the AAP, which is a minimum price. If the market price is above the AAP, purchases on the market will naturally not be made at the AAP. As soon as the market price falls below the AAP[513], all of a given product can be bought by the relevant entities at the AAP, until the price rises again above the minimum level. China confirmed that if the market price for wheat and rice fell below the AAP for an extended period of time, the relevant entities would continue to make purchases without restriction while the measures were activated.[514] Activation and deactivation does not affect the eligibility of products to receive the AAP, nor can it lower the quantity of production eligible to receive the AAP.

7.4.5.3.4 Minimum grain quality requirements

7.307. Regarding the fourth factor, China argues that only wheat and rice of a certain quality can be purchased under the programmes. China cites, as an example, Article 4 of the 2015

[509] United States' first written submission, para. 54.

[510] Article 9, 2012 Wheat Implementation Plan, (Exhibit USA-24/CHN-29B Revised), p. 5; Article 9, 2014 Mid- to Late-Season Rice Implementation Plan, (Exhibit USA-48/CHN-31B Revised), p. 6; Article 9, 2015 Wheat and Rice Implementation Plan, (Exhibit USA-27/CHN-28B Revised), p. 6; Article 9, 2013 Wheat Implementation Plan, (Exhibit USA-25/CHN-19B Revised), p.5; Article 9, 2012 Early-Season Indica Rice Implementation Plan, (Exhibit USA-44/CHN-34B Revised), p. 5; Article 9, 2014 Wheat and Early-Season Indica Rice Implementation Plan, (Exhibit USA-26/CHN-30B Revised), pp. 6 and 14.

[511] China's first written submission, para. 75 (referring to Article 6, 2015 Wheat and Rice Implementation Plan, (Exhibit USA-27/CHN-28B Revised), pp. 5-6).

[512] China's first written submission, para. 79 (referring to Approving the activation of Wheat 2015 Minimum Procurement Implementation Plan in Linyi City in Shandong Province (Zhong Chu Liang Lu [2015] No. 141), 25 June 2015, (Exhibit CHN-42B), p. 1).

[513] Following a three-day monitoring period, and following approval by the State Administration of Grain. See China's response to Panel question No. 36, paras. 151-152.

[514] See China's response to Panel question No. 41, where China responded similarly through implication, but noted that the scenario the Panel had described was virtually impossible, and highly unlikely to occur, due to considerations of supply and demand (but crucially, not considerations regarding limitations on *purchases*).

Implementation Plan that provides that "[g]rain subject to the minimum procurement price refers to the in-grade products produced in 2015", i.e. products which satisfy the minimum grade requirements prescribed by the applicable national standards.[515] Moreover, China's "Notice on Issuing the Rules on Matters Related to Implementing National Standards of Grain and Oil Quality" provides that grains below these grades shall not be purchased by the government.[516]

7.308. China has stated that grain of quality inferior to "grade 5" grain (the minimum quality[517] accepted for purchase under the domestic support measures), known as "out-of-grade" grain, is not subject to a minimum purchase price and is not able to be procured under the Implementation Plans.[518] The question in relation to this argument is whether this amount of out-of-grade grain has already been taken into account in the data provided as the "quantity of eligible production" by either of the parties. If not, this limitation would have to be taken into account when calculating the respective AMS and the relevant percentage of the production which is considered out-of-grade would have to be excluded from the QEP, as the AAP would not be able to apply to this out-of-grade product. This is reinforced by the wording found within many of the Implementation Plans. As noted above, certain of these reports include the phrase "[t]he [product] eligible to be purchased at the minimum procurement price refers to the in-grade product".[519] Out-of-grade product is explicitly excluded from eligibility.

7.309. Both China[520] and the United States[521] have provided data relating to out-of-grade grain though neither has expressly indicated whether this number has been taken into account in the data provided by the parties.[522] From each party's arguments we can assume that the data provided by China does indeed take this limitation into account and deducts the relevant amount from what it determines as the QEP[523], while the United States does not. The United States argues that the amount is "negligible" and that "off grade grain is a *de minimis* volume each year".[524]

7.310. The United States argues that "China's MPS Programs provide applied administered prices for all grade-able grain." The United States contends that "[i]f a farmer plants wheat, rice, or corn, especially if she does so in anticipation of receiving the applied administered price from the government, the farmer intends to grow sell-able, grade-able grain."[525] We agree that "no farmer intends to grow "off grade" product"[526], but we also note this does not change the fact that any quantity of grain, which is determined to be out-of-grade, could not receive the AAP, and is therefore ineligible to receive it.

7.311. This fourth limiting factor is compelling, in that it will directly impact the amount of product that is eligible to receive the AAP. Given the above, the Panel will take this additional limitation into account in its determination of China's QEP for the respective products.

[515] China's first written submission, para. 82 (referring to Article 4, 2015 Wheat and Rice Implementation Plan, (Exhibit USA-27/CHN-28B Revised), pp. 2-3).

[516] China's first written submission, para. 82 (referring to 2010 National Standards of Grain Quality Notice, (Exhibit CHN-43B Revised).

[517] See Article 4, 2015 Wheat and Rice Implementation Plan, (Exhibit USA-27/CHN-28B Revised), pp. 2-3; National Wheat Standard (GB1351-2008) (English translation), (Exhibit CHN-91B); National Rice Standard (GB1350-2009) (English translation), (Exhibit CHN-92B).

[518] See China's response to Panel question No. 25, paras. 110-113, referring to 2010 National Standards of Grain Quality Notice, (Exhibit CHN-43B Revised), p. 2.

[519] 2012 Early-Season Indica Rice Implementation Plan, (Exhibit USA-44/CHN-34B Revised), p. 2. (emphasis added)

[520] China's response to panel question No. 93, Table 6.

[521] United States' response to Panel question No. 93. China's State Administration of Grain, Standard & Quality Center, Quality Survey Reports 2010-2016, (Exhibit USA-98).

[522] The Panel notes the United States' argument that China has not provided sources supporting its data, as well as both parties' acknowledgements that the data that was provided by both parties is consistent. See also China's response to Panel question No. 93.

[523] As China only considers production purchased to be eligible, any out-of-grade product that was not purchased would necessarily not be included in China's reporting of its QEP.

[524] United States' response to Panel question No. 93; United States' comments on China's responses to question No. 93.

[525] United States' response to Panel question No. 25, para. 103.

[526] United States' response to Panel question No. 25, para. 103.

7.4.5.3.5 Consumption of grain on small-scale farms

7.312. Regarding the fifth and final factor, China argues that it is necessary to keep in mind that, similar to the situation in many other developing countries, small-scale farms in China typically consume a significant portion of the staple foods that they produce and that smallholder farmers often put aside a portion of their wheat and rice production to be used either as food for the family, animal feed, or to guard as seeds for the next planting year.[527] According to China, these smallholder farmers also use the wheat and rice they harvest as barter for other crops or goods or services.[528] As a result, the total amount of wheat and rice available to be sold by farmers on the market or under the minimum procurement price programme is, in China's view, smaller than the total amount of wheat and rice actually produced.[529]

7.313. In this regard, China submits that it tracks the amount of non-marketable production of wheat and rice through the use of a "commodity rate" - the ratio in any given year between the annual amount of wheat or rice sold and the total production.[530] China states that "between 9-18 percent of total wheat production in China in 2012-2015, and between 17-22 percent of total rice production in China during the same period was consumed or retained by Chinese farmers, and not available for purchase in the marketplace".[531]

7.314. As noted, the discussion in this section is about the amount of production that is *eligible* to receive the AAP. Whether the grain is consumed on-farm or sold at the market, the pertinent question is whether the grain that was produced would be able to benefit from the AAP if the seller so desired. The Panel considers that, as China had not specified a limitation on how much of each product could be *purchased* if the market price is below the AAP, the entirety of the crop produced on the farm would be *eligible*, in the ordinary meaning of the word, to receive the AAP.

7.4.5.3.6 Conclusion

7.315. As a result, the Panel considers that, in addition to the geographical limitation already taken into account in the data provided by the parties, only one of the above alleged limitations – the volume of out-of-grade grain for each year - impacts the eligibility of the relevant products to receive the AAP. Production which is determined to be out-of-grade cannot benefit from the AAP, and thus cannot be included in the QEP when calculating AMS. In the absence of any explicit or implicit limits in the challenged Chinese measures, the Panel understands the QEP, or quantity of production eligible to receive the AAP, to be the entire volume of production in the relevant specified provinces, less any out-of-grade grain.

7.4.5.4 Processing-level adjustment

7.316. We turn now to the last outstanding issue regarding the definition of the variables of the MPS Formula, which relates to the processing-level adjustment that may be required to be applied to some of these variables.

7.317. Simply put, this issue arises because of the differences between the FERP used in Rev.3., which refers to *milled and semi-milled rice*, and the AAP, which China provides for *unmilled paddy rice* sold by farmers.[532] This fact requires the adjustment of some of these variables either to a

[527] China's response to Panel question No. 54.

[528] China's first written submission, paras. 84-86 (referring to John Davis & Ping Zong, "*Household own-consumption and grain marketable surplus in China*", Applied Economics, 34:8 (2010), 969-974, (Exhibit CHN-46); David Buschena, Vincent Smith and Hua Di, "*Policy reform and farmers' wheat allocation in rural China: a case study*", Australian Agricultural and Resource Economics Society Inc. and Blackwell Publishing Ltd, 2005, (Exhibit CHN-47)).

[529] China's first written submission, paras. 84-86.

[530] China's first written submission, para. 85; 2016 Agricultural Costs and Benefits, (Exhibit CHN-4B), p. 123.

[531] China's first written submission, para. 86.

[532] The United States explains that:

> At harvest, rice is known as "paddy" or "rough rice." Typically, paddy rice must be processed or milled for human consumption. The first stage of milling (cleaning/shelling) creates "brown rice," and the rice may be subsequently further polished (removing the bran) into white rice.

higher or lower level of processing: from unmilled rice to milled rice, or *vice versa*, to avoid a situation where each of the variables reflects a different processing stage for rice.

7.318. Both parties agree on the necessity of this adjustment.[533] However, they disagree on (i) the extent of the adjustment; and (ii) the variable to which it should be applied. China argues that since the data for the AAP and the QEP is presented at the processing level of unmilled rice, it is necessary to adjust both of these to reflect the processing level of "semi-milled or wholly milled rice, whether or not polished or glazed", that is, the level of the FERP.[534] The United States argues for adjustment of the FERP (milled rice) downwards, to match the unmilled level of the AAP and the QEP.

7.319. Table 9 outlines the various levels of processing for rice in the available data for the FERP, the AAP and the QEP.

Table 8: Comparison of levels of processing for relevant rice data[535]

Variable	Level of processing
Eligible production	Paddy/unmilled rice[536]
AAP	Paddy/unmilled rice[537]
FERP	semi-milled or wholly-milled rice, whether or not polished or glazed[538]

7.320. We note that China relies on an OECD report which explains that, in the first level of processing, 80% of the volume of unmilled paddy rice is retained as brown rice, while 20% of the volume of unmilled rice is discarded hulls. In the next level of processing, to produce milled rice, another 10% of the volume is lost.[539] For these reasons, China contends that the average "milling rate" or "milling yield" of unmilled rice to milled brown rice is 70%[540] and that this is consistent with the United States' own statistics, which applied a conversion rate of 70% to express the relationship between unmilled rice and milled rice, as exported.[541] China's adjustment thus uses a "milling rate" of 70% to adjust both the volume of eligible production and the AAP from unmilled rice to milled rice, which China contends is the same rate as used in Rev.3.[542] China is therefore maintaining that the rate used to adjust the volume in the QEP should similarly be applied to the adjustment of price in the AAP, because "the volume/quantity effect of further processing rice is the predominant factor affecting the price of rice at different levels of processing."[543]

7.321. For its part, the United States explains that it has constructed a price-based adjustment factor based on a comparison of available monthly pricing data for milled rice versus unmilled rice

> Agricultural production statistics typically report rice production on a paddy or rough basis, since this accounts for the entire weight of the grain, but milled and polished rice accounts for the majority of international rice exports and imports. (United States' first written submission, para. 45.)

[533] This point was confirmed by the panel in *Korea – Various Measures on Beef* which found that "both the FERP and the AAP must be calculated at an equivalent stage of processing or converted accordingly". Panel Report, *Korea – Various Measures on Beef*, para. 828.

[534] China's response to Panel question No. 99.

[535] There is no disagreement between the parties on the level of processing of the different variables.

[536] China's first written submission, para. 236; China's response to Panel question No. 38, para. 162.

[537] China's first written submission, para. 236; China's response to Panel question No. 38, para. 162.

[538] China's tables of supporting material, Appendix DS 5-4: f.o.b. Prices for Corn, Japonica rice and Indica rice, WT/ACC/CHN/38/Rev.3, (Exhibit USA-43).

[539] OECD 2016 Document on Compositional Considerations for New Varieties of Rice, (Exhibit CHN-65), Table 5.

[540] China's first written submission, para. 241 (referring to the OECD 2016 Document on Compositional Considerations for New Varieties of Rice, (Exhibit CHN-65), Table 5).

[541] China's first written submission, para. 228 (referring to United States Department of Agriculture, World Agricultural Supply and Demand Estimates, August 2017, U.S. Rice Supply and Use (Rough Equivalent of Rough and Milled Rice), (Exhibit CHN-66)).

[542] China's first written submission, para. 235 (referring to Conversion rate applied in WT/ACC/CHN/38/, (Exhibit CHN-64)).

[543] See China's response to Panel question No. 38, para. 170, where China states that the use of a volume-based conversion rate is also reasonable and appropriate for the price-based conversion required here, and consistent with an objective assessment of the facts.

in China[544] and that the calculated adjustment rate of milled to unmilled rice in China is 60%.[545] This 60% price conversion rate was developed by comparing published prices of milled rice to unmilled rice and calculating an average rate for the 12 year period of available data.[546] Any adjustment to a price within the equation, according to the United States, should be made at a rate of 60%.

7.322. We agree with the parties that a processing-level adjustment is necessary to avoid a mathematically inappropriate comparison. However, and as mentioned above, we observe two issues which must be resolved before applying such an adjustment: (i) the variable or variables which should be adjusted; and (ii) the rate of the adjustment.

7.4.5.4.1 Which variable should be adjusted

7.323. With respect to the question of which variables should be adjusted, we consider that it is appropriate to first determine whether the Agreement on Agriculture provides any guidance in this regard.

7.324. The starting point of our analysis is the text of the Agreement on Agriculture. In this regard, there are two relevant sections: (i) Paragraph 7 of Annex 3 states that the AMS "shall be calculated as close as practicable to the point of first sale of the basic agricultural product concerned"; and (ii) Article 1(b) of the Agreement on Agriculture provides that that ""basic agricultural product" in relation to domestic support commitments is defined as the product as close as practicable to the point of first sale as specified in a Member's Schedule and in the related supporting material".

7.325. These provisions furnish some guidance in our determination of the most appropriate variable to be adjusted. However, they do not, in themselves, set out a mandatory rule as to the variable that should be adjusted.

7.326. We now turn to assess the possible guidance afforded by the Agreement on Agriculture in order to be able to calculate China's AMS for the most appropriate rice product at a level closest to the point of first sale.

7.4.5.4.1.1 Basic agricultural product

7.327. Article 1(b) of the Agreement on Agriculture states that ""basic agricultural product" in relation to domestic support commitments is defined as the product as close as practicable to the point of first sale as specified in a Member's Schedule and in the related supporting material". The phrase is also relevant in Annex 3: Paragraph 1 states "subject to the provisions of Article 6, an Aggregate Measurement of Support (AMS) shall be calculated on a product-specific basis for each basic agricultural product receiving market price support"; Paragraph 7 provides that "[t]he AMS shall be calculated as close as practicable to the point of first sale of the basic agricultural product concerned. Measures directed at agricultural processors shall be included to the extent that such measures benefit the producers of the basic agricultural products"; and Paragraph 9 indicates that "[t]he fixed external reference price … shall generally be the average f.o.b. unit value for the basic agricultural product concerned in a net exporting country … in the base period."

7.328. The plain meaning of the phrase "basic agricultural product" is important for our purposes. "Basic" is defined as "[o]f, pertaining to, or forming a base"[547] and "constituting or serving as the

[544] United States' first written submission, para. 115.

[545] United States' first written submission, paras. 115-116 (referring to the Agreement on Agriculture, paragraph 9 of Annex 3; Panel Report *Korea – Various Measures on Beef*, para. 828 (stating that "the fixed external reference price must be at (or converted to) the same stage in the processing chain as the applied administered price for the basic agricultural product(s) concerned")).

[546] See China National Bureau of Statistics, *China Yearbook of Agricultural Price Survey* (2006), (Exhibit USA-69); China National Bureau of Statistics, *China Yearbook of Agricultural Price Survey* (2008), (Exhibit USA-70); China National Bureau of Statistics, *China Yearbook of Agricultural Price Survey* (2012), (Exhibit USA-71); 2014 China Yearbook of Agricultural Price Survey, (Exhibit USA-72); China National Bureau of Statistics, *China Yearbook of Agricultural Price Survey* (2016), (Exhibit USA-99).

[547] Oxford English Dictionary Online, defintition of "basic", available at: <OED Online. http://www.oed.com/view/Entry/15848>, accessed on 22 July 2018.

basis or starting point".[548] A "product" is "[a]n object produced by a particular action or process"[549] while "agricultural" is "[o]f, relating to, or used in agriculture"[550] which is "the practice of growing crops, rearing livestock, and producing animal products".[551] As such, a "basic agricultural product" in the current case would be an object produced through the practice of growing crops which forms a base or starting point for potential further processing.

7.329. China argues that the phrase "as close as practicable to the point of first sale" is used in the context of identifying the basic agricultural product. This phrase allegedly emphasizes that the basic agricultural product specified in a Member's schedule is not simply an identification of the product variety, but also an identification of the processing level of the product. According to China, the key to identifying the basic agricultural product lies in the phrase "as specified in a Member's Schedule and in the related supporting material" which suggests that the basic agricultural product, or more specifically, the processing level of the basic agricultural product, can be found in a Member's schedule and supporting material. In this regard, China states that "Rev.3 ... specified the processing level for [Indica rice and Japonica rice], which is "semi-milled or wholly milled rice, whether or not polished or glazed".[552]"[553]

7.330. The United States argues that "for Indica and Japonica rice, there is no indication of the type of rice, either for the external reference prices or the AAPs. China asks the Panel to infer a chosen point of sale and a type of "basic agricultural product" based on the comparison on various draft Supporting Tables, none of which contains any explicit written reference to this point of sale, and the recollection of China's negotiators[554]".[555]

7.331. Indica rice and Japonica rice were net export products in China's 1996-1998 base period and thus their external reference prices were determined by the f.o.b. prices, on the basis of China's Customs statistics.[556]

7.332. The Panel considers that the reference in Paragraph 9 of Annex 3 to "the average f.o.b. unit value for the basic agricultural product concerned ..." requires that the AAP and the FERP must both be for the "basic agricultural product". This reasoning is reinforced by Paragraph 7, discussed further below, which states that AMS "shall be calculated as close as practicable to the point of first sale of the basic agricultural product concerned".

7.333. In addition, as pointed out by the United States, the inclusion of the phrase: "measures directed at agricultural processors shall be included to the extent that such measures benefit the producers of the basic agricultural products" in Paragraph 7 of Annex 3 reinforces the understanding that product-specific AMS should be calculated so as to measure the benefit at the first point of sale, which typically would involve the producers.[557] According to China, the United States' approach here ignores the purpose of this part of Paragraph 7, which China alleges is to eliminate (from the AMS calculation) measures that do not constitute domestic support because they are not provided "in favour of domestic producers" or "in favour of agricultural producers".[558] We disagree. The Panel is required to holistically interpret the relevant provisions. In this case, this means interpreting the meaning of "basic agricultural product" in light of the specific exclusion of measures directed at

[548] Merriam-Webster Online, definition of "basic", available at: < https://www.merriam-webster.com/dictionary/basic>, accessed on 22 July 2018 .

[549] Oxford English Dictionary Online, defintition of "product", available at: <OED Online, http://www.oed.com/view/Entry/151988>, accessed on 22 July 2018.

[550] Oxford English Dictionary Online, defintition of "agricultural", available at: OED Online, <http://www.oed.com/view/Entry/4178>, accessed on 22 July 2018.

[551] Oxford English Dictionary Online, defintition of "agriculture", available at: OED Online, <http://www.oed.com/view/Entry/4181>, accessed on 22 July 2018.

[552] See the fixed external reference prices for Indica rice and Japonica rice in Table DS5 of Rev.3, which exactly match the fixed external reference prices for Indica rice and Japonica rice in Appendix DS 5-4 of Rev.3. See also Conversion rate applied in WT/ACC/CHN/38/, (Exhibit CHN-64), which indicates that the data for the applied administered price and the eligible production for Indica rice and Japonica rice contained in DS5 of Rev.3 had been adjusted to reflect milled rice data.

[553] China's response to Panel question No. 99, para. 317. (footnote original)

[554] Conversion rate applied in WT/ACC/CHN/38, (Exhibit CHN-64).

[555] United States' response to Panel question No. 99, para. 179. (footnote original)

[556] See WT/ACC/CHN/38/Rev.3, endnote 17(2), and Appendix DS 5-4, (Exhibit USA-43).

[557] United States' response to Panel question No. 99, para. 176.

[558] China's comments on the United States' response to Panel question No. 99, para. 247 (referring to Agreement on Agriculture, Article 3.2, 6.1, 6.3, 7.1 and 7.2(a).

agricultural processors from the AMS calculation, unless those measures benefit agricultural producers.

7.334. What the Panel has to determine in this part of its analysis, therefore, is the particular basic agricultural product in this case. Importantly, while the definition of "basic agricultural product" in Article 1(b) of the Agreement on Agriculture includes a reference to a Member's schedule, Paragraph 7 of Annex 3 refers only to the "point of first sale" of the agricultural product concerned.

7.335. The United States may be correct in its assertion that China's tables of supporting material do not explicitly set out the level of processing of each of the rice products at issue here, contrary to China's argument. However, China's tables of supporting material do refer to HS Code 10063000 for Japonica rice and 10063000 for Indica rice, in Appendix DS 5-4: "f.o.b. Prices for Corn, Japonica Rice and Indica Rice". These HS Codes refer to "semi-milled or wholly-milled rice, whether or not polished or glazed". We consider that while China is able to specify the basic agricultural product in its Schedule, this may not necessarily extend to specifying the level of processing, especially for the purposes of calculating AMS. In this regard, while China has included the HS code of milled rice variants to which a reader can refer, it has identified each of "Indica rice" and "Japonica rice" by name.

7.336. The product included in the tables of supporting material (which, in this particular instance, is milled rice) has an f.o.b. price to determine the FERP. We understand that milled rice is included for the purposes of demonstrating an f.o.b. price as required by Paragraph 9 (as unmilled rice is generally not exported or imported to any significant degree). This product does not necessarily accord with the overarching requirement that AMS should be calculated as close as practicable to the point of first sale, as further discussed below. We see a fundamental disconnect between China's specification of the "basic agricultural product" in its tables of supporting material, and the "point of first sale" of rice. It is not necessary to decide which of these would prevail in the abstract. Our task here is to calculate the AMS for each relevant product. This is to be done as close as practicable to the point of first sale.

7.337. The Panel needs to determine the basic agricultural product here for the purposes of properly calculating China's AMS. There is no obligation to determine the basic agricultural product on the basis of China's tables of supporting material alone, and we will also consider the "point of first sale" which would accord most with the ordinary meaning of "basic agricultural product", as defined above. We understand that the relevant product in China's tables of supporting material has been specified as "Indica rice" and "Japonica rice". We turn to examine the point of first sale of such rice, as specifically directed by Paragraph 7 of Annex 3.

7.4.5.4.1.2 Point of first sale

7.338. Paragraph 7 of Annex 3, concerned with the AMS calculation itself, states that the AMS "shall be calculated as close as practicable to the point of first sale of the basic agricultural product concerned".[559]

7.339. The United States argues that the phrase "point of first sale" indicates that "the AMS is to be calculated in relation to the first instance the commodity is sold" and that "[t]he relevant point of first sale in this dispute is when Chinese farmers in the relevant provinces sell their wheat, Indica rice, [or] Japonica rice, … to the Chinese government or entities purchasing at the direction of the Chinese government".[560] Specifically in regard to rice, the United States submits that the first sale defined in this way would be on an unmilled rice basis and that therefore the FERP for rice must be converted to an unmilled rice equivalent value.

7.340. China, for its part, argues that the phrase "as close as practicable to the point of first sale" emphasizes that the basic agricultural product specified in the Schedule is not simply an identification of the product variety, but also an identification of the processing level of the product.[561] For China,

[559] See also Agreement on Agriculture, Article 1(b) which defines "basic agricultural product" in relation to domestic support commitments … as the product as close as practicable to the point of first sale as specified in a Member's Schedule and in the related supporting material".

[560] United States' response to Panel question No. 99.

[561] China's response to Panel question No. 99.

the words "as close as practicable" indicate that the basic agricultural product is not necessarily the product at the beginning of the processing chain sold at the point of first sale, but rather, that it can be a further processed product. China argues that it has specified in its tables of supporting material that the processing level for the two varieties of rice is "semi-milled or wholly milled rice, whether or not polished or glazed", and subsequently that *this* is the basic agricultural product related to rice.[562]

7.341. We believe that the relevant point of first sale of the basic agricultural product would be the point at which Chinese *producers* of rice in the relevant provinces sell their product to the government or its relevant purchasing entities. This is because, as outlined in Paragraph 7 of Annex 3, the calculation of AMS is aimed at assessing measures which benefit producers of basic agricultural products. In other words, it is the point at which the measure acts to benefit the producers that is relevant here (that is, the point at which the rice producers sell their rice at the AAP). In addition, the plain meaning of "point of first sale" indicates that AMS is to be calculated in relation to the first instance the commodity is sold.[563] The price at the point of first sale for rice would be the "farm-gate", "paddy" or "unmilled" price of both Indica and Japonica rice.

7.342. Mindful of this, and interpreting the term "basic agricultural product" holistically in the context of the Agreement on Agriculture, we consider that the basic agricultural product, as close as practicable to the point of first sale, is unmilled (Indica and Japonica) rice.

7.343. The Panel notes that, mathematically, there is no difference in the resulting MPS when only the FERP is adjusted to reflect an unmilled equivalent level, or when both the AAP and QEP are adjusted to reflect milled equivalent levels if the price and quantity conversion rates applied are the same (that is, for example, if both price and quantity are adjusted at a rate of 70%). The United States argues in this regard that the correct rate to use for adjusting price, based on its calculations, is not 70%, but 60%.[564]

7.344. Adjustment rate: r for quantities and prices

Calculating MPS at a milled level:

$$MPS = \left(\frac{AAP}{r} - FERP\right) * rQ = \frac{rQ * AAP}{r} - rQ * FERP = (\boldsymbol{AAP - rFERP}) * \boldsymbol{Q}$$

Calculating MPS at an unmilled level:

$$MPS = (\boldsymbol{AAP - rFERP}) * \boldsymbol{Q}$$

7.345. Finally, China contends that adjustment of the *fixed* external reference price is not legally permissible. China submits that if any price needs to be adjusted for purposes of calculating AMS, so as to permit a proper comparison of prices for the same product at the same level of processing and trade, then the AAP must be adjusted, because that price is not "fixed".[565]

7.346. The Panel does not find this argument convincing. As noted by the United States, Paragraph 9 of Annex 3 states explicitly that "the fixed reference price may be adjusted for quality differences as necessary".[566] This indicates that China's argument regarding the immutable nature of the reference price due to the inclusion of the word "fixed" is misplaced. Clearly, on the wording of Paragraph 9 itself, the Agreement on Agriculture allows for the adjustment of the FERP and thus the word "fixed" would not act to prevent the adjustment of the FERP if the Panel considers this necessary or appropriate.

7.347. In light of the above, we consider that in order to properly calculate the relevant AMS for Indica and Japonica rice we will adjust the FERP downwards to a level equivalent to unmilled rice.

[562] China's response to Panel question No. 99, para. 317.
[563] As noted by the United States. See United States' response to Panel question No. 99, para. 176.
[564] United States' first written submission, para. 116.
[565] China's first written submission, para. 246.
[566] United States' second written submission, paras. 97-98.

This approach ensures calculation of the relevant AMS as close as practicable to the point of first sale of the basic agricultural product.

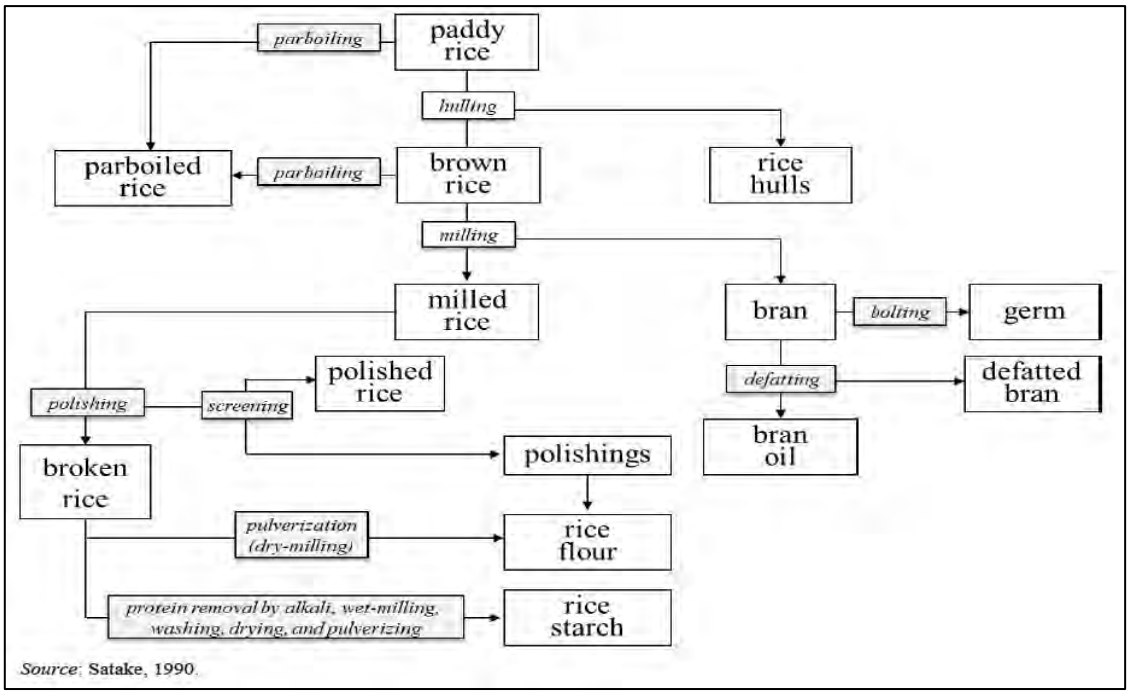
7.4.5.4.2 Adjustment rate to be used in this case

7.348. We have determined that the FERP will be adjusted to reflect an unmilled equivalent level. We now move to determine the most appropriate rate at which to adjust the FERP. As noted previously there are two potential options presented by the parties here: a rate of 60%, which the United States argues must be applied to the FERP (or to any price-based adjustment)[567], or a rate of 70% which China initially argues should apply to both the QEP and the AAP (originally a quantity-based adjustment, identically applied to price).[568] China has stated, however, that "to adjust downwards the fixed external reference prices to reflect the processing level of paddy rice, … the conversion rate should again be 70%, such that the milled rice fixed external reference price would have to be multiplied by 0.7".[569] China has provided data for the adjusted FERP in this regard.[570] The ability to use either of these adjustment rates depends, first, on the availability of suitable data provided by the parties to the Panel.

7.349. A major point of contention between the parties is the use, by the United States, of "polished long-grained non-glutinous rice and polished round-grained rice" in determining its price-based adjustment rate. This rate allegedly results from an incorrect product comparison, according to China.[571] China argues that the necessary adjustment rate is one that flows from a comparison between: (i) the rice products exported by China in 1996-1998 (and on which the FERP is based); and (ii) unmilled rice to which the minimum procurement price applied in 2012-2015. For China, the product on which the 1996-1998 FERP is based is "semi-milled or wholly milled rice, whether or not polished or glazed", which is a broad category of rice and includes cheaper semi-milled rice and broken rice, as well as more expensive forms of rice, such as polished rice with broken rice removed. China contends that the United States has assumed that the product to use as the proxy for the external reference price is the highest quality product − "polished long-grained non-glutinous rice and polished round-grained rice", which is naturally the most expensive.[572] As the 1996-1998 FERP was based on "semi-milled or wholly milled rice, whether or not polished or glazed", it would be incorrect to compare the price used there with only polished rice (the highest quality product) in the current calculations, China argues. The United States, on the other hand, in its second written submission, argues that China's contention that polished rice is a significantly more refined product than milled rice is inaccurate, as polished rice is milled rice.[573] China's contention appears to be confirmed by Figure 5 of China's first written submission, an OECD overview of rice at various stages of processing, reproduced below.[574] This problem is exacerbated, according to China, as the 60% rate is based on the use of Chinese *retail* prices for polished long-grained and polished round rice[575] while the external reference price set out in Rev.3 is a *wholesale* f.o.b. export price.[576]

[567] United States' response to Panel question No. 101.
[568] China's response to Panel question No. 101.
[569] China's response to Panel question No. 101.
[570] China's response to Panel question No. 101, table 14.
[571] China's response to Panel question No. 38.
[572] China's first written submission, para. 248 (referring to 2014 China Yearbook of Agricultural Price Survey, (Exhibit USA-72)).
[573] United States' second written submission, para. 103.
[574] China's first written submission, para. 240, Figure 5.
[575] China's first written submission, para. 250 (referring to 2014 China Yearbook of Agricultural Price Survey, (Exhibit USA-72)).
[576] China's first written submission, para. 250.

Figure 3: OECD overview of rice at various stages of processing



Source: China's first written submission, Figure 5.[577]

7.350. As correctly noted by China, the wholesale f.o.b. export price, as set out in Rev.3, covers both polished rice, and unpolished, or broken rice.[578] Restricting that product category to polished rice, as the United States suggests, would result in taking as the basis for adjustment the most expensive type of rice, leaving out the unpolished or broken rice. This approach is, in our view, incorrect, because it would fail to take into account prices of less expensive types of rice that are covered by the wholesale f.o.b. export price mentioned in Rev.3. The so-derived conversion rate of 60% would thus be distorted and we cannot use it as the basis for our calculations.

7.351. China argues that, under these circumstances, the use of a volume-based conversion rate would be appropriate where no better price-based conversion rate is available.[579] We agree that in the absence of more accurate price-based data for the conversion, we can complete our calculations based on a less-preferable, but equally valid, volume-based conversion rate.[580]

7.352. We thus conclude that because of the absence of appropriate price-based conversion data, we will make the adjustment to the FERP using the volume-based conversion rate of 70%.

[577] OECD Environment Directorate, Revised Consensus Document on Compositional Considerations for New Varieties of Rice (Oryza sativa): Key Food and Feed Nutrients, Anti-nutrients and Other Constituents, 2016, (Exhibit CHN-65).

[578] The United States relied on data attributable to the "rural free market," which it considers may underestimate the differential between paddy rice prices and export milled or semi-milled rice prices because they do not account for the transportation, bagging or packaging, and other costs associated with export. United States' second written submission, para. 103.

[579] China's response to Panel question No. 38, para. 171.

[580] While we agree with China's suggestion to use the volume-based conversion rate of 70%, this conclusion should not be read as endorsing China's argument that the determination of the adjustment rate should be consistent with the contents of Rev.3. See China's first written submission, paras. 234-235, 243-251, China's response to Panel question No. 100. While certain elements of China's CDM found within Rev.3 could be relevant for Panel's determination of current AMS, we do not consider the fact that China had purportedly utilized an identical conversion rate in Rev.3 to be binding or determinative when adjusting the variables at this stage of our assessment.

7.4.5.4.3 Conclusion on the processing-level adjustment

7.353. To summarize the conclusions that we have arrived at in this section on the processing level adjustment, we will (i) adjust the FERPs for Indica and Japonica rice, which is the only variable at a higher level of processing than "unmilled", and (ii) make the adjustment using the volume-based conversion rate of 70%, due to the absence of appropriate price-based conversion data.

7.4.6 Calculation of China's Current Total AMS

7.354. We have resolved the issues before us relating to the definition and calculation of each of the variables of the MPS formula. Briefly, the AAP is the minimum purchase price identified in the annual Wheat MPP Notices[581] and Rice MPP Notices[582] (at Grade 3).[583] The FERP to be used in this case is based on the same years used to calculate China's Base Total AMS, i.e. 1996-1998. For Indica and Japonica rice, the FERP will be adjusted downward at a rate of 70% to reflect the level of unmilled rice used in the AAP and QEP. The QEP to receive the AAP is the entire volume of production in the relevant specified provinces, less any out-of-grade grain. Furthermore, the total value of production for the various products is calculated by multiplying the total amount of wheat (or rice) produced in China in a certain year by the producer price (or farm gate price) of wheat (or rice) for that year.[584]

7.355. These legal and technical considerations will guide our calculation of China's Current Total AMS.

7.356. In this section, we will assess the parties' arguments regarding the prices and quantities that should inform the calculation of China's domestic support in the form of market price support for rice and wheat, in the years 2012-2015. After doing so and having established the appropriate figures to be used, we will proceed to make our own calculations of the market price support component of China's AMS and Current Total AMS for the commodities and in the years at issue. We will conclude by assessing whether China is in compliance with its relevant domestic support obligations.

7.357. We begin by addressing the general framework we will use to review the numbers and supporting evidence that have been presented over the course of these proceedings. In this regard, we note that in contrast to the findings in the previous sections in relation to the legal definition of the AAP, the FERP and the QEP, the present assessment is mainly factual in nature.

7.358. In this connection, we asked the parties how the Panel is to assess the calculations presented by them, including the extent to which we can or should re-run the numbers presented by the parties. We also asked them how we should treat any discrepancies or inconsistencies in the data presented by them. For the United States, the Panel should review the calculations, along with the relevant source material underlying these calculations. The United States also argues that the Panel should seek to resolve any discrepancies in the calculations by recourse to the source material, and that, as the trier of fact, the Panel should seek to resolve any discrepancies by evaluating the respective pieces of evidence to determine their reliability and probative value.[585] China generally agrees with the United States and posits that in its role as trier of fact, the Panel may make factual

[581] 2012 Wheat Annual Notice, (Exhibit USA-20/CHN-18B), p. 1; 2013 Wheat Annual Notice (Exhibit USA-21/CHN-93B) p. 1; 2014 Wheat Annual Notice, (Exhibit USA-22/CHN-20B), p. 1; 2015 Wheat Annual Notice, (Exhibit USA-23/CHN-21B), p. 1.

[582] 2012 Rice Annual Notice, (Exhibit USA-39/CHN-23B), p. 1; 2013 Rice Annual Notice, (Exhibit USA-40/CHN-24B), p. 1; 2014 Rice Annual Notice, (Exhibit USA-41/CHN-25B), p. 1; 2015 Rice Annual Notice, (Exhibit USA-42/CHN-26B), p. 1.

[583] These figures were multiplied by 20 in order to derive a price per ton.

[584] Both the United States and China use the same source to determine the producer price (or farm gate price) for wheat and rice. China's Farm Gate Prices 1995 to 2015, (Exhibit USA-79), Agricultural Product Cost and Returns 2010-2016, (Exhibit USA-81/CHN-67); China National Development and Reform Commission, Compilation of Materials on Agricultural Product Cost and Returns (2016), (Exhibit USA-81/CHN-67). Prices are available for early-, mid-, and late-season Indica rice, and Japonica rice. It appears that the United States has used the producer price for mid-season Indica rice only as the producer price for mid- to late-season Indica rice in its calculations, as noted by China. China's comments on the United States' response to Panel question No. 96.

[585] United States' response to Panel's question No. 63 (second substantive meeting).

findings that differ from those advocated by the parties, provided that the Panel's findings have an evidentiary basis in the record, and they are otherwise consistent with the requirement to make an objective assessment. In addition, China argues that the Panel's mandate extends to an objective assessment of any discrepancies in the data, and to making factual findings that resolve any such discrepancies.[586]

7.359. We note that under Article 11 of the DSU, we are directed to make an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements. In our view and in the context of this case, this implies that we should not accept the calculations and numbers presented by the parties before carefully examining their accuracy and reliability. In addition, our task allows us to resolve any inconsistencies or discrepancies that we find by resorting to the original sources of the data and by running our own calculations on the basis of the available evidence in the record. In this vein, we asked the parties several questions that sought to clarify certain inconsistencies in the numbers presented in the parties' written submissions.[587] The parties clarified that most of these inconsistencies were due to differences in the units of measurement used, the number of decimal places, rounding, and some errors in the transposition of numbers when aggregating them across different tables.

7.360. After carefully assessing each of these issues and the evidence before us, we decided to standardize the metrics to be used into millions of tons, for quantities, and renminbi per ton, for prices. We also decided to work with all the decimal places available so as to avoid any inaccuracies resulting from rounding. Finally, we ran our own calculations to either confirm or correct the ones presented by the parties. After doing so, we presented the parties with a table that summarized our assessment regarding the different figures needed for the calculations of China's Total AMS and Current Total AMS.[588] The parties agreed with most of the numbers presented but, in some instances, they submitted additional corrections or revisions. We have taken due note of these.

7.361. The tables below present the resulting information.

7.4.7 MPS Calculations

7.4.7.1 Wheat

7.362. Table 9 sets out all the variables required to run the MPS formula and derive a percentage to compare against China's 8.5% *de minimis* level, namely the AAP, the FERP, the QEP and the total value of production. First, we multiply the total national production of wheat by the producer price for each year, to calculate the total value of production of wheat.

7.363. The table then determines the QEP. This is done by (i) setting out the volume of production of wheat in each of the covered provinces and then (ii) subtracting the out-of-grade production from each of these provinces. The QEP per province is then totalled to determine the final QEP.

7.364. The AAP is the price set out in the relevant measures, multiplied by 20 to obtain a price expressed in renminbi/ton.

7.365. The FERP is the average of three external reference prices for the years 1996-1998, set out in Appendix DS 5-3 of China's tables of supporting material.

7.366. To calculate an MPS value, first the FERP is subtracted from the AAP. The resulting price differential is multiplied by the QEP. The resulting monetary value is the MPS for a specific year. Finally, this MPS is divided by the total value of production above to arrive at a percentage which is then compared to China's 8.5% *de minimis* level.

[586] United States' response to Panel's question No. 63 (second substantive meeting).
[587] See United States' response to Panel's question Nos. 72-74 (first substantive meeting).
[588] See United States' response to Panel's question No. 96. See also (Exhibit CHN-88).

Table 9: Calculation of MPS for wheat from 2012-2015

Wheat MPS Calculation	Units	2012	2013	2014	2015
Total national production[589]	million tons	121.023	121.926	126.208	130.185
Producer price[590]	¥/ton	2,166.20	2,356.20	2,411.80	2,328.60
Total value of production	million ¥	262,160.02	287,282.04	304,388.45	303,148.79
Volume of production by covered province[591]					
Hebei	million tons	13.377	3.872	14.299	14.350
Jiangsu	million tons	10.488	11.013	11.604	11.740
Anhui	million tons	12.940	13.320	13.936	14.110
Shandong	million tons	21.795	22.188	22.638	23.466
Henan	million tons	31.774	32.264	33.290	35.010
Hubei	million tons	3.708	4.168	4.216	4.209
Total	million tons	94.082	96.825	99.983	102.885
Out-of-grade percentage[592]					
Hebei	percentage	0.0	1.0	0.0	0.0
Jiangsu	percentage	2.0	1.0	0.3	1.0
Anhui	percentage	1.0	0.0	0.0	1.7
Shandong	percentage	0.0	1.0	0.2	0.0
Henan	percentage	1.0	0.0	0.0	0.0
Hubei	percentage	8.0	0.0	0.0	0.0
QEP per provinces					
Hebei	million tons	13.377	13.733	14.299	14.350
Jiangsu	million tons	10.278	10.903	11.569	11.623
Anhui	million tons	12.811	13.320	13.936	13.870
Shandong	million tons	21.795	21.966	22.593	23.466
Henan	million tons	31.456	32.264	33.290	35.010
Hubei	million tons	3.411	4.168	4.216	4.209
MPS Calculation					
QEP	million tons	93.128	96.354	99.903	102.528
AAP[593]	¥/ton	2,040.00	2,240.00	2,360.00	2,360.00
Average 1996-1998 FERP (c.i.f price)[594]	¥/ton	1698.13	1698.13	1698.13	1698.13
Wheat MPS = (AAP-FERP)*QEP	million RMB	31,837.83	52,211.49	66,122.74	67,860.03

[589] China's first written submission, para. 87, Table 4. China's Rural Statistical Yearbook (2013), (Exhibit CHN-49), p. 152; China's Rural Statistical Yearbook (2015), (Exhibit CHN-50), p. 164; China's Rural Statistical Yearbook (2016), (Exhibit USA-76/CHN-33), p. 168; United States' first written submission, para. 122; United States' response to Panel question Nos. 72-73; China's Statistical Yearbook, Table 12-10, (2016), (Exhibit USA-18); China's Statistical Yearbook, Table 12-10 (2015), (Exhibit USA-73); China's Statistical Yearbook, Table 12-10 (2014), (Exhibit USA-74); China's Statistical Yearbook, Table 13-15 (2013), (Exhibit USA-75) China's Rural Statistical Yearbook (2016), Table 7-17 (Exhibit USA-76/CHN-33).

[590] China's first written submission, para. 272, Table 21; Agricultural Product Cost and Returns 2010-2016, (Exhibit USA-81/CHN-67). United States' first written submission, para. 122; China's Farm Gate Prices 1995 to 2015 (Exhibit USA-79).

[591] United States' response to Panel Question No. 73, Table 8 (first substantive meeting). China's Statistical Yearbook, Table 12-10, (2016), (Exhibit USA-18); China's Statistical Yearbook, Table 12-10 (2015), (Exhibit USA-73); China's Statistical Yearbook, Table 12-10 (2014), (Exhibit USA-74); China's Statistical Yearbook, Table 13-15 (2013), (Exhibit USA-75).

[592] China's response to Panel question No. 93, Table 6; United States' response to Panel question No. 93, China's States Administration of Grain, Standard & Quality Centre, Quality Survey Reports 2010-2016 (Exhibit USA-98).

[593] China's first written submission, para. 270, Table 20; 2012 Wheat Annual Notice, (Exhibit USA-20/CHN-18B); 2013 Wheat Implementation Plan, (Exhibit USA-25/CHN-19B Revised); 2014 Wheat Annual Notice, (Exhibit USA-22/CHN-20B); 2015 Wheat Annual Notice, (Exhibit USA-23/CHN-21B). United States' first written submission, para 111, Table 6; 2013 Wheat Annual Notice (Exhibit USA-21/CHN-93B).

[594] WT/ACC/CHN/38/Rev.3, Appendix DS 5-3, (Exhibit USA-43).

Wheat MPS Calculation	Units	2012	2013	2014	2015
MPS / Total value of production	percentage	12.14	18.17	21.72	22.39

7.4.7.2 Rice

7.367. The calculations for rice (Japonica, early-season Indica and late-season Indica) are relatively more complex. This is mainly due to differences in the mathematical approaches taken by the parties and differences in the data submitted by the parties responding to the mentioned mathematical differences.

7.368. There are three discrete issues in this regard: (i) the different ratios used by the United States (31.6%) and China (33.3%) to determine the proportion of Japonica rice that makes up the national production of rice in China; (ii) differences between the data submitted by the parties, or lack thereof, regarding the provincial breakdown of Japonica and Indica rice in the covered provinces in order to determine the QEP; and (iii) China's use of a weighted average to determine the AAP for Indica rice that was used in the calculation of the MPS Formula.

7.369. We explore each of these issues below.

7.4.7.2.1 Total value of production of rice

7.370. China's Statistical Yearbook annually provides information on total "rice" production by province[595], and as noted by both parties, China's Rural Statistical Yearbooks[596] do not distinguish between Indica and Japonica rice.[597] Though both parties agree on the total volume of national rice production, they have differing views on the proportions of national rice production which constitute Japonica and Indica rice.

7.371. The United States argues that Japonica rice makes up 31.6% of China's rice production and that the total volume of production of Japonica is thus determined by multiplying the total national rice production by 0.316.[598] China argues that "[r]eflecting the reality of Chinese agricultural production, japonica rice makes up one third of China's total rice production."[599] China notes that this proportion has been used in a number of its notifications.[600]

7.372. We have carefully reviewed the evidence presented by the parties to support their respective assertions. Regarding the United States' position, we note that the process by which the United States arrives at 31.6% is not itself entirely clear as we could not identify the precise origin of the data within the exhibits referenced by the United States. Upon examination of the portion of China's Statistical Yearbook (2016) submitted by the United States[601], we note that it contains multiple years detailing several stages of the production of rice as well as a breakdown of production of these products per province, without indicating the year (or years) to which the breakdown refers to. Without a reference to those years for each province, it is unclear as to whether the 31.6% ratio is meant to apply uniformly to the years 2012-2015. We were thus unable to replicate precisely the results obtained by the United States. Regarding China's arguments, we observe that the 1:2 ratio is supported by notifications that China has made to the WTO Committee on Agriculture. These, however, do not explain the calculation process used to arrive at this figure or provide any statistical data on the production of Japonica vs. Indica rice in China.

[595] China's Statistical Yearbook, Table 12-10, (2016), (Exhibit USA-18); China's Statistical Yearbook, Table 12-10, (2015), (Exhibit USA-73); China's Statistical Yearbook, Table 12-10 (2014), (Exhibit USA-74); China's Statistical Yearbook, Table 13-15 (2013), (Exhibit USA-75).

[596] China's Rural Statistical Yearbook (2013), (Exhibit CHN-49); China's Rural Statistical Yearbook (2015), (Exhibit CHN-50); China's Rural Statistical Yearbook (2016), (Exhibit USA-76/CHN-33).

[597] United States' first written submission, para. 120; China's response to Panel question No. 97, para. 305; China's comments on the United States' response to Panel question No. 97, para 239.

[598] United States' first written submission, fn. 244.

[599] China's first written submission, para. 257.

[600] *See* China's Notification (2002-2004), G/AG/N/CHN/17 (24 March 2010), (Exhibit USA-2); China's Notification (2005-2008), G/AG/N/CHN/21 (13 October 2011); and China's Notification (2009-2010), G/AG/N/CHN/28 (6 May 2015).

[601] China's Statistical Yearbook, Table 12-10, (2016), (Exhibit USA-18).

7.373. We note that both parties agree on the fact that Japonica rice production is (roughly) one third of national rice production.[602] Additionally, the difference in the overall results obtained using each of the two approaches is minimal, as will be discussed below.

7.4.7.2.2 Volume of production of rice per province

7.374. According to the United States, additional information regarding crop production by season is available in China's Rural Statistical Yearbook and Agricultural Statistical Reports regarding production volume by province for early season rice, mid-to-late or single season rice, and late season rice.[603] In this regard, the United States argues that nearly all early season and late season rice is Indica rice, while middle season single crop rice is Japonica rice.[604]

7.375. In order to determine the production of early-season Indica rice, mid-late-season Indica rice and Japonica rice on a provincial basis, the United States attempts to identify those provinces that primarily or only grow Japonica or Indica rice. Accordingly, the United States submits that almost all of the rice reported as early-season rice is Indica rice.[605] The United States goes on to state that in the more temperate northeast provinces of Liaoning, Jilin, and Heilongjiang, farmers grow primarily Japonica rice, and the measures for Japonica rice operate only in those three provinces.[606] The southern provinces of Jiangxi, Henan, Hubei, Hunan, Guangxi Zhuang and Sichuan primarily grow Indica rice[607], and Jiangsu and Anhui provinces grow both Indica rice and Japonica rice.[608] For the provinces which grow both mid-late-season Indica rice and Japonica rice[609], the total rice volume has been subdivided by the United States to reflect the portion of production estimated to be attributed to each species.[610]

7.376. China disagrees with the data provided by the United States concerning the division of Indica and Japonica rice production in the MPP provinces, as "the United States' division is not based on any official source".[611] As a result, China characterises the production data provided by the United States for the different types of rice per province as being a rough estimation by the United States, based on elements from three reports, dated 2001[612], 2006[613] and 2011[614], respectively. In addition, China argues that the United States does not appear to have applied the percentage that it had itself

[602] See United States' first written submission, fn. 244.
[603] United States' first written submission, para. 120.
[604] United States' first written submission, fn. 234.
[605] China's Rural Statistical Yearbook (2016), Table 7-18, (Exhibit USA-76/CHN-33); China Agricultural Statistical Reports (2011-2014), (Exhibit USA-77) pp. 5, 11, 19.
[606] United States' first written submission, para. 121; China's Rural Statistical Yearbook (2016), Table 7-17, and 7-18, (Liaoning, Jilin, and Heilongjiang reporting no early (Indica) rice production, and only a single season of mid-late-season rice), (Exhibit USA-76/CHN-33); see also Funing, *et al.*, *Alternative Approach to Measure Comparative Advantage in China's Grain Sector* (2001), p. 7, (Exhibit USA-35) and Chen, *Current Situation and Trends in Production of Japonica Rice in China* (2006), p. 2 (2006) (discussing three northeast provinces and Jiangsu), (Exhibit USA-36).
[607] United States' first written submission, para. 121; China's Rural Statistical Yearbook (2016), Table 7-17, and 7-18 (2016), (Exhibit USA-76/CHN-33); Chen, *Current Situation and Trends in Production of Japonica Rice in China* (2006), p. 4 (2006) (noting the difficulty of the southern provinces switching to Japonica rice) (Exhibit USA-36); see also Hansen, et al., *China's Japonica Rice Market*, 32 (2002) (Exhibit USA-34).
[608] United States' first written submission, para. 121.
[609] According to the United States, Anhui and Jiangsu both grow both Japonica and mid-late-season Indica rice, however in different proportions. Jiangsu is a major producer of Japonica and 86 percent of its production is estimated to be Japonica. Anhui is a lesser producer of Japonica and 19 percent of its production is estimated to be Japonica. United States' first written submission, fn. 231; See Yuzhu, *Basic Knowledge about Japonica Rice* (2011), p. 7 (Exhibit USA-78), compare with China Agricultural Statistical Reports (2011-2014), (Exhibit USA-77).
[610] United States' first written submission, para. 121; Yuzhu, *Basic Knowledge about Japonica Rice* (2011), p. 7, (Exhibit USA-78). Compare with China Agricultural Statistical Reports (2011-2014), (Exhibit USA-77).
[611] China's response to Panel question No. 96, para. 305; China's comments on the United States' response to Panel question No. 97, paras. 239-240.
[612] Funing, *et al.*, *Alternative Approach to Measure Comparative Advantage in China's Grain Sector* (2001), p. 7 (Exhibit USA-35)
[613] Chen, *Current Situation and Trends in Production of Japonica Rice in China* (2006), p. 2 (2006) (Exhibit USA-36)
[614] Yuzhu, *Basic Knowledge about Japonica Rice* (2011), p. 7 (Exhibit USA-78)

identified from the three reports[615], for the data it submitted to the Panel.[616] China thus states that it is not in a position to confirm the accuracy of these data, let alone to agree with them.

7.377. We agree with China that China's Statistical Yearbooks do not distinguish between Indica and Japonica rice when reporting production values. We also agree with China that the evidence provided by the United States does not refer to the years at issue in this dispute, i.e. 2012-2015, and that it is not sourced from official reports. In this connection, we have not been able to determine how the United States has arrived at its proportions of Japonica rice in various provinces from the evidence provided − the relevant information to do this does not seem to be present in the exhibits provided by the United States. We note, however, that China did not submit any evidence to support its contention of the inaccuracy of the United States' calculation, nor did it provide any alternative proportions to be used by the Panel. The evidence on the record does not contain any other source with more recent or official data on the breakdown of the two types of rice by province.

7.378. Given the above, particularly the differences between the parties' approaches when determining the total proportion of Japonica rice produced in China, the Panel will conduct two sets of calculations: one set will broadly follow the United States' approach, using the data provided by the United States, where available, for the volumes of rice used to determine the total value of production and the QEP, and the other set of calculations will broadly follow China's approach and will use the data provided by China, where available, for the volumes of rice used to determine the total value of production and the QEP.

7.4.7.2.3 Weighted average AAP

7.379. The third and final issue relates to the use of a weighted average to calculate one single AAP value for Indica rice when running the MPS Formula.

7.380. China argues that, given there are separate AAPs for early-season and mid-late-season Indica rice, a weighted average AAP should be determined for Indica rice as a whole.[617] The weight China assigns to each type of rice for each year is the actual purchased amount in the respective year.[618]

7.381. We agree with China that its measures provide for two separate AAP values: one for early-season and the other for mid-late-season Indica rice. However, we are not persuaded that a weighted average is the best approach. This is so because China bases its weighting of the AAP on the amount of rice purchased, and not the QEP as defined by the Panel.[619] In our view, a simple average of the two AAPs is suitable to determine an AAP for Indica rice as a whole. Thus, the Panel will not use China's weighted average approach for the AAPs for Indica rice. It will instead use a simple average where necessary.

---

[615] Hansen, et al., *China's Japonica Rice Market*, p. 38 (2002), (Exhibit USA-34); Chen, *Current Situation and Trends in Production of Japonica Rice in China* (2006), p. 7 (2006), (Exhibit USA-36), Yuzhu, *Basic Knowledge about Japonica Rice* (2011), p. 7, (Exhibit USA-78).

[616] China's comments on the United States' response to Panel question No. 97, para. 240.

[617] China's first written submission, para. 237, Table 10.

[618] China's first written submission, para. 237.

[619] In any event, if the Panel were to consider that China had meant for the weight to derive from a variable QEP (however defined), rather than a static "amount purchased", the Panel notes that the results would be mathematically equivalent in this case, if the other data inputs remained constant. See the formula below:

Summed MPS for early- and mid-late-season Indica rice:

$$MPSind = MPSe + MPSml = (AAPe - FERPind) * QEPe + (AAPml - FERPind) * QEPml$$

China uses the following weighted average AAP in its calculation of MPS for Indica rice:

$$MPSind = \left(\frac{AAPe * QEPe + AAPml * QEPml}{QEPe + QEPml} - FERPind\right) * (QEPe + QEPml)$$

Both methodologies used in this case are mathematically equivalent.

$$MPSind = MPSe + MPSml = (AAPe - FERPind) * QEPe + (AAPml - FERPind) * QEPml$$
$$= AAPe * QEPe + AAPml * QEPml - FERPind * (QEPe + QEPml)$$
$$= \left(\frac{\boldsymbol{AAPe * QEPe + AAPml * QEPml}}{\boldsymbol{QEPe + QEPml}} - \boldsymbol{FERPind}\right) * (\boldsymbol{QEPe + QEPml})$$

7.4.7.2.4 Conclusion on these issues

7.382. For the reasons outlined above, we will conduct two sets of calculations:

a. In the first set of calculations, we broadly follow the United States' approach. This involves using the United States' national breakdown of Japonica and Indica rice (at a 31.6% ratio), as well as the United States' breakdown in the covered provinces. For the calculation of MPS for Indica rice, specifically, we will calculate two different MPS values, one for early-season and the other for mid- late-season, using the two separate AAPs in China's measures. Finally, we will add them up to arrive at an MPS for Indica rice as a whole. This MPS value is then divided by the total value of production of all Indica rice in China (a sum of early- and mid-late-season based on the United States' 31.6% ratio).

b. In the second set of calculations, we broadly follow China's approach. This involves using China's national breakdown of Japonica and Indica rice (at a 33.3% ratio), as well as a proxy breakdown of rice production in the covered provinces. For the calculation of MPS for Indica rice, specifically, we will calculate one MPS value for Indica rice, using a simple average of the early- and mid-late-season AAPs. This MPS value is then divided by the total value of production of all Indica rice in China (based on China's 33.3% ratio).

7.383. As will be seen below, in either set of calculations, the result is above China's 8.5% *de minimis* level for both Indica and Japonica rice, and the average difference between the United States' and China's alternatives is approximately 0.27 percentage points for Indica and 0.25 percentage points for Japonica. In our view, this difference is negligible and does not affect our final conclusion regarding China's compliance with its domestic support commitments.

7.4.7.2.5 Japonica rice

7.4.7.2.5.1 Japonica rice (United States' approach)

7.384. Table 10 sets out all the variables required to carry out the MPS formula and derive a percentage to compare against China's 8.5% *de minimis* level, namely the AAP, the FERP, the QEP and the total value of production. First, it sets out the total national production of Japonica rice (the total national production of *all* rice in China multiplied by 0.316, which the United States argues is necessary to arrive at the correct proportion of Japonica). It goes on to multiply this total national production of Japonica rice by the producer price for each year, to calculate the total value of production of Japonica rice.

7.385. The table then determines the QEP. This is done by (i) setting out the volume of production of Japonica rice in each of the covered provinces, as provided exclusively by the United States, and then (ii) subtracting the out-of-grade production from each of these provinces. The QEP per province is then totalled to determine the final QEP.

7.386. The AAP is the price set out in the relevant measures, multiplied by 20 to obtain a price expressed in renminbi/ton.

7.387. The FERP is the average of three external reference prices for the years 1996-1998, as set out in Appendix DS 5-4 of China's tables of supporting material. We adjust this FERP downwards to the level of unmilled rice by multiplying it by 0.7, as discussed earlier.

7.388. To calculate an MPS value, the adjusted FERP is subtracted from the AAP. The resulting price differential is multiplied by the QEP. The resulting monetary value is the MPS for a specific year. Finally, this MPS is divided by the total value of production above to arrive at a percentage which can be compared with China's 8.5% *de minimis* level.

Table 10: Calculation of MPS for Japonica rice from 2012-2015 (United States' breakdown)

Japonica rice MPS Calculation (US)	Units	2012	2013	2014	2015
Total national production[620]	million tons	64.539	64.341	65.256	65.760
Producer price[621]	¥/ton	2,919.60	2,936.60	3,035.20	2,951.20
Total value of production	million ¥	188,426.83	188,944.93	198,065.65	194,070.65
Average 1996-1998 FERP (f.o.b. prices - milled)[622]	¥/ton	3290.63	3290.63	3290.63	3290.63
Volume of production by covered province[623]					
Liaoning	million tons	5.078	5.069	4.515	4.677
Jilin	million tons	5.320	5.633	5.876	6.301
Heilongjiang	million tons	21.712	22.206	22.510	21.997
Jiangsu	million tons	16.360	16.551	16.461	16.811
Anhui	million tons	2.422	2.364	2.431	2.592
Total	million tons	50.892	51.823	51.793	52.378
Out-of-grade percentage[624]					
Liaoning	percentage	0.0	0.0	0.0	0.0
Jilin	percentage	0.0	0.0	0.0	0.0
Heilongjiang	percentage	0.0	0.0	0.0	0.3
Jiangsu	percentage	0.0	0.0	0.0	1.5
Anhui	percentage	0.0	0.0	0.0	0.0
QEP per province					
Liaoning	million tons	5.078	5.069	4.515	4.677
Jilin	million tons	5.320	5.633	5.876	6.301
Heilongjiang	million tons	21.712	22.206	22.510	21.931
Jiangsu	million tons	16.360	16.551	16.461	16.559
Anhui	million tons	2.422	2.364	2.431	2.592
MPS Calculation					
QEP	million tons	50.892	51.823	51.793	52.060
AAP (unmilled)[625]	¥/ton	2,800.00	3,000.00	3,100.00	3,100.00
Average 1996-1998 FERP (unmilled equivalent)	¥/ton	2303.44	2303.44	2303.44	2303.44
Japonica MPS = (AAP-adjusted FERP)*QEP	million RMB	25,270.76	36,097.66	41,256.06	41,468.62
MPS / Total value of production	percentage	13.41	19.10	20.83	21.37

[620] United States' response to Panel question No. 73, Table 9 (first substantive meeting); China's Statistical Yearbook, Table 12-10, (2016), (Exhibit USA-18); China's Statistical Yearbook, Table 12-10 (2015), (Exhibit USA-73); China's Statistical Yearbook, Table 12-10 (2014), (Exhibit USA-74); China's Statistical Yearbook, Table 13-15 (2013), (Exhibit USA-75).

[621] China's first written submission, para. 258, Table 15; Agricultural Product Cost and Returns 2010-2016, (Exhibit USA-81/CHN-67). United States' first written submission, para. 122; China's Farm Gate Prices 1995 to 2015 (Exhibit USA-79).

[622] WT/ACC/CHN/38/Rev.3, Appendix DS 5-3, (Exhibit USA-43).

[623] United States' response to Panel question No. 73, Table 8 (first substantive meeting); China's Statistical Yearbook, Table 12-10, (2016), (Exhibit USA-18); China's Statistical Yearbook, Table 12-10 (2015), (Exhibit USA-73); China's Statistical Yearbook, Table 12-10 (2014), (Exhibit USA-74); China's Statistical Yearbook, Table 13-15 (2013), (Exhibit USA-75).

[624] China's response to Panel question No. 93, Table 6; United States' response to Panel question No. 93, China's States Administration of Grain, Standard & Quality Centre, Quality Survey Reports 2010-2016 (Exhibit USA-98).

[625] China's first written submission, Table 8; 2012 Rice Annual Notice, (Exhibit USA-39/CHN-23B); 2013 Rice Annual Notice, (Exhibit USA-40/CHN-24B); 2014 Rice Annual Notice, (Exhibit USA-41/CHN-25B); 2015 Rice Annual Notice, (Exhibit USA-42/CHN-26B); United States' first written submission, para. 112, Table 6.

7.4.7.2.5.2 Japonica rice (China's approach)

7.389. Table 11 sets out all the variables required to run the MPS formula and derive a percentage to compare against China's 8.5% *de minimis* level, broadly using China's approach. First, it sets out the total national production of Japonica rice (the total national production of *all* rice in China multiplied by 0.333, which China argues is necessary to arrive at the correct proportion of Japonica). It goes on to multiply this total national production of Japonica rice by the producer price for each year, to calculate the total value of production of Japonica rice.

7.390. The table then determines the QEP. While China does provide the percentage of out-of-grade production in each province, it did not provide data on production by province. Thus, in the case of Japonica rice, the table first sets out the data on the total volume of production of Japonica rice in all of the covered provinces, without any provincial breakdown. This value was arrived at by multiplying the total volume of production of all rice in the covered provinces by 0.333. The table then averages the percentages of out-of-grade production provided by China into a single figure. Calculating the QEP involves (i) setting out the total volume of production of Japonica rice in all of the covered provinces and then (ii) subtracting the out-of-grade production (calculated using the average of the out-of-grade percentages) from this total. The result is the final QEP.

7.391. The AAP is the price set out in the relevant measures, multiplied by 20 to obtain a price expressed in renminbi/ton.

7.392. The FERP is an average of three external reference prices for the years 1996-1998, as set out in Appendix DS 5-4 of China's tables of supporting material. We adjust this FERP downwards to the level of unmilled rice by multiplying it by 0.7.

7.393. To calculate an MPS value, first the adjusted FERP is subtracted from the AAP. The resulting price differential is multiplied by the QEP to arrive at an MPS for a specific year, expressed as a monetary value. Finally, this MPS is divided by the total value of production above to arrive at a percentage which can be compared with China's 8.5% *de minimis* level.

Table 11: Calculation of MPS for Japonica rice from 2012-2015 (China's breakdown)

Japonica rice MPS Calculation (China)	Units	2012	2013	2014	2015
Total national production[626]	million tons	68.011	67.803	68.767	69.339
Producer price[627]	¥/ton	2,919.60	2,936.60	3,035.20	2,951.20
Total value of production	million ¥	198,563.71	199,109.69	208,721.09	204,633.04
Average 1996-1998 FERP (f.o.b. prices - milled)[628]	¥/ton	3290.63	3290.63	3290.63	3290.63
Volume of production[629]					
Total in covered provinces	million tons	53.059	53.309	53.966	54.659
Out-of-grade percentage[630]					
Liaoning	percentage	0.0	0.0	0.0	0.0
Jilin	percentage	0.0	0.0	0.0	0.0
Heilongjiang	percentage	0.0	0.0	0.0	0.3
Jiangsu	percentage	0.0	0.0	0.0	1.5
Anhui	percentage	0.0	0.0	0.0	0.0
Average	percentage	0.0	0.0	0.0	0.4
MPS Calculation					
QEP	million tons	53.059	53.309	53.966	54.462
AAP (unmilled)[631]	¥/ton	2,800.00	3,000.00	3,100.00	3,100.00
Average 1996-1998 FERP (unmilled equivalent)	¥/ton	2303.44	2303.44	2303.44	2303.44
Japonica MPS = (AAP-adjusted FERP)*QEP	million RMB	26,347.09	37,132.90	42,987.41	43,382.13
MPS / Total value of production	percentage	13.27	18.65	20.60	21.20

[626] Production amount of Japonica rice = national total * 33.3%; See China's first written submission, Table 5; China's Rural Statistical Yearbook (2013), (Exhibit CHN-49), p. 152; China's Rural Statistical Yearbook (2015), (Exhibit CHN-50), p. 164; China's Rural Statistical Yearbook (2016), (Exhibit USA-76/CHN-33), p. 168; China's Rural Statistical Yearbook (2016), (Exhibit USA-76/CHN-33), p. 167.

[627] China's first written submission, para. 258, Table 15; Agricultural Product Cost and Returns 2010-2016, (Exhibit USA-81/CHN-67). United States' first written submission, para. 122; China's Farm Gate Prices 1995 to 2015 (Exhibit USA-79).

[628] WT/ACC/CHN/38/Rev.3, Appendix DS 5-3, (Exhibit USA-43).

[629] These figures were arrived at by taking the total production of rice in the provinces covered by the measures and multiplying this by 0.333. China's Rural Statistical Yearbook (2013), (Exhibit CHN-49), p. 152; China's Rural Statistical Yearbook (2015), (Exhibit CHN-50), p. 164; China's Rural Statistical Yearbook (2016), (Exhibit USA-76/CHN-33), p. 168; China's Rural Statistical Yearbook (2016), (Exhibit USA-76/CHN-33), p. 167.

[630] China's response to Panel question No. 93, Table 6; United States' response to Panel question No. 93, China's States Administration of Grain, Standard & Quality Centre, Quality Survey Reports 2010-2016 (Exhibit USA-98).

[631] China's first written submission, Table 8; 2012 Rice Annual Notice, (Exhibit USA-39/CHN-23B); 2013 Rice Annual Notice, (Exhibit USA-40/CHN-24B); 2014 Rice Annual Notice, (Exhibit USA-41/CHN-25B); 2015 Rice Annual Notice, (Exhibit USA-42/CHN-26B); United States' first written submission, para. 112, Table 6.

7.4.7.2.6 Indica rice (United States' approach)

7.4.7.2.6.1 Early-season Indica rice

7.394. Table 12 sets out all the variables required to run the MPS formula for early-season Indica rice following the United States' approach. First, it sets out the total national production of early-season Indica rice, provided exclusively by the United States. It goes on to multiply this total national production by the producer price for early-season Indica rice for each year, to calculate the total value of production.

7.395. The table then determines the QEP. This is done by (i) setting out the volume of production of early-season Indica in each of the covered provinces, as provided exclusively by the United States, and then (ii) subtracting the out-of-grade production from each of these provinces. The QEP per province is then totalled to determine the final QEP.

7.396. The AAP is the price set out in the relevant measures, multiplied by 20 to obtain a price expressed in renminbi/ton.

7.397. The FERP is the average of three external reference prices for the years 1996-1998 for "Indica rice", as set out in Appendix DS 5-4 of China's tables of supporting material. We adjust this FERP downwards to the level of unmilled rice by multiplying it by 0.7, as discussed above.

7.398. To calculate an MPS value, first the adjusted FERP is subtracted from the AAP. The resulting price differential is multiplied by the QEP. The resulting monetary value is the MPS for a specific year. Finally, this MPS is divided by the total value of production above to arrive at a percentage. This percentage, in the case of early-season and mid-late-season Indica rice, is for descriptive purposes only, as it is a total MPS percentage for Indica rice that we will compare against China's 8.5% *de minimis* value.

Table 12: Calculation of MPS for early-season Indica rice from 2012-2015 (United States' breakdown)

Early-Season Indica rice MPS Calculation (US)	Units	2012	2013	2014	2015
Total national production[632]	million tons	33.291	34.145	34.012	33.687
Early-season producer price[633]	¥/ton	2,622.00	2,603.20	2,681.60	2,687.40
Total value of production	million ¥	87,289.00	88,886.26	91,206.58	90,530.44
Average 1996-1998 FERP (f.o.b. prices - milled)	¥/ton	2343.00	2343.00	2343.00	2343.00
Volume of production by covered province[634]					
Anhui	million tons	1.320	1.308	1.283	1.092
Jiangxi	million tons	8.002	8.280	8.201	8.119
Hubei	million tons	2.089	2.228	2.387	2.523
Hunan	million tons	8.187	8.605	8.548	8.589
Guangxi Zhuang Autonomous Region	million tons	5.449	5.552	5.433	5.288
Total	million tons	25.047	25.973	25.852	25.611
Out-of-grade percentage[635]					
Anhui	percentage	0.0	0.0	0.0	0.0
Jiangxi	percentage	1.0	1.0	0.0	0.0
Hubei	percentage	0.0	0.0	0.0	0.0
Hunan	percentage	1.0	0.0	3.0	1.0
Guangxi Zhuang Autonomous Region	percentage	1.0	1.0	1.0	0.0
QEP per province					
Anhui	million tons	1.320	1.308	1.283	1.092
Jiangxi	million tons	7.922	8.197	8.201	8.119
Hubei	million tons	2.089	2.228	2.387	2.523
Hunan	million tons	8.105	8.605	8.292	8.503
Guangxi Zhuang Autonomous Region	million tons	5.395	5.496	5.379	5.288
MPS Calculation					
QEP	million tons	24.831	25.835	25.541	25.525
AAP (unmilled)[636]	¥/ton	2,400.00	2,640.00	2,700.00	2,700.00
Average 1996-1998 FERP (unmilled equivalent)[637]	¥/ton	1640.10	1640.10	1640.10	1640.10
Early-season Indica MPS = (AAP-adjusted FERP)*QEP	million RMB	18,868.79	25,832.10	27,071.15	27,054.06

[632] United States' response to Panel question No. 73, Table 9 (first substantive meeting); China's Statistical Yearbook, Table 12-10, (2016), (Exhibit USA-18); China's Statistical Yearbook, Table 12-10 (2015), (Exhibit USA-73); China's Statistical Yearbook, Table 12-10 (2014), (Exhibit USA-74); China's Statistical Yearbook, Table 13-15 (2013), (Exhibit USA-75).

[633] China's first written submission, para. 258, Table 15; Agricultural Product Cost and Returns 2010-2016, (Exhibit USA-81/CHN-67). United States' first written submission, para. 122; China's Farm Gate Prices 1995 to 2015 (Exhibit USA-79).

[634] United States' response to Panel question No. 73, Table 8 (first substantive meeting); China's Rural Statistical Yearbook (2016), Table 7-18, (Exhibit USA-76/CHN-33); China Agricultural Statistical Reports (2011-2014), (Exhibit USA-77), pp. 5, 11, 19.

[635] China's response to Panel question No. 93, Table 6; United States' response to Panel question No. 93, China's States Administration of Grain, Standard & Quality Centre, Quality Survey Reports 2010-2016 (Exhibit USA-98).

[636] China's first written submission, Table 8; 2012 Rice Annual Notice, (Exhibit USA-39/CHN-23B); 2013 Rice Annual Notice, (Exhibit USA-40/CHN-24B); 2014 Rice Annual Notice, (Exhibit USA-41/CHN-25B); 2015 Rice Annual Notice, (Exhibit USA-42/CHN-26B).

[637] WT/ACC/CHN/38/Rev.3, Appendix DS 5-3, (Exhibit USA-43).

Early-Season Indica rice MPS Calculation (US)	Units	2012	2013	2014	2015
MPS / National value of production of Indica	percentage	21.62	29.06	29.68	29.88

7.4.7.2.6.2 Mid-Late-Season Indica rice

7.399. Table 13 sets out all the variables required to run the MPS formula for mid-late-season Indica rice following the United States' approach. First, it sets out the total national production of mid-late-season Indica rice, which the United States asserts is calculated by subtracting the volume of early-season Indica and Japonica rice from the total volume of Chinese rice production. The table goes on to multiply this total national production by the producer price for an average of the mid- & late-season producer price for each year, to calculate the total value of production.

7.400. The table then determines the QEP. This is done by (i) setting out the volume of production of mid-late-season Indica rice in each of the covered provinces, as provided exclusively by the United States, and then (ii) subtracting the out-of-grade production from each of these provinces. The QEP per province is then totalled to determine the final QEP.

7.401. The AAP is the price set out in the relevant measures, multiplied by 20 to obtain a price expressed in renminbi/ton.

7.402. The FERP is the average of three external reference prices for the years 1996-1998 for "Indica rice", as set out in Appendix DS 5-4 of China's tables of supporting material. We adjust this FERP downwards to the level of unmilled rice by multiplying it by 0.7, as discussed above.

7.403. To calculate an MPS value, first the adjusted FERP is subtracted from the AAP. The resulting price differential is multiplied by the QEP. The resulting monetary value is the MPS for a specific year. Finally, this MPS is divided by the total value of production above to arrive at a percentage. This percentage, in the case of early-season and mid-late-season Indica rice, is for descriptive purposes only, as it is a total MPS percentage for Indica rice which is to be compared against China's 8.5% de minimis value.

Table 13: Calculation of MPS for mid-late-season Indica rice from 2012-2015 (United States' breakdown)

Mid-late-season Indica rice MPS Calculation (US)	Units	2012	2013	2014	2015
Total national production[638]	million tons	106.406	105.136	107.239	108.739
Average of Mid- & Late-season producer price[639]	¥/ton	2,733.40	2,670.30	2,748.10	2,694.30
Total value of production	million ¥	290,851.32	280,743.61	294,702.91	292,975.22
Average 1996-1998 FERP (f.o.b. prices - milled)	¥/ton	2343.00	2343.00	2343.00	2343.00
Volume of production by covered province[640]					
Jiangsu	million tons	2.641	2.672	2.658	2.714

[638] United States' response to Panel question No. 73, Table 9 (first substantive meeting); China's Statistical Yearbook, Table 12-10, (2016), (Exhibit USA-18); China's Statistical Yearbook, Table 12-10 (2015), (Exhibit USA-73); China's Statistical Yearbook, Table 12-10 (2014), (Exhibit USA-74); China's Statistical Yearbook, Table 13-15 (2013), (Exhibit USA-75).

[639] China's first written submission, para. 258, Table 15; Agricultural Product Cost and Returns 2010-2016, (Exhibit USA-81/CHN-67). United States' first written submission, para. 122; China's Farm Gate Prices 1995 to 2015 (Exhibit USA-79). It is prudent to use an average of the producer prices for mid- and late-season Indica rice. As an incorrect average of the producer price for mid-late-season rice was submitted by the United States, the calculation for this type of rice is performed using the correctly averaged producer price for mid-late-season Indica rice.

[640] United States' response to Panel question No. 73, Table 8 (first substantive meeting); China's Rural Statistical Yearbook (2016), Table 7-18, (Exhibit USA-76/CHN-33); China Agricultural Statistical Reports (2011-2014), (Exhibit USA-77), pp. 5, 11, 19.

Mid-late-season Indica rice MPS Calculation (US)	Units	2012	2013	2014	2015
Anhui	million tons	10.193	9.951	10.232	10.910
Jiangxi	million tons	11.758	11.760	12.051	12.153
Henan	million tons	4.926	4.858	5.286	5.315
Hubei	million tons	14.425	14.539	14.908	15.584
Hunan	million tons	18.130	17.011	17.792	17.859
Guangxi Zhuang Autonomous Region	million tons	5.971	6.010	6.228	6.090
Sichuan	million tons	15.354	15.490	15.261	15.526
Total	million tons	83.398	82.291	84.416	86.151
Out-of-grade percentage[641]					
Jiangsu	percentage	0.0	0.0	0.0	0.0
Anhui	percentage	1.0	1.0	0.8	0.0
Jiangxi	percentage	1.0	0.0	0.0	0.0
Henan	percentage	0.0	3.0	2.2	1.1
Hubei	percentage	0.0	4.0	0.7	0.0
Hunan	percentage	0.0	1.0	0.0	1.7
Guangxi Zhuang Autonomous Region	percentage	1.0	1.0	0.0	0.0
Sichuan	percentage	0.0	0.0	1.3	1.0
QEP per province					
Jiangsu	million tons	2.641	2.672	2.658	2.714
Anhui	million tons	10.091	9.851	10.150	10.910
Jiangxi	million tons	11.640	11.760	12.051	12.153
Henan	million tons	4.926	4.712	5.170	5.257
Hubei	million tons	14.425	13.957	14.804	15.584
Hunan	million tons	18.130	16.841	17.792	17.555
Guangxi Zhuang Autonomous Region	million tons	5.911	5.950	6.228	6.090
Sichuan	million tons	15.354	15.490	15.063	15.371
MPS Calculation					
QEP	million tons	83.119	81.234	83.915	85.634
AAP (unmilled)[642]	¥/ton	2,500.00	2,700.00	2,760.00	2,760.00
Average 1996-1998 FERP (unmilled equivalent)	¥/ton	1640.10	1640.10	1640.10	1640.10
Mid-late-season Indica MPS = (AAP-adjusted FERP)*QEP	million RMB	71,473.84	86,099.90	93,976.52	95,901.15
MPS / Value of Production	percentage	24.57	30.67	31.89	32.73

7.4.7.2.6.3 Total Indica rice MPS calculation

7.404. Table 14 sets out the total value of production of all Indica rice calculated by summing the value of production of early- and mid-late-season Indica rice, provided in Tables 12 and 13 above.

[641] China's response to Panel question No. 93, Table 6; United States' response to Panel question No. 93, China's States Administration of Grain, Standard & Quality Centre, Quality Survey Reports 2010-2016 (Exhibit USA-98).

[642] China's first written submission, Table 8; 2012 Rice Annual Notice, (Exhibit USA-39/CHN-23B); 2013 Rice Annual Notice, (Exhibit USA-40/CHN-24B); 2014 Rice Annual Notice, (Exhibit USA-41/CHN-25B); 2015 Rice Annual Notice, (Exhibit USA-42/CHN-26B).

Table 14: Total value of production for Indica rice from 2012-2015 (United States' breakdown)

	Units	2012	2013	2014	2015
Total value of production (all Indica rice)	million RMB	378,140.32	369,629.88	385,909.49	383,505.66

7.405. Table 15 sets out the total MPS for Indica rice, which is the sum of the MPS for early- and mid-late-season Indica rice, set out in Tables 12 and 13 above. This total MPS is divided by the total value of production of Indica rice (calculated in Table 14) to arrive at a percentage which can be compared with China's 8.5% *de minimis* level.

Table 15: Calculation of total MPS for Indica rice from 2012-2015 (United States' breakdown)

Total Indica rice MPS calculation	Units	2012	2013	2014	2015
Total MPS for Indica rice = early-season MPS + mid-late-season MPS)	million RMB	90,342.63	111,931.99	121,047.67	122,955.21
MPS / Total value of production Indica rice	percentage	23.89	30.28	31.37	32.06

7.4.7.2.7 Indica rice (China's approach)

7.406. Table 16 sets out all the variables required to run the MPS formula for Indica rice broadly following China's approach. First, it sets out the total national production of Indica rice, which China asserts is the amount of rice which is not Japonica rice (i.e. 66.7% of total national production).

7.407. The table goes on to multiply this total national production by the producer price calculated as an average of the early-, mid- & late-season producer prices for each year, to calculate the total value of production.

7.408. The table then determines the QEP. While China does provide the percentage of out-of-grade production in each province, it did not provide data on production by province. Thus, in the case of Indica rice, the table first sets out the data on the volume of production of Indica rice in all of the covered provinces. This is the total volume of production of all rice in the covered provinces, multiplied by 0.667. The table then averages the percentages of out-of-grade production provided by China into a single figure. Calculating the QEP involves (i) setting out the total volume of production of Indica rice in all of the covered provinces and then (ii) subtracting the out-of-grade production (calculated using the average out-of-grade percentage) from this total.

7.409. The AAP is an average of the early and mid-late prices set out in the relevant measures, multiplied by 20 to obtain a price expressed in renminbi/ton.

7.410. The FERP is the average of three external reference prices for the years 1996-1998 for Indica rice, as set out in Appendix DS 5-4 of China's tables of supporting material. We adjust this FERP downwards to the level of unmilled rice by multiplying it by 0.7, as discussed above.

7.411. To calculate an MPS value, first the adjusted FERP is subtracted from the AAP. The resulting price differential is multiplied by the QEP. The resulting monetary value is the MPS for a specific year. Finally, this MPS is divided by the total value of production above to arrive at a percentage which can be compared with China's 8.5% *de minimis* level

Table 16: Calculation of MPS for Indica rice from 2012-2015 (China's breakdown)

Indica rice MPS Calculation (China)	Units	2012	2013	2014	2015
Total national production[643]	million tons	136.225	135.809	137.740	138.886
Average of early-, mid- and late-season producer price	¥/ton	2,696.27	2,647.93	2,725.93	2,692.00
Total value of production	million ¥	367,300.04	359,613.72	375,470.52	373,881.31
Average 1996-1998 FERP (f.o.b. prices - milled)	¥/ton	2343.00	2343.00	2343.00	2343.00
Volume of production[644]					
Total in covered provinces	million tons	106.278	106.778	108.095	109.481
Out-of-grade percentage[645]					
Anhui	percentage	0.5	0.5	0.4	0.0
Jiangxi	percentage	1.0	0.5	0.0	0.0
Hubei	percentage	0.0	2.0	0.4	0.0
Hunan	percentage	0.5	0.5	1.5	1.4
Guangxi Zhuang Autonomous Region	percentage	1.0	1.0	0.5	0.0
Jiangsu	percentage	0.0	0.0	0.0	0.0
Henan	percentage	0.0	3.0	2.2	1.1
Sichuan	percentage	0.0	0.0	1.3	1.0
Average	percentage	0.4	0.9	0.8	0.4
MPS Calculation					
QEP	million tons	105.879	105.777	107.250	109.009
AAP average of Early & Mid-Late (unmilled)[646]	¥/ton	2,450.00	2,670.00	2,730.00	2,730.00
Average 1996-1998 FERP (unmilled equivalent)	¥/ton	1640.10	1640.10	1640.10	1640.10
Indica MPS = (AAP-adjusted FERP)*QEP	million RMB	85,751.59	108,939.72	116,891.99	118,809.17
MPS / Total value of production	percentage	23.35	30.29	31.13	31.78

7.4.8 Conclusion on the calculation of China's Current Total AMS

7.412. From the above calculations, we observe that China's product-specific AMS, as provided through market price support, for each of wheat, Indica rice and Japonica rice in the years 2012,

[643] Production amount of Indica rice = national total * (1-33.3%); See China's first written submission, Table 5; China's Rural Statistical Yearbook (2013), (Exhibit CHN-49), p. 152; China's Rural Statistical Yearbook (2015), (Exhibit CHN-50), p. 164; China's Rural Statistical Yearbook (2016), (Exhibit USA-76/CHN-33), p. 168; China's Rural Statistical Yearbook (2016), (Exhibit USA-76/CHN-33), p. 167.

[644] These figures were arrived at by taking the total production of rice in the provinces covered by the measures and multiplying this by 0.667. No provincial breakdown is given due to insufficient data on the record. China's Rural Statistical Yearbook (2013), (Exhibit CHN-49), p. 152; China's Rural Statistical Yearbook (2015), (Exhibit CHN-50), p. 164; China's Rural Statistical Yearbook (2016), (Exhibit USA-76/CHN-33), p. 168; China's Rural Statistical Yearbook (2016), (Exhibit USA-76/CHN-33), p. 167.

[645] China's response to Panel question No. 93, Table 6; United States' response to Panel question No. 93, China's States Administration of Grain, Standard & Quality Centre, Quality Survey Reports 2010-2016 (Exhibit USA-98).

[646] China's first written submission, Table 8; 2012 Rice Annual Notice, (Exhibit USA-39/CHN-23B); 2013 Rice Annual Notice, (Exhibit USA-40/CHN-24B); 2014 Rice Annual Notice, (Exhibit USA-41/CHN-25B); 2015 Rice Annual Notice, (Exhibit USA-42/CHN-26B).

2013, 2014 and 2015, is above China's 8.5% *de minimis* threshold. For rice, this is so regardless of which of the variations in the calculations is employed to produce the AMS values, as discussed above. Therefore, an above-nil AMS value is to be included in China's Current Total AMS figures.

7.413. We thus find that China's level of support in favour of domestic producers is in excess of China's commitment level of "nil", set forth in Section I of Part IV of China's Schedule of Concessions on Goods (CLII). Therefore, China is not in compliance with its domestic support commitments pursuant to Articles 3.2 and 6.3 of the Agreement on Agriculture.

7.5 Claim under Article 7.2(b) of the Agreement on Agriculture

7.414. The Panel recalls that the United States made an alternative claim, to the extent that China's commitment level of "nil" were understood as not setting out any commitment, requesting the Panel to find that the challenged measures are inconsistent with China's obligation under Article 7.2(b) of the Agreement on Agriculture.[647] Given our findings under Articles 3.2 and 6.3 of the Agreement on Agriculture, we do not find it necessary to conduct an assessment of the United States' alternative claim.

8 CONCLUSIONS AND RECOMMENDATIONS

8.1. The Panel concludes that in the years 2012, 2013, 2014 and 2015, China provided domestic support, expressed in terms of its Current Total AMS, in the form of market price support to producers of wheat, Indica rice and Japonica rice in excess of its commitment level of "nil", set forth in Section I of Part IV of China's Schedule of Concessions on Goods CLII. As such, China acted inconsistently with its obligations under Articles 3.2 and 6.3 of the Agreement on Agriculture.

8.2. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. The Panel concludes that, to the extent that the measures at issue are inconsistent with certain provisions of the Agreement on Agriculture, they have nullified or impaired benefits accruing to the United States under that agreement.

8.3. Pursuant to Article 19.1 of the DSU, the Panel recommends that China bring its inconsistent measures into conformity with its obligations under the Agreement on Agriculture.

_____

[647] United States' first written submission, para. 137 and fn 251.

WORLD TRADE ORGANIZATION

WT/DS511/R/Add.1

28 February 2019

(19-1134)

Original: English

CHINA – DOMESTIC SUPPORT FOR AGRICULTURAL PRODUCERS

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to D to the Report of the Panel to be found in document WT/DS511/R.

_____

LIST OF ANNEXES

ANNEX A

WORKING PROCEDURES OF THE PANEL

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX D

RAW DATA

ANNEX A

WORKING PROCEDURES OF THE PANEL

ANNEX A

WORKING PROCEDURES OF THE PANEL

ADOPTED ON 11 AUGUST 2017

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

5. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which its presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

6. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If the United States requests such a ruling, China shall submit its response to the request in its first written submission. If China requests such a ruling, the United States shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

7. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

8. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. The Panel may grant an extension to this deadline. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

9. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions attached as Annex 1, to the extent that it is practical to do so.

.....

10. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by the United States could be numbered USA-1, USA-2, etc. If the last exhibit in connection with the first submission was numbered USA-5, the first exhibit of the next submission thus would be numbered USA-6.

Questions

11. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting.

Substantive meetings

12. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

13. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite the United States to make an opening statement to present its case first. Subsequently, the Panel shall invite China to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the United States presenting its statement first.

14. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask China if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite China to present its opening statement, followed by the United States. If China chooses not to avail itself of that right, the Panel shall invite the United States to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

15. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

16. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

17. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

18. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

19. Each party shall submit an integrated executive summary of the facts and arguments as presented to the Panel in its written submissions and oral statements, in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions. Each party's integrated executive summary shall not exceed 30 pages. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions.

20. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

Interim review

21. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

22. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

23. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

24. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file 2 paper copies of all documents it submits to the Panel. Exhibits may be filed in 4 copies on CD-ROM or DVD and 2 paper copies. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy to ****.****@wto.org, ****.****@wto.org and ****.****@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When

the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

25. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

EXECUTIVE SUMMARY OF THE U.S. FIRST WRITTEN SUBMISSION

1. Each year, the People's Republic of China ("China") provides a significant level of domestic support to its agricultural producers through a variety of subsidy programs and other measures. This dispute addresses a single means of agricultural support, "market price support" ("MPS"), which China utilizes to support farmer incomes and increase production for basic agricultural products, including wheat, Indica rice, Japonica rice, and corn. Through this form of support alone, China has provided support far in excess of its WTO commitments. The level of domestic support China provided to its agricultural producers in 2012, 2013, 2014, and 2015 exceeded the level set out in Section I of Part IV of China's Schedule of Concessions on Goods ("CLII"). China's level of domestic support in favor of agricultural producers has therefore breached Articles 3.2 and 6.3 of the *Agreement on Agriculture* ("Agriculture Agreement") for the years 2012, 2013, 2014, and 2015.

2. China's MPS programs announce on an annual basis an applied administered price that will be available to farmers either immediately upon initiation of each year's program, as for corn, or when market prices drop below the applied administered price, as for wheat, Indica rice, and Japonica rice. This applied administered price is provided or furnished to farmers in the major producing provinces during the period immediately following harvest. By guaranteeing farmers an established price for their commodities, China's MPS programs for wheat, Indica rice, Japonica rice, and corn ensure that commodity prices in the relevant provinces are maintained at the Chinese government's chosen support level.

I. CHINA'S IMPLEMENTATION OF MARKET PRICE SUPPORT PROGRAMS

3. Per the annual policy direction in the *Document Number 1* and regulatory framework provided by the *2004 Grain Distribution Regulation*, China issued annual announcements of minimum prices for wheat, Indica rice (early season and mid-to-late season), and Japonica rice, and implementation plans for purchasing those grains harvested in 2012, 2013, 2014, and 2015 at the established prices. Together these instruments form the wheat, Indica rice, and Japonica rice MPS Programs. China has also maintained similar MPS Programs for corn announced through an annual notice in the years 2012, 2013, 2014, and 2015.

A. China's Wheat Market Price Support Program

4. Wheat is China's second most prevalent crop, after rice, and China is one of the world's top wheat producers. Between 2005 and 2015, wheat production in China increased by 25 percent, with production in 2015 reaching 130.19 million metric tons ("MT") annually.

5. China issues two documents each harvest year to implement the MPS Program for wheat. First, prior to the planting of winter wheat, China announces the annual "minimum purchase price" in a *Notice on Raising the Wheat Minimum Purchase Price* or *Notice on Announcing the Wheat Minimum Purchase Price* ("*Wheat MPS Notices*"). This is China's applied administered price for wheat. China's National Development and Reform Commission ("NDRC"), Ministry of Finance ("MoF"), Ministry of Agriculture ("MoA"), State Administration of Grain, and the Agricultural Development Bank of China jointly issue the annual *Wheat MPS Notice*s.

6. The *Wheat MPS Notices* are directed to China's "development and reform commissions, price bureaus, finance departments (bureaus), agricultural departments (bureaus, commissions, offices), grain bureaus, and Agricultural Development Bank of China branches in all provinces, autonomous regions, and municipalities directly under the central government." The *Wheat MPS Notices* state that "each locality is required to earnestly and properly carry out dissemination work for the grain minimum purchase price policy." The *2015 Wheat MPS Notice* states that "[i]n order to protect the interests of farmers and prevent 'low grain prices hurting farmers,'" the *Notice* is provided to "guide farmers to plant rationally, and promote the stable development of grain production."

7. Second, the NDRC, MoF, MoA, State Administration of Grain, Agricultural Development Bank, and China Grain Reserves Corporation ("Sinograin") publish a *Notice on Issuing the Wheat and Rice*

Minimum Purchase Price Implementation Plan, "in order to implement and fulfill the spirit of the [*2015 Document Number 1*]." Attached to the notice is a detailed *Wheat and Rice Minimum Purchase Price Implementation Plan* (the "*Wheat MPS Implementation Plans*") that is issued "in accordance with the relevant provisions in the [*2004 Grain Distribution Regulation*]."

8. The annual *Wheat MPS Implementation Plans* reaffirm the applied administered price initially announced in the *Wheat MPS Notices*, noting that this is "the at-depot price of direct purchases [of wheat] from farmers by the purchasing and storage depots responsible for making purchases at the minimum purchase price." The *Wheat MPS Implementation Plans* subsequently set forth the parameters of that season's MPS Program for wheat including: (1) the geographic scope, (2) characteristics of qualifying wheat, (3) relevant timeframe, (4) the roles and responsibilities of the numerous Chinese government entities involved in implementing, and financing the MPS Program.

9. Each year to implement the Wheat MPS Program, local offices of Sinograin and the Agricultural Development Bank of China must identify and authorize "entrusted purchasing and storage depots" in each affected province. These depots or warehouses must satisfy a number of specific criteria to be eligible to participate in the program. Further, "the total depot storage capacity volume of the entrusted purchasing and storage depots within each county shall be linked to the forecast volume of grain purchases at minimum purchase prices in that locality."

10. Under the Wheat MPS Program, "entrusted purchasing and storage depots . . . are required to announce, on a board in a prominent location at the purchasing site, policy information relating to the implementation of the minimum purchase price for each grain variety, . . . including the purchase price, quality standards, deduction methods for weight increase of moisture and impurities, the purchase settlement method, and the implementation period, so that farmers can transact in 'grain with peace of mind.'"

11. The *Wheat MPS Implementations Plans* clarify that entrusted purchasing and storage depots "must not" "refuse grain sold by farmers that meets the standard;" "will promptly settle the grain sales price with the farmer, and must not issue IOUs to the farmers." Further, entities charged with making purchases "shall actively enter the market to purchase new grain."

12. Purchase and administration costs under the MPS Program for wheat are financed through loans "secured by a directly affiliated enterprise of [Sinograin], [in the form of] a loan uniformly from the Agricultural Development Bank of China, at the locality [of the depots]." Further, ownership "rights belong to the State Council, and the grain must not be put to use nor mortgaged without approval by the state." The wheat held by the entrusted purchasing and storage depots will eventually be sold "according to the principle of selling at profitable prices, rationally formulate base sales prices, and auction [the grain] at public auctions on grain wholesale markets or online."

13. The Chinese instruments setting out the MPS Programs for wheat instruct central and provincial government officials to initiate a program of wheat purchases on an annual basis. The MPS Programs ensure that farmers in the six major wheat producing provinces are able to make sales of qualifying wheat at the announced applied administered price, if the prevailing domestic market price falls below the applied administered price. As described below, the MPS Programs for Indica rice and Japonica rice operate in a similar manner.

B. China's Indica Rice and Japonica Rice Market Price Support Programs

14. China is the world's largest rice market, accounting for nearly a third of global production and consumption. Between 2005 and 2015, total rice production in China increased by 15 percent, with production in 2015 reaching 208.23 million MT annually.

15. China issues two documents each harvest year to implement the MPS Programs for Indica rice and Japonica rice. China first issues an annual *Notice on Raising the Rice Minimum Purchase Price* or *Notice on Announcing the Rice Minimum Purchase Price* ("*Rice MPS Notices*") each year, which defines the "minimum purchase price" or applied administered price for three products: early-season Indica rice, mid-to-late season Indica rice, and Japonica rice. NDRC, MoF, MoA, State Administration of Grain, and the Agricultural Development Bank jointly issue the annual *Rice MPS Notices.*

16. The *Rice MPS Notices* are directed to China's "development and reform commissions, price bureaus, finance departments (bureaus), agriculture departments (bureaus, commissions, and offices), grain bureaus, and Agricultural Development Bank of China branches of all provinces, autonomous regions, and municipalities directly under the central government." The *Rice MPS Notices* are issued in January or February, which is well in advance of planting. The *Rice MPS Notices* state that "[a]s it is currently the middle of the preparatory spring plowing period, all localities are required to earnestly and properly carry out dissemination work for the grain minimum purchase price policy." The *Rice MPS Notices* continue that the announced price is to "guide farmers to plant rationally, and promote the stable development of grain production."

17. Second, the NDRC, in conjunction with the MoF, MoA, State Administration of Grain, Agricultural Development Bank of China, and Sinograin, publish an annual *Notice on Issuing the Wheat and Rice Minimum Purchase Price Implementation Plan,* "in order to implement and fulfill the spirit of the [2015 Document Number 1]." Attached to the notice is a detailed *Wheat and Rice Minimum Purchase Price Implementation Plan* (the "*Indica Rice and Japonica Rice MPS Implementation Plans*") that is issued "in accordance with the relevant provisions in the [*2004 Grain Distribution Regulation*].

18. Typically, the early Indica rice Implementation Plan is released first, and a joint mid-to-late Indica rice and Japonica rice plan follows during the later planting season. In other instances, the *Indica Rice and Japonica Rice MPS Implementation Plans* are announced in the same document as the *Wheat MPS Implementation Plan,* as was the case for 2015.

19. The annual *Indica Rice and Japonica Rice MPS Implementation Plans* reaffirm the applied administered price initially announced in the *Rice MPS Notices*, noting that this is "the at-depot price of direct purchases [of rice] from farmers by the purchasing and storage depots responsible for making purchases at the minimum purchase price." The *Indica Rice and Japonica Rice MPS Implementation Plans* subsequently set forth the parameters of that season's MPS Program for wheat including: (1) the geographic scope, (2) characteristics of qualifying Indica rice or Japonica rice, (3) relevant timeframe, and (4) the roles and responsibilities of the numerous Chinese government entities involved in implementing, and financing the MPS Program.

20. Each year to implement the Indica Rice and Japonica Rice MPS Programs, local offices of Sinograin and the Agricultural Development Bank of China must identify and authorize "entrusted purchasing and storage depots." These depots or warehouses must satisfy a number of specific criteria to be eligible to participate in the program. Further, "the total depot storage capacity volume of the entrusted purchasing and storage depots within each county shall be linked to the forecast volume of grain purchases at minimum purchase prices in that locality."

21. When the Indica Rice and Japonica Rice MPS Programs are activated, "entrusted purchasing and storage depots . . . are required to announce, on a board in a prominent location at the purchasing site, policy information relating to the implementation of the minimum purchase price for each grain variety, [this information] will include the purchase price, quality standards, deduction methods for weight increase of moisture and impurities, the purchase settlement method, and the implementation period, so that farmers can transact in 'grain with peace of mind.'"

22. The *Indica Rice and Japonica Rice MPS Implementation Plans* clarify that entrusted purchasing and storage depots "must not" "refuse grain sold by farmers that meets the standard," "will promptly settle the grain sales price with the farmer, and must not issue IOUs to the farmers." Further, entities charged with making purchases "shall actively enter the market to purchase new grain."

23. Purchase and administration costs under the MPS Program for rice are financed through loans "secured by a directly affiliated enterprise of [Sinograin], [in the form of] a loan uniformly from the Agricultural Development Bank of China, at the locality [of the depots]." Ownership "rights belong to the State Council, and the grain must not be put to use nor mortgaged without approval by the state." The Indica rice and Japonica rice held by the entrusted purchasing and storage depots, will eventually be sold "according to the principle of selling at profitable prices, rationally formulate base sales prices, and auction [the grain] at public auctions on grain wholesale markets or online."

24. The Chinese instruments setting out the MPS Programs for Indica rice and Japonica rice instruct central and provincial government officials to initiate a program of Indica rice or Japonica rice purchases on an annual basis. The MPS Programs ensure that farmers in the identified major rice producing provinces are able to make sales of qualifying rice at the announced applied administered price, if the prevailing domestic market price falls below the applied administered price. The MPS Program for corn operates in a similar manner.

C. China's Corn Market Price Support Program

25. China is the world's second largest producer of corn. Since 2005, China's corn production has increased 38 percent. Corn is primarily grown in northern and northeastern China.

26. As described in China's *Document Number 1*, the measures related to corn procurement are part of a "temporary" program to procure and store corn. To implement market price support for corn, China issues a single document titled the *Notice on Issues Relating to National Temporary Reserve Purchases of Corn in the Northeast Region* (the "*Notice on Purchases of Corn*"). The *Notices on Purchases of Corn* are issued jointly by NDRC, the State Administration of Grain, MoF, and Agricultural Development Bank of China, and provide details on the available applied administered price, geographic scope, timing, and requirements of the Corn MPS Program.

27. The Corn MPS Programs provide that the applied administered price is to be available in three Northeast provinces − Liaoning, Jilin, and Heilongjiang − and the Inner Mongolia Autonomous Region. The *Notices on Purchases of Corn* for 2012 through 2015 provide the applied administered prices in the referenced provinces and autonomous region. This price is "the at-depot purchase price of direct purchases from farmers by the purchasing and storage depots."

28. The Corn MPS Program operates from when the *Notice on Purchases of Corn* is issued typically in late November or early December until April 30 of the following calendar year. This is the period immediately following the corn harvest in northeastern China.

29. The Corn MPS Program provides that the applied administered price is for "domestically produced corn produced in 2015, meeting the quality standards for national at-grade product," or "Grade 3" corn. The applied administered price is "the at-depot purchase price of direct purchases from farmers by the purchasing and storage depots." Corn that meets a lower or higher grade may also be purchased and "[p]rice differences between adjacent grades will be controlled at 0.02 yuan per *jin* [half kilogram]."

30. Sinograin is "entrusted by the state to act as the primary policy implementation entity," and in particular "will make open purchases of farmers' surplus grain and prevent the occurrence of farmers' 'difficulty selling grain.'" Aspects of the work are also delegated to the provincial governments who may issue their own implementing measures.

31. The *Notices on Purchases of Corn* further provide that "COFCO, Chinatex, and [Aviation Industry Corporation of *China ("*AVIC")], as the supplemental forces for [Sinograin], are entrusted by [Sinograin] to undertake purchasing and storage tasks, and will independently take on loans from the Agricultural Development Bank of China." Other warehouses and granaries may be designated as "purchasing and warehouse sites" by joint decision of local subsidiaries of Sinograin, and the Agricultural Development Bank of China, as well as local grain administration authorities. Further, permanent and temporary storage facilities may be built by Sinograin and provincial officials where there is determined to be a need for additional storage.

32. Each identified "purchasing and warehouse site" throughout the Northeast region is "required to openly post and purchase in accordance with stipulated prices." Further, they must "ensur[e] that grain standards and quality and price policies are posted and standard sample products are displayed." While assuring that these requirements are followed, the sites will also "make open purchases of farmers' surplus grain and will prevent the occurrence of 'difficulty selling grain' among farmers."

33. The Chinese instruments setting out the MPS Programs for corn instruct central and provincial government officials to initiate a program of corn purchases on an annual basis. The MPS

Programs ensure that farmers in the northeast provinces are able to make sales of qualifying rice at the announced applied administered price, once notice of the program has been issued.

II. CHINA MUST MAINTAIN DOMESTIC SUPPORT EXPRESSED AS CURRENT TOTAL AMS AT LEVELS BELOW CHINA'S FINAL BOUND COMMITMENT LEVEL WHEN CALCULATED IN ACCORDANCE WITH THE AGRICULTURE AGREEMENT

34. China may, like other Members of the WTO, maintain domestic support programs, including market price support programs, as long as the domestic support provided under those programs does not exceed the Member's fixed commitment levels. The basic obligations in the Agriculture Agreement regarding domestic support are set forth as follows: (1) Article 3.2 states that: "[s]ubject to the provisions of Article 6, a Member shall not provide support in favour of domestic producers in excess of the commitment levels specified in Section I of Part IV of its Schedule;" (2) Article 6.3 states that: "[a] Member shall be considered to be in compliance with its domestic support reduction commitments in any year in which its domestic support in favour of agricultural producers expressed in terms of Current Total AMS does not exceed the corresponding annual or final bound commitment level specified in Part IV of the Member's Schedule"; and (3) finally, Article 7.2(b) states that: "[w]here no Total AMS commitment exists in Part IV of a Member's Schedule, the Member shall not provide support to agricultural producers in excess of the relevant *de minimis* level set out in paragraph 4 of Article 6."

35. The Agriculture Agreement thus frames a WTO Member's obligation to limit domestic support: first, the Member's individual commitment recorded in Section I of Part IV of the Member's Schedule, and second, the *de minimis* level of support that may be provided by a Member to its producers of basic agricultural products, without including the value of that product-specific AMS in the calculation of Current Total AMS.

36. China scheduled a "Final Bound Commitment Level" of "nil" in Section I of Part IV of its Schedule of Concessions on Goods ("China's Schedule CLII"). China's consistency with this commitment is measured in terms of its Current Total Aggregate Measurement of Support (Current Total AMS), which is the sum of the Aggregate Measurement of Support (AMS) provided to each basic agricultural product.

37. Pursuant to Article 1(a) of the Agriculture Agreement, the AMS for each basic agricultural product must be "calculated in accordance with the provisions of Annex 3 of this Agreement and taking into account the constituent data and methodology used in the tables of support material incorporated by reference in Part IV of the Member's Schedule." Article 1(h), in turn, provides that a Member's "Total AMS" for a given year refers to "the sum of all domestic support provided in favour of agricultural producers, calculated as the sum of all aggregate measurements of support for basic agricultural products, all non-product-specific agreement measurements of support and equivalent measurements of support for agricultural products." Pursuant to Article 6.4 of the Agriculture Agreement, a Member's Current Total AMS does not include product-specific AMS values that are less than or equal to the relevant *de minimis* level of support. For China, the *de minimis* level of support equals 8.5 percent of the total value of production of a basic agricultural product during the relevant year.

38. Therefore, to determine China's Current Total AMS for each year, the Panel first must calculate the product-specific AMS for each basic agricultural commodity, and compare that value to the total value of production for that agricultural product. To the extent that the product-specific AMS for a particular basic agricultural product exceeds China's *de minimis* level of 8.5 percent, the full value of the product-specific AMS would be included in China's Current Total AMS. Because China has committed to a level of domestic support of "nil" or zero, in the event the product-specific AMS for any basic agricultural product exceeds the *de minimis* level of 8.5 percent, China will have breached Articles 3.2 and 6.2 of the Agriculture Agreement.

Market Price Support

39. Annex 3 of the Agriculture Agreement identifies support that "shall" be included in a Member's AMS calculation. It states that "an Aggregate Measurement of Support (AMS) shall be calculated on a product-specific basis for each basic agricultural product receiving *market price support*, non-exempt direct payments, or any other subsidy not exempted from the reduction

commitment ("other non-exempt policies")." Thus, the Agriculture Agreement states that "market price support" in favor of basic agricultural products is a form of non-exempt domestic support and must be included in a Member's AMS calculation.

40. The Agriculture Agreement does not expressly define the term "market price support;" it is useful to consider the ordinary meaning of the constituent terms of "market price support" to understand the scope of domestic support programs contemplated by this term. A "market" is the physical or geographic place where commercial transactions take place, or the business of buying and selling, including the rate of purchase or sale, of a particular good or commodity. "Price" is defined as "a sum in money or goods for which a thing is or may be bought or sold." "Support" is defined as "the action of holding up, keeping from falling, or bearing the weight of something" or "the action of contributing to the success of or maintaining the value of something."

41. Relevant to the consideration of the term "market price support," the dictionary also supplies a number of definitions of compound terms. The *Shorter Oxford English Dictionary*, defines "market price" as "the current price which a commodity or service fetches in the market." Further, it defines "price support" as "assistance in maintaining the levels of prices regardless of supply and demand."

42. Thus, the ordinary meaning of the constituent terms, as well as the compound phrases indicates that "market price support" is the provision of assistance in holding up or maintaining the price for a product in the market, regardless of supply and demand. In the context of Annex 3, paragraph 1, an AMS for "each basic agricultural product" includes the provision of assistance in holding up or maintaining a market price for that agricultural product.

43. Paragraph 8 of Annex 3 provides the methodology for calculating the specific type of support at issue in this dispute − market price support. Paragraph 8 states that "market price support shall be calculated using the *gap* between a *fixed external reference price* and the *applied administered price* multiplied by the *quantity of production eligible* to receive the applied administered price." The paragraph goes on to provide that "[b]udgetary payments made to maintain this gap, such as buying-in or storage costs, shall not be included in the AMS."

44. Thus, the calculation of market price support is based on the price gap between the "applied administered price" identified in the domestic support measure and the "fixed external reference price," multiplied by the quantity of eligible production.

Applied Administered Price

45. The Agriculture Agreement does not define the term "applied administered price". It is therefore necessary to evaluate the ordinary meaning of the constituent terms of "applied administered price." Specifically, "applied" is defined as to "put to practical use; having or concerned with practical application." This definition suggests an actual or real life action. With respect to "administered," "administer" is defined as to "carry on or execute (as office, affairs, etc.)," to "execute or dispense," or to "furnish, supply, give (orig. something beneficial to)." Finally, as described above, "price" is defined as "a sum in money or goods for which a thing is or may be bought or sold" or its "value or worth."

46. Considering these definitions, the "applied administered price" is the price a Member dispenses or furnishes to support a particular basic agricultural product. Paragraph 8 also refers to "the" applied administered price, suggesting that this price is known and discernable. The applied administered price is thus price set or established by the government and is, as such, distinguishable from a prevailing domestic market price. The "applied administered price" is the price the Chinese government *provides* for each of the basic agricultural products and is *identified* for each product and each year in the Chinese legal instruments implementing the program (Relevant data available at U.S. First Written Submission, Table 6; Exhibits US-20 − US-23, US-39 − US-42, US-52 − US-55).

Fixed External Reference Price

47. The "fixed external reference price" is a *static reference value* defined by the Agriculture Agreement in Annex 3, paragraph 9. This states that the price "shall be based on the years 1986 to 1988" and "may be adjusted for quality differences as necessary." These fixed external reference

prices can be determined using official Chinese customs data from these years (Relevant data available at U.S. First Written Submission, Table 7; Exhibit US-65).

Eligible Production

48. The third element of the market price support calculation methodology contained in Annex 3, paragraph 8, of the Agriculture Agreement directs that the established price gap be multiplied "by the quantity of production eligible to receive the applied administered price." The ordinary meaning of the terms indicates that "eligible production" is all of the production entitled or permitted to receive the administered price. Specifically, the ordinary meaning of "eligible" is "[f]it or entitled to be chosen for a position, award, etc." Thus, the "quantity of production eligible" is a portion or amount of the commodity produced that is entitled to receive the applied administered price. It is the amount of agricultural production that has the rightful claim to receive the applied administered price, whether or not that amount of production actually received the specified applied administered price.

49. The Appellate Body in *Korea – Beef* considered the meaning of the phrase "quantity of production eligible to receive the applied administered price" and reached a similar understanding. The Appellate Body stated that "production eligible to receive the applied administered price" has "a different meaning in ordinary usage from 'production actually purchased.'" The Appellate Body further defined "eligible" as that which is "fit or entitled to be chosen." It noted that "a government is able to define and limit 'eligible' production," and that "[p]roduction actually purchased may often be less than eligible production." Thus, "eligible production" within the meaning of Annex 3, paragraph 8 of the Agriculture Agreement is production, which is fit or entitled to receive the administered price, whether or not the production was actually purchased.

50. Because under China's programs all production in identified provinces is fit or entitled to receive the applied administered price, the "quantity of production eligible" is drawn from China's National Bureau of Statistic and Ministry of Agriculture official wheat, rice, and corn production volumes (Relevant data available at U.S. First Written Submission, Table 8; Exhibits US-18, US-73 – US-75).

III. CHINA'S MPS PROGRAMS FOR WHEAT, INDICA RICE, JAPONICA RICE, AND CORN PROVIDE GREATER THAN DE MINIMIS LEVELS OF DOMESTIC SUPPORT AND THUS RESULT IN CHINA EXCEEDING ITS DOMESTIC SUPPORT COMMITMENT FOR 2012, 2013, 2014, AND 2015

51. China's MPS Programs for wheat, Indica rice, Japonica rice, and corn are "market price support" measures as contemplated by Annex 3 of the Agriculture Agreement. As a preliminary matter, China has notified its Wheat and Rice MPS Programs on the "Product Specific Aggregate Measure of Support: Market Price Support" supporting table "DS:5" of its annual notification. These programs are notified as "product-specific." Therefore, China itself has stated that the MPS Programs for wheat, Indica rice, and Japonica rice operate as product-specific "market price support" and has characterized these programs as such to WTO Members.

52. Further, China's MPS Programs for wheat, Indica rice, Japonica rice, and corn constitute "market price support" within the meaning of Annex 3, because each Program exhibits an "applied administered price" and "quantity of production eligible." Specifically, China announces for each MPS Program the "minimum procurement price" at which designated state-owned enterprises will purchase wheat, Indica rice, Japonica rice, and corn. This annually announced "minimum procurement price" constitutes an "applied administered price," because it is the known or discernable price China dispenses or furnishes for each basic agricultural product, regardless of the price that would be otherwise determined by the market. This offers price support to Chinese farmers in the designated regions.

53. China's MPS Programs also each establish a "quantity of eligible production." The MPS Programs specify that production in designated provinces is eligible for support, and in those provinces the state-owned enterprises will purchase all proffered product. Therefore, the portion or amount of the commodity produced that is entitled to receive the administered price is identified in the MPS Programs as all production produced in the identified provinces.

54. For these reasons, China's MPS Programs for wheat, Indica rice, Japonica rice and corn are "market price support" programs for the purposes of the Agriculture Agreement and must be evaluated per the methodology set forth in Annex 3.

55. As described above, Annex 3, paragraph 8, of the Agriculture Agreement provides the calculation methodology for market price support as:

*(Applied Administered Price − Fixed External Reference Price) * Quantity of Production Eligible = AMS*

56. Based on the values for each element of the "market price support" calculation, as well as the "total value of production" data, China has provided support in excess of its *de minimis* level for each of wheat, Indica rice, Japonica rice, and corn solely through its market price support programs for the years 2012, 2013, 2014, and 2015. Accordingly, China has acted inconsistently with its obligations pursuant to Articles 3.2 and 6.3 of the Agriculture Agreement on the basis of the level of domestic support provided through China's market price support measures in favor of wheat, Indica rice, Japonica rice, and corn, viewed separately or collectively. Therefore, the United States requests that the panel issue the mandatory recommendation for China to bring its measures into conformity with the Agriculture Agreement.

EXECUTIVE SUMMARIES OF THE U.S. COMMENTS ON CHINA'S CHALLENGE TO THE PANEL'S TERMS OF REFERENCE, U.S. ORAL STATEMENTS AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL, AND THE U.S. RESPONSES TO THE PANEL'S FIRST SET OF QUESTIONS

57. [Summaries of the U.S. comments on China's challenge to the Panel's terms of reference, the U.S. oral statements at the first substantive meeting, and the U.S. Responses to the Panel's First Set of Questions are reflected in the Executive Summary of the U.S. First and Second Written Submissions.]

EXECUTIVE SUMMARY OF THE U.S. SECOND WRITTEN SUBMISSION

I. DOMESTIC SUPPORT PROVIDED BY CHINA TO ITS CORN PRODUCERS IN 2012 THROUGH 2015 IS PROPERLY WITHIN THE PANEL'S TERMS OF REFERENCE

58. During this panel proceeding, China has not denied that it provided domestic support to corn producers from 2012 through 2015 in excess of its Final Bound Commitment Level. Instead, China erroneously argues that the Panel is precluded from examining and making findings and recommendations on China's provision of domestic support to its corn producers from 2012 through 2015. China argues that the annual legal instruments through which China provided domestic support to its corn producers in 2015 have "expired," and on that basis the provision of domestic support provided to Chinese corn producers from 2012 through 2015 is outside the Panel's terms of reference.

59. China's arguments misunderstand "the matter" at issue in this dispute, and the nature of domestic support challenges generally, which necessarily relate to past action by a responding Member. As explained below, the United States properly identified the matter at issue in its panel request − the only matter as of the date of panel establishment that would permit an examination, and a finding of WTO-inconsistency. The DSU thus requires the Panel to examine and make findings and a recommendation regarding China's provision of domestic support during the relevant years. The expiration of annually-issued legal instruments through which China provided such support in the relevant years does not alter the Panel's terms of reference. Moreover, China's non-transparency prevents it from demonstrating that China ceased to provide domestic support to its corn producers in excess of its commitment level prior to the establishment of the Panel.

60. The "matter" to be resolved is that described in Article 7.1 of the DSU. This provision states that a panel's terms of reference are "[t]o examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), *the matter referred to the DSB* by the [United States] in [its panel request] …, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreements". With respect to Article 7.1 of the DSU, the Appellate Body has stated: "[a] panel's terms of reference are governed by the request for the establishment of a panel. In other words, the panel request identifies the measures and the claims that a panel will have the authority to examine and on which it will

have the authority to make findings." Accordingly, the matter that the DSB places within a panel's terms of reference for its examination is defined by the complaining Member's panel request.

61. Thus, as set out in the U.S. panel request and explained in prior submissions, the United States has challenged China's provision of domestic support to its agricultural producers during the years 2012, 2013, 2014, and 2015 as inconsistent with China's Final Bound Commitment Level of "nil" and in breach of Articles 3.2 and 6.3 of the Agriculture Agreement. The panel request describes four measures at issue: the "domestic support provided by China" (or "China's domestic support in favor of agricultural producers") in each of the years 2012, 2013, 2014, and 2015. It also describes eight affirmative claims, i.e., the United States challenges that the levels of domestic support provided for each of the four years exceeds China's final bound commitment level in breach of Article 3.2 and of Article 6.3 of the Agriculture Agreement. These four measures and eight claims constitute the "matter" that the DSB has charged the Panel with examining through its terms of reference.

62. In addition to identifying the "matter," the U.S. panel request also includes additional information that previews the main arguments the United States will advance in its First Written Submission to demonstrate its claims. Prior panels and the Appellate Body have explained that there is a significant difference between the claims identified in a panel request, which establish the panel's terms of reference under Article 7 of the DSU, and the arguments supporting those claims, which are set out and clarified progressively in the written and oral submissions. The United States has identified both in its panel request.

63. The U.S. panel request is best understood by parsing the constituent parts of the three sentences in the U.S. panel request. The italicized language identifies the measures, the bolded language identifies the claims, and the underlined language previews the arguments put forward by the United States.

> The United States considers that China has acted inconsistently with its obligations pursuant to Articles 3.2 and 6.3 of the Agriculture Agreement because the level of *domestic support provided by China* exceeds China's commitment level of "nil" specified in Section I of Part IV of China's Schedule CLII. In particular, *China's domestic support in favor of agricultural producers*, expressed in terms of its current Total Aggregate Measurement of Support ("Total AMS"), exceeds China's final bound commitment level in 2012, 2013, 2014, and 2015 on the basis of domestic support provided to producers of, *inter alia*, wheat, Indica rice, Japonica rice, and corn. The United States further considers that, to the extent applicable, *these measures* are inconsistent with China's obligation under Article 7.2(b) of the Agriculture Agreement because, in 2012, 2013, 2014, and 2015, *China provides domestic support* for wheat, Indica rice, Japonica rice, and corn in excess of its product-specific de minimis level of 8.5 percent for each product.

64. The first sentence includes the measures and claims. The second sentence previews that the claims will be demonstrated on the basis of a specific argument. The third sentence includes an alternative claim and argument. As the Appellate Body recognized in *EC − Selected Customs*, "nothing in Article 6.2 prevents a complainant from making statements in the panel request that foreshadow its arguments in substantiating the claim. If the complainant chooses to do so, these arguments should not be interpreted to narrow the scope of the measures or the claims." Accordingly, the U.S. panel request includes both the matter referred to the DSB under Article 7 of the DSU, and a preview of the arguments supporting those claims that the United States advanced progressively in its written and oral submissions.

65. Therefore, contrary to China's claims that the Panel is precluded from examining China's provision of domestic support to its corn producers in 2012, 2013, 2014, and 2015, the Panel's function pursuant to Article 11 of the DSU is to make an objective assessment of "the matter" before it − the same "matter" that the DSB has put within the Panel's terms of reference. In this dispute, in light of the U.S. panel request and Article 7.1 of the DSU, the Panel must make an objective assessment as to whether China's provision of domestic support to Chinese agricultural producers in each of the relevant years exceeded China's commitment level and thereby breached its commitments under the Agriculture Agreement.

A. China's Rebuttal Arguments Do Not Establish that the Measures and Claims Identified in the U.S. Panel Request Fall Outside the Panel's Terms of Reference

66. In China's Response to the Panel's Questions, China makes a number of false statements and advances arguments unsupported by the DSU and the Agriculture Agreement. First, China argues that "domestic support" and the "level of domestic support" are not measures but a "legal concept," and therefore are insufficient to present the problem clearly under Article 6.2 of the DSU. In supporting its argument, China tries to draw a parallel between "domestic support" covered by the Agriculture Agreement and "subsidies" disciplined under the SCM Agreement. Further, it argues that the "level of domestic support" is not a measure, but an unspecified reference to a numerical value that fails to "identify the specific measures that are alleged to have contributed to the level of domestic support." China's arguments are in error and must fail principally because the United States properly identified the measure at issue in its panel request.

67. The United States has not identified the measure in its panel request as simply the "level of domestic support" or "domestic support." China has failed to provide the complete and accurate identification of the measure included in the U.S. panel request. As stated repeatedly, the measure at issue is "China's domestic support in favor of agricultural producers" (also expressed as the "domestic support provided by China"), and the panel request then lists legal instruments through which that support is provided. The measure is therefore neither a numerical value, nor a legal concept but *action* by China. As China itself noted in its answer, the measure at issue in a dispute may be any act or omission attributable to the responding Member. The United States, indeed, identified the measure as "China's domestic support in favor of agricultural producers" and "domestic support provided by China." Thus, the United States identified a specific measure at issue − an act attributable to China − in its panel request.

68. Moreover, contrary to China's argument, a comparison between domestic support under the Agriculture Agreement and a subsidy under the SCM Agreement does not support China's position that the provision of domestic support by China is insufficient to identify the specific measure at issue. Unlike the Agriculture Agreement, the SCM Agreement prohibits Members from providing certain types of subsidies, known as prohibited subsidies, and seeks to neutralize adverse trade effects on the interests of another Member, through serious prejudice actions and authorizing the use of countervailing measures. Conversely, the Agriculture Agreement neither prohibits any specific form of domestic support, nor seeks to counter any negative effects of the provision of support. The Agriculture Agreement simply seeks to limit the amount of domestic support provided by a Member and requires that the Member calculate and notify the amount of support given in accordance with certain methodologies.

69. In addition, China seems to conflate terms of reference issues with issues to be resolved on the merits. The question of whether the measures identified in the panel request can breach an obligation under a covered agreement is a substantive issue to be addressed and resolved on the merits. China's argument that "domestic support" and "level of domestic support" are legal concepts not only misstates the U.S. identification of the measure, but asserts that these "concepts" *cannot* breach the Agriculture Agreement themselves. The Panel should examine whether the measure identified by the United States (the provision of domestic support by China) breaches the Agriculture Agreement as part of its review of the merits.

70. In a final attempt to persuade the Panel, China baselessly argues that the right to challenge "domestic support" or the "level of domestic support" would deprive the respondent of its due process rights to know the case it must answer, result in uncertainty about the steps it must take to bring its measure into conformity, and permit a complaining Member to inappropriately broaden the scope of any compliance proceeding. China's concerns are unfounded. First, as explained above, the United States did in fact identify the specific measure at issue. Second, the concern China advances is not present in this dispute. The U.S. panel request, in addition to identifying "China's domestic support in favor of agricultural producers," also sets out the instruments through which the support is provided (and the United States has not sought to rely on any other instruments). It further listed the agricultural products through which China's breach would be demonstrated (and the United States has not sought to prove its case on the basis of other products). Thus, China's concern may apply to another dispute and another panel request, but the circumstances China concerns itself with are not present here. Typically, original panels do not dictate to respondents how to bring their measures into conformity; rather, a panel's recommendation is simply to bring

measures into conformity with the covered agreement. Respondents have the flexibility to choose how to comply with a panel's recommendation. Therefore, despite China's arguments, the U.S. identification of "China's domestic support in favor of agricultural producers," including domestic support to China's corn producers, is not contrary to the DSU and would not permit challenges to unidentified measures.

71. Second, China mischaracterizes the nature of a domestic support challenge. To overcome an objection that its terms of reference argument renders domestic support unchallengeable, China goes so far as to argue that a complaining Member could bring an AMS claim *before* the necessary data is available to prove a breach. China's statement reflects a fundamental misunderstanding of WTO AMS commitments and would, indeed, render such commitments beyond challenge. A Member's domestic support commitments, in terms of their Final Bound Commitment Level, apply with respect to domestic support provided over a full calendar, marketing, or financial year. Therefore, the question of whether a WTO Member is in breach of its domestic support commitments necessarily involves a retrospective examination of the level of domestic support, calculated as Current Total AMS provided over a period of time. Where a challenge involves market price support programs, the complaining party must produce, among other things, data related to a country's total annual production volume and average farm-gate prices for the full years at issue in order to establish the level of domestic support provided and then compare that support to a Member's AMS commitments.

72. With respect to the market price support at issue in this dispute, data for both annual production and prices for each product were necessary for the United States to examine whether China had exceeded its Final Bound Commitment Level. And, importantly, the United States and other WTO Members do not have access to the necessary data until *China itself* releases it to the public. The complete data required for the United States to analyze China's compliance with WTO rules for the year 2015 were not publicly available *until November 2016* − nearly a year after the end of the relevant time period. Therefore, the United States filed its request for establishment of a panel as soon as was feasible, on December 5, 2016, less than a month after the complete data became available.

73. Under these circumstances, China's argument that the United States is precluded from challenging China's provision of domestic support to its corn producers for 2012-2015 would, indeed, frustrate the ability of the United States or any other WTO Member to challenge China's provision of domestic support in excess of its WTO commitments. If the Panel were precluded from examining past provisions of domestic support simply because a program has allegedly changed, given the retrospective nature of domestic support obligations, simple changes to a legal instrument would preclude challenges to a Member's domestic support without the Member having achieved conformity of its support with its WTO obligations. The Panel should not endorse a legally erroneous approach that would also open such a loophole in WTO rules. Instead, consistent with the DSU and the Agriculture Agreement, the Panel should consider China's domestic support provided through annual legal instruments during the years at issue, as set out in the U.S. panel request and therefore within the Panel's terms of reference.

74. Such an analysis is exactly what the panel and Appellate Body did in *Korea − Beef*. Specifically, in *Korea − Beef*, the United States and Australia requested the DSB to establish a panel on April 15, 1999 and July 12, 1999, respectively, and the panel was established on May 26, 1999. The panel and Appellate Body issued findings concerning domestic support provided in 1997 and 1998 − that is, the two years *prior to* the complaining parties' requests for panel establishment. Moreover, in examining whether Korea's provision of domestic support in 1997 and 1998 exceeded its domestic support commitments, the panel reviewed annual legal instruments that were no longer in effect at the time the DSB established the panel to examine the matter raised in the requests for panel establishment.

75. The U.S. approach in this dispute is the same as that taken in *Korea − Beef*, the only prior WTO dispute addressing market price support programs. In both, a complaining party seeks to demonstrate a Member's breach of its domestic support commitments through the domestic support provided through the legal instruments capable of examination. Accordingly, the Panel should approach the domestic support China confers, and the time-bound legal instruments it employs, no differently than did the panel and Appellate Body in *Korea − Beef*. Failing to do so would ignore the fact that Current Total AMS is determined annually, as well as ignore the annual nature of market price support programs in China.

B. China's Rebuttal Arguments Do Not Establish that the Panel Is Precluded From Making Findings and Recommendations On the Measures Identified in the U.S. Panel Request

76. The United States has explained that it is not challenging a measure that had expired prior to panel establishment, but rather is challenging the domestic support provided by China. China has not alleged or demonstrated that the legal instruments through which it provided domestic support in 2016 had removed any WTO-inconsistency as of the date of panel establishment. Therefore, the replacement of the annual 2015 corn legal instrument with another instrument for 2016 is not relevant. To the extent the 2015 corn support legal instrument is considered to have "expired," it would be appropriate for the Panel to make findings and recommendations in light of the Panel's terms of reference and the DSU provision (Article 19.1) requiring a recommendation for any measure within the panel's terms of reference found to be WTO-inconsistent.

77. The Appellate Body reports in *China − Raw Materials* demonstrate that expiry of an annual legal instrument should not deprive the complaining party of a finding and recommendation on a WTO-inconsistent measure within a panel's terms of reference. The situation in this dispute is similar to that in *China − Raw Materials*, which also dealt with a series of annual Chinese measures. The Appellate Body held that with respect to annual instruments that implement a measure (in that dispute, export duties or quotas), a panel should make findings on a recurring measure, as evidenced by annual legal instruments that may have been superseded in the course of the dispute. In so doing, both the panel and Appellate Body examined the measure *as it existed at the time of panel establishment*. The Appellate Body noted that if complainants were precluded from challenging measures of an annual nature that may have expired during the course of the panel proceedings, it would create a loophole in the system. Complainants could find themselves 'taking aim' at 'appearing and disappearing targets,' and responding parties could evade a panel's scrutiny by removing measures during the panel proceedings and reinstating them in the future without any consequences.

78. In the present dispute, China argues that *Raw Materials* is not applicable because the annual legal instruments that implement the provision of domestic support for corn in 2015 allegedly expired before panel establishment. However, as explained above, China is incorrect that the expiration of an annual legal instrument for a particular year prevents a panel from making findings on the domestic support provided through that instrument in the relevant year − the U.S. panel request sets out the only "matter" that existed and demonstrated China's WTO-inconsistent support as of that date. Moreover, in the context of domestic support, China's argument creates the very loophole the panel and Appellate Body in *Raw Materials* sought to avoid.

79. Most of the instruments identified in the U.S. panel request are annual in nature − both for corn and for wheat and rice. China has indicated that it does not argue that the market price support programs for wheat or rice have expired. As China explained at the first panel meeting and in its answers to the Panel's questions, the rice and wheat programs essentially operate in the same way the export duties and quotas in *Raw Materials* operated − *i.e.*, they consist of an ongoing legislative framework and a series of annual measures that identify the specific applied administered price and implementation plans for each year in which the MPS program operates. However, China has not explained why the Panel should view the instruments for corn any differently, or why the differences between the annual legal instruments for corn in 2015 and 2016 mean that the expiration of the 2015 legal instruments extinguishes the Panel's authority with respect to the provision of support during 2012-2015.

80. Specifically, China does not dispute that all of the annual legal instruments for rice and wheat issued in 2012 through 2015 in fact expired prior to the establishment of the panel. Therefore, China appears to suggest that the continued existence of the ongoing legal framework measures, including the 2004 Grain Distribution Regulation, preserves the Panel's authority to make findings regarding the provision of domestic support for rice and wheat in the relevant years. But China's argument does not support finding that corn domestic support has "expired", for two reasons.

81. First, the *2004 Grain Distribution Regulation* provides authority for China to implement market price support for corn, as well as for wheat and rice. The annual legal instruments for each product covers one year (and therefore could be argued to "expire" with that year). There is no logical basis to distinguish rice and wheat from corn, then, and to think that the authorizing framework that applies to the three products provides a basis for the Panel's terms of reference for rice and wheat,

but not for corn. China's approach would lead to the very "disappearing target" dilemma the panel and Appellate Body in *Raw Materials* warned against.

82. Second, China's argument apparently relies on the absence of a regulatory framework pursuant to which the corn instruments were enacted. But, if the mere absence of an ongoing legal framework meant that the expiration of annual instruments precluded a panel from making findings, this again would allow the same "disappearing target" danger − a constantly moving target that required a complainant to continually update its analysis in hopes of keeping up with the changing measures. Moreover, such a finding would encourage Members to reduce the level of transparency in their systems and instead rely on annual, and even *ad hoc*, legal instruments alone − a development that would only add to a complainant's difficulty in bringing a successful challenge.

83. As the United States has explained previously (and again in the next section of this submission), the fact is we do not know − and the Panel therefore cannot properly evaluate − the factual and legal situation in China in 2016. Under such circumstances, and given the nature of challenges to a Member's AMS, to avoid prejudicing U.S. rights to meaningful findings and recommendations with respect to the provision of domestic support in 2012-2015, including through support for corn, the Panel must make findings on the matter as articulated in the U.S. panel request. That the specific legal instruments upon which those findings would be based may have expired does not alter the matter at issue or exclude the relevant measures from the Panel's terms of reference.

84. In addition to being required to examine the "matter" before it, if the Panel finds China's provision of domestic support to be inconsistent with China's obligations, it must, pursuant to Article 19.1 of the DSU, recommend that China bring its measure(s) into conformity with the Agriculture Agreement. Pursuant to Article 11, therefore, the Panel must make an objective assessment as to whether China's provision of domestic support to Chinese agricultural producers in each of the relevant years is in excess of its commitment level and thereby breaches China's commitments under the Agriculture Agreement. If the Panel finds China's provision of domestic support to be inconsistent with China's obligations, it must, pursuant to Article 19.1 of the DSU, recommend that China bring its measure(s) into conformity with the Agriculture Agreement.

85. Thus, a panel is required to make a recommendation on any measure that it finds to be inconsistent with China's WTO obligations; and such a recommendation is the right of a complainant under the DSU. Therefore, if this Panel finds that China has provided domestic support in excess of its AMS commitments for any of the relevant years, the Panel must recommend that China bring the measure(s) into compliance with its obligations.

C. China Has Not Demonstrated That Its Market Price Support Program for Corn "Expired," or That It Ceased to Provide Domestic Support for Corn in Excess of Its Commitment Level in 2016

86. As explained in the preceding section, the matter at issue before the Panel is whether China's provision of domestic support to its agricultural producers from 2012 through 2015 is inconsistent with its domestic support commitments. Based on the U.S. panel request and the nature of AMS disputes, the expiration of specific legal instruments through which the United States has demonstrated that China has breached its Final Bound Commitment Level does not preclude the Panel from making findings on this matter. For completeness, however, the United States also explains in this section why China also has failed to show that its market price support program for corn had "expired" by the time of the Panel's establishment, or that it ceased to provide domestic support for corn in excess of its commitment level in 2016.

87. First, China asserts at some length that after the "expiry" of the 2015 corn market price support instrument, it moved to a system of "market-oriented purchase" by "market players," where all types of entities may decide to make purchases "on their own initiative." According to China, the 2016 corn purchasing instruments are "*seeking* to achieve a market-based price discovery." China supports this assertion with the text of the 2016 corn purchasing instruments. However, the market-based aspirations espoused in the *2016 Northeast Region Corn Purchase* are simply not sufficient to demonstrate that China no longer provides domestic support for corn in excess of its commitments. The United States notes that *seeking* market-based price discovery is not the same as *eliminating* price support policies for corn, and "reform" of the price support program is not the same as

termination. On its face, then, the instrument China identifies does *not* support its assertion that market-price support had "expired" or been withdrawn.

88. The aspirations and policy "reform" reflected in the *2016 Northeast Region Corn Purchase Notice* and other 2016 policy statements are in fact similar to those identified in the *2004 Grain Opinion* and *2004 Grain Distribution Regulation*, pursuant to which China's market price support for wheat and rice are implemented. For instance, the *2004 Grain Distribution Regulation* states that the "state encourages market entities of various forms of ownership to engage in grain business operations, so as to promote fair competition" and that the "grain price is formed principally by market supply and demand." But the *2004 Grain Distribution Regulation* also provides that, "to protect the interests of grain farmers, the State Council may decide, when necessary, to implement minimum purchase prices in the main grain-producing regions." In this manner, though China's *2016 Northeast Region Corn Purchase Notice* calls for "advancing corn purchasing and storage system reform," this reform is similar to the "marketization reform in grain purchasing and sales" pursued in 2004.

89. This dichotomy between encouraging "market-oriented purchases" and maintaining government control also is apparent on the face of the 2016 corn purchasing instruments and reflected in China's responses to the Panel's Questions. The *2016 Northeast Region Corn Purchase Notice* cites as its goal facilitating a situation where farmers "sell corn according to the fluctuating market price," and that "market entities of all types [are] independently entering the market to make purchases." However, China's *2016 Northeast Region Corn Purchase Notice* simultaneously provides that relevant regions must "comprehensively organize the branches of central government-owned enterprises under jurisdiction and local backbone grain enterprises to lead the way in entering the market for purchasing." The 2016 instrument further states that "[r]elevant central government-owned enterprises such as COFCO and AVIC must fully utilize their own channels and advantages to launch marketized purchasing, striving not to go lower than the policy-based purchasing amount of the previous year, and properly bring into play their guiding and driving role." All of this is to "prevent the occurrence of farmers having "difficulties in selling grain.'" Therefore, while the 2016 measure does encourage "all types" of entities to enter the market, it *also* recognizes and provides for the continuing role of state-owned enterprises tasked with ensuring the market operates properly to compensate farmers and avoid difficulty selling corn by purchasing substantial volumes of newly harvested corn. Thus, direction towards increased "marketization" does not, and has not in the past, meant that the Chinese government cannot continue to engage in the provision of domestic support through government purchasing, including at support prices.

90. The provincial implementation measure from Heilongjiang, the *2016 Notice on Proper Handling of Corn in Heilongjiang*, similarly recognizes the separate roles of private actors beginning to "marketize" the corn market, and state-owned enterprises tasked with driving the market by making purchases at levels similar to prior years. For instance, the regional implementing instrument states that "all types of entities can enter the market to purchase the corn as they wish." To that end, the provincial government is both "encouraging multiple market players to actively purchase and sell corn in the market," and "mak[ing] overall plans on coordinating the branches of central enterprises and major local grain enterprises in the administrative regions to take the lead to purchase corn in the market." Specifically, the instrument provides that "[a]ssociated branches of central enterprises, such as COFCO, Chinatex Corporation, Aviation Industry Corporation of China, etc. shall make full use of their own advantages and channels to carry out the market-oriented purchase, work harder to ensure the purchase volume [is] no less than that of the policy-based purchase last year, and play a leading role in stabilizing the market and guiding the expectations." Thus, while the instrument released at the provincial level by Heilongjiang suggests a desire for private enterprises to enter the market and purchase corn, it also recognize the need for state-owned enterprises to guide the market through continuing purchasing activities and ensuring that farmers are able to sell their corn.

91. Second, China argues in its responses to Panel Question 2(b) that prices for corn are now determined by the market and "reflect[] the market forces of supply and demand." To support this assertion, China cites to an NDRC press release reporting that "[c]orn prices are based on the market," and reflect "reasonable price differences resulting from regional differences and corn quality differences." The United States notes that the press release was published on June 23, 2017, *seven months* after the U.S. panel request. The NDRC press release contains *no* citations or data, and therefore consists of a series of unsubstantiated assertions. This new exhibit provides no information that is pertinent to the Panel's assessment of "the matter" as of the date of panel establishment.

92. Moreover, that China permitted prices for corn to decline from artificially high levels does not demonstrate that China has instituted a "market-based price discovery mechanism," or that Chinese corn prices have "linked up with the international market." To the contrary, Chinese corn prices have remained above international prices for corn throughout 2016 and 2017 as illustrated by Exhibit US-94. Further, the GAIN Reports cited by China further illustrate the continuing differential between Chinese domestic prices for corn and international prices. According to the GAIN Reports, the "spot market" for corn in early December 2016 provided a price of 1,681 RMB or $244 per ton. The Report compares these Chinese port prices to the U.S. corn import price in December 2016 which "landed at Chinese ports is about 1,500 RMB per ton ($218)," and other competing grain imports such as U.S. sorghum, which costs 1,690 RMB or $205. Thus, the lack of an applied administered price communicated to private market actors and farmers does not mean that the domestic price is market-based, or that the purchases made by state-owned enterprises were not done at support prices.

93. Third, China makes a number of other erroneous assertions regarding its 2016 corn purchasing instruments and activities. In particular, China states that that the 2016 instruments "are *not* designating enterprises to purchase corn." As the United States described in its response to Panel Question 2(a)-(c), the central and provincial level instruments implemented in 2016 mirrored prior corn market price support instruments in all relevant policy and logistical elements − including the designation of state-owned enterprises, such as Sinograin, COFCO, and AVIC, to purchase corn. Like in prior years, private entities may also purchase corn, but designated state-owned enterprises have a "guiding and driving role." These state-owned enterprises "must fully utilize their own channels and advantages to launch marketized purchasing, striving not to go lower than the policy-based purchasing amount of the previous year." Further, both the 2015 and 2016 corn purchasing instruments also provide for financing through the Agricultural Development Bank of China, and making available storage for purchased grain.

94. Next, China erroneously asserts that "there is no purchase of corn by government entities after 30 April 2016," and that "the Chinese government does not have statistics" regarding purchases after the expiry of the TRPR. However, as described in the response of the United States to Panel Question 2(a)-(c), Sinograin, a state-owned enterprise also charged with making purchases between 2012 and 2015, reported that it purchased 21.41 million metric tons of corn during the 2016/17 harvest through 743 Sinograin depots in the northeast region. According to Sinograin, this was 21 percent of the production in northeast China and 70 percent of the volume procured by state-owned enterprises. Describing its activities, Sinograin further reported that "[i]n circumstances where purchasing entities have decreased, the strength of the market is insufficient, and there is downward pressure on prices, [Sinograin headquarters] *does not push prices even lower*; it actively enters the market to expand the number of depots and accelerate the rate of purchasing to send a strong signal to stabilize and guide market expectations." Moreover, in addition to the statistics kept by state-owned enterprises, such as Sinograin, the 2016 corn purchasing instruments direct certain recordkeeping and reporting activities. The *2016 Northeast Region Corn Purchase Notice,* states that "[a]ll relevant regions must . . . strengthen situation analysis and evaluation, closely track market changes, regularly announce information such as grain purchasing progress and market price trends." Thus, it appears that records regarding purchasing and pricing activity are held by the Chinese government through its provinces and state-owned enterprises.

95. Finally, the United States notes that it is China that argues that its market price support for corn "expired" in 2016, and therefore it is for China to demonstrate that this claim is supported by the record facts. To make this argument China must demonstrate that as of the date of panel request it had ceased to provide support for corn in excess of its commitments. China has made this assertion, but as described above and in the U.S. response to the Panel's Question 2, it was not clear at the time of panel request and it is not clear now that China has ceased to provide support prices to Chinese corn farmers, or that it no longer provides support in excess of its commitment levels.

II. China has Failed to Rebut the United States' Claim that China Breached its Domestic Support Commitments

96. China attempts to rebut the U.S. showing that China has exceeded its permitted levels of domestic support by arguing that it is permitted to use an alternative approach to the computation of the product-specific AMS. Specifically, China argues that the methodology contained in Annex 3 of the Agriculture Agreement is only a "fallback" option, and that the Supporting Tables attached to

Part IV of its Schedule of Concessions contain agreed China-specific methodologies that supplant the methodology required by the Agriculture Agreement. However, China's position is unsupported by the text and structure of the relevant covered agreements, including China's Protocol of Accession.

97. China, like all WTO Members, committed to abide by the rules outlined in the Agriculture Agreement, as well as maintain a level of domestic support at or below its Final Bound Commitment Level of "nil." Paragraph 1.3 of China's Protocol of Accession specifically states: "*[e]xcept as otherwise provided for in this Protocol*, those obligations in the Multilateral Trade Agreements annexed to the WTO Agreement that are to be implemented over a period of time starting with entry into force of that Agreement shall be implemented by China as if it had accepted that Agreement on the date of its entry into force." The Agriculture Agreement is one of the listed Multilateral Trade Agreements annexed to the WTO Agreement, and with which China has agreed to comply.

98. Consistent with Paragraph 1.3 Members also agreed in China's Accession Protocol to certain modifications of the calculation methodology for Current Total AMS. Specifically, pursuant to paragraph 235 of China's Working Party Report, incorporated by reference into China's Protocol of Accession, China agreed that, for purposes of Article 6.4, it would maintain product-specific domestic support at or below a *de minimis* level of 8.5 percent of the total value of production for each basic agricultural product and that China would not have recourse to Article 6.2.

99. In contrast to Paragraph 235, Paragraph 238 of the Working Party Report records that Members did not agree with all elements of the methodology and policy classifications used in China's Supporting Tables. Specifically, Members asked China to clarify methodological issues contained in its Supporting Tables, and, China agreed to clarify the methodological issue in the context of its notification obligations under the Agriculture Agreement. This demonstrates that WTO Members did not view China's Supporting Tables as reflecting new rights or obligations of China to which they were "agreeing."

100. Therefore, for China, as for other Members, Paragraph 8 of Annex 3 of the Agriculture Agreement mandates the methodology for calculating the value of the type of domestic support at issue in this dispute − market price support. Paragraph 8 states that "market price support shall be calculated using the *gap* between a *fixed external reference price* and the *applied administered price* multiplied by the *quantity of production eligible to receive* the applied administered price."

101. China has argued that the Panel can look to information contained in its Supporting Tables to identify China-specific methodologies for identification of the fixed external reference price and the quantity of eligible production, and that these methodologies supplant the "fallback" obligations contained in Annex 3 of the Agriculture Agreement. Specifically, China argues that "Articles 1(a)(ii) and 1(h)(ii) of the *Agreement on Agriculture* … specifically designate the 'constituent data and methodology' as the elements from the supporting tables that give rise to domestic-support-related rights and obligations in the calculation of Current (Total) AMS." China relies on the Appellate Body report in *Korea − Beef* to argue that there is no hierarchy between the relevant provisions of Annex 3 and a Member's constituent data and methodology. China's arguments misunderstand the relationship between the Agriculture Agreement and a Member's Schedule of Concessions and Supporting Tables, as well as the role and status of information contained in Supporting Tables under the Agriculture Agreement.

102. The Agriculture Agreement provides the ways in which the information contained in a Member's Supporting Tables may be used in the calculation of a Member's Current Total AMS, but it does not give rise to domestic-support related rights and obligations in the calculation of Current Total AMS. The Agriculture Agreement directs the reliance of a Member's Supporting Table to provide Member-specific factual information used to understand a Member's agricultural sector. Specifically, Article 1(b) states that "basic agricultural product" "is defined as the product as close as practicable to the point of first sale as specified in a Member's Schedule and in the related supporting material." Similarly, the definition of "year" provided by the Agriculture Agreement in Article 1(i) "refers to the calendar, financial or marketing year specified in the Schedule relating to that Member." Thus, the Agriculture Agreement directs the use of a Member's Supporting Table to glean Member-specific factual information for purposes of identifying the basic agricultural products in the Member's territory and definition of year for a particular program; it does not create independent rights and obligations.

103. Where the Agriculture Agreement does not expressly direct recourse to information contained in the Supporting Tables, the information may be used only as provided in Articles 1(a) and 1(h). Specifically, Article 1(a)(ii) of the Agriculture Agreement states that the product-specific AMS must be "calculated *in accordance with* the provisions of Annex 3 of this Agreement and *taking into account* the constituent data and methodology used in the tables of support material incorporated by reference in Part IV of the Member's Schedule." Article 1(h), in turn, provides that a Member's "Total AMS" refers to "the sum of all domestic support provided in favour of agricultural producers, calculated as the sum of all aggregate measurements of support for basic agricultural products, all non-product-specific aggregate measurements of support and equivalent measurements of support for agricultural products." For a given year, the "Current Total AMS" must be calculated *in accordance with* the provisions of this Agreement, including Article 6, *and with* the constituent data and methodology used in the supporting material."

104. The inclusion of the phrase "in accordance with" in Article 1(a)(ii) indicates that a product-specific AMS calculation must be conducted "consistent with" the methodology provided in Annex 3. Conversely, the use of the phrase "taking into account" in reference to constituent data and methodology requires a panel to "take into consideration, [or] notice" that information. This indicates that the Panel must consider any relevant constituent data and methodology, but may not accord a higher degree of consideration to that information than it does the methodology in Annex 3.

105. Contrary to China's argument, the Appellate Body report in *Korea – Beef* supports this understanding. In that dispute, the Appellate Body noted the distinction reflected in the text of Article 1(a)(ii) between the phrases "in accordance with" and "taking into account," and found that the ordinary meaning of the phrases suggests a hierarchy attributing a "more rigorous standard" to Annex 3, than to constituent data and methodology. The Appellate Body did not limit this statement regarding the supremacy of Annex 3 to those circumstances in which *no* constituent data and methodology were provided by a Member; nor would the text of the Agriculture Agreement have supported such a view. Rather, the text of the Agriculture Agreement suggests that, when performing the calculation of AMS for a particular product pursuant to Annex 3, the data and methodology contained in the supporting material may provide additional information relevant to the calculation of support for the specific product at issue, but it does not permit Members to use alternative methodologies in its Supporting Table.

106. When discussing how a panel should treat a conflict between Annex 3 and a Member's constituent data and methodology, China states that "the Appellate Body in *Korea – Beef* did not resolve the question of any hierarchy between the relevant provisions of Annex 3 and a Member's constituent data and methodology . . . the Appellate Body therefore explicitly left open the question of a hierarchy, and even entertained the possibility that the hierarchy could be in favor of the constituent data and methodology." Contrary to China's argument, the Appellate Body in *Korea – Beef* did address the apparent hierarchy between Annex 3 and a Member's constituent data and methodology, and did not find that Article 1(a)(ii) permitted a panel to favor a Member's constituent data and methodology.

A. The Legal Status of a Member's Supporting Table Is the Same regardless of When the Member Joined the WTO

107. China also argues that the constituent data included in a Member's Supporting Tables has a different legal status depending on whether the Member is an original Member or a recently acceding Member. Specifically, China argues that, "for each original Member of the WTO, . . . based on the incorporation by reference of a Member's supporting tables into that Member's Schedule of Concessions, the supporting tables constitute an integral part of the GATT 1994." However, in contrast to original WTO Members, China argues that for "later-acceded Members . . . the supporting tables are an integral part of the terms of that Member's accession to the WTO, under Article XII:1 of the Marrakesh Agreement." This is false, and China's argument must fail for two reasons.

108. First, China's Schedule of Concessions, including Part IV, does not form part of China's Accession Protocol. Rather, as stated in Part II, paragraph 1 of China's Protocol of Accession: "[t]he Schedules annexed to this Protocol shall become the Schedule of Concessions and Commitments annexed to the GATT 1994." This is consistent with the treatment of other WTO Members' Schedules of Concessions, which also form part of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"). Thus, it is clear that China's Schedule of Concessions is not part of the Accession Protocol, but the GATT 1994.

109. Second, Article 21, paragraph 1 of the Agriculture Agreement clarifies the relationship between the Agriculture Agreement and the GATT 1994. It states that the "provisions of the GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the other provisions of this *Agreement*." In other words, where there is a conflict between the provisions of the Agriculture Agreement and the GATT 1994, the Agriculture Agreement would prevail.

110. In the *EC − Export Subsidies on Sugar* dispute, the panel and the Appellate Body agreed that "WTO Members may use entries in their Schedules of Concession to clarify and qualify the 'concession' they individually agree to assume," but they may not "reduce or conflict with obligations they have assumed under the GATT or WTO Agreement, including the Agreement on Agriculture." This echoed prior statements by a GATT 1947 panel in *US − Sugar* suggesting that a "Schedule[] of Concessions" is for Members to "incorporate . . . acts yielding rights under the General Agreement but not acts diminishing obligations under that Agreement." Therefore, where, as here, a Member's Schedule conflicts with the obligations of the Agriculture Agreement, the provisions of that Schedule must fail, and the Panel must apply the applicable provisions of the Agriculture Agreement instead.

111. We note that the European Union relies on *EC − Export Subsidies on Sugar* to suggest that a Member may deviate from agreements found in the covered agreement in its Schedule where the deviation "does not 'reduce' *per se* the commitments of the newly acceded Members under the Agriculture Agreement." That is, the European Union suggests that a panel must evaluate the apparent change to the Member's commitment to determine whether it in fact "reduces" the commitment, or only alters it. However, the European Union fails to provide the legal basis for such a position, much less explain how or why in practice such a rule could operate. Similar to China's arguments, the European Union's argument would mean that every WTO Member could in theory be bound by as-of-yet unknown commitments, different from those reflected in the texts of the covered agreements as agreed by WTO Members, and different from the commitments of every other WTO Member.

112. The only vehicle through which China could accede to a commitment not consistent with the obligations of the Agriculture Agreement was its Accession Protocol, including any paragraphs of the Working Party Report incorporated by reference into that Protocol. Absent such a commitment, China must comply with the obligations of the Agriculture Agreement like any other WTO Member must, including the methodological obligations contained in Annex 3 with respect to the calculation of market price support. For these reasons, the Supporting Tables thus do not, and could not, themselves set out any legally permissible deviation from the Agriculture Agreement.

113. Even aside from the fact that China may not alter an Agriculture Agreement commitment through its Schedule or Supporting Table, we note that China's Supporting Tables contain no reference to an article in the Agriculture Agreement, nor any express language indicating that the Membership agreed to alter a commitment specifically for China. Compare the language included in China's Supporting Table to the language used in China's Working Party to deviate from the *de minimis* amount outlined in Article 6.4 of the Agriculture Agreement.

114. When WTO Members agreed to provide China with an obligation different from the Agriculture Agreement, they clearly referenced the legal obligation to be modified by name. The Working Party Report thus clearly evinces that WTO Members *agreed* to provide China with a different *de minimis* than that provided for in the Agriculture Agreement, and *agreed* that China would not have recourse to Article 6.2 of the Agriculture Agreement. In contrast, China's Supporting Table contains no similar reference. On the face of the Supporting Table, there is no indication that the WTO Members agreed to modify *any* legal obligation (because there was no agreement), and there is no reference to Annex 3 or any other provision in the Agriculture Agreement. Accepting China's argument would create a situation where, again, Members would not know what other Members' obligations are, because numerous implicit methodologies could be drawn from the data and descriptions provided in a Member's Supporting Tables. Such an interpretation lacks any legal basis and would lead to absurd and unworkable results.

115. This dilemma becomes apparent when looking more closely at China's arguments regarding the quantity of eligible production. China argues that the Panel should use the procurement amounts for purposes of calculating MPS for the programs at issue here, because it used procurement for the programs in existence when it calculated its base AMS. However, the description provided in the Supporting Table does not make clear how the China's market price support programs operated,

including whether the programs limited purchases to a specific amount. Were the latter to be true, total production would not have been the appropriate value to use for eligible production.

116. China argues that any differences between the programs does not matter, because constituent data and methodology apply to products, and not measures. However, China fails to explain how this view supports its arguments. With respect to eligible production, for example, China argues that the Panel must calculate market price support based on the calculation of the market price support program (measure) in its Supporting Tables. China therefore appears to suggest that while the methodology in the Supporting Tables relates to a particular program, the methodology now must necessarily be used with respect to all market price support measures for the same product regardless of the differences between the market price support programs at issue. However, if constituent data and methodology apply to products and not measures, then the more logical consequence of this view would be that China's use of an alternative methodology with respect to the calculation of a particular program simply does not reflect the type of constituent data and methodology the Panel must take into account in determining China's current product-specific AMS for the relevant products. Regardless, as the United States has explained, China may not rely on constituent data and methodology where the methodology is inconsistent with the requirements of the Agriculture Agreement.

117. Moreover, not knowing how a program described in China's Supporting Tables works, it is unclear on what basis the Panel would be able to determine that the values used in that calculation reflect the intention by the Members to alter the market price support methodology for purposes of calculating China's product-specific and Current Total AMS. That is, the Panel cannot determine based on the record before it whether the calculation provided in the Supporting Table is consistent with Annex 3 or not. Therefore, based on the vague factual descriptions provided in the Supporting Table alone, China asks the Panel to assume an intention on the part of the WTO Membership to amend an obligation under the Agriculture Agreement as it applied to China only.

118. The situation regarding the fixed external reference price is no different. China used a value in its Supporting Tables for purposes of calculating Base Total AMS and now asks the Panel to derive from that usage an intention by the Members to alter the terms of China's accession. Not only would such an exercise be inconsistent with the terms of China's Accession Protocol, it would create significant uncertainty with respect to Members' obligations, not only under the Agriculture Agreement, but under the *General Agreement on Trade in Services* ("GATS") and any number of other Agreements.

119. The second concern raised by China's argument is the disparity it would create between original and acceding Members to the WTO. Without a clear indication in the legal texts, a Member like China acceding to the WTO six years after the conclusion of the Uruguay round would have been able to do so on terms significantly more production- and trade-distorting than original Members. That is, were China able to use a quantity of eligible production limited only to the quantity actually procured, China's freedom to distort would be compounded, as the effect of such support might be provided to total production, but the calculation would only need to reflect a small portion of that support. China thus could have an identical program to another Member like India, but, unconstrained by the same obligations as those other Members, be able to provide significantly more support to its producers, increasing consequent production and trade effects. China has provided no argumentation that would allow such an interpretation in the absence of the clear, and legally confirmed intention of WTO Members, and the Panel should reject China's arguments accordingly.

120. Accordingly, the Panel should reject China's interpretations of the relevant Agreements, because they lack any legal basis and would give rise to serious concerns regarding the status and content of the WTO commitments of all Members.

B. China Has Not Demonstrated the Existence of a Subsequent Practice or Subsequent Agreement Regarding the Use of an Alternative Fixed External Reference Price For Newly Acceding WTO Members

121. In addition to its argument that both its quantity of eligible production and its fixed external reference price were modified by virtue of information contained in its Supporting Table, China has now argued in its responses to questions that the "practice of Members to use, for later-acceded Members, a different base period, including for the fixed external reference price, constitutes a

subsequent practice in the application of the treaty, within the meaning of Article 31 of the Vienna Convention."

122. The use of post-1986-1988 fixed external reference prices by recently acceding Members does not fit within the definition of subsequent practice or subsequent agreement per Article 31(3) of the *Vienna Convention on the Law of Treaties* ("VCLT"). Article 31(3) of the VCLT provides, in relevant part, that with respect to the general rule of interpretation "[t]here shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."

123. That is, Article 31(3) directs that a panel shall take into account that subsequent practice "which establishes the *agreement of the parties* regarding [the] *interpretation*" of the treaty. Therefore, for the practice of WTO Members to be relevant to the Panel's interpretive exercise, the practice must relate to the interpretation of a relevant provision of the Agriculture Agreement. In this dispute, the Panel is charged with interpreting and applying China's obligations under Article 3.2 and 6.3 of the Agriculture Agreement regarding Current Total AMS. The Agriculture Agreement provides instructions for the calculation of each of China's product-specific AMSs, and then its Current Total AMS, in Articles 1(a)(ii) and 1(h)(ii), and by extension in Annex 3 and Article 6.

124. The heart of the interpretative concern is Annex 3, paragraph 9 of the Agriculture Agreement, which states the "fixed external reference price shall be based on the years 1986 to 1988." The text of Annex 3 is clear in requiring Members to calculate market price support for purposes of product-specific AMS using a fixed external reference price of 1986-1988. Customary rules of interpretation do not permit an interpreter to use context, or a subsequent practice or agreement, to reach an interpretation inconsistent with the ordinary meaning of the terms of the provision in question, such that they create a derogation or exception from the provisions of the treaty. Rather, these sources of interpretation must be used to determine the particular meaning of the terms as used in the relevant provision.

125. The Appellate Body in *EC − Bananas (Article 21.5)* made a similar finding with respect to subsequent agreements. It noted that Article 31(3)(a) relates to the situation where an agreement specifies how existing rules or obligations in force are to be "applied;" the term does not connote the creation of new or the extension of existing obligations. Therefore, a subsequent practice, like a subsequent agreement, cannot have the legal effect of changing the obligation set out in a covered agreement.

126. China has shown no subsequent agreement regarding the interpretation of Annex 3, paragraph 9, because it has pointed to no text in any supporting table that even refers to that provision and it has pointed to no "agreement" that speaks to an "interpretation" of that provision. Moreover, a panel cannot refer to subsequent practice in order to develop an interpretation of a legal provision that applies to some Members only, and not to other Members. China appears to suggest that the alleged subsequent practice would support *different meanings* of the text of the Agriculture Agreement for different Members. But while a legal provision may be susceptible to multiple interpretations, the interpretative exercise cannot change depending on the Member in question. This would lead to an illogical result, whereby each Member may be subject to potentially very different obligations.

127. Therefore, the Panel should reject China's argument that the use of an alternative fixed external reference price for newly acceding WTO member amounts to a subsequent practice or subsequent agreement under the VCLT.

EXECUTIVE SUMMARY OF U.S. ORAL STATEMENTS AT THE SECOND SUBSTANTIVE MEETING WITH THE PANEL

I. CHINA ERRS IN CLAIMING THAT THE PANEL MUST CALCULATE CHINA'S CURRENT AMS CONSISTENT WITH CHINA'S BASE AMS

128. Throughout this dispute, China has argued that China's "Current Total AMS" for subsequent years must be calculated consistently with the calculation of its "Base Total AMS," as set out in its Supporting Tables. China asserts that "the same constituent data and methodology, including the same fixed external reference prices and the same methodology for determining eligible production,

must be used to calculate both *Base* (Total) AMS and *Current* (Total) AMS." While China insists that the Agriculture Agreement and its Supporting Tables can be interpreted harmoniously, it is clear that China is suggesting that a Member's Supporting Table can supplant the calculation requirements provided in the Agriculture Agreement for calculation of AMS and Current Total AMS with country-specific methodologies. This would both contradict the Agriculture Agreement and significantly expand China's ability to provide domestic support while other WTO Members are subject to different rules. The text of the WTO Agreements simply does not support this understanding.

129. The Agriculture Agreement defines the terms "AMS," "Base Total AMS," and "Current Total AMS," and sets out specific instructions and methodologies for the calculation of "AMS" and "Current Total AMS." The Agriculture Agreement does not impose specific requirements on the calculation of AMS during a base period or Base Total AMS. Indeed, Base Total AMS is not relevant as an obligation of a Member; rather, that calculation provided a basis for the Annual and Final Bound Commitment Levels that are the subject of a Member's commitments under Article 3.2 and 6.3. Naturally, then, the Agriculture Agreement nowhere requires "consistency" between the calculation of Current Total AMS and the calculation of Base Total AMS.

130. First, turning to AMS, it is described in Article 1(a). AMS is the annual level of non-exempt domestic support, expressed in monetary terms, provided to the producers of the basic agricultural product or non-product-specific support provided in favor of the agricultural producers generally. Romanette (i) of Article 1(a) states that AMS "with respect to support provided during the base period" is "specified in the relevant tables of supporting material incorporated by reference in Part IV of a Member's Schedule." From the plain text, it is clear that Article 1(a)(i) does not set out or mandate any calculation for AMS during the base period, but rather identifies where the value of such support is recorded for the base period. Romanette (ii) addresses AMS "with respect to support provided during any year of the implementation period and thereafter." As we described earlier, Article 1(a)(ii) does require a calculation. Each product-specific AMS in a subsequent year will be "calculated in accordance with the provisions of Annex 3 of this Agreement and taking into account the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule."

131. Thus, Article 1(a)(ii) provides a calculation requirement for AMS in the subsequent years, while Article 1(a)(i) provides no such requirement for AMS provided during the base period. Nothing in the Agreement suggests that the method a Member used to calculate AMS in the base period would have the effect of nullifying the obligation to calculate AMS in the subsequent years "in accordance with" Annex 3, and "taking into account" constituent data and methodology. As previously explained, "taking into account" does not require calculation consistent with or in conformity with information contained in the Supporting Tables. Rather, it requires a Panel to give consideration to country-specific "constituent data and methodology" − including the types of basic agricultural products grown in that Member's territory, the "year" relevant for domestic support, or whether supported products have unique attributes that affect the calculation of support such as multiple growing seasons, processing practices or requirements, or issues of quality − when calculating AMS.

132. The AMS or AMSs described in Article 1(a) are discrete component parts of a Member's Total AMS. Specifically, if individual AMSs exceed the *de minimis* level when calculated in accordance with Article 6 of the Agriculture Agreement, each such product-specific AMS (and if applicable a non-product specific AMS) must be included in the "Total AMS." Total AMS refers to a different stage in the computation of domestic support − namely, the summing of component parts. Article 1(h) defines Total AMS as the "sum of all domestic support provided in favour of agricultural producers, calculated as the sum of all aggregate measurements of support for basic agricultural products, all non-product-specific aggregate measurements of support and all equivalent measurements of support for agricultural products."

133. The definition of Total AMS informs the definition of both "Base Total AMS" and "Current Total AMS." Specifically, Article 1(h)(i) states that Base Total AMS, all domestic support provided in favor of agricultural producers in the "base period," is "as specified in Part IV of a Member's Schedule."

134. Critically, again, Article 1(h) does not provide a calculation methodology for determining the value of Base Total AMS; it indicates where the value of such support can be found. As the Appellate Body observed in *Korea − Beef*, "Base Total AMS, and the commitment levels resulting or derived

therefrom, are not themselves formulae to be worked out, but simply absolute figures set out in the Schedule of the Member concerned."

135. Separately, in romanette (ii), Article 1(h) provides the definition and calculation directions for "Current Total AMS." Current Total AMS is "the sum of all domestic support provided in favour of agricultural producers . . . actually provided during any year of the implementation period and thereafter." The Current Total AMS is "calculated in accordance with the provisions of this Agreement, including Article 6, and with the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule." Thus, Article 1(h)(ii) provides both a definition of Current Total AMS and instructions for the calculation of Current Total AMS.

136. Nothing in the text of the Agriculture Agreement provides, as suggested by China, that Base Total AMS calculations that may (or may not) be contained in a Member's Supporting Tables can supplant the rules in Article 1(h) to calculate "Current Total AMS." Because no particular calculation or rules for such a calculation is required to establish Base Total AMS, naturally, the Agreement nowhere suggests that consistency is required between the calculations. Rather, constituent data and methodology reflected in these documents may provide country-specific data and methodologies to inform, but not alter, the calculation requirements set out in Article 1(h).

137. China's proposed methodology is not consistent with the calculations contained in its supporting tables. Not only do China's arguments regarding "consistency" between the calculations of Base Total AMS and Current Total AMS fail because they are legally unfounded, but China's proposed market price support calculations are not in fact "consistent" with the calculations actually utilized in its Supporting Tables. This is a critical point, and fatal to China's case. Recall that China has been asserting that its Current Total AMS must be calculated using the *same* methodology as in its Schedule. But, on closer inspection, China *did not in fact use* a "fixed external reference price" based on the years 1996 to 1998 for wheat, Indica rice, Japonica rice, and corn in its original Base Total AMS. To recall, China asserts that the "*fixed external reference price* for wheat is 1698.1 Yuan per ton, as set out in Appendix DS 5-3 to Rev.3." Similarly, citing an appendix to DS-5 of its Supporting Tables, China provides a "fixed external reference price of 2343.0 yuan per ton for Indica rice and a fixed external reference price of 3290.6 yuan per ton for Japonica rice. China broadly notes "China's FERP for corn may be found in Rev.3." China further clarifies in its second written submission that "Rev.3 . . . includes FERPs for China that apply to certain products," and that "[t]hese FERPS are (i) based on a *three-year* base period of 1996-1998; (ii) based on China's status, during that period, *as a net exporter or net importer* of the product at issue; and, (iii) *fixed*."

138. However, China's calculation of its Base Total AMS *was not* based on a "fixed external reference price" or the values drawn from Appendix DS 5-3 or Appendix DS 5-4 of its Supporting Tables. Instead, China's market price support calculations for wheat, Indica rice, Japonica rice, and corn in its DS 5 Supporting Table used three different, annual "external reference price[s]" corresponding to each year of the base period. The fifth column in China's Support Table is labeled "external reference price" – not "fixed" external reference price; and the values contained in that column reflect three different prices, one for each year. According to footnotes 17 and 18 to the Supporting Table, these "external references prices" were calculated based on CIF prices for wheat, and on FOB prices for Indica rice, Japonica rice, and corn. Rather than use a *fixed* external reference price covering 1996-1998, as China has asserted to the Panel, China's market price support calculations thus compared a 1996 applied administered price to a 1996 external reference price, a 1997 applied administered price to a 1997 external reference price, and a 1998 applied administered price to a 1998 external reference price. The values of market price support calculated in these tables were included in China's DS 4 Table calculating its Base Total AMS. To illustrate, in the row covering wheat, for each year from 1996-1998, there is a separate price. So, it is not the same average price that would reflect a fixed external reference price.

139. Thus, Table DS 5, which contain the actual calculations of market price support for wheat, Indica rice, Japonica rice, and corn, reveals that the calculation of market price support during the base period did not utilize a "fixed" external reference price at all. Rather, the calculation appears to reflect an evaluation of market price support using the price gap between an applied administered price and the average FOB or CIF unit value for the basic agricultural product *in the specific year in question*.

140. Were this methodology applied to the calculation of market price support in this dispute, China's support would be determined based on the gap between the applied administered price for wheat in 2015, for example, and the average CIF prices for Chinese wheat imports *in 2015*, and similar external reference prices would be needed for each year from 2012 to 2014. China does not argue that a Panel may calculate market price support in this way, and Annex 3, which requires the use of a "fixed external reference price . . . based on the years 1986 to 1988," does not permit such a calculation methodology.

141. China draws its proposed "fixed external reference price" for each product, not from the Supporting Tables that informed its market price support (DS 5) and Base Total AMS (DS 4) calculations, but from a separate appendices included in its Rev. 3 containing values that appear not to have been used in the original calculation process. These appendices provide the underlying calculation for China's year-by-year external reference price calculation, including the import/export volumes, import/export values, CIF/FOB prices, and calculated CIF/FOB unit prices. The charts also contain an average of these values, but this is not utilized elsewhere in the document, and in particular to calculate the AMS for each product for each year.

142. For this reason, China's demand for consistency between the Base Total AMS and Current Total AMS seems misplaced. First, nothing in the text of the Agriculture Agreement provides, as suggested by China, that Base Total AMS calculations contained in a Member's Supporting Tables can replace the binding commitments in the Agreement to calculate "Current Total AMS" in accordance with Annex 3. Second, in any event, China's own Supporting Tables did not use the data or methodology suggested by China in its actual calculation of market price support and Base Total AMS. Rather, the Agriculture Agreement sets forth the requirements for calculating Current Total AMS in subsequent years and this includes recourse to country-specific data and methodology reflected in a Member's Supporting Tables to the extent that it informs, but does not alter, the calculation requirements.

II. China Has Not Established That the Panel Is Precluded from Issuing Findings and Recommendations Concerning China's Provision of Domestic Support to Corn Producers in 2012 through 2015

143. China has not demonstrated that its Corn MPS Program had "expired" prior to the Panel's establishment; nor has China shown that it ceased to purchase corn at administratively determined prices during the 2016/17 harvest. First, the introduction of a direct payment program for corn producers does not demonstrate that China no longer purchases corn at an administratively determined price. Second, while China asserts that its *2016 Northeast Region Corn Purchasing Notice* provides for "market-oriented" purchases by "market players," where all types of entities may decide to make purchases on their own initiative, the *2016 Notice* directs the same state-owned enterprises who were engaged in corn purchases in prior years to "striv[e] not to go lower than the policy-based purchasing amount of the previous year."

144. Although not required in order to satisfy the obligations of Article 6.2 of the DSU, the United States has continued to seek additional information and instruments related to China's 2016-17 corn purchase programs for the Panel's reference. The additional information found suggests that China had not ceased to provide market price support in 2016. First, despite China's statements regarding the transition to the use of a "market price" for government purchases of corn in 2016, the United States has identified a notice of administered prices issued by Sinograin to certain purchasing locations in Inner Mongolia on October 16, 2016. Entitled, *Notice on Activating 2016 Autumn Grains Corn Purchase Work* (Exhibit US-101), this document − released one month after the "reformed" purchasing instruments − announces the prices at which government purchases will be made, and directs local grain depots to display or post the available prices for new, standard grain corn in that area. This announcement read together with the 2016 Northeast Region Corn Purchase Notice (Exhibit US-87) are very similar in form and content to the 2012 − 2015 Corn MPS Programs.

145. Second, Exhibit US-102, entitled *Jilin Notice on Further Proper Handling of Corn Purchases and Sales Work* issued by the Jilin Province Grain Bureau, a provincial branch of the State Administration of Grain, directs Sinograin and other state-owned enterprises to enter the corn et and make corn purchases, in order to counteract negative market trends, including falling corn prices.

146. Third, Exhibit US-103, a May 2017 transcript of a live broadcast interview of the Jilin Province Grain Bureau Vice Director confirms that Sinograin's Jilin province subsidiary has given full play to its role of macro-control and as a 'stabilizing instrument' and 'ballast.'" Taken together, these documents suggest that China has not "ceased" government purchases of corn at pre-set prices.

U.S. Responses to the Panel's Second Set of Questions

Summary of U.S. Response to Panel Question 74

147. Generally, other Member's Supporting Tables may be considered "context" in instances where they assist in the interpretation as directed by Article 31 of the VCLT.

148. We also note that while other Members' Schedules may be looked to as context, they are only one source of context. Typically, interpreters look first to the "immediate context" of a term or provision, including for instance the rest of the particular provision at issue, the other provisions of the relevant WTO Agreement, other similar provisions in other Agreements, and the overall structure of the Agreement, which may be considered along with the Agreement's object and purpose.

149. Contrary to China's arguments, customary rules of interpretation do not permit an interpreter to use context to reach an interpretation inconsistent with the ordinary meaning of the terms of the provision in question, such that they create a derogation or exception from the provisions of the agreement. Importantly, when China points to certain other Members' Supporting Tables as context, it does not and cannot assert that those Supporting Tables provide context for the calculation of current AMS and Current Total AMS. Rather, it can only point to certain other Members' use of a different time period for purposes of calculating *base AMS*. Thus, to the extent these Supporting Table provide context, they do not provide *relevant* context − that is, context for the understanding of the particular calculation as described in the provision of the Agreement on Agriculture in question.

150. More relevant context is provided by China's Accession Protocol and Working Party Report. The clear intention to alter the calculation methodology for China for future years, including a China-specific *de minimis* support level, was recorded in paragraph 235 of the Working Party Report and incorporated into China's Accession Protocol. This demonstrates *how* WTO Members altered a WTO obligation when they *intended* to alter that obligation. Paragraph 235 does not contain any alteration to the Article 1(a)(ii) or Annex 3 current AMS obligations. China's Supporting Table is not the appropriate vehicle to alter a WTO obligation and contains no text suggesting an intention to alter an obligation.

Summary of U.S. Response to Panel Question 75

151. China has no reduction commitments and has an ongoing Final Bound Commitment Level of "nil." China is obligated to maintain Current Total AMS, when calculated in accordance with Annex 3 and Article 6 of the Agriculture Agreement, at a zero level.

U.S. Comments on China's Response to the Panel's Second Set of Questions

Summary of U.S. Comments on China's Response to Panel Question 52

152. China erroneously argues that Sinograin acted as a market player and subsequently "adjusted its prices" to reflect market prices reflected in Exhibits CHN-111-B − CHN-127-B. However, Sinograin is a state-owned enterprise directed by the State Council to actively enter the corn market and make purchases at amounts not lower than the prior year. Moreover, nothing in the documents presented by China indicates that Exhibit US-101 did not implement mandatory purchases at pre-set prices, or that this announcement was "replaced" with subsequent notices. Rather, the documents placed on the record by China appear to be internal price monitoring documents devoid of any indication of its authenticity and status, rather than directions to purchase at a particular price as provided for in Exhibit US-101.

Summary of U.S. Comments on China's Response to Panel Question 83

153. China asserts that constituent data and methodology "must be used consistently, where pertinent, for the calculation of that Member's Base (Total) AMS and Current (Total) AMS."

154. China misstates the requirements of Articles 1(a) and 1(h) of the Agriculture Agreement. Articles 1(a) and 1(h) prioritize consideration and use, not of what data and methodology were used to evaluate different programs at the time of accession, but rather the calculation requirements provided by the text of the Agriculture Agreement. This is made explicit by the hierarchy provided in Article 1(a)(ii). Article 1(a)(ii) does not use the same language or instruction to describe both elements of calculation, as suggested by China. Rather, it specifies Members are to calculate the value of AMS "in accordance with the provisions of Annex 3 of this Agreement," and that Members are to calculate AMS "taking into account the consistent data and methodology used in the tables of supporting material." Article 1(h)(ii) governing the calculation of Current Total AMS in subsequent years presents a similar hierarchy.

155. Articles 1(a)(ii) and 1(h)(ii) do not limit the application of constituent data "to the same measures that already existed during the base year." Instead, the text limits the application by first plainly stating that the calculation in subsequent years must be consistent with the text of the Agriculture Agreement. The subsequently used data and methodology may not be not inconsistent with the requirements of the Agriculture Agreement. The reference to constituent data and methodology does not, as suggested by China, permit the use of a methodology that was accurate for a program in the base period (such as the using a pre-set maximum procurement volume as the quantity of eligible production) to calculate the value of support provided through a different program that requires a different evaluation pursuant to the requirements of Annex 3.

156. In support of the application of "methodology" used to evaluate *different* domestic support measures that operated under *different* legal requirements and parameters, China again falls back on its demand for "consistency." China suggests that a calculation not based on this historic methodology used to evaluate a different program would "involve substantial distortions," and "would become a meaningless apples-to-oranges comparison." China's argument is again without merit.

157. Consistency from year-to-year and, crucially, amongst Members is provided by observing the requirements of the Agriculture Agreement, including Annex 3 and Article 6, regardless of the domestic support program, agricultural product, or Member at issue. Consistency with the requirements of the Agriculture Agreement with regard to quantity of production eligible to receive the applied administered price and with regard to the fixed external reference price is what ensures a meaningful evaluation, and is the basis for evaluating the value of domestic support provided in any year after accession.

158. Finally, with regard to the statements of the panel and the Appellate Body in *Korea − Beef*, China suggests that the Appellate Body "shared the panel's understanding of . . . the need for consistency with Base AMS." The United States does not share China's reading the Appellate Body's statements. Specifically, the Appellate Body's footnote citing to the panel report in *Korea − Beef* appears to indicate that while the panel and Appellate Body both agreed they did not need to reach the issue of how to address constituent data and methodology, the Appellate Body *disagreed* with the panel's broad statements regarding consistency between the calculation of Base Total AMS and Current Total AMS. Specifically, the Appellate Body asserted that a hierarchy exists between the text of the Agreement and a Member's constituent data and methodology, and this would appear to directly refute China's proposed blanket requirement for "consistency."

ANNEX B-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA

I. INTRODUCTION

1. This dispute arises against the background of the complexity and special characteristics of the agricultural sector of the People's Republic of China ("China"). It concerns the nature and scope of China's right to provide domestic support for its wheat, rice and corn farmers. It also raises important systemic issues regarding the interpretation and application of the methodology for the calculation of aggregate measurement of support ("AMS"), under the terms of both (i) Annex 3 of the *Agreement on Agriculture* and (ii) a Member's negotiated and agreed "constituent data and methodology", as found in the Member-specific Supporting Tables incorporated by reference in Part IV of each Member's Schedule. For Members that have acceded to the World Trade Organization ("WTO") subsequent to the Uruguay Round, such as China, these "constituent data and methodology" are of particular relevance because they are also part of those Members' terms of accession, and a basis upon which China and other later-acceded Members have undertaken their domestic support reduction commitments.

2. In its submissions to the Panel, China has rebutted U.S. claims, under Articles 3.2, 6.3 and 7.2(b) of the *Agreement on Agriculture*, that China's AMS from market price support for wheat, indica rice and japonica rice exceeds China's domestic support reduction commitments. China has also demonstrated that alleged market price support for corn, under China's Temporary Purchase and Reserve Policy ("TPRP"), expired prior to panel establishment, and is thus outside the Panel's terms of reference. Accordingly, the Panel is precluded from making any findings or recommendations with respect to the TPRP for corn.

II. RELEVANT BACKGROUND

3. China's past and present domestic support policies for its agricultural sector, and the direction in which they are evolving, can be understood only against the background of the particular challenges facing China. First and foremost amongst those is the unique challenge of ensuring a sufficient, stable, reliable and affordable supply of food for China's population of 1.38 billion people, the largest in the world. In meeting the challenge of ensuring food security, consistent with its WTO obligations, China employs a variety of agricultural policy measures, including public stockholding.

4. While China imports large volumes of grains – in 2016, 167 million tons – the bulk of China's food requirements is supplied by China's domestic agricultural sector. That sector is dominated by small-scale family farms, relying predominantly on family labor, and other smallholder farms. Indeed, for a large part of China's population, these small-scale household farms constitute the main source of both income and other means to support their livelihood, including through the consumption of agricultural commodities grown on their family farms. To appreciate the importance of China's agricultural policies, China notes that, in 2016, its rural population accounted for 590 million people. Of that rural population, many are involved in the production of wheat, rice and corn, the agricultural products at issue in this dispute. Thus, China's agricultural policies necessarily affect the well-being of a significant proportion of its population, and accordingly have an important impact on the stability and the sustainable development of China's society and economy.

5. These complex and important policy considerations are enshrined in China's regulation of the marketing and distribution of basic agricultural products, including for wheat, rice and corn. At the same time, China's agricultural policies for wheat, rice and corn are moving towards a comprehensive opening of those grain markets.

6. China's unique agricultural challenges stand in sharp contrast to the situation in the United States and other large agricultural commodity-exporting countries, where agricultural production is dominated by very large and highly mechanized farm operations. Indeed, the average size of a U.S. farm is several hundred times larger than the average size of a farm in China. The advantage of large-sized U.S. farms is further enhanced by the United States' USD 19.1 billion AMS entitlement.

Together, scale and substantial amounts of domestic support have enabled U.S. farmers to produce large volumes of agricultural products, and to sell them cheaply. As a result, the United States is a net *exporter* of agricultural products, including for corn and wheat. By contrast, China is a net *importer* of grains.

7. China and the WTO Membership negotiated and agreed China's domestic-support-related commitments under the *Agreement on Agriculture* against this background. China's objective in those negotiations was to ensure it retained the flexibility to provide domestic support for food security purposes, and to encourage Chinese farmers to remain on their farms to grow the staple crops, including wheat, rice and corn, necessary to feed China's large population.

8. Like most developing countries, China was not in the position to declare a Base Total AMS for its 1996-1998 base period. Accordingly, China accepted a domestic support reduction commitment of "nil", limiting domestic support to levels below its *de minimis* threshold. China was further required to accept a *de minimis* threshold of 8.5% of the value of production of each basic agricultural product, instead of the 10% level for developing countries, provided for under Article 6.4 of the *Agreement on Agriculture*. In exchange, China secured agreement to use "the amount purchased" as the measure of "eligible production" in the context of market price support measures. In addition, China uses fixed external reference prices from its 1996-1998 base period. These agreed commitments, which are included in China's "constituent data and methodology" in its Supporting Tables in WT/ACC/CHN/38/Rev.3, or "Rev.3", are incorporated in China's Accession Protocol.

9. Since its accession to the WTO in 2001, China has relied on, *inter alia*, the negotiated and agreed constituent data and methodology in Rev.3 to devise its agricultural policies consistent with its domestic support reduction commitments. Specifically, in 2004, China implemented reform of its agricultural policies, adopting a market-oriented grain policy, with direct government intervention into the market authorized only in exceptional circumstances to protect farmers from the effects of significant fluctuations in supply and demand. For example, under the minimum procurement price ("MPP") programs for wheat, indica rice and japonica rice, which apply in certain provinces, purchases occur only when market prices fall below the established MPP level. The MPP program is not available when prices are above that level. Moreover, prior to 2016, China implemented the TPRP for corn in four northeast provinces/regions, designed to meet food security purposes. In 2016, China reformed the TPRP and enacted market-based reforms. China's new corn measures involve the use of direct payments to farmers growing corn, with the amount of payments determined by historic benchmarks. The measures further seek to limit the production of corn.

III. THE MEASURES AT ISSUE UNDER THE PANEL'S TERMS OF REFERENCE

10. The United States' panel request defines the Panel's terms of reference. It identifies as the specific measures at issue, pursuant to Article 6.2 of the DSU, the MPP programs for wheat, indica rice and japonica rice, and the (albeit expired) TPRP for corn. Consistent with its identification of the measures at issue, the United States presented arguments and evidence in its First Written Submission.

11. However, upon China's showing, in its own First Written Submission, that the TPRP for corn had expired prior to panel establishment, and was, thus outside the Panel's terms of reference, the United States attempted to re-define the "measures at issue" in this dispute as the "levels of domestic support", or "domestic support" in each of the years 2012-2015.

12. The Panel must make its own objective assessment of its terms of reference, and of the measures at issue. In so doing, the Panel must reject the United States' attempt to unilaterally re-define, following establishment of the Panel and its terms of reference, the "measures at issue" in these proceedings. As explained in the next section, the Panel must also find that the expired TPRP for corn is outside its terms of reference.

A. The United States' challenge in this dispute is limited to alleged market price support under the MPP for wheat, indica rice and japonica rice, and the (albeit expired) 2012-2015 TPRP for corn

13. The starting point of any WTO dispute is the identification of an act or omission by a Member as a specific "measure at issue", within the meaning of Article 6.2 of the DSU. It is *that* measure which is the object of claims of inconsistency with one or more of the provisions of the covered agreements. And it is *that* measure that may, if found to be inconsistent, become subject to recommendations, under Article 19.1 of the DSU.

14. Accordingly, the core requirements that any panel request must fulfill, consistent with Article 6.2, are the identification of the specific "measures at issue" and the claims raised. These requirements "serve the due process objective of notifying the parties and third parties of the nature of a complainant's case".[1]

15. China has established that, properly construed, the U.S. panel request identifies the legal basis of the complaint, *i.e.*, the claims at issue as follows: "[t]he level of domestic support China provides is in excess of its commitment level of 'nil'", resulting in an alleged inconsistency with Articles 3.2, 6.3 and 7.2(b) of the *Agreement on Agriculture*.[2]

16. The U.S. panel request then proceeds to identify the specific measures at issue. It explains that "*[t]he legal instruments through which China provides domestic support* in favor of agricultural producers, including support in favor of producers of wheat, indica rice, japonica rice, and corn, operating collectively or separately, include, but are not limited to"[3] a list of individually specified legal instruments. These legal instruments permit the identification of the following specific measures at issue: the MPP programs for wheat, indica rice and japonica rice and the (albeit expired) TPRP for corn.

17. Thus, the U.S. panel request identifies as the measures at issue the MPP programs for wheat, indica rice and japonica rice, and the (albeit expired) 2012-2015 TPRP for corn. Contrary to the U.S. assertion, the MPP and TPRP measures identified do not constitute mere "additional information", "argument" or "evidence" to provide a preview of the U.S. case − they comprise and delimit the specific "measures at issue".

18. Indeed, while the United States erroneously parses out the text of the U.S. panel request into alleged "measures", "claims" and "arguments", the United States is forced to accept that its panel request

> sets out the instruments through which the support is provided (and the United States has not sought to rely on any other instruments). It[s panel request] further listed the agricultural products through which China's breach would be demonstrated (and the United States has not sought to prove its case on the basis of other products).[4]

Thus, the United States accepts that its case is limited to alleged market price support provided by the MPP programs for wheat and rice and the (albeit expired) TPRP for corn, as the specific measures under its panel request. Not surprisingly, these are also the sole measures for which the U.S. submissions assert, based on argument and evidence, alleged inconsistencies with the covered agreements.

19. The United States further attempts to support its erroneous argument that its panel request covers "domestic support", by arguing that that it "does not seek a finding that any particular legal instrument … is in breach of China's commitments … because the existence or maintenance of a market price support program or any other legal instrument would not itself necessarily lead to the breach of a domestic support commitment".[5] Yet, the U.S. argument does not support its position.

[1] Appellate Body Report, *US − Carbon Steel*, para. 126.
[2] United States, first written submission, para. 15, *citing* WT/DS511/8, p. 1 (second substantive paragraph) (underlining added).
[3] WT/DS511/8, p. 1 (second substantive paragraph) (emphasis added).
[4] United States, second written submission, para. 27.
[5] United States, response to Panel Question 5, para. 32.

Instead, the U.S. argument is a mere reflection of the fact that the U.S. claims are of an "as applied" nature, rather than "as such". As the Appellate Body explained in *US − Continued Zeroing*, "the distinction between 'as such' and 'as applied' claims does not govern the definition of a measure for purposes of WTO dispute settlement".[6] Thus, the U.S. clarification that it is challenging certain measures "as applied", as opposed to "as such", has no bearing on the identification of the measures at issue, and certainly does not establish that the measure at issue must be "domestic support".

B. Identification of "domestic support" as the specific measure at issue would fail to meet the "specificity requirements" of Article 6.2 of the DSU

20. In any event, the U.S. identification of "domestic support" as the measure at issue would fail to meet the specificity requirements under the DSU. As the Appellate Body explained in *US − Continued Zeroing*, "the specificity requirement means that the measures at issue must be identified with sufficient precision so that what is referred to adjudication by a panel may be discerned from the panel request".[7]

21. China has explained that the reference to the legal concept of "domestic support" cannot be used to identify a specific measure. Instead, it *characterizes* an otherwise specifically identified measure under WTO law. This is consistent with the fact that the legal concept of "domestic support" itself covers many different forms of domestic support, including: different forms of "amber box", "blue box", and "green box" domestic support measures. The United States is forced to recognize that domestic support does not specifically identify any particular measure at issue. It explains that "the Agriculture Agreement gives WTO Members the flexibility to provide domestic support *in various forms*".[8] In these circumstances, a mere reference to "domestic support" is insufficient to meet the specificity requirements under Article 6.2 of the DSU.

22. While the Appellate Body has accepted that "there may be circumstances in which a party describes a measure in a more generic way", the Appellate Body nonetheless required that such generic characterization "allow[] the measure to be discerned".[9] Indeed, the inability of the legal concept "domestic support" under the *Agreement on Agriculture* to allow the measure at issue to be discerned is similar to that of the legal concept of a "subsidy", under the *SCM Agreement* − both of which are used to characterize a specific measure under the substantive provisions at issue, but are insufficient to identify a specific measure under Article 6.2.

23. Finally, in re-defining "domestic support" as the "measure at issue", the United States reduces the specifically identified and enumerated legal instruments in its panel request to mere "evidence". As mere evidence of an alleged breach (and not identifications of the measures at issue), the Panel would be precluded to rely on that evidence to inform the meaning and scope of the U.S. reference to "domestic support" as the alleged measure at issue. That is, the Panel cannot rely on that evidence to inform its understanding of the meaning and scope of the term "domestic support" in a manner that permits that term to meet the specificity requirements under Article 6.2. In those circumstances, The Panel would have to find that the U.S. panel request, in its entirety, fails to meet the specificity requirements.

24. The United States does not address any of China's arguments set out above. Instead, it simply asserts that "domestic support" can be a measure at issue because it fulfills one relevant requirement − namely that it constitutes *action* by China. Yet, to constitute a "measure at issue", any challenged "act or omission" by a Member must, additionally, be identified in a panel request with the required level of specificity.

25. In short, if the Panel were to find that the U.S. panel request identified "domestic support" as the "measure at issue", that request would fail to meet the specificity requirement under Article 6.2, and the Panel would have to deny the U.S. claims in this dispute. By contrast, the Panel would be able to consider the particular measures and claims that an objective assessment of the U.S. panel request reveals, as set out above. This is a further reason on which the Panel should reject the United States' post-hoc rationalization of its panel request, which the United States only adopted following China's demonstration that the U.S. panel request inappropriately challenges the

[6] Appellate Body Report, *US − Continued Zeroing*, para. 179.
[7] Appellate Body Report, *US − Continued Zeroing*, para. 168.
[8] United States, second written submission, para. 28 (emphasis added).
[9] Appellate Body Report, *US − Zeroing (Japan) (Article 21.5 − Japan)*, para. 116.

expired TPRP for corn.

C. Permitting claims against a measure identified as "domestic support" raises serious systemic concerns

26. Moreover, accepting "domestic support" as the "measure at issue" raises due process concerns. Under Article 19.1 DSU, a panel may make recommendation only with respect to "measures at issue", and it is with respect to those measures that an implementing Member is required to achieve compliance. Thus, the scope of any recommendation is constrained by the specific measures identified in a panel request.

27. In these proceedings, the United States appears to seek a recommendation that China bring its "domestic support" into conformity, without limiting that recommendation to those market-price-support-related measures that have been the sole focus of the United States' case before the Panel. Specifically, the United States argues that the recommendation should cover "domestic support", and that "[t]he Panel need not include a further characterization of the measures in its recommendation".[10]

28. The United States errs. Under Article 3.7 of the DSU, WTO dispute settlement must contribute to a "positive solution to the dispute". This objective requires a panel to inform a respondent, through specific findings, of the particular measures that have resulted in particular WTO inconsistencies. Pursuant to a recommendation under Article 19.1 of the DSU, a respondent is then under an obligation to remedy the WTO inconsistencies identified, by bringing the measures found to have resulted in the WTO inconsistencies into conformity with its WTO obligations. The particular findings of WTO inconsistencies that form the basis for a recommendation are framed with reference to the specific arguments and evidence provided by the parties, and cannot relate to specific measures or claims not covered by the parties' arguments and evidence. Otherwise, recommendations could cover specific measures that may potentially fall under the umbrella of "domestic support", but for which the respondent has not had a chance to defend itself. This would violate the respondent's due process rights.

29. Accordingly, a panel's recommendation must identify, and must be limited to, the particular measures (amongst those properly before a panel) that the panel has found to have resulted in particular WTO inconsistencies, based on the parties' arguments and evidence.

D. Conclusion

30. The U.S. panel request reflects a deliberate choice to challenge the MPP programs for wheat, indica rice and japonica rice, and the (albeit expired) 2012-2015 TPRP for corn. That choice has consequences − China's due process rights and the jurisdiction of the Panel mean that the United States cannot, belatedly, broaden the scope of the measures at issue.

IV. THE TPRP FOR CORN EXPIRED PRIOR TO PANEL ESTABLISHMENT AND IS THEREFORE OUTSIDE THE PANEL'S TERMS OF REFERENCE

31. China has further established that its TPRP for corn expired prior to panel establishment, and is therefore outside the Panel's terms of reference. Yet, the United States asserts, erroneously, that the expiry of the TPRP for corn prior to panel establishment did not affect the Panel's terms of reference, and that, in any event, the TPRP continues to exist.

A. Factual background

32. From 2012 to 2015, China's Central Government provided for a TPRP for corn in Liaoning, Jilin, and Heilongjiang Provinces and in the Inner Mongolia Autonomous Region. The TPRP for corn was established through annual TPRP Notices issued by several national-level government authorities. These TPRP Notices set out the geographic and temporal scope of the TPRP, and determined the TPRP price at which designated entities offered to purchase corn during a defined period of time. For example, the 2015 TPRP Notice set a TPRP purchase price of RMB 1 yuan per jin for "grade 3" corn offered for purchase at certain purchasing and storage depots in the Jilin, Liaoning,

[10] United States, response to Panel Question 59, para. 39.

Heilongjiang Provinces and the Inner Mongolia Region. This price was available for a purchasing period that lasted from 1 November 2015 to 30 April 2016.

33. In announcing the discontinuation of the TPRP for corn, on 28 March 2016, the deputy director of the National Development and Reform Commission of the People's Republic of China ("NDRC") explained that the TPRP for corn had encountered "prominent problems", including a "heavy financial burden".[11] Similarly, a *Ministry of Finance ("MOF") Opinion* explained that "the corn temporary purchase and reserve system does not fit into the current situation".[12] Starting with the 2016 harvest, China "has made the reform of the [TPRP], pursuant to the principle of 'Price formed by market and decoupling of price and subsidy'", involving the expiry of the TPRP and the introduction of "'market-oriented purchase' plus ' direct subsidies'".[13] Such direct payments are available to producers of corn in the four provinces/region, subject to certain requirements to limit production.

B. Under Article 6.2 of the DSU, measures that have expired prior to panel establishment generally fall outside a panel's terms of reference

34. Under Article 6.2 of the DSU, the general rule is that a measure that no longer exists at the time of panel establishment is outside a panel's terms of reference. For example, in *EC − Chicken Cuts*, the Appellate Body noted that a measure at issue must be "in existence at the time of the establishment of the panel".[14] Likewise, in *China − Raw Materials*, the panel noted that "the date of a panel's establishment is critical in deciding which measures may be included in a panel's terms of reference".[15] And in *EC − Biotech*, the panel held that "the question [that this panel] is mandated to answer is whether on the date of its establishment, … the European Communities applied a general *de facto* moratorium on approvals".[16]

35. China explained that, for expired measures, there is one notable exception to the general rule that a measure at issue, under Article 6.2, must exist at the time of panel establishment. Specifically, a measure that has expired prior to panel establishment may be properly before a panel where it is demonstrated that it continues to affect the operation of a covered agreement. The burden of prove to establish that the expired measure continues to affect the operation of a covered agreement falls on the complaining Member. Here, the United States has not even attempted to meet that burden.

36. Instead, the United States simply ignores the well-established case law in favor of asserting that failure to make a recommendation on the matter that the DSB referred to the Panel would deprive the United States of its rights under the DSU. In particular, the United States argues that "[t]he alleged expiry of a legal instrument does not change the matter the DSB put within the Panel's terms of reference, nor does it make another matter susceptible to examination by the Panel".[17] In short, the United States argues that, since the "matter" referred to this Panel includes the expired TPRP measure, the Panel must review that measure. Yet, while the United States may have *intended* to place an expired measure before the Panel, its expiry before panel establishment means that that measure was never properly part of the matter referred to the Panel by the DSB. The case law is clear − a measure that has expired at the time of panel establishment is *not* properly before a panel.

37. In its Second Written Submission, the United States appears to have recognized the existence of the general rule, when referring to situations where an expired measure has been replaced by a new measure that is of the "same essence". The United States argues that "a panel should make findings on a *recurring* measure".[18] Indeed, consistent with the case law on expired measures, a "recurring" measure could be properly before a panel in a situation where a specifically listed measure has expired prior to panel establishment, but where that measure has been replaced

[11] The State Council, News Report "Corn Temporary Purchase and Reserve System will be Shifted to a 'Market-oriented Purchase' and 'Direct Subsidies'", available at: http://www.gov.cn/xinwen/2016-03/28/content_5059171.htm (last viewed 26 October 2017) (English translation), (Exhibit CHN-74-B).

[12] MOF Opinion, May 2016, (Exhibit CHN-73-B), Section I.

[13] *Notice on Proper Handling of Corn Purchase Work in Northeast China This Year (2016)* (Guo Liang Tiao [2016] No. 210), 19 September 2016 (English translation), (Exhibit CHN-80-B), p. 1.

[14] Appellate Body Report, *EC − Chicken Cuts*, para. 156.

[15] Panel Report, *China − Raw Materials*, para. 7.19.

[16] Panel Report, *EC − Biotech*, para. 7.1301 (underlining added).

[17] United States, response to Panel Question 11, para. 56.

[18] United States, second written submission, para. 39 (emphasis added).

by is a new measure that is of the "same essence" as the expired measure. In fact, in those circumstances, the measure at issue has not truly expired. Yet, on the facts of this case, the United States has not, and cannot, demonstrate that the TPRP for corn has been replaced by a measure that is of "the same essence". China turns to these factual issues in the next section.

38. The United States also argues that domestic support cases are somehow unique, allegedly because "a dispute challenging the conformity of a Member's domestic support with its domestic support commitments necessarily involves a retrospective analysis".[19] In making this argument, the United States confuses the distinction between the existence of a measure, and the existence of evidence necessary to show a WTO inconsistency.

39. With respect to the existence of a *measure*, there is nothing inherently different about claims involving domestic support measures compared to claims involving other measures. That is, nothing warrants a carve-out from the case law on expired measures. In particular, domestic support measures do not necessarily involve annual measures that would always have expired, as the United States initially argued. In fact, domestic support measures often involve long-standing programs supporting agriculture through payments or other support. Annual measures may also form part of an ongoing program. This was precisely the situation in *US − Upland Cotton* where the United States provided annual marketing loan payments pursuant to a multi-year marketing loan program.

40. Moreover, with respect to the evidence, China explained that domestic support measures are not the only type of measure for which an assessment of their WTO consistency may involve consideration of historic evidence. Indeed, while a domestic support *measure* must exist at the time of panel establishment, its WTO consistency may be assessed in light of (i) evidence predating panel establishment, (ii) evidence contemporaneous with panel establishment, or (iii) the most recent evidence, depending on their availability. These considerations apply across many types of measures and disputes. Yet, the need for evidence that may predate panel establishment, to enable assessing the WTO consistency of a measure, does not remove the requirement for the measures to exist at the time of panel establishment.

41. Finally, systemic concerns arise were the Panel to accept the U.S. argument that panels are required to make findings and recommendations on expired measures. Accepting the U.S. argument would result in purely declaratory judgments. Yet, WTO dispute settlement is not designed to deliver declaratory judgments.[20] Rather, it is designed to secure a positive solution to the dispute. The Panel must, thus, avoid a declaratory judgment.

42. Contrary to the U.S. assertions, this would not prejudice the United States. This is because the United States has no right to purely declaratory judgment. To recall, in *US − Certain EC Products*, the Appellate Body held that panels may not make recommendations with respect to expired measures. It explained that this rule exists because there is an "obvious inconsistency" between, on the one hand, a finding that a measure has expired, and, on the other hand, a panel's recommendation that such expired measure be brought into conformity with the applicable WTO obligations, including through its withdrawal.[21]

43. The United States' reliance on the panel report in *EC − Biotech* and the Appellate Body report in *China − Raw Materials* does not change that finding. Indeed, the United States mischaracterizes *EC − Biotech* as standing for the proposition that panels may make recommendations on expired measures. In fact, the opposite is true. The panel in *EC − Biotech* made recommendations with respect to an unwritten general *de facto* moratorium on the approval of biotech products − *which it found existed at the time of panel establishment*. In the face of uncertainty whether the measure continued to exist, or had subsequently ceased to exist during the panel proceedings, as the European Communities asserted, the panel made a recommendation "to the extent that[] that measure ha[d] not already ceased to exist".[22] This is evidently different from the situation here, where the evidence demonstrates that the TPRP for corn has *expired prior to panel establishment*.

44. With respect to *China − Raw Materials*, the United States fails to appreciate that the concern to which it referred, involving an "endlessly moving target" loophole, is resolved through the case

[19] United States, response to Panel Question 4, para. 21.
[20] Appellate Body Report, *US − Wool Shirts and Blouses*, p. 19.
[21] Appellate Body Report, *US − Certain EC Products*, para. 81.
[22] Panel Report, *EC − Biotech*, para. 8.16.

law, including *China − Raw Materials* itself. That case law permits challenges of, and eventually recommendations on, measures (including programs and "series of measures") *that continue to exist at the time of panel establishment or measures that have "replaced" them, where they are of the "same essence"*. However, contrary to the U.S. assertions, neither the case law in general, nor *China − Raw Materials* in particular, stand for the proposition that a panel must, or even may, make recommendations with respect to measures (i) that did not exist at the time of panel establishment or (ii) that expired during panel proceedings, in situations where those measures have not been "replaced" by new measures that are of the "same essence". In other words, *China − Raw Materials* does not permit, let alone require, panels to make recommendations with respect to expired measures.

45. In these circumstances, the Panel should conclude that the TPRP for corn, which expired prior to panel establishment, is outside the Panel's terms of reference.

C. The evidence demonstrates that the TPRP for corn has expired

46. As noted above, the TPRP for corn expired prior to panel establishment. China has established that, in its place, and starting with the 2016 harvest, China began providing direct payments to producers of corn in the four provinces/region, subject to certain requirements to limit production, and established a market-based price discovery mechanism, with prices reflecting the supply-demand relationship.

47. Initially, the United States asserted that the 2012-2015 TPRP for corn continues to exist because China allegedly had merely "reformed" its corn policy. The United States errs. In China, a policy "reform" generally refers to a fundamental change in that policy, resulting in the discontinuation of the previously existing policy. Indeed, the *MOF Opinion* that announced the new corn measures described these measures as a "reform of market economy system, emphasizing the decisive role of the market in the allocation of grain resources and better performing the role of government".[23] Indeed, the fundamental "reform" that occurred in China's domestic support for its corn producers was to abolish the previous fixed TPRP prices and introduce a new direct payment program for producers of corn. As the NDRC official announcing the reform explained, it would result in a "price formed by the market and decoupling of price and subsidy"[24] − *i.e.*, the absence of an applied administered price, under "the principle of 'Price formed by market and decoupling of price and subsidy'".[25]

48. Outside this litigation, the United States fully agrees. Indeed, since early 2016, the United States Department of Agriculture ("USDA") has consistently explained, in report after report, that China abandoned the TPRP. Even in this litigation, the United States admits that purchases under the TPRP ended on 30 April 2016.[26]

49. Nonetheless, the United States makes vague allegations about the existence of an applied administered price for corn during 2016 and beyond. Confusing the question before the Panel further, the United States also asserts that it is China's burden to "demonstrate that it had withdrawn or modified its support so as to come within its domestic support commitments for corn by the time of panel establishment".[27] That U.S. assertion reflects a misunderstanding of the general principle on the burden of proof. Since the United States, and not China, asserts that there continues to exist an applied administered price in the new corn measures, the United States carries the burden to provide evidence to substantiate this assertion. Absent such evidence, there is no legal basis for the United States to claim that the Panel must make findings and recommendations regarding the TPRP.

50. In fact, evidence from before panel establishment demonstrates that the key elements of the reform consisted of three major new components: (i) the establishment and operation of a direct

[23] MOF Opinion, May 2016, (Exhibit CHN-73-B), Section I.

[24] The State Council, News Report "Corn Temporary Purchase and Reserve System will be Shifted to a 'Market-oriented Purchase' and 'Direct Subsidies'", available at: http://www.gov.cn/xinwen/2016-03/28/content_5059171.htm (last viewed 26 October 2017) (English translation), (Exhibit CHN-74-B); MOF Opinions, May 2016, (Exhibit CHN-73-B), Section I.

[25] *Notice on Proper Handling of Corn Purchase Work in Northeast China This Year (2016)* (Guo Liang Tiao [2016] No. 210), 19 September 2016 (English translation), (Exhibit CHN-80-B), p. 1.

[26] United States, 12 December 2017 comments, para. 35.

[27] United States, responses to Panel Questions 4 and 9, paras. 25, 48-49.

payment program for eligible Northeast corn producers based on historic areas planted to corn, and not connected to the price for corn; (ii) the establishment and implementation of a series of measures designed to limit production of corn in the provinces/region adopting the new corn measures; and, (iii) the implementation of policies seeking to achieve a market-based price discovery mechanism for corn, resulting from a market with diversified purchasers and sellers, and multi-channel distribution, of corn.

51. The USDA recognized the production-limiting effects of the new corn direct payment program, as implemented in China's Northeast region, noting a drop in corn harvested area and expectations of further decline. Similarly, price developments in China's corn market since the 2016 introduction of the production-limiting direct payment program are consistent with a market-based price discovery mechanism and the absence of market price support.

52. The United States also argued that the TPRP for corn continued to exist based on allegedly significant *similarities* between the *2015 TPRP Notice* and a *2016 Northeast Region Corn Purchase Notice*. Issued following the expiry of the TPRP for corn, the *2016 Notice* requires provincial/regional governments to *encourage* market participants to purchase corn and to collaborate in the orderly purchasing, financing, storage, and warehousing of corn in the Northeast region. That is, the *2016 Notice* sets out government tasks to support the new market-based price discovery mechanisms.

53. Crucially, while mischaracterizing the alleged policy objective of the *2016 Notice* as involving purchase work similar to that under the TPRP price, the United States ignores entirely the absence of any applied administered price from the *2016 Notice*. Instead, the United States asserts irrelevant similarities. Yet, there are fundamental differences between the *2015 TPRP Notice* and the *2016 Notice* that reflect the core of the fundamental reform in China's TPRP for corn, which resulted in the absence of a Government-determined TPRP price at which designated entities purchase corn. For example, while the United States highlights that, under the *2015 TPRP Notice*, China Grain Reserves Corporation ("SinoGrain") was "entrusted by the State"[28] to perform purchases at the TPRP price, it remains silent regarding the absence of any such entrustment under the *2016 Notice*. Indeed, the new corn measures established a *market-based price discovery mechanism*, and the *2016 Notice* repeatedly references criteria and elements to be adopted to create and sustain that mechanism. These references are found throughout the *2016 Notice*, but are entirely absent from the *2015 TPRP Notice*. In these circumstances, the *2016 Notice* contradicts the U.S. assertion of a continued existence of the TPRP for corn.

54. Late in the proceedings, the United States then purported to have found evidence of China's alleged continued application of an applied administered price for corn. As support, the United States produced a notice by SinoGrain's Inner Mongolia Branch to its depots in Inner Mongolia, communicating prices at which to purchase corn.

55. The United States errs in asserting that it has identified an applied administered price for corn. In fact, the document identified by the United States consists of a set of different, *market-based purchase prices* at which SinoGrain's Inner Mongolia Branch offered, on 14 October 2016, to purchase corn at various of its depots in the Inner Mongolia Region. That is, rather than constituting evidence of an applied administered price, the document identified by the United States involved an *offer*, *at a particular point in time*, to purchase corn at *varying market-based prices* in different locations in the Inner Mongolia Region.

56. Moreover, China has established that this offer by one of many purchasers of corn in China (SinoGrain) was superseded by later market-based offers from the same entity to purchase corn at different market-based prices. Specifically, the evidence demonstrates that SinoGrain's market-based price offers change from time to time, and reflect changing *market prices* in line with *market developments*. Indeed, after 30 April 2016, SinoGrain had no mandate from the Chinese Government to purchase corn at an applied administered price. Thus, and contrary to the U.S. assertion, the SinoGrain branch notice identified by the United States is not based on any authority or legal basis flowing from the *2016 Notice*.

57. By way of background, the evidence demonstrates that SinoGrain headquarters issues, from time to time, notices with guidance prices for corn purchases to its provincial/region branches. Those guidance prices take into account market price information observed, collected and published by

[28] United States, response to Panel Question 55, para. 23.

China's State Administration of Grain, similarly to the manner in which U.S. corn traders take into account information on corn prices continuously published by the USDA. Moreover, these guidance prices are not determinative of prices offered by each SinoGrain depot. Instead, each of the four SinoGrain's branches in China's Northeast region enjoys discretion to set, through consecutive branch notices, the prices at which its local depots offer, from time to time, to purchase corn, based on local market conditions. Each SinoGrain depot in these four provinces/region then offers to purchase corn at the market-based price set for it in the most recent branch notice. That is, depending on evolving market conditions, one set of prices offers will be superseded by a later set of prices offers, adjusted either upwards or downwards, reflecting market developments. In short, China has established that SinoGrain's purchase price offers are consistent with local *market prices*.

58. While SinoGrain has, at present, no mandate from the Chinese Government to purchase corn *at an applied administered price*, purchasing corn remains one of its core business activities. Consistent with the fact that, after 30 April 2016 and under the new corn measures, the Chinese corn market is characterized by a market-based price discovery mechanism, SinoGrain follows a market-based process to purchase corn at market prices. Indeed, the evidence demonstrates that, in making fluctuating price offers, SinoGrain follows a common and well-established practice that is consistent with that adopted by large commodity traders worldwide. Like SinoGrain, those traders inform potential sellers of corn of the price at which they would, from time to time, purchase corn. Specifically, China demonstrated that other major purchasers of corn in China similarly publish price offers to purchase corn, and that those price offers fluctuate based on market developments. China further established that it is a common practice in the United States for small and large purchasers of corn to publish announced prices at which they will purchase corn.

59. Thus, China demonstrated that the announcement of offered purchase prices by SinoGrain and other corn purchasers in China is a completely *normal*, *expected*, and *necessary* element of a functioning price-discovery mechanism. That announcement does not establish the existence of an applied administered price, as the United States argues. With SinoGrain's prices indistinguishable from market prices, the United States cannot show the existence of an applied administered price. Accordingly, it cannot show that the TPRP for corn continues to exist.

D. Conclusion

60. In sum, the Panel should conclude that the 2012-2015 TPRP for corn, which expired prior to panel establishment, is outside the Panel's terms of reference.

V. THE UNITED STATES FAILED TO DEMONSTRATE THAT CHINA'S DOMESTIC SUPPORT FOR WHEAT AND RICE VIOLATES ARTICLES 3.2, 6.3, AND 7.2 OF THE *AGREEMENT ON AGRICULTURE*

A. Factual background on China's MPP for wheat and rice

61. Pursuant to China's *2004 Grain Opinion* and *2004 Grain Distribution Regulation*, China implemented market price support in the form of minimum procurement price ("MPP") programs for wheat, indica rice and japonica rice for each of the years 2012-2016. These programs are established through annual MPP Notices that are adopted jointly by a number of different entities, including the NDRC, MOF, Ministry of Agriculture ("MOA"), and State Administration of Grain ("SAG"). The annual MPP Notices set the annual level of the MPP for wheat, indica rice and japonica rice of particular quality grades, with MPP prices defined for a standard Grade 3 and adjusted for Grades 1-2 and 4-5.

62. The same entities that adopt the MPP Notice also introduce annual MPP Implementation Plans. These Implementation Plans inform implementing authorities[29] of, *inter alia*, the geographic scope, relevant timeframe, rules on the activation and deactivation of the MPP programs, and the characteristics of qualifying wheat and rice.

63. With respect to the geographic scope of the MPP programs in 2012-2016, the MPP program for wheat covered six wheat-producing provinces (Hebei, Jiangsu, Anhui, Shandong, Henan and Hubei); the MPP programs for indica rice and japonica rice covered (i) five early-season indica rice

[29] These include the provincial Development and Reform Commissions, Price Bureaus, Departments (Bureaus) of Finance, Agriculture Departments (Bureaus, Commissions, Offices), Administrations of Grain, and autonomous regions and municipalities.

producing provinces (Anhui, Jiangxi, Hubei, Hunan and Guangxi); and, (ii) eleven mid-to-late season indica and japonica rice producing provinces (Liaoning, Jilin, Heilongjiang, Jiangsu, Anhui, Jiangxi, Henan, Hubei, Hunan, Guangxi and Sichuan).

64. Under the MPP Implementation Plans, the time period during which the MPP programs may be implemented during the applicable year is limited. For example, purchases of wheat under the MPP program may take place between May 21 to September 30 of each applicable year; MPP purchases of early-season indica rice may take place between 16 July and September 30 of each applicable year; and for purchases of mid-to-late season indica rice and japonica rice, the timeframes differ depending on the province. For Jiangsu, Anhui, Jiangxi, Henan, Hubei, Hunan, Guangxi, and Sichuan Provinces, the MPP program is implemented between mid-September and 31 January, and for Liaoning, Jilin, Heilongjiang Provinces, it is implemented between October/November and February/March.

65. Moreover, purchases under the MPP programs are not activated during the entirety of the implementation period. The MPP Implementation Plans provide that purchases at the MPP are activated only "when the grain market price drops to the minimum procurement price stipulated by the government".[30] Purchases are deactivated when the market price rises again above the MPP. It follows that the MPP programs retain, as the guiding principle, market-based price discovery and purchases by market actors, and intervene only where market prices drop below the MPP. Thus, and consistent with the *2004 Grain Opinion* and *2004 Regulation on Grain Distribution*, the grain price is formed principally by supply and demand, except when a "material change occurs in the relationship between supply and demand of grain".[31] Thus, the actual application of the MPP program is further limited to (i) the *timeframe* during which prices are found to fall below the MPP; and (ii) *areas* within its geographic scope where prices were found to have fallen below the MPP price.

66. As noted above, the MPP applies to wheat, indica rice and japonica rice of particular qualities. Specifically, only purchases of in-grade grains may occur − *i.e.*, wheat or rice that is of Grades 1 to 5 of China's National Grain Standard. Out-of-grade grains − *i.e.*, wheat and rice that is of a quality lower than Grade 5 − may not be purchased under the MPP programs.

67. Despite the existence of the MPP programs, the vast majority of wheat and rice is sold on the market. Indeed, purchases under the wheat MPP program did not exceed 25% of total production in the covered provinces (or 22% of total production in China), and purchases under the rice MPP programs did not exceed 20% of total rice production in the covered provinces (or 16% of total production in China).

68. As an important background fact, China further notes that, similarly to the situation in many other developing countries, small-scale farms in China typically consume a significant portion of the staple foods that they produce, including wheat and rice. It follows that the total amount of wheat and rice available to be sold by farmers on the market or under the MPP programs is smaller than the total amount of wheat and rice actually produced. Based on data from China's *Rural Statistical Yearbook*, between 9-18% of total wheat production in China in 2012-2015, and between 17-22% of total rice production was consumed or retained by Chinese farmers, and not available for purchase in the marketplace.

B. Legal argument

69. Contrary to the U.S. claims, China's market price support, under its MPP programs for wheat, indica rice and japonica rice, is consistent with its domestic support commitments under Articles 3.2, 6.3 and 7.2(b) of the *Agreement on Agriculture*.

70. Under Articles 3.2 and 6.3, Members shall not provide overall annual domestic support for their agricultural producers, calculated as Current Total AMS, in excess of their Member-specific domestic support reduction commitments, as set out in Part IV of their Schedules. Those domestic support reduction commitments, in turn, result from a Member-specific calculation of Base Total AMS − *i.e.*, Total AMS during each Member's base period. Article 7.2(b) further clarifies that, where

[30] *See, e.g.*, 2015 Wheat & Rice Implementation Plan, (Exhibit CHN-28-B), Article 6; 2016 Wheat & Rice Implementation Plan, (Exhibit CHN-32-B), Article 8.

[31] *Regulation on the Administration of Grain Distribution*, 2004 (English translation), (Exhibit CHN-9-B), Article 27.

a Member's domestic support reduction commitment is "nil", as in the case of China, that Member shall not provide domestic support in excess of its *de minimis* level. For China, paragraph 235 of its Working Party Report, as incorporated into China's Accession Protocol, sets that *de minimis* level at 8.5% of the total value of production of each basic agricultural product.

71. As summarized below, the United States has failed to establish that China's Current AMS, calculated for each of its market price support measures for wheat, indica rice and japonica rice, exceeds China's *de minimis* support level of 8.5% of the total value of production of each of these products. Accordingly, the United States has failed to establish that China's Current Total AMS exceeds China's "nil" domestic support reduction commitment. Below, China first summarizes its arguments regarding general concepts for the calculation of AMS, in particular the role of a Member's constituent data and methodology, before turning to the AMS calculation for market price support at issue here, and any applicable conflict rules. China then provides the resulting AMS calculations.

1. The role of a Member's constituent data and methodology in the calculation of Current AMS

72. China has established that, in calculating Current AMS and Current Total AMS under Articles 1(a)(ii) and 1(h)(ii) of the *Agreement on Agriculture*, the United States errs by relying *solely* on the provisions of Annex 3. Pursuant to Articles 1(a)(ii) and 1(h)(ii), that calculation must consider both (i) the framework for the calculation of AMS set out in Annex 3 of the *Agreement on Agriculture*, *and* (ii) China's constituent data and methodology, included in its Supporting Tables in Rev.3. Consideration of, additionally, China's constituent data and methodology has important consequences for two key variables in the calculation of Current AMS from China's market price support for wheat and rice. As discussed in more detail below, these variables are (i) China's fixed external reference prices for these products, taken from China's Member-specific 1996-1998 base period, and (ii) China's methodology for the determination of the amount of "eligible production" as "amount purchased", both as detailed in China's Supporting Tables in Rev.3.

73. Under customary rules of treaty interpretation, it is well-established that "a treaty should be interpreted as a whole",[32] and that a treaty interpreter must not read out entire aspects of a treaty. Moreover, "a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously".[33] Application of the *Vienna Convention* rules on treaty interpretation also requires a treaty interpreter to avoid, where possible, reading two provisions of the same treaty as conflicting. As set out below, a holistic and harmonious reading of Annex 3 and China's constituent data and methodology is possible. Nonetheless, below, China also addresses the applicable conflict rule.

a. *Articles 1(h)(ii) and 1(a)(ii) of the Agreement on Agriculture require a holistic and harmonious interpretation*

74. The requirement to interpret a treaty holistically and harmoniously, and not to read out entire aspects of that treaty, applies with even greater force where, as here, the treaty requires that two provisions be considered together. As noted, the starting point of the interpretive exercise determining the applicable calculation rules for Current AMS and Current Total AMS are Articles 1(a)(ii) and 1(h)(ii) of the *Agreement on Agriculture*, which define Current AMS and Current Total AMS. For purposes of their calculation, Articles 1(a)(ii) and 1(h)(ii) direct a treaty interpreter to consider and give meaning to *two sources of treaty text*: (i) Annex 3; and, (ii) a Member's "constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule". Thus, the Panel must attempt to adopt a holistic and harmonious interpretation that gives meaning to both.

b. *The meaning of "constituent data and methodology" in Articles 1(a)(ii) and 1(h)(ii)*

75. China considers it useful to begin by exploring the meaning of the phrase "constituent data and methodology". That phrase covers those data and methodologies in a Member's Supporting Tables that are *characteristic*, *formative*, *essential*, and *integral* for the calculation of both *Base* and

[32] Appellate Body Report, *Korea – Dairy*, para. 81.

[33] Appellate Body Report, *Argentina – Footwear (EC)*, para. 81 and footnote 72 thereto (emphasis in original).

Current AMS and *Base* Total AMS and *Current* Total AMS. Under Articles 1(a)(i) and 1(h)(i) both "constituent data" and "constituent methodology", applied together with other elements of the Supporting Tables, gave rise to a Member's *Base* AMS and *Base* Total AMS (collectively referred to as "Base (Total) AMS"), and, thus, that Member's domestic support reduction commitments. Under Articles 1(a)(ii) and 1(h)(ii), both remain relevant for, and must be applied in, the calculation of a Member's *Current* AMS and *Current* Total AMS (collectively referred to as "Current (Total) AMS"). That is, *Base* (Total) AMS and *Current* (Total) AMS are calculated by reference to the same Member-specific constituent data and methodology in a Member's Supporting Tables.

76. In this respect, China explained that "constituent data and methodology" must be able to constitute an unchanging element (either a data point or a methodology) that carries over from the calculation of *Base* (Total) AMS to the calculation of *Current* (Total) AMS. As detailed below, for China's market price support for wheat and rice, the term (i) "constituent data" applies to: (a) the numerical value of the fixed external reference prices based on data from the 1996-1998 base period, and (b) the conversion rate of 70% for paddy-rice-based data into milled-rice-based data. In turn, (ii) "constituent methodology" applies to: (a) the methodology for the determination of eligible production as "amount purchased", and (b) the methodology for converting paddy-rice-based data into milled-rice-based data.

77. Although, the Parties provided similar definitions of "data", "methodology" and "constituent", and agreed that "constituent" qualifies "data" and "methodology", the U.S. interpretation of "constituent data and methodology" effectively fails to give any meaning to the phrase. Fundamentally, the United States takes the flawed view that "constituent data and methodology" are only of historical, and/or factual interest, and not relevant for the calculation of Current (Total) AMS. While the United States provides a few examples of what it considers to be constituent data and methodology, these examples are largely covered under other provisions. For example, the United States refers to the definition of the "basic agricultural product" and the "year" for which AMS is to be calculated. Yet, both are covered separately by Articles 1(b) and 1(i) of the *Agreement on Agriculture*.

78. If the role of constituent data and methodology were, as the United States argues, either non-existent or extremely limited, there would have been no need for Articles 1(a)(ii) and 1(h)(ii) to refer to them as one of two elements necessary for, and relevant to, the calculation of Current (Total) AMS from present domestic support. Accordingly, the U.S. position effectively reduces the references to "constituent data and methodology" to nullity, contrary to the customary rules of treaty interpretation, and Article 3.2 of the DSU.

c. The ordinary meaning of "in accordance with" and "taking into account" in Articles 1(h)(ii) and 1(a)(ii)

79. Articles 1(a)(ii) and 1(h)(ii) also speak to the relationship between the framework for the AMS calculation in Annex 3 and a Member's constituent data and methodology. That relationship must be determined based on the ordinary meaning of the terms "in accordance with" and "taking into account" in Articles 1(a)(ii) and 1(h)(ii), in their context, and in light of the object and purpose of the *Agreement on Agriculture*. In addition, there is limited guidance from the findings of the panel and the Appellate Body in *Korea – Beef* – although on the facts of that dispute, Korea had no relevant constituent data and methodology for beef.

80. Article 1(a)(ii) provides that Current AMS is "calculated *in accordance with* the provisions of Annex 3 …, and *taking into account* the constituent data and methodology". Article 1(h)(ii) uses only the phrase "in accordance with", providing that Current Total AMS shall be "calculated *in accordance with* the provisions of this Agreement, including Article 6 [which includes Annex 3], *and with* the constituent data and methodology". China has established that, contrary to the U.S. view, the term "in accordance with" applies to both sources of treaty text referenced. The dictionary meaning of "in accordance with" is "in agreement or harmony with, in conformity to, according to".[34] That is, under Article 1(h)(ii), Current Total AMS must be calculated "in agreement or harmony with" *both* (i) the framework of Annex 3 and (ii) "the constituent data and methodology". The same requirement flows from Article 1(a)(ii), which also uses the phrase "in accordance with" when referring to Annex 3. Indeed, in *Korea – Beef*, the Appellate Body confirmed the meaning of the term "in accordance with",

[34] Oxford English Dictionary, OED Online, "in accordance with, n.", pp. 2-3, available at: http://www.oed.com/view/Entry/1170? (last viewed 26 October 2017), (Exhibit CHN-53).

and also recognized that Article 1(h)(ii) attributes equal importance to both sources of treaty text.[35]

81. Article 1(a)(ii) uses the phrase "taking into account" when referring to "the constituent data and methodology". The meaning of "to take into account" is "to include something in an account or reckoning".[36] Thus, similarly to Article 1(h)(ii), Article 1(a)(ii) also emphasizes the role of "the constituent data and methodology" in calculating AMS.

82. In short, Articles 1(a)(ii) and 1(h)(ii) require the Panel to give meaning to both Annex 3 and the constituent data and methodology, in a holistic and harmonious manner. Contrary to the U.S. arguments, they are not conflict rules that give, in all circumstances, precedence to Annex 3 over a Member's constituent data and methodology. In any event, questions of hierarchy become relevant only where a conflict existed between Annex 3 and a Member's constituent data and methodology, which does not arise on the facts of this dispute.

d. Current AMS and Current Total AMS are part of the same overall calculation

83. The relationship between Annex 3 and a Member's constituent data and methodology is also defined by the fact that Articles 1(a)(ii) and 1(h)(ii) are part of the same overall calculation. They do not involve different assessments, as the United States argues in an attempt ultimately to remove China's constituent data and methodology from the calculation of Current AMS. Instead, Annex 3 and a Member's constituent data and methodology must each be given the same meaning and the same weight in the calculation of both AMS and Total AMS.

84. As China has explained, the notion of AMS, which expresses domestic support in monetary terms, is built into each of the concepts of AMS, Total AMS, Current Total AMS and Base Total AMS. As the panel in *Korea − Beef* held, "all these concepts, e.g. domestic support, AMS, Current Total AMS, and total domestic support and the provisions of Articles 1(a), 1(h), 3.2, 6.4, and 7.2 are organically and inextricably linked".[37] It follows that AMS must be calculated in the same manner for purposes of both AMS and Total AMS. This requirement flows also from the fact that Total AMS is defined, in Article 1(h), as the sum of the AMS calculations for each basic agricultural product (along with non-product-specific AMS), subject only to *de minimis* exclusion rules under Article 6.4. In the summing-up that results in Total AMS, each AMS component remains unaltered, however, and is *not* re-calculated, demonstrating that calculating both AMS and Total AMS is part of the same overall calculation.

85. Indeed, both AMS and Total AMS, whether calculated for the base period or for current domestic support, are elements of the same overall calculation of a level of domestic support. In the case of *Base* AMS and *Base* Total AMS, the AMS components are part of the calculation that yielded a Member's Base Total AMS and the resulting annual and final bound commitment levels, including where the reduction commitment is "nil". And, in the case of *Current* AMS and *Current* Total AMS, they are part of the calculation that assesses whether a Member's domestic support in any year after the base period has exceeded that Member's domestic support reduction commitments, in violation of Articles 3.2 and 6.3.

86. Thus, contrary to the U.S. assertions that both are separate exercises, there is no basis to require one set of calculations for Current AMS, under Article 1(a)(ii), and another set of calculations for the same Current AMS that is summed up into Current *Total* AMS, under Article 1(h)(ii) (subject only to *de minimis* exclusions).

e. *The relevant context, and object and purpose of the Agreement, reflecting the requirement for consistency in the calculation of Base (Total) AMS and Current (Total) AMS*

87. Further illuminating the role of a Member's constituent data and methodology in the calculation of Current AMS and Current Total AMS is the need for consistency in the calculation of (i) Base (Total) AMS and (ii) Current (Total) AMS. That need for consistency flows from relevant

[35] Appellate Body Report, *Korea − Beef*, footnote 111.

[36] Oxford English Dictionary, OED Online, "to take account of, n.", pp. 21-22, available at: http://www.oed.com/view/Entry/1194? (last viewed 26 October 2017), (Exhibit CHN-54).

[37] Panel Report, *Korea − Beef*, para. 813.

context and the object and purpose of the *Agreement on Agriculture*. The need for consistency is an important element in the Panel's consideration of the role, in calculating Current AMS from China's market price support for wheat and rice, of China's constituent data and methodology in Rev.3. Specifically, it is relevant for the identification of the appropriate fixed external reference prices sources from data reflecting the China's 1996-1998 base period; the methodology for the determination of eligible production as "amount purchased"; and, the methodology for converting paddy-rice-based data into milled-rice-based data, reflecting a conversion rate of 70%.

88. Beginning with *context*, Articles 1(a)(i) and 1(h)(i) refer to AMS and Total AMS during the base period "as specified in the relevant tables of supporting material incorporated by reference in Part IV of a Member's Schedule" and "as specified in Part IV of a Member's Schedule", respectively. Thus, they refer to the *same* Member-specific Supporting Tables that, pursuant to Articles 1(a)(ii) and 1(h)(ii) include constituent data and methodology as elements of the calculation of Base AMS and Base Total AMS.

89. The calculations of Base (Total) AMS in those Supporting Tables reflect the framework in Annex 3 and Member-specific constituent data and methodologies. Indeed, paragraph 5 of Annex 3 explains that Annex 3 also served as a framework for the calculation of the Base (Total) AMS, as recorded in a Member's Supporting Tables. Paragraph 5 stipulates that "[t]he AMS calculated as outlined below [*i.e.*, in paragraphs 6-13 of Annex 3] for the base period shall constitute the base level for the implementation of the reduction commitment on domestic support". As a result, a Member's Base (Total) AMS will generally reflect the framework set out in Annex 3. Accordingly, the United States errs in arguing that *Base* AMS calculations occurred in a legal vacuum, allegedly because "the Agreement does not provide a specific calculation methodology".[38] Instead, Base AMS calculations were guided by the framework in Annex 3 (as set out in paragraph 5 thereof) and included Member-specific constituent data and methodology (as noted in Articles 1(a)(ii) and 1(h)(ii)).

90. China also rebutted the related, and equally erroneous, U.S. argument that there is no requirement for consistency in the calculation of Base (Total) AMS and Current (Total) AMS because the former is of historical interest only. As set out above, the U.S. position is contradicted by the *Agreement on Agriculture*. Articles 1(a)(ii) and 1(h)(ii) signify that the choices Members made in the calculation of Base (Total) AMS have consequences in the calculation of Current (Total) AMS. Specifically, while *Base* AMS and *Current* AMS differ with respect to the time period for which they are calculated, they are calculated using the *same* calculation framework under Annex 3 and the *same* constituent data and methodology. Thus, contrary to the U.S. assertion, they are "inextricably linked",[39] and the constituent data and methodology from the calculation of Base (Total) AMS remain relevant for the calculation of Current (Total) AMS.

91. Further relevant context is provided by the domestic support provisions in the *Agreement on Agriculture* – *i.e.*, Articles 6.1, 6.3, 7.1, 20, title of Annex 2, paragraph 1 of Annex 3. They each refer to domestic support *reduction* commitments. Similarly, recital 3 of the *Agreement's* preamble provides that the object and purpose of the *Agreement*, with regard to domestic support, is to achieve "progressive reductions in agricultural support".

92. Consistency with the objective to reduce domestic support requires that compliance with a Member's domestic support reduction commitments is assessed in a meaningful manner – *i.e.*, in a manner that permits drawing conclusions about a Members' *reduction* of its domestic support. This requires consistency in the calculation of *Base* (Total) AMS (which reflects domestic support during the base period and served as the basis for a Member's domestic support reduction commitments) and *Current* (Total) AMS (which reflects current domestic support). A lack of consistency in the calculation of both would undermine the usefulness of the Current (Total) AMS calculation as a proxy for the level of current domestic support, relative to a Member's domestic support reduction commitments, which flow from *Base* (Total) AMS. Indeed, the panel in *Korea – Beef* explicitly recognized this need for consistency.[40] The Appellate Body found no error in the panel's findings.[41]

93. As China has shown, failure to use, where pertinent, consistently the *same* constituent data

[38] United States, response to Panel Questions 62, para. 46.
[39] Panel Report, *Korea – Beef*, para. 813.
[40] Panel Report, *Korea – Beef*, para. 811.
[41] Appellate Body Report, *Korea – Beef*, paras. 113-114 (footnote 49), and 118.

and methodology together with the framework of Annex 3 leads to substantial distortions in the calculation of *Current* (Total) AMS, relative to *Base* (Total) AMS. Specifically, if constituent data and methodology used for the calculation of *Current* (Total) AMS *differed* from those used for the calculation of *Base* (Total) AMS, AMS calculations would become meaningless *apples-to-oranges* comparisons that reveal nothing about actual reductions in domestic support. Variations in the constituent data and methodology mean that one cannot know whether, for example, a Member's compliance with its reduction commitments results from (i) actual reductions in its domestic support, or (ii) simply from the use of *different* constituent data and methodology.

94. Importantly, where *different* constituent data and methodology are used, a reduction in AMS may be found, and may mask actual levels of domestic support that either remain unchanged or have even increased. These distortions are illustrated by the exaggerating effect on China's *Current* AMS of the United States' application of (i) entirely new fixed external reference prices for wheat and rice, based on 1986-1988 (rather than 1996-1998) data; and, (ii) a different methodology for the determination of "eligible production".

95. While the United States, at times, recognized these distortions, and argued that constituent data and methodology may be used where a Member continues to apply *the same program*, there is no basis for that narrow reading of the consistency requirement. In any event, the United States appears to have abandoned that argument.

96. In short, the requirement for consistency in the calculation of Base (Total) AMS and Current (Total) AMS that flows from the text and context in Articles 1(a) and 1(h), the context of paragraph 5 of Annex 3, and the design and architecture of the *Agreement on Agriculture*. It follows that the framework in Annex 3 and a Member's constituent data and methodology must be used consistently in the same manner when a Member continues more broadly to use certain forms of domestic support for a basic agricultural product for which its Supporting Tables include relevant constituent data and methodology. The United States' negation of the need for such consistency is without a basis in the *Agreement on Agriculture*.

97. Finally, and contrary to the U.S. assertion, China has established that the need for consistency applies irrespective of whether a Member has a "positive" or a "nil" domestic support reduction commitment. Under the terms of the *Agreement on Agriculture*, and contrary to the U.S. assertions, both constitute reduction commitments. Thus, China's commitment level of "nil" is an ongoing domestic support "*reduction*" commitment. Indeed, absent a *reduction* commitment, the domestic support disciplines of Articles 3.2 and 6.3 of the *Agreement on Agriculture* would not apply to China.

f. Constituent data and methodology are an important basis for a Member's domestic support reduction commitments

98. The considerations above highlight that a Member's domestic support reduction commitments arise, in important part, from its Member-specific constituent data and methodology. Ignoring those constituent data and methodology in assessing compliance with individually negotiated and Member-specific domestic support reduction commitments, as the United States does, would be tantamount to re-writing that Member's commitments. Moreover, using different constituent data and methodology would undermine the utility of Current AMS calculations as a means to assess compliance with Member-specific domestic support *reduction* commitments.

i. For later-acceded Members their constituent data and methodology are also part of their Accession Protocols

99. The implications of the United States' attempt at reading out a Member's constituent data and methodology are aggravated for later-acceded Members, such as China. For those Members, their constituent data and methodology are not only part and parcel of their domestic support reduction commitments, but also of their "terms of accession", under Article XII:1 of the Marrakesh Agreement. Contrary to the U.S. assertions, China's Supporting Tables in Rev.3, which include its constituent data and methodology, are *part of* China's Accession Protocol. Specifically, Annex 8 thereto includes China's Schedule of Concessions and Commitments on Goods ("Schedule"), which incorporates Rev.3. Indeed, China's Schedule notes that it "result[ed] from the negotiations between the People's Republic of China and WTO Members [*and that it*] *is annexed to the Protocol of Accession*

of China".[42] As part of China's Accession Protocol, Rev.3 enjoys the same legal status as the Accession Protocol.

100. The United States further errs in arguing that China's Schedule, including Rev.3, lost its status as part of China's Accession Protocol because it became annexed to the GATT 1994. The legal status of Rev.3 as part of China's Accession Protocol is not affected by its integration into the GATT 1994. As noted, Schedules of Concessions in an accession protocol form part of the "terms of accession", under Article XII:1 of the Marrakesh Agreement. They are an integral part of the package of rights and obligations under which that Member acceded to the WTO, and can never lose their status as "terms of accession".

ii. The constituent data and methodology give rise to China's domestic support commitments

101. China's constituent data and methodology gave rise to binding commitments, as part of China's domestic support reduction commitments. Contrary to the U.S. assertions, they do not "alter" or "supplant" those commitments. Instead, they are themselves China's negotiated and agreed "terms of accession". China has explained that the U.S. position rests on an erroneous understanding of the relationship between an Accession Protocol and the *Agreement on Agriculture.* When a new Member accedes to the WTO under Article XII:1 of the Marrakesh Agreement, it does not agree to undertake pre-existing commitments in the *Agreement on Agriculture*, as those commitments stood prior to its accession. Instead, it accedes to the *Agreement on Agriculture* subject to individually negotiated and agreed commitments that are set out in the "terms of accession" under the Accession Protocol.

102. For China, this is confirmed by paragraphs 1.2 and 12.1 of China's Accession Protocol. Paragraph 1.2 confirms that the Accession Protocol, including the domestic-support-related commitments, "shall be an integral part of the WTO Agreement". Paragraph 12.1 then stipulates that "China shall implement the provisions contained in China's Schedule of Concessions and Commitments on Goods and, as specifically provided in this Protocol, those of the Agreement on Agriculture". Thus, China is required to implement the provisions of the *Agreement on Agriculture* subject to the terms of its Accession Protocol. That is, China's Accession Protocol does not "alter" domestic support reduction commitments; it gives rise to those commitments.

103. Moreover, China has rebutted the U.S. arguments that aim to invalidate the binding nature of China's constituent data and methodology. First, China has demonstrated that paragraph 1.3 of China's Accession Protocol does not speak to the question of substantive commitments China allegedly undertook as those commitments stood prior to its accession. Instead, it relates to potential transition periods, and explains that, unless specifically stated, China is not entitled to them. Second, China explained that paragraph 238 of China's Working Party Report does not reflect a disagreement between China and its negotiating partners as to China's constituent data and methodology that would invalidate them. Rather, paragraph 238 records concerns regarding certain policy classification of certain "green box" support unrelated to China's domestic support reduction commitments. Finally, China has explained that the case law from *EC − Sugar* regarding the role of schedules in undertaking commitments is inapposite. This is because Rev.3 is part of China's Accession Protocol, and because, in any event, the scheduling rules for export subsidy and domestic support commitments are very different in light of the Member-specific nature of domestic support reduction commitments, including the ability to use Member-specific constituent data and methodology that give rise to these commitments.

2. The appropriate methodology to calculate Current (Total) AMS for China's market price support measures for wheat and rice

104. Having set out the general interpretative framework, and the need for consistency in the calculation of Base (Total) AMS and Current (Total) AMS, China turns to demonstrating the importance of using its own constituent data and methodology, where relevant. Specifically, China now turns to the AMS calculations required for market price support pursuant to paragraph 8 of Annex 3, and identifies on the basis of a holistic and harmonious interpretation the data and

[42] WT/ACC/CHN/49/Add.1 (emphasis added).

methodologies to be used in those calculations.

105. To begin, AMS from market price support is to be calculated on the basis of the difference between the fixed external reference price ("FERP") for the product at issue and its applied administered price ("AAP"), multiplied by the quantity of eligible production. Most of these input factors have been the subject of intense debate.

a. The appropriate fixed external reference prices based on data from 1996-1998

106. China has demonstrated that its FERPs must be sourced from its 1996-1998 base period. This result flows from a holistic and harmonious interpretation, consistent with the customary rules of treaty interpretation, of all relevant provisions of the *Agreement on Agriculture*, in light of relevant context and the object and purpose of the treaty.

107. By contrast, the United States takes the view that China's FERPs must be identified reflecting a 1986-1988 base period. For the United States, this flows from the alleged clarity and plain meaning of a few words in paragraph 9 of Annex 3, ignoring the rest of the *Agreement on Agriculture* and China's constituent data and methodology in Rev.3. The United States errs, and bases its interpretation on only a subset of relevant materials. China established that the case law provides numerous examples where consideration of all relevant text, context and the objective and purpose of the treat result in interpretations of a provision, or select words in a provision, that go beyond the alleged clarity of those words.

108. Thus, in approaching the interpretative task of identifying the relevant base period for Chinas' FERPs, the Panel's first task is to identify *what* it is being called upon to interpret. Only then is it meaningful to discuss *how* that interpretative exercise must proceed. Contrary to the U.S. assertion, the Panel is not called upon to interpret a few words in paragraph 9 of Annex 3 in clinical isolation from all the other provisions of the *Agreement on Agriculture*.

109. Instead, the Panel is required to interpret, holistically and harmoniously, all provisions of the *Agreement* that deal with the determination of the base period for the FERPs, in the light of relevant context and the object and purpose of the *Agreement*. This involves consideration of Articles 1(a) and 1(h), as well as paragraphs 5 and 9 of Annex 3, and additionally China's constituent data and methodology in Rev.3, along with the context from other Members' Supporting Tables, as included in those Members' Schedules, and the need to ensure consistency in the calculation of Base (Total) AMS and Current (Total) AMS, which flows from the design and architecture of the *Agreement on Agriculture*.

110. Following the correct interpretative approach, China has established that the proper, holistic and harmonious interpretation of these provisions establishes a single rule regarding the identification of the applicable base period for Members' domestic support commitments, including for their FERPs. That single rule requires each Member to use a three-year base period for establishing its domestic support reduction commitments, including for the identification of the applicable FERPs to be used in the calculation of Base (Total) AMS and Current (Total) AMS. *Under that single rule, the three-year base period must be sufficiently proximate to the time of the Member's accession*.

111. Consistent with the context provided by Members' Supporting Tables, this single rule is implemented through different modalities. For original Members, the base period proximate to the time of the creation of the WTO is generally 1986-1988, as memorialized in paragraph 9 of Annex 3 and in those Members' Supporting Tables. For each of the 36 later-acceded Members, there are Member-specific three-year base periods that are each proximate to the time of accession of the later-acceded Member concerned, as agreed in the relevant accession protocol between that Member and the WTO, and as memorialized in each of those later-acceded Members' Supporting Tables. Specifically, of the 36 Members that acceded to the WTO after the conclusion of the Uruguay round, all[43] used a three-year base period for the calculation of Base (Total) AMS that was proximate to their accession, and later than 1986-1988. And all 10 later-acceded Members that maintained market price support measures during their Member-specific base periods drew their FERPs from the same base period used to calculate Base (Total) AMS. For China specifically, that base period is 1996-1998, as indicated in its Supporting Tables, which are also part of its Accession Protocol. Indeed, each of the draft Schedules China prepared during the five-year negotiating period from 1997 to 2001 consistently used the most recent three-year time period, and none used 1986-1988. No Member objected to this approach.

112. Thus, the context provided by other Members' Supporting Tables reinforces the interpretation of the relevant treaty provisions that China has advanced in these proceedings, whereby (i) original Members were generally required to use a 1986-1988 base period, including for their fixed external reference prices, while (ii) later-acceded Members were required to use a later base period, including for their fixed external reference prices, that was proximate to the time of their accession. That is, for Members that acceded after the Uruguay Round, including China, this context supports the conclusion that they are not required to calculate their FERPs on the basis of a 1986-1988 base period; instead, they must use the base period in their respective Schedules – *i.e.*, for China, 1996-1998, as set out in Rev.3. China considers that the Panel should give significant weight to this context.[44]

113. Moreover, the object and purpose of the *Agreement on Agriculture* demonstrates the error in the United States' treatment of the 1996-1998 base period, resulting from the above interpretative exercise, as relevant only for the calculation of Base (Total) AMS, but not Current (Total) AMS. This U.S. argument ignores the role and purpose of FERPs and the requirement for consistency in the *Agreement*. To recall, a FERP acts as a benchmark to permit an assessment of a Member's Current AMS from market price support relative to its Base AMS from market price support, in line with that Member's domestic support reduction commitments. A WTO Member must calculate its Current (Total) AMS consistently by using the same constituent data and methodology it used to calculate its Base (Total) AMS, including the same FERPs. Otherwise, it would be subjected to AMS commitments it did not undertake, in violation of Article 3.2 of the DSU.

114. The existence of the single rule that the three-year base period, including for the FERPs, must be sufficiently proximate to the time of the Member's accession is consistent with a 2010 Technical Note by the WTO Secretariat, which explains that, "[w]hereas a fixed period (1986-1988) was established for commitments on domestic support and export subsidies undertaken in the Uruguay Round, the base periods for Members acceding under Article XII of the WTO Agreement have been determined on an individual basis".[45] Indeed, for later-acceding Members, a 1996 Technical Note from the WTO Secretariat on the accession process emphasizes that acceding governments should calculate an "external reference price" from data "normally for *each of the last three years*".[46]

115. China further notes that forcing each of the 36 later-acceded Members, including China, to calculate, going forward, Current AMS using different FERPs has important systemic consequences. During none of the accession negotiations did the United States, or any other Member, suggest that

[43] There is one exception, Bulgaria, which arose from the particular factual situation regarding its accession.

[44] China also notes that, alternatively, the Panel could perhaps view the Schedules of later-acceded Members as evidence of a common, concordant and consistent "subsequent practice" relating to the interpretation of the relevant provisions of the *Agreement on Agriculture.* The Panel's conclusions under both approaches would remain unchanged. Indeed, resort to subsequent practice merely confirms, and does not in any way modify, the meaning that results from a holistic and harmonious interpretation employing other tools of treaty interpretation.

[45] WT/ACC/10/Rev.4, p. 25.

[46] WT/ACC/4, pp. 3-4 (emphasis added).

a 1986-1988 base period had to be used, including for the FERPs. Doing so now forces later-acceded Members to comply with commitments not undertaken, in violation of not only Article 3.2 of the DSU, but also each of their respective accession protocols. Moreover, for several of these Members, there may be no 1986-1988 data from which to draw FERPs, given that several countries at issue did not even exist in 1986-1988. Rather than using proxy data, as the United States suggests, under the proper interpretation, those Members should simply use their own FERPs in their Supporting Tables.

116. Finally, the United States errs in arguing that China's three-year average FERPs were not "used" in its Supporting Tables, and must therefore be ignored when calculating Current AMS. China's FERPs appear in Rev.3 as the three-year average of external references prices during China's 1996-1998 base period. Moreover, in calculating Base AMS, China used the data for the external reference prices for each of the three years of its 1996-1998 base period. Specifically, for each year of the 1996-1998 base period, China used the external reference price from the year at issue. Thus, the U.S. allegation that "China did not 'use' these data points (or methodologies) in the calculation of its market price support"[47] is unavailing.

117. Indeed, China's approach is consistent with the need to use constituent data and methodology for the calculation of both *Base* (Total) AMS and *Current* (Total) AMS. China calculated Base AMS using annual 1996-1998 external reference prices. It continues to calculate *Current* AMS using FERPs that reflect the average of those *same* external reference prices. This ensures consistency as China's FERPs are *fixed* and serve as external reference prices situated in the 1996-1998 base period.

b. The appropriate applied administered prices

118. The dictionary meaning of an "administered price" refers to a price "determined not by market forces but by administrative action".[48] The dictionary meaning of "applied" includes "brought to bear, made effective, acting at a point or place".[49] Thus, the AAP refers to the price, as set or established by a government, at which a Member effectively provides market price support for the producers of a basic agricultural product. Similarly, the United States observed that an AAP must be "known and discernible", and that it is a "price set or established by a government and …, as such, *distinguishable from a prevailing market price*".[50]

119. The requirement for a comparison between the AAP and the FERP means that "both the FERP and the AAP must be calculated at an equivalent stage of processing or converted accordingly".[51] As paragraphs 8 and 9 of Annex 3 require the FERP to be *fixed* − limiting permissible adjustment to those for quality differences − any adjustment to make the required price/product comparison must be made to the AAP. Thus, the United States errs in adjusting the FERP. Instead, as China has demonstrated that relevant adjustments must be made to the AAP and the amount of eligible production. China addresses the Parties' debate regarding the appropriate conversion factor in the context of identifying the basic agricultural product, below.

c. The appropriate methodology for determining eligible production

120. Under paragraph 8 of Annex 3, calculating AMS from market price support requires that the difference between the FERP and the AAP be multiplied by the quantity of eligible production. In the case of China's market price support for wheat and rice, the methodology to determine that amount is included as a constituent methodology in its Supporting Tables. Specifically, in calculating Base AMS for wheat and rice, China determined "eligible production" as the "amount purchased".

[47] *See* United States, response to Panel Question 79, para. 136.

[48] Oxford English Dictionary, OED Online, "administered, adj.", available at: http://www.oed.com/view/Entry/2532? (last viewed 26 October 2017), (Exhibit CHN-60).

[49] Oxford English Dictionary, OED Online, "applied, adj.", available at: http://www.oed.com/view/Entry/9713? (last viewed 26 October 2017), (Exhibit CHN-61).

[50] United States, first written submission, para. 97 (emphasis added).

[51] Panel Report, *Korea − Beef*, para. 828.

121. By way of background, Rev.3 records the "amount purchased" methodology as having been used for both market price support measures that China maintained during the base period for wheat and rice. Specifically, it explains that "*eligible production* for State Procurement Price" refers to "*the amount purchased* by state-owned enterprises from farmers at state procurement price for the food security purpose", and that "*eligible production* for Protective Price" refers to "*the amount purchased* by state-owned enterprises from farmers at protective price in order to protect farmer's income".[52] Indeed, each of the draft Schedules China prepared during the five-year negotiating period from 1997 to 2001 consistently used this methodology for the determination of the amount of eligible production. Throughout the 14 working party meetings and numerous informal consultations, there is no record of any WTO Member disputing this methodology. Instead, the use of purchased amounts to determine eligible production is part of the custom-made package that China and all Members agreed to as part of China's "terms of accession".

122. Contrary to the erroneous U.S. argument, China's methodology for the determination of "eligible production" is not only of historical interest since it was applied to the measures that existed during the 1996-1998 base period. Instead, it remains relevant as a constituent methodology under Articles 1(a)(ii) and 1(h)(ii) of the *Agreement on Agriculture* for the calculation of China's Current AMS and Current Total AMS from market price support for wheat and rice. Moreover, and contrary to the U.S. assertions, it is a constituent *methodology* because it sets out a method for the determination of eligible production that applies consistently across the two different market price support measures that China maintained at the time for wheat and rice. Thus, and contrary to the U.S. assertions, it was not tied to, and applicable for, only those specific measures.

123. The U.S. error in concluding that China's constituent methodology in Rev.3 may be ignored results in the U.S. reliance on solely the dictionary definition of the term "eligible". For that, the United States points to the findings of Appellate Body in *Korea − Beef*, arguing on that basis that "eligible" refers to the total amount of production in the geographic area where a market price support measure operates.

124. The United States errs. Exclusive reliance on an undefined term in Annex 3 could only be warranted in situations in which there is no relevant constituent data and methodology for the product at issue. That was precisely the situation in *Korea − Beef*, where Korea's Schedule did not contain relevant constituent data and methodology for beef. By contrast, market price support for wheat and rice was included in China's calculation of its Base Total AMS, and there are relevant constituent data and methodology. Indeed, unlike the situation in *Korea − Beef*, the constituent data and methodology incorporated in China's Supporting Tables contains a specific methodology for the determination of the amount of eligible production for the products at issue.

125. In these circumstances, the Panel must consider the text in paragraph 8 and China's constituent methodology, relevant context and the object and purpose of the treaty. Adopting this approach, WTO panels and the Appellate Body consistently look *beyond* a few words considered in isolation in one provision, and consider relevant context and the object and purpose of the treaty to arrive at a meaning that may qualify or depart from the literal meaning of those few words used, when considered alone.

126. Indeed, unlike the United States' interpretative approach (which is based solely on the text of paragraph 8 and ignores all other elements of the interpretative exercise), China's interpretation is arrived at by appropriately considering, in a holistic and harmonious manner, all elements of the interpretive exercise under Article 31 of the *Vienna Convention − i.e.*, all applicable text, the context and the object and purpose of the *Agreement on Agriculture*.

127. To begin, paragraph 8 refers to "the quantity of production eligible to receive the applied administered price". As the Appellate Body held in *Korea − Beef*, the dictionary meaning of "eligible" is "fit or entitled to be chosen".[53] To recall, in that dispute, the Appellate Body focused its interpretation on the dictionary meaning of the term "eligible", because Korea had no constituent data and methodology for beef. Thus, where there is no further relevant text or context − and in particular in the absence of relevant constituent data and methodology − "eligible" production may be determined based on production that is "fit or entitled to be chosen". It is against that legal

[52] WT/ACC/CHN/38/Rev.3, note 19.
[53] Appellate Body Report, *Korea − Beef*, para. 122.

standard then that the specific facts surrounding the measure at issue must be assessed.

128. Thus, the United States misunderstands the Appellate Body in *Korea – Beef*. Contrary to the U.S. assertions, the Appellate Body did not find that, where a Member's market price support measures do not declare any quantity of production as "eligible" to receive the applied administered price, the default "interpretation" requires use of "total production" as "eligible production", when calculating market price support under paragraph 8 of Annex 3. Instead, the legal standard in the absence of any relevant constituent data and methodology continues to be production that is "fit or entitled to be chosen".

129. In the circumstances of this dispute, the Panel must also take into account China's constituent methodology in Rev.3, determining the amount of "eligible production" as "the amount purchased". China has established that, contrary to the U.S. position, a holistic and harmonious interpretation of (i) paragraph 8 of Annex 3 and (ii) the constituent data and methodology in Rev.3 is possible. Indeed, paragraph 8 does not prescribe in detail how "eligible production" must be identified, and does not specify a singular methodology for doing so.

130. China's interpretation that eligible production for its market price support for wheat and rice must be determined based on "the amount purchased" flows, in particular, from the context and object and purpose of the *Agreement on Agriculture*, which require consistency in the calculation of Base (Total) AMS and Current (Total) AMS – *i.e.*, a proper apples-to-apples comparison in assessing compliance with China's domestic support reduction commitments. Indeed, and contrary to the U.S. assertion, China's interpretation of "eligible production" ensures that China is held to the domestic support reduction commitments that it agreed with the Membership, and recorded in its Accession Protocol.

131. In short, and as China has explained in detail, considering all the elements of the interpretative exercise – *i.e.*, the texts and context of Articles 1(a) and 1(h), as well as paragraphs 5 and 8 of Annex 3, and, China's constituent methodology in Rev.3, and in light of their context and the object and purpose of the *Agreement on Agriculture* – the proper interpretation of the methodology for the determination of the amount of "eligible production" for China's market price support for wheat and rice is "amount purchased". Thus, when calculating AMS from China's market price support for wheat and rice, it is necessary to apply a methodology for determining eligible production based on the "amount purchased".

132. The United States also sought to support its arguments for a methodology to determine "eligible production" as "total production" based on alleged market effects of market price support measures. Yet, the United States finally recognized that the *Agreement on Agriculture* does not "seek[] to counter any negative effects of the provision of support".[54] This confirms China's position that the calculation of AMS from market price support is not linked to, and does not measure, the "effects" of such measures. Indeed, reading an "effects" test into the rules on the calculation of a Member's AMS would be inconsistent with the *Agreement's* definition of AMS as a measure of a Member's "annual level of support, *expressed in monetary terms*" under Article 1(a).

d. The relevant basic agricultural products

133. For each calculation of Current AMS, it is necessary to identify the relevant basic agricultural product, for which that calculation must be undertaken. The United States argues that, pursuant to paragraph 7 of Annex 3, AMS must be calculated at the "point of first sale" of an *agricultural commodity* – *i.e.*, for the product that leaves the farm.

134. Yet, as China has explained, Article 1(b) and paragraph 7 of Annex 3 require AMS to be calculated for "the *product as close as practicable* to the point of first sale *as specified in a Member's Schedule and in the related supporting material*".[55] Thus, as the United States accepts elsewhere, Article 1(b) of the *Agreement on Agriculture* defines the basic agricultural product, for which AMS is to be calculated, by reference to a Member's Supporting Tables, as included in its Schedule. There is no requirement that the "basic agricultural product" "specified" in a Member's Supporting Tables is the product at the beginning of the processing chain, as sold at the point of first sale. Rather, that product is simply as specified in a Member's Supporting Tables, and may be processed. It is that

[54] United States, second written submission, para. 25.
[55] Emphasis added.

product, for which data need to be sourced as close as practicable to the point of its first sale.

135. In these proceedings, issues regarding the identification of the relevant basic agricultural product have arisen principally in the context of rice. The United States erroneously calculated Current AMS for each of *paddy* indica rice and *paddy* japonica rice. By contrast, China's Supporting Tables in Rev.3 identify the basic agricultural rice products as *milled* indica rice and *milled* japonica rice. Specifically, for both types of rice, China's FERPs in Rev.3 are expressed in terms of HS10063000 – *i.e.*, "semi-milled or wholly milled rice, whether or not polished or glazed". Similarly, China's Base AMS in Supporting Table DS:5 was calculated for *milled* indica rice and *milled* japonica rice. Pursuant to Articles 1(b) and paragraph 7 of Annex 3, China's Current AMS must, therefore, similarly be calculated on the basis of *milled* indica rice and *milled* japonica rice.

136. As noted, where certain variables for the calculation of AMS from market price support are reported for a form of processing other than that of the basic agricultural product, these variables need to be converted to represent the basic agricultural product. Relevant conversion rates may be included in a Member's constituent data and methodology in their Supporting Tables.

137. As relevant to these proceedings, China's AAPs and amounts of eligible production are reported in terms of *paddy* rice. To convert these price and volume data into *milled* rice equivalents, China's Supporting Tables in Rev.3 used a single 70% conversion rate, which is derived from volume-based data. As constituent data, the Panel should apply this same conversion rate. This conversion rate is, moreover, reasonable, appropriate, and consistent with an objective assessment of the facts. It reflects a milling rate applicable between paddy rice and milled rice and is acknowledged and accepted, including by the OECD and the USDA. Use of a volume-based conversion rate is self-evidently reasonable and appropriate for a volume-based conversion, such as for the amount of eligible production. Use of that same conversion rate is also reasonable and appropriate for the price-based conversion for the AAP, where precise data is unavailable, as the United States accepts. Indeed, the volume/quantity effect of further processing rice is the predominant factor affecting the price of rice at different levels of processing.

138. By contrast, the United States uses a 60% price conversion rate for its conversion of FERPs into *paddy* rice data. It derived this conversion rate from a ratio between (i) the retail price for *paddy* rice and (ii) the price of *polished* rice in the Chinese retail market. Using polished rice, the United States selected the most processed product, with the highest price, among the varieties of rice falling under HS10063000, thereby distorting the applicable conversion rate. The U.S. proposed conversion rate is further inappropriate, because it adjusts not only the level of processing, but also the level of trade of the data concerned.

139. In sum, the Panel should use the 70% conversion rate included in China's constituent data and methodology to convert data on the AAP and the eligible production, and to ensure that both data are expressed at the equivalent level of processing as the rice FERPs in Rev.3.

e. China's de minimis level

140. Under paragraph 235 of China's Working Party Report, which is incorporated in China's Accession Protocol, China is entitled to a *de minimis* level of 8.5% of the total value of production for each basic agricultural product, instead of the 10% that apply for other developing Members under Article 6.4 of the *Agreement on Agriculture*. Thus, as long as China's product-specific domestic support for a basic agricultural product is equivalent to, or less than, 8.5% of the total value of production of that product, China is not required to include such support in its Current Total AMS under Articles 3.2 and 6.3 of the *Agreement*, and complies with its domestic support reduction commitments, including under Article 7.2(b).

f. Total value of production of a basic agricultural product

141. China's *de minimis* assessment requires calculating AMS as a percentage of the total value of production for the basis agricultural product at issue. As noted above, pursuant to Article 1(b), the relevant basic agricultural product is identified in a Member's Supporting Tables. Paragraph 7 of Annex 3 further provides that "AMS shall be calculated as close as practicable to the point of first sale of the basic agricultural product concerned". Similarly, the total value of production of the basic agricultural product must be calculated "as close as practicable to the point of first sale" of the

product concerned. Thus, the total value of production for wheat and rice should be calculated by multiplying the total amount of wheat, *milled* indica rice and *milled* japonica rice produced in China with the producer price for these products, determined as the weighted average of market prices and government administered prices. This approach is consistent with the manner in which total value of production is determined in Rev.3.

3. In case the Panel finds a conflict, the Accession Protocol, including Rev.3, prevails over the *Agreement on Agriculture*

142. If the Panel were to disagree that a harmonious interpretation of Annex 3 and China's constituent data and methodology in Rev.3 is possible, and were to find a conflict for any of the data or methodologies to be used, China has explained that its constituent data and methodology in Rev.3 prevail to the extent of that conflict. To recall, China's constituent data and methodology in Rev.3 are part of its Accession Protocol and, thus, the Marrakesh Agreement. Accordingly, when resolving a conflict between China's constituent data and methodology in Rev.3 and the provisions of the *Agreement on Agriculture*, the applicable conflict rule is that in Article XVI:3 of the Marrakesh Agreement. Article XVI:3 provides as follows: "In the event of a conflict between a provision of this Agreement [*i.e.*, the Marrakesh Agreement] and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict". Accordingly, in the event of a conflict, Rev.3 would prevail over the *Agreement on Agriculture*, to the extent of that conflict.

143. The United States recognizes that application of this conflict rule means that precedence must be given to the Accession Protocol. Indeed, it properly relies on the same mechanism to support its argument that the applicable *de minimis* support level for the calculation of China's Current Total AMS is 8.5%, rather than the 10% otherwise applicable under Article 6.4(b) of the *Agreement on Agriculture*. According to the United States, this result flows from paragraph 235 of China's Working Party Report, as included in China's Accession Protocol, which prevails to the extent of its conflict with Article 6.4(b).

144. China further rebutted all three alleged conflict rules that the United States considers apply so as to displace China's constituent data and methodology in Rev.3. First, China explained that the alleged hierarchy in Article 1(a)(ii) of the *Agreement on Agriculture* does not exist, and that, in any event, Article 1(a)(ii) does not constitute a conflict rule. Second, China explained that Article 21.1 of the *Agreement on Agriculture* is applicable only to conflicts between the GATT 1994 and the *Agreement on Agriculture*. It does not apply in case of conflict between a "term of accession" and the provisions of the *Agreement on Agriculture*. For later-acceded Members, Article XVI:3 of the Marrakesh Agreement, as a higher level conflict rule, takes priority over any other conflict rule in the covered agreements. Indeed, to the extent that a conflict rule in a Multilateral Trade Agreement, such as Article 21.1, were to suggest a different conflict resolution from that dictated by Article XVI:3, that rule would itself be in conflict with Article XVI:3, which would prevail. Third and finally, China explained that, likewise, the case law from *EC − Sugar* regarding conflicts between a Schedule and a covered agreement does not apply in case of a conflict between a "term of accession" and the provisions of the *Agreement on Agriculture*.

4. Conclusion

145. In sum, either through a holistic and harmonious interpretation, or on the basis of the applicable conflict rule, the Panel must recognize the role of China's constituent data and methodology, and use them, as identified above, in the calculation of China's Current (Total) AMS for wheat and rice.

C. China's AMS calculation for market price support for wheat and rice

1. China's domestic support for wheat for 2012-2016 is within its 8.5 percent *de minimis* commitment level

146. Having identified the legal errors in the U.S. approach to calculating AMS from market price support for wheat, provided under the MPP for wheat, China then set out the accurate calculations. Specifically, in its AMS calculations, China used the appropriate *1996-1998* FERP for wheat, as included in Rev.3, rather than the flawed FERP used by the United States, based on 1986-1988 data.

Moreover, like the United States, China sourced the AAP for wheat from the annual wheat MPP measures for each of the years 2012-2016. Finally, and again consistent with Rev.3, China used as the amount of eligible production the amount of wheat that was actually purchased under the MPP program in each of years 2012-2016, instead of the, legally incorrect, total amount of wheat production in the MPP provinces, as used by the United States.

147. China demonstrated that its AMS from market price support for wheat in each of these years was less than 8.5% of the total value of wheat production in China. Specifically, China's product-specific AMS from market price support for wheat, as a percentage of the total value of production in 2012, 2013, 2014, 2015, and 2016, is 3.02%, 1.54%, 5.51%, 4.54%, and 6.56, respectively.[56] Each of these values is below the *de minimis* level of 8.5% of the total value of China's wheat production. Thus, China's market price support for wheat is consistent with its domestic support reduction commitments under the *Agreement on Agriculture*.

2. China's domestic support for indica rice and japonica rice for 2012-2016 is within its 8.5 percent *de minimis* commitment level

148. As explained above, the United States advanced an incorrect interpretative approach to the identification of many of the relevant elements of the calculation of AMS from market price support for indica rice and japonica rice. Accordingly, the United States' AMS calculations are seriously flawed, reflecting the flawed legal bases on which they are built.

149. To begin, the United States calculated AMS for the wrong basic agricultural rice product – *i.e.*, for *paddy* indica rice and *paddy* japonica rice. Yet, a proper interpretation of Articles 1(b) and paragraph 7 of Annex 3, along with Rev.3, compels the conclusion that, for China, AMS for rice must be calculated for each of *milled* indica rice and *milled* japonica rice. Accordingly, the Panel should rely on China's AMS calculations for these products.

150. Correcting for further U.S. errors, China calculated AMS using the appropriate *1996-1998* FERPs for *milled* indica rice and *milled* japonica rice, as included in Rev.3. These FERPs replace the flawed FERPs used by the United States, which are, erroneously, converted into *paddy* indica rice and *paddy* japonica rice, and based on *1986-1988* data, rather than data from China's 1996-1998 base period. Like the United States, China sourced the AAP for paddy indica rice and paddy japonica rice from the annual MPP indica rice and japonica rice measures for each of the years 2012-2016. However, China converted these values into *milled* indica rice and *milled* japonica rice values, using the appropriate 70% conversion rate. Finally, and consistent with Rev.3, China used as the amount of eligible production the amount of indica rice and japonica rice that was actually purchased under the MPP programs in each of years 2012-2016, instead of the total amount of indica rice and japonica rice production in the MPP provinces, as used by the United States. Again, China converted the amount of *paddy* indica rice and *paddy* japonica rice purchased into *milled* indica rice and japonica rice equivalents, using the appropriate 70% conversion rate.

151. On the basis of the appropriate calculations, China's product-specific AMS from market price support for *milled indica rice*, as a percentage of the total value of production in 2012, 2013, 2014, 2015, and 2016, was 0.02%, 5.52%, 4.08%, 3.91%, and 3.00%, respectively.[57] Moreover, China's product-specific AMS from market price support for *milled japonica rice*, as a percentage of the total value of production in 2012, 2013, 2014, 2015, and 2016, was 0.99%, 4.74%, 6.95%, 7.84% and 8.26, respectively.[58] Each of these values is below the *de minimis* level of 8.5% of the total value of China's milled indica rice and milled japonica rice production. Thus, China's market price support for indica rice and japonica rice is consistent with its domestic support reduction commitments under the *Agreement on Agriculture*.

152. In the alternative, China also calculated AMS from market price support for indica rice and japonica rice combined. China's product-specific AMS from market price support for rice, as a percentage of the total value of rice production in 2012, 2013, 2014, 2015, and 2016 is 0.36%, 4.87%, 4.82%, 5.00%, and 4.55%, respectively.[59] Each of these values is below the *de minimis* level of 8.5% of the total value of China's rice production. Again, China's market price support for

[56] China, first written submission, para. 273 (Table 22) and Exhibit CHN-88 (Table 22).
[57] China, first written submission, para. 261 (Table 17) and Exhibit CHN-88 (Table 17).
[58] China, first written submission, para. 261 (Table 18) and Exhibit CHN-88 (Table 18).
[59] China, first written submission, para. 264 (Table 19) and Exhibit CHN-88 (Table 19).

rice is consistent with its domestic support reduction commitments under the *Agreement on Agriculture*.

VI. CONCLUSION AND REQUEST FOR RELIEF

153. For the summarized above, and set out in detail in its submissions, China requests the Panel to find as follows:

- For wheat, indica rice and japonica rice, China requests the Panel to find that the United States has failed to establish that China provided domestic support in excess of its *de minimis* commitment level of 8.5% of the value of production, and therefore has failed to establish that China acted inconsistently with Articles 3.2, 6.3, and 7.2(b) of the *Agreement on Agriculture*.

- For corn, since the TPRP expired in 2016, and thus before panel establishment, China requests that the Panel find that this measure falls outside the Panel's terms of reference.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA

I. INTRODUCTION

1. Australia's submissions in this dispute have focused on the relationship between a Member's Schedule and obligations in WTO Agreements; as well as the legal interpretation of key provisions in the Agreement on Agriculture, including the methodology used to calculate market price support, the meaning of "production eligible" in Annex 3, and the reference period for the "fixed external reference price".

2. In Australia's view, the Agreement on Agriculture provides clear and precise direction for calculating market price support, including the reference period to be used for a fixed external reference price. In *Korea – Beef*,[1] the WTO Appellate Body has also provided clear and unambiguous guidance on what is meant by the term "production eligible" in Annex 3.

3. As relevant context for interpreting the provisions at issue, it is important to recall that the Agreement on Agriculture provides "a framework for the long-term reform of agricultural trade and domestic policies, with the aim of leading to fairer competition and a less distorted sector".[2] The Agreement not only places *rules* and *limitations* on domestic agricultural support by Members, it also aspires to *reduce* domestic support. The Agreement on Agriculture recognises Members' long term objective of "provid[ing] for substantive progressive *reductions* in agricultural support"[3] and contains commitments by Members to continue reforms to *reduce* support.[4]

4. Accordingly, Australia is of the view that any outcome in this dispute that would effectively allow Members, including China, to *increase* levels of domestic support would be in direct conflict with the object and purpose of the Agreement on Agriculture.

II. Relationship between a Member's Schedule and obligations in WTO Agreements

5. Much of China's legal argument in this dispute centres on the status of WT/ACC/CHN/38/Rev.3 (hereafter referred to as 'Rev. 3') a document included as a reference under the heading "Relevant Supporting Tables and document" in Part IV of China's Schedule. China argues that the document should be considered treaty level text.

6. In Australia's view, Rev. 3 is not in itself a Schedule, it is merely a reference in a Schedule which provides an illustration of domestic support in China at the time of its accession.

7. Even if the Panel were to take a different view on the status of Rev.3, Australia observes that Members cannot use Schedules to unilaterally modify their obligations under the WTO Agreements.[5] In particular, information in a document referenced in one Member's Schedule cannot be used to override legal obligations in the Agreement on Agriculture.

III. Calculating market price support

8. In Australia's view, the Agreement on Agriculture provides clear and unequivocal guidance for calculating market price support. It provides that AMS should be "calculated *in accordance with* the provisions of Annex 3" and "*taking into account* the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of a Member's Schedule".

9. In this dispute, the US has put forward its estimations of China's market price support using the provisions of Annex 3, whereas China argues that the "constituent data and methodology" in Rev. 3 is the more relevant authority. While both of these sources are *valid* for calculating market

[1] Appellate Body Report, *Korea – Various Measures on Beef*.
[2] WTO, "Agriculture gateway" available online at https://www.wto.org/english/tratop_e/agric_e/agric_e.htm, accessed on 19 January 2018.
[3] Preamble, Agreement on Agriculture.
[4] Article 20, Agreement on Agriculture.
[5] Appellate Body Report, *EC – Export Subsidies on Sugar,* paras. 212-213 and 220.

price support, the Agreement on Agriculture makes clear that their status under the WTO Agreement is not *equal*.

10. The phrase "in accordance with" indicates that the calculation of domestic support *must comply with* the provisions of Annex 3. By contrast, the phrase "taking into account" requires that *consideration be given* to a Member's Schedule, without specifying the weight such consideration should be accorded. This interpretation has been affirmed by the Appellate Body in *Korea − Various Measures on Beef*.[6]

11. In Australia's view, two points are therefore clear: (i) reference to Annex 3 is mandatory; and (ii) the relevance of a Member's Schedule is of a lesser nature and, at the very least, subsidiary to Annex 3. As such, there is no direct obligation on the Panel to *accept* or *apply* the constituent data and methodology in China's Schedule. The Panel is only required to "*consider*" it. However, in any event, the requirements of Annex 3 override any methodology contained in a Member's Schedule (or contained in a reference within a Member's Schedule).

IV. The meaning of "production eligible"

12. In Australia's view, the Appellate Body's findings in *Korea − Beef* make clear that, absent exceptional circumstances, "production eligible" is all production *"fit or entitled"* to be purchased and will generally equate to total production.[7]

13. Accordingly, in applying the text of the WTO Agreement to the facts in this dispute, Australia considers that the relevant values to be used for "eligible production" in the calculation for market price support should be the value of total production of each given commodity in the identified provinces.

14. China submits that this definition of "production eligible" does not apply and the Panel should instead rely on the definition of "eligible production" in Rev. 3.[8] The Rev. 3 definition limits eligible production to "the amount *purchased* by state-owned enterprises from farmers".

15. China's alternative definition of "eligible production" − which seeks to limit eligible production to the amount *actually purchased* − cannot be accepted for three reasons.

16. First, the definition does not reflect the economic impact of market price support programs, which provides producers with the "assurance that their products can be marketed at least at the support price".[9] Given this assurance, the price distorting effect of market price support takes place the moment a product is *eligible* to be purchased by the government.

17. Second, the definition is contrary to the terms of Annex 3 of the Agreement on Agriculture, as interpreted and applied by the Appellate Body in *Korea −Beef*.[10] Since a Member cannot use its Schedule to reduce or modify commitments under WTO Agreements, China's proposed alternative definition is not legally valid − even if Rev. 3 had the status of a Schedule.

18. Third, limiting eligible production to the actual amount purchased would permit Members to underreport the level of domestic support they provide and, as a consequence, effectively allow Members to *increase* such support. Any outcome that would lead to increased levels of domestic support would undermine the object and purpose of the Agreement on Agriculture to not only *limit* domestic support but also to *reduce* it.

V. The reference period for the "fixed external reference price"

[6] Appellate Body Report, *Korea − Various Measures on Beef*, para. 111.

[7] Appellate Body Report, *Korea − Various Measures on Beef*, para. 120. The Panel in *Korea − Various Measures on Beef* had earlier specified that the actual amount purchased by a government is not relevant, nor are the government outlays involved: Panel Report *Korea − Various Measures on Beef*, para. 827.

[8] China's first written submission, paras. 196-203.

[9] Panel Report, *Korea − Various Measures on Beef*, para. 827.

[10] Appellate Body Report, *Korea − Various Measures on Beef*, para. 120. The Panel in *Korea − Various Measures on Beef* had earlier specified that the actual amount purchased by a government is not relevant, nor are the government outlays involved: Panel Report *Korea − Various Measures on Beef*, para. 827.

19. The methodology for calculating market price support is set out in paragraph 8 of Annex 3 of the Agreement on Agriculture. One of the figures to be inserted into the formula is the "fixed external reference price".

20. Paragraph 9 of Annex 3 specifies that "the fixed external reference price shall be based on the years 1986 to 1988". The text in the Agreement on Agriculture is mandatory and unambiguous.

21. In this dispute, China asserts that an alternative reference period − namely, the years 1996-1998 − applies in calculating China's market price support. China argues this on the basis that: this is the period used in Rev. 3 (the supporting material referenced in China's Schedule); WTO Members accepted this period as one of the terms of China's accession to the WTO; this approach would be in accordance with a technical note by the WTO Secretariat for acceding Members[11]; and all accessions since the establishment of the WTO in 1995 have used base periods other than 1986-88.

22. In Australia's view, the text of the Agreement is clear. The Agreement on Agriculture specifies that the fixed external reference price *shall* be based on the years 1986 to 1988; and neither China's Accession Protocol nor its Working Party Report specifies that an alternative reference period to 1986-88 must be used. While the documents and practice put forward by China in support of an alternative reference period highlight key *policy* considerations, they do not constitute a *legal* basis on which to apply a later reference period.

23. In Australia's view, if WTO Members determine that a new reference period should apply for acceding Members this should be provided for explicitly − either through amendment of the Agreement on Agriculture or express provision in relevant Accession Protocols.

[11] (WT/ACC/4, pp3-4) which provides that "in order to calculate a product-specific AMS for these products, relevant tables from Supporting Tables DS:5 and DS:7 should be used" and that an "external reference price" is to be calculated from data "normally for each of the last three years"

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

I. CHINA'S CLAIM REGARDING THE TPRP CORN MEASURE (ARTICLES 6.2 AND 7.1 OF THE DSU)

1. China argues that the Temporary Purchase and Reserve Policy ("TPRP") for corn, which was applied between 2012 and 2015, does not constitute a "measure at issue" under Article 6.2 of the DSU because the TPRP had been terminated by the time the United States requested the establishment of the Panel, and would thus fall outside the Panel's terms of reference under Article 7.1 of the DSU[1].

2. Brazil understands, however, that if a measure no longer in effect is still relevant to the dispute, the Panel should exercise caution before deciding to exclude it from its terms of reference. An excessively restrictive interpretation of the measures considered to be within the terms of reference could undermine the ability of the dispute settlement system to bring about a positive solution to the dispute, in conformity with Article 3.7 of the DSU. Brazil notes that, in the present case, the parties do not seem to dispute that the TPRP was in force between 2012 and 2015 and that such market price support subsidy was used to calculate China's Current Total AMS for those years. Thus, Brazil understands that the TPRP should be considered by the Panel for a proper assessment of this case.

II. CALCULATION METHODOLOGY ON CHINA'S DOMESTIC PRICE SUPPORT MEASURES FOR WHEAT, CORN AND RICE

3. In Brazil's view, the Panel in the present dispute is challenged to set a proper balance regarding the relation between Annex 3 and a Member's "data and methodology", on the basis of Article 1(a)(ii) of the Agreement on Agriculture (AoA). Brazil considers that the analysis by the Panel concerning the calculation of China's market price support should focus separately on the concepts of FERP and eligible production.

4. With regard to the FERP, Brazil recalls China's argument about the principle set out in WTO Document WT/ACC/4 (a WTO Secretariat note providing guidance for acceding Members), which provides that "[i]n order to calculate a product-specific AMS, an 'external reference price' is to be calculated from data 'normally for each of the last three years'"[2]. As China accession to the WTO occurred in 2001, the base period of 1996-1998 instead of 1986-1988, as disposed in paragraph 9 of Annex 3 of the AoA, could be considered acceptable. Besides, utilizing the most recent data available for the calculation of the FERP consists of a common practice among Members that have joined the WTO after 1995.

5. About the calculation of eligible production, China claims its constituent data and methodology set out in its schedule should be "taken into account". In accordance with that document, China's eligible production for wheat and rice should be "the amount purchased" by state owned enterprises. This proposed methodology, however, conflicts with the established definition of "eligible production", which comprises the whole set of production that could potentially be purchased by the government as defined by the Member's municipal rules. In that sense, the Appellate Body found in *Korea – Beef* that "production eligible to receive the applied administered price" in paragraph 8 of Annex 3 has a different meaning in ordinary usage than "production actually purchased"[3].

6. Brazil notes that any disposition on a Member's data and methodology regarding eligible production cannot modify its obligations under the AoA, in line with the findings by the Appellate

[1] China's First Written Submission, para. 323.
[2] China's First Written Submission, para. 48.
[3] Appellate Body Report, *Korea – Various Measures on Beef*, para. 120.

Body in *EC – Export Subsidies on Sugar*: "we find no provision under the AoA that authorizes Members to depart, in their Schedules, from their obligations under that Agreement"[4].

7. In conclusion, Brazil views that, in order to maintain a harmonious interpretation of the covered agreements, the concept of "eligible production" cannot have different meanings depending on the Members' Schedules. A Member could, however, insert elements of clarification in its data and methodology regarding its understanding of "eligible production" only to the extent it is commensurate with the established definition of said term.

[4] Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 220.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. INTRODUCTION

1. Canada presents its views on three issues in this case. First, it is an accepted custom that acceding Members use more recent reference years than 1986 to 1988. Second, for the definition of eligible production, the text of the Agreement on Agriculture must take priority over the supporting tables where there is any contradiction. Third, the proper methodology for determining eligible production for market price support is to use the amount "fit or entitled" to be purchased, which can be the total production of the product if no limitations are imposed.

II. ACCEDING MEMBERS MAY USE A MORE RECENT REFERENCE PERIOD FOR THE FIXED EXTERNAL REFERENCE PRICE

2. While paragraph 9 of Annex 3 of the Agreement on Agriculture refers to the years 1986 to 1988 for the reference period, this does not prevent Members acceding to the WTO under Article XII of the Marrakesh Agreement from using a more recent base period. It is fair and reasonable to use more recent and up-to-date information for acceding countries, as data going back to 1986 may not be available, and acceding countries may not have been formally independent or even existed at that time. Members have consistently and uniformly applied the practice of Article XII acceding Members using the three most recent years in reporting the fixed external reference price. As such, this constitutes an international custom in the context of Paragraph 9 of Annex 3.

3. Article 3.2 of the DSU requires the DSB to resolve disputes in accordance with the customary rules of interpretation of public international law. The Appellate Body has on numerous occasions recognized the relevance and application of customary international law in WTO dispute settlement[1].

4. In this instance, the WTO Membership has applied a consistent practice over the course of thirty-six post-Uruguay Round accessions. Every acceding Member that reported data in its constituent data and methodology used a more recent base period with respect to Supporting Table DS:5. In all of the supporting tables of all acceding Members, the only acceding Member that ever used a 1986 to 1988 base period in its supporting tables was Bulgaria, which is explained by the fact that it acceded so soon after entry into force of the WTO Agreement as the second newly acceding Member. However, even Bulgaria provided data up to 1990 where it was available for one table. The first acceding Member, Ecuador, did not report any support programs and therefore had no data in supporting tables.

5. Thus, in every instance of accession following the conclusion of the Uruguay Round over more than 20 years, there has been a consistent and uniform practice among Members. All Members were aware of this practice and consented to it, or at the very least acquiesced to this practice. During the thirty-six accession processes, no Member has objected to the use of the three most recent reference years.

6. Moreover, the recognition by the Membership that this practice was required under the Agreement on Agriculture is demonstrated by Members' consistent use of the Technical Note by the *Secretariat on Information to be Provided on Domestic Support and Export Subsidies in Agriculture* in accessions[2]. Members have consistently referred to this document during accession processes and the requirement to use the three most recent years of available data and concluded thirty-six accessions with no stated objection to the use of those reference years. The uniform, consistent use of the three most recent years for the relevant reference period following the conclusion of the

[1] See e.g. Appellate Body reports, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 301-316; *EC – Hormones*, paras. 120-125; *US – Line Pipe*, para. 259.

[2] Information to be provided on Domestic Support and Export Subsidies in Agriculture – Technical Note by the Secretariat, WT/ACC/4.

Uruguay Round shows that Members considered this practice to be consistent with the Agreement on Agriculture.

7. During the Uruguay Round itself, the years 1986 to 1988 were chosen as three recent representative years in order for the fixed external reference price to reflect the actual extent of support provided as accurately as possible[3]. The continued use of the three most recent years by acceding Members represents the application of that same principle.

8. This consistent and uniform practice of every WTO Member in every accession process, accompanied with the *opinio juris* of Members that this practice was consistent with the Agreement on Agriculture, shows that Members have adopted a customary rule of using the three most recent years for the reference period for acceding Members. This custom applies only with respect to Members acceding under Article XII of the Marrakesh Agreement. Paragraph 9 of Annex 3 remains applicable to original Members under Article XI of the Marrakesh Agreement.

III. THE TEXT OF THE AGREEMENT ON ELIGIBLE PRODUCTION TAKES PRIORITY OVER CHINA'S SUPPORTING TABLES

9. There is an apparent contradiction between the supporting tables and the text of Annex 3 in respect of China's use of production actually purchased in China's supporting tables rather than the quantity of production eligible to receive the applied administered price as required under paragraph 8 of Annex 3. However, in this case there is no consistent, uniform practice that implies that all WTO Members intended to allow for China to employ a methodology for calculating eligible production in a manner different from Annex 3 and different from the requirements for other WTO Members. As such, there is no customary norm with respect to eligible production that could modify the obligation under the Agreement on Agriculture.

10. The text of Article 1(a) of the Agreement on Agriculture sets out the meaning of Aggregate Measurement of Support or AMS. Article 1(a)(ii) specifies that support shall be calculated in accordance with Annex 3, which is an integral part of the Agreement. It also provides that the constituent data and methodology incorporated by reference into the Member's schedule must be taken into account when calculating AMS. In defining Total AMS, Article 1(h)(ii) also makes reference to the constituent data and methodology, stating that Total AMS shall be calculated "in accordance with" the Agreement on Agriculture and the constituent data and methodology.

11. The Appellate Body in *Korea − Various Measures on Beef* examined these provisions and found that the relationship between Annex 3 and the constituent data and methodology was one of an "apparent hierarchy"[4]. It found that the provisions of Annex 3 take priority over the constituent data and methodology used in a Member's supporting tables[5].

12. In Canada's view, this approach is reasonable. Annex 3 of the Agreement on Agriculture provides an explicit requirement for how market price support is to be calculated. As per Article 21.2, Annex 3 is an integral part of the Agreement on Agriculture. The supporting material incorporated by reference in Part IV of a Member's Schedule, however, is not an integral part of the Agreement.

13. A Member cannot use its Schedule to reduce its commitments nor to depart from its obligations under the Agreement[6]. Logically, this principle also applies to supporting tables incorporated by reference into a Member's Schedule. China, like all other WTO members, must abide by the terms of the treaty, including paragraph 8 of Annex 3. Upon its accession to the WTO, China agreed to comply with the entire WTO Agreement, including the Agreement on Agriculture. China cannot reduce its obligations or commitments under the Agreement on Agriculture or any other agreement through the supporting tables incorporated by reference into its Schedule. As the Appellate Body found in *EC − Export Subsidies on Sugar*, "we find no provision under the Agreement on Agriculture that authorizes Members to depart, in their Schedules, from their obligations under that Agreement."[7] Thus, China cannot justify departing from its obligations under Annex 3 of the

[3] See e.g. GATT documents MTN.GNG/NG5/TG/W/12, para. 11 (Exhibit CAN-1); MTN.GNG/NG5/TG/W/15, para. 11 (Exhibit CAN-2); and MTN.GNG/NG5/TG/W/16, para. 4 (Exhibit CAN-3).
[4] Appellate Body Report, *Korea − Various Measures on Beef*, paras. 112-113.
[5] Appellate Body Report, *Korea − Various Measures on Beef*, para. 114.
[6] Appellate Body Report, *EC − Export Subsidies on Sugar*, paras. 217-220.
[7] Appellate Body Report, *EC − Export Subsidies on Sugar*, para. 220.

Agreement on Agriculture on the basis of an endnote to a supporting table incorporated by reference into its Schedule.

14. China's commitment in paragraph 238 of the Working Party Report to provide "further methodological clarification" to its supporting tables ("Rev.3") supports these tables must be of a lower precedence than Annex 3 of the Agreement on Agriculture. A document that is expressly acknowledged as containing methodological issues that require further clarification cannot have the same status as binding treaty text. Paragraph 238 of the Working Party Report notes China's commitment that the issues requiring methodological clarification "would be addressed in the context of China's notification obligations under the Agreement on Agriculture". However, any subsequent unilateral notification made by China on applicable methodology cannot have the power to modify China's treaty obligations. Therefore, contrary to China's argument that Rev.3 must be considered as having equal value to the treaty text[8], the reference to Rev.3 in paragraph 238 of the Working Party Report clearly supports Canada's argument that this should not be the case.

15. Of course, Members are required to take the supporting tables into account, as required by Article 1(a)(ii). However, in the event of a contradiction between the Agreement and the supporting material incorporated by reference in a Member's Schedule, the text of the Agreement must take priority.

IV. ELIGIBLE PRODUCTION MEANS PRODUCTION "FIT OR ENTITLED" TO RECEIVE THE APPLIED ADMINISTERED PRICE

16. The definition of eligible production must be the same for all Members. The provisions of the covered agreements must be interpreted in a coherent and consistent manner, giving meaning to all applicable provisions harmoniously[9]. Having an interpretation that would allow for a different definition of eligible production for China alone would be inconsistent with this principle. Moreover, it would result in an inconsistent application of market price support disciplines.

17. In examining the meaning of eligible production, the Appellate Body in *Korea − Various Measures on Beef* found the following: under paragraph 8 of Annex 3, "production eligible to receive the applied administered price" means "production that is 'fit or entitled' to be purchased rather than production that was actually purchased"[10]. "Production actually purchased may often be less than eligible production"[11].

18. While in *Korea − Various Measures on Beef*, the measure in question applied to a fixed, announced quantity of production that was eligible for purchase, the findings and principles from that case remain applicable in the present dispute. The object and purpose of the Agreement on Agriculture includes the objective of providing for "substantial progressive reductions in agricultural support and protection sustained over an agreed period of time resulting in correcting and preventing restrictions and distortions in world agricultural markets"[12]. The panel in *Korea − Various Measures on Beef* noted specifically that the purpose of disciplining the provision of market price support related to "the effect of a government policy measure on agricultural producers of a basic product rather than the budgetary cost of that measure borne by government"[13].

19. This is because the distortive effect produced by a market price support measure occurs when the applied administered price is announced. The existence of a minimum support price provides economic guarantees to producers, which affects the market. The effect continues to exist as long as producers of the product benefit from the assurance of the minimum support price. As a result, the quantity of production actually purchased may have no relevance to these distortive effects.

20. This is why the reasoning in *Korea − Various Measures on Beef* is applicable to the present dispute. If, as in the facts of *Korea − Various Measures on Beef*, a government limits the quantity of production eligible for purchase at the applied administered price to a fixed quantity, then the distortion of the market for that product will be limited in scope to that quantity. As the Appellate

[8] China's first written submission, paras. 104-158.
[9] Appellate Body Report, *US − Anti-Dumping and Countervailing Duties (China)*, para. 570.
[10] Appellate Body Report, *Korea − Various Measures on Beef*, para. 120.
[11] Ibid.
[12] Agreement on Agriculture, Preambular para. 3.
[13] Panel Report, *Korea − Various Measures on Beef*, para. 827.

Body found, "in establishing its program for future market price support, a government is able to define and limit 'eligible' production"[14]. However, if the government does not set *any* limitations, then the signal to the market is that *all* production is "fit or entitled" to receive the applied administered price. Thus it is reasonable and appropriate in this situation that *all* production should be reported as eligible production.

21. The Appellate Body's interpretation of eligible production, meaning production "fit or entitled" to be purchased, allows for a logical and harmonious application to different factual circumstances of any given market price support program. The facts related to the particular measure establish how eligible production is determined. For example, if there is an announcement that the administered price will be applied only to a given quantity, then that defines the production eligible to receive that price for the purposes of paragraph 8 of Annex 3. As another example, if the measure operates only in certain regions, then the quantity of eligible production may be limited to production in those regions.

22. However, the amount of grain used by farmers for their own consumption is irrelevant to the quantity of production eligible to receive the applied administered price. Farmers consuming their own products are not isolated from the market or from the market price support program. If there are no limitations on the amount of production eligible to receive the applied administered price, then the government has distorted the market in a way that affects all production. If the applied administered price is high enough, a farm household could sell part or all of their production and then buy cheaper alternative foodstuffs. The fact that some production might not have been sold or that some farmers might consume some of their own production is irrelevant to the distortions caused by the market price support program, which is what the Membership negotiated these provisions of the Agreement on Agriculture to discipline.

23. The quantity of production consumed by farmers is thus not independent of the price policy. The quantity of eligible production is about *production*. There are no exceptions in the Agreement on Agriculture for production that is not sold, because all of the production can *potentially* be sold. The text of the Agreement is clear: all production eligible to receive the applied administered price shall be included in the calculation for market price support. All production eligible to receive the applied administered price is covered by the market price support program regardless of how or whether it is sold, and therefore it must be considered in calculating the product-specific AMS.

24. The disciplines in the Agreement on Agriculture seek to reduce and prevent restrictions and distortions in agricultural markets. The legal test is not whether an individual farmer would personally benefit from a market price support program by selling at a higher price. The question is whether the production is affected by the market distortions caused by the market price support program. The Agreement on Agriculture requires that all eligible production be considered in the calculation because the price distortions affect the entire market if no limit is imposed on the amount of production that is eligible to receive the applied administered price.

25. The question in each case is how to determine "the quantity of production eligible to receive the applied administered price". To ensure a harmonious interpretation of the covered agreements vis-à-vis each WTO Member, the core elements of eligible production need to be respected when it is being applied to particular measures, in accordance with the principles elaborated upon in *Korea − Various Measures on Beef*. Namely, the quantity of production must be considered "fit or entitled" to receive the applied administered price.

26. The reasoning and findings in *Korea − Various Measures on Beef* are consistent with the text of the Agreement on Agriculture and its object and purpose. Therefore, the Panel must examine how China has defined and limited eligible production in its market price support measures. If there are no limitations on purchases of a particular product, then the total quantity of production must be considered "fit or entitled" to receive the applied administered price, regardless of the actual purchases made by the government.

[14] Appellate Body Report, *Korea − Various Measures on Beef*, para. 120.

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF COLOMBIA

1. The government of Colombia intervened in this case given its systemic interest in the application of several provisions of the Agreement on Agriculture. Therefore, Colombia provided its views on some of the legal claims discussed before the Panel.

2. While not taking a final position on the specific merits of this case, Colombia acknowledged the importance of the issues discussed for the clarification of the obligations under the Agreement on Agriculture presented by the Parties to the dispute. In particular, with respect to the issue of the methodology for calculating the amount of "market price support", Colombia encourage this Panel to carefully review the scope and clarify two important concepts: (i) the "fixed external reference price"; and, (ii) "eligible production", with respect to Paragraphs 9 and 8 of Annex 3 of the aforementioned Agreement.

3. With respect to the former, Colombia submitted that the "fixed external reference price" for China should be based on its Accession Protocol documented in the Working Party on the Accession of China, Document WT/ACC/CHN/38/Rev.3. of 19 July 2001. The average contained therein reflects the prices of 1996-98. Although this reference period may deviate from that specified in Paragraph 9 of Annex 3, reliance thereon appears relevant in the case at hand.

4. The principle of *lex specialis* prescribes that the law governing a specific subject matter takes precedence over a more general provision. Here, the conflict between China's Accession Protocol, constituting an integral part of its WTO obligations, and Paragraph 9 of Annex 3 may be resolved by reference to this principle. It appears that China's obligations concerning the establishment of a "fixed external reference price" would, thus, be governed by the more specific rule, its Accession Protocol. Furthermore, from a practical perspective, it is not feasible to necessarily rely on the period specified in Paragraph 9 concerning acceding members as opposed to original WTO members. Data for the period of 1986-88 may be may be incomplete or inaccessible for national authorities. Therefore, in the case of China, the reference period should be that of 1996-98.

5. Furthermore, Colombia submitted that the appropriate "fixed external reference price" should be adjusted taking into account the prices of goods at the same level of trade. Under Paragraph 9, this is contained within the wider formulation that "[t]he fixed external reference price may be adjusted for quality differences as necessary." In the case of rice, if the "applied administered price" was provided for unmilled rice by China, then the "fixed external reference price" should be adjusted to "unmilled rice", even though the accession document (Rev 3) does not reflect this difference.

6. Lastly, with respect the concept of "eligible production", Colombia submitted that, in the absence of a pre-announced limit on the quantity to be bought, all production is eligible to receive the applied administered price. In the case of China "eligible production", thus, includes all selected provinces where the measures of support are available.

7. The Panel's findings in *Korea-Various Measures on Beef* paragraph 827 support this approach. In that case it was stated that "eligible production (…) should comprise the total marketable production of all producers which is eligible to benefit from the market price support, even though the proportion of production that is actually purchased by a governmental agency may be relatively small or even nil". The Appellate Body confirmed this approach in Paragraph 120 of its Report. Hence, eligible production in the case at hand includes all the production fit to receive the support, whether actually bought or not, whether consumed on-farm or not.

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF ECUADOR

1 GENERAL ISSUES

Ecuador considers that the specific calculations for certain products should be applicable to all equally, for example in the case of products that are not included in the Part IV of a Member's Schedule. The Appellate Body or the Panel reports which have been prepared after analysis and investigation, provide recommendations that should be taken into account as a kind of opinio juris and in turn be a guide on similar cases, therefore the panel in the case Korea - Beef has already ruled that the calculation method of Annex 3 should be applied only in cases where the product is not in Part IV of the Members' agenda.

2 QUANTITY OF ELIGIBLE PRODUCTION (QEP)

Ecuador considers that if a requirement was imposed on China to accede to the WTO and it was complied with, it is perfectly valid and applicable. The requirement imposed on China is what determines if it's eligible production on the basis of the quantity of production compared with a market price support measure, which is detailed in document WT / ACC / CHN / 38 / Rev.3, issued in September 2001. If China had the faculty to establish these measurement parameters, they should be taken into account at the time of calculations and not those parameters which are applicable to other countries. China must follow its obligations adopted as agreed while it was negotiating it's accession.

The issue that a certain amount of grain production is for it's own consumption is relevant since taking into account the size and the population of China it can be interpreted that the levels of measurement of their total production will be on a larger scale at the moment of making the calculation. However, by stating that a percentage does not go to the market, the situation may change because the calculations are not directly proportional when talking about the total production of grains versus grains destined for trade and for the market.

3 FIXED EXTERNAL REFERENCE PRICE (FERP)

In the document of Accession of China to the WTO WT / ACC / CHN / 38 / Rev.3 it is observed that the calculations are made in-the period 1996-1998, the accession document was approved, besides being used for references in other cases, so it is tacitly understood that the period that is used in the cases of China is the one mentioned above. It must be considered as well that no other Member and also Ecuador has expressed opposition to the period of time for reference, especially for those members who acceded to the WTO after 1995.

4 CALCULATIONS AND METHODOLOGY

The legal status of the document WT/ACC/CHIN/38/rev.3, when incorporated in the original list submitted by China as a list of concessions acquires the same legal status as the lists annexed to the its Accession Protocol.

Regarding the tables presented, Ecuador considers that they are not incompatible with the regulations, statements and of the Agreement on Agriculture. Therefore, the tables presented cannot modify the commitments made, nor can they be used as lists to modify agreements.

The *Agreement of Agriculture* on its Annex 3 determines that the market price support should be:

- Market price support: market price support shall be calculated using the gap between a fixed external reference price and the applied administered price multiplied by the quantity of production eligible to receive the applied administered price. Budgetary payments made to maintain this gap, such as buying-in or storage costs, shall not be included in the AMS

- The fixed external reference price shall be based on the years 1986 to 1988 and shall generally be the average f.o.b. unit value for the basic agricultural product concerned in a net exporting country and the average c.i.f. unit value for the basic agricultural product concerned in a net importing country in the base period. The fixed reference price may be adjusted for quality differences as necessary.

Therefore, any methodology and trade measure under the Agreement of Agriculture should be based on Annex 3 definitions and calculations.

ANNEX C-6

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

I. THE RELATIONSHIP BETWEEN THE MEMBERS' SCHEDULES AND THE AOA

1. The commitments limiting subsidization undertaken by Members pursuant to the AoA are included in Part IV of each Member's Schedule and are an integral part of the GATT 1994. The Appellate Body addressed comprehensively the issue of the relationship between the commitments on subsidization included in a Member's Schedule and the provisions of the AoA in *EC − Export Subsidies on Sugar*. There, the Appellate Body confirmed that, just like under the GATT 1994, there is "no provision under the Agreement on Agriculture that authorizes Members to depart in their Schedules from their obligations under that Agreement"[1].

2. Therefoire, the domestic support commitments specified in the Schedules (including the supporting documents incorporated by reference in the Schedules, such as WT/AC/CHN/38/Rev. 3) must be in conformity with the provisions of the AoA and do not allow Members to depart from the obligations imposed by those provisions.

II. WHAT IS THE RELEVANT PERIOD FOR CALCULATING THE FIXED EXTERNAL REFERENCE PRICE?

3. The reference in paragraph 9 of Annex 3 to the years 1986-1988 does not prevent those Members acceding to the WTO after its establishment from specifying in their Schedules a more recent base period, agreed by all Members as part of the accession process. The calculation of the current AMS must "take into account"/be "in accordance with" such more recent base period, as required by Article 1(a)(ii) and Article 1(h)(ii) of the AoA. The reference in paragraph 9 of Annex 3 to the years 1986-1988 reflects the fact that this was the period which had been used by the participants in the Uruguay Round negotiations for the purposes of quantifying their base AMS in accordance with the Modalities Paper. For that reason, the requirement to use that period is addressed primarily to the original Members of the WTO.

4. In the EU's view, it would be unreasonable to require that the accession terms of new Members continue to be negotiated on the basis of data which, by now, are more than 30 years old. Moreover, the use of more recent data does not "reduce" *per se* the commitments of the newly acceded Members under the AoA, unlike in *EC − Export Subsidies on Sugar*. As observed by the Appellate Body in *Korea − Beef*, there is no reason why the FERP for a more recent period should be necessarily higher than the FERP for the years 1986-1989. Moreover, in the case of China, the same period has been used consistently for calculating both the applied administered price and the FERP for the base AMS and the FERP used in the current AMS.

5. For those reasons, the reference to the years 1986-1989 in paragraph 9 of Annex 3 must be understood dynamically. In other words, where a newly acceded Member has used a more recent period for calculating the base AMS in its Schedule, as agreed during the accession process, the current AMS must be based on that period, provided that such period has the same basic characteristics, in respect of that Member, as the years 1986-1988, in respect of the original Members. In particular, that period should pre-date as closely as possible to the date of accession and be sufficiently representative. This interpretation of paragraph 9 of Annex 3 of the AoA is comforted by well-established WTO practice. As pointed out by China, the Schedules of each and every one of the thirty-six Members that have acceded to the WTO since the establishment of the WTO specify base periods other than 1986-88 for the purposes of Supporting Table DS:5.

III. WHAT IS THE RELEVANT "ELIGIBLE PRODUCTION"?

6. For the reasons explained by the United States and not contested by China, the ordinary meaning of 'eligible production' is all of the production entitled or permitted to receive the administrative price, regardless of the quantity actually purchased by the Government. That reading

[1] Appellate Body Report, *EC − Export Subsidies on Sugar*, para. 220

is confirmed by the fact that the words "production eligible" are followed in paragraph 8 by the words "to receive … " and not by other terms that would point to the quantities actually purchased, such as "that received …" or "actually receiving …". That reading, moreover, reflects the *rationale* or purpose of market price support policies (or of the various arrangements that governments may put in place to provide market price support to producers of basic agricultural products), which is to maintain the price of the whole production of a certain product at a desired level.

7. The Appellate Body explicitly confirmed these findings of the Panel by stating that:

> We share the Panel's view that the words "production eligible to receive the applied administered price" in paragraph 8 of Annex 3 have a different meaning in ordinary usage from "production actually purchased ". The ordinary meaning of "eligible" is "fit or entitled to be chosen". Thus, "production eligible" refers to production that is "fit or entitled" to be purchased rather than production that was actually purchased. In establishing its program for future market price support, a government is able to define and to limit "eligible" production. Production actually purchased may often be less than eligible production.[2]

8. In essence, since the notion of 'market price support' seeks to gauge the effects of a government policy measure on agricultural producers of a basic product and, as a matter of fact, these effects depend on the production that may be purchased at the administered price (and not solely or necessarily on the quantity actually purchased), it follows that the notion of 'eligible production' must refer to production that is "fit or entitled" to be purchased, rather than production that was actually purchased,

9. As regards China's argument that it is entitled to calculate market price support by using actual purchases, because it used actual purchases in its calculations in the tables of supporting material in its Schedule, the European Union would note, first of all, that the meaning of footnote 19 to Rev. 3 is by no means unequivocal. More importantly, as indicated in paragraphs 237 and 238 of the Working Party Report on the Accession of China some Members raised concerns with regards to the Supporting Tables in Rev.3. Furthermore, if a Member were authorised to calculate market price support basing itself merely on the actual production purchased by the Government, it would almost systematically underestimate its AMS. Indeed, it is only where the quantity actually purchased tallies with the eligible production that that Member would not underestimate its AMS, whereas in all other frequent situations China's approach would allow a Member to underestimate its AMS, even though the support it provides benefits the marketable production as a whole.

10. It follows that China's line of defence would allow a Member not simply to clarify and qualify the commitments that it has undertaken at the moment of accession but rather "to reduce or conflict" with the obligations already imposed on it by the provisions of the AoA, and notably by paragraph 8 of Annex 3, as they result from their ordinary meaning, *rationale* and previous case law.

[2] Appellate Body Report, *Korea – Beef*, para. 120.

ANNEX C-7

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDIA

1. India welcomes the opportunity to present its views to the Panel on certain systemic issues arising for interpretation under the Agreement on Agriculture ("AoA"). India's views in this submission are limited to the issue of assessment of "*production eligible to receive the applied administrative price"*, for the purposes of calculation of Aggregate Measurement of Support ("AMS") in the AoA.

2. India notes that the First Written Submission of the United States as well as the Third Party Written Submissions by Australia, Brazil, Canada and EU have relied on *Korea-Beef* to state that "production eligible to receive the applied administered price" has a different meaning in ordinary usage from "production actually purchased"[1] and that "eligible production" within the meaning of Annex 3, Paragraph 8 of the AoA is production which is fit or entitled to receive the administered price, whether or not the production was actually purchased.[2] Australia has further stated that *'production eligible' is all production 'fit or entitled' to be purchased and will generally equate to total production*."[3]

3. In India's view, these submissions, while relying on the findings of *Korea-Beef,* have not considered the facts and circumstances of that dispute, which provide context and rationale for the findings. The findings of the panel and the Appellate Body in *Korea-Beef* were specific to a circumstance when there was a declaration by Korea of an eligible quantity for purchase at the support price, which was held to be the "eligible production". The panel and the Appellate Body considered this declared quantity to constitute "eligible production", which was different from what Korea eventually procured under the facts of that dispute. In its reasoning, the Appellate Body relied on the ordinary meaning of "eligible" and explained that this referred to what is "fit or entitled to be chosen", and further that "production eligible" refers to production that is "fit or entitled" to be purchased rather than production that was actually purchased. This was in the context of the announcement made by Korea in the facts of that dispute, to purchase a specified quantity of cattle for the 1997 calendar year.[4]

4. In India's third-party submission, India has explained that there would be situations wherein there is no specification of any quantity; but a mere listing of crops that a government may or may not procure. Not all countries, for instance, pre-determine the quantity of production that may be procured, since this will be based on the needs and resources available, which may vary across time and geographical areas. The quantity eligible for procurement is therefore determined only at the time when such procurement is required and made.

5. Being a complex and sensitive issue, the manner in which to administer domestic support for agriculture is not always determined at the federal level in all countries, but often at the regional/ sub-federal levels, leading to wide variations in procurement models. Sometimes Members simply list crops/products, and not the quantities that would be procured, thereby leaving determination of quantity eligible for procurement to the time of such procurement, which may be done at the sub-federal level. There are also instances when numerous products are listed in a Member's listing of price support, but these may not be procured at all. In such situations, it is simply illogical to state that all quantities of the specific product that is produced, will be eligible for procurement. Such a proposition is absurd and unrealistic, since it may be virtually impossible to extend the price support to the entire production.

6. Australia argues that *"the price distorting effect of a product takes place the moment it is eligible to be purchased"* which is why *"any consideration of the product distorting effect of market*

[1] Para 103, First Written Submissions by the United States, *referring to Korea – Beef* (AB), para. 120.
[2] Para 103, First Written Submissions by the United States, *referring to Korea – Beef* (Panel), para. 827 (noting that "eligible production for the purposes of calculating the market price support component of current support should comprise the total marketable production of all producers which is eligible to benefit from the market price support, even though the proportion of production which is actually purchased by a governmental agency may be relatively small or even nil").
[3] Para 22, Third Party Submission of Australia
[4] *Korea-Beef* (AB), para. 121

support must be taken at that point."[5] Clearly, in situations where the total production is never procured, and there is no expectation even among producers that the total production will ever be procured, there is no question of any price distorting effect arising from the market support till the time that procurement actually takes place. It would be highly incongruous to suggest, then, that the mere listing of crops would cause a price-distorting effect equivalent to the procurement of the entire quantity produced!

7. In India's view, it is crucial to recognise the multiplicity of political and economic realities underlying agricultural policies of various countries, especially developing countries, instead of assuming that there is one immutable "economic reality" that should inform all asessments of domestic support requirements.

8. The interpretation of "eligible production" in Korea-Beef cannot therefore be extended to be applied in the abstract in cases when there is no declaration of quantity of production to be procured. Such a reasoning is not only devoid of any basis in actual procurement practices of countries but could lead to an anomalous result of considering all production of a particular product in a Member's territory as "eligible production"- a proposition that can only be considered as fanciful for most Members.

9. India reiterates that the term "eligible production" necessitates the specification of a *quantity* that is eligible. The absence of any specification of a quantity for procurement cannot mean that the entire production of the listed crop would constitute 'eligible production'. Rather, the reality of the situation would be that what is eligible for procurement is determined *only at the time that a procurement needs to be made*.

10. In addition, it is significant to underscore that the term used in the AOA is 'production eligible to receive the applied administered price' and not 'crops/ products eligible to receive the applied administered price'. A mere listing of crops, which, if considered as eligible for procurement, would receive the applied administered price, cannot be interpreted to mean that *all production* of such crops would be eligible for procurement.

11. In conclusion, India would like to state that the reasoning in *Korea-Beef* should be viewed in light of the very specific context in which it arose – one where there is a difference between the Korean Government's declaration of an "intent" and its actual procurement of beef. The identification of such "intent" in other cases may require application of a more context-specific methodology where there is no declaration of intent by specifying eligibility in quantitative terms. It is important to take into consideration context-specific evidence such as the actual procurement practices of Members, and their notifications under Article 18 of the AoA. It follows that if there is no conflict between any declared quantity and *actual* procurement, and the price support is in effect available only for the quantities procured, then it follows that only what is *actually* procured is *entitled* to the price support.

12. India requests the panel to carefully scrutinize and consider the interpretive issues under the AoA which would benefit from further clarification in light of the present dispute.

[5] Para 28, Third Party Submission of Australia

ANNEX C-8

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDONESIA

I. INTRODUCTION

1. Indonesia exercises its rights to participate as a third party in this case due to its systemic concern on the interpretation and application of the provisions of the covered agreement at issue in this dispute, in particular Paragraph 9 Annex 3 and Paragraph 8 Annex 3 of the Agreement on Agriculture ("AoA").

II. INTERPRETATION AND APPLICATION OF "FIXED EXTERNAL REFERENCE PRICE"

2. As indicated in Indonesia's third party statement, Indonesia highlights the interpretive issue of the terms which will clarify the obligation of WTO Member according to the AoA. In this case, Indonesia pays attention to the terms of: (1) "Fixed External Reference Price" as set out in the Paragraph 9 Annex 3; and (2) "Eligible Production" as indicated through Paragraph 8 of Annex 3 of the AoA.

3. In order to calculate the market price support provided by particular Member, the Annex 3 Paragraph 8 of the AoA provides that "market price support shall be calculated using the gap between a fixed external reference price and the applied administered price multiplied by the quantity of production eligible to receive the applied administered price....".

4. Consequently, the reference to the fixed external reference price provided under the Paragraph 9 of Annex 3 states that "the fixed external reference price shall be based on the years 1986 to 1988 and shall generally be the average f.o.b. unit value for the basic agricultural product concerned in a net exporting country and the average c.i.f. unit value for the basic agricultural product concerned in a net importing country in the base period. The fixed external reference price may be adjusted for quality differences as necessary."

5. In their written submission, China has argued that the United States has erroneously referred to the fixed external reference price based on the prices of 1986-1988. Indonesia took note that China has relied on its Part IV of China's Schedule's notification (Rev.3) that the reference shall be the 1996-98 average of FOB and CIF prices given as export and import unit values.[1]

6. Indonesia is on the view that it is necessary for the Panel to analyze and pay to attention the methodology to execute the adjustability nature of the fixed external reference price as set out under the last sentence of Paragraph 9 of Annex 3. Consequently, Panel should also determine the conditions in order to deem the adjustment as "necessary" for the reference of Fixed External Reference Price. The interpretation itself will be the key element to examine the arguments provided by the Parties in this case.

III. INTERPRETATION AND APPLICATION OF "ELIGIBLE PRODUCTION"

7. In the calculation of Market Price Support, the term of "production eligible to receive the applied administered price" has also been the key component. Meanwhile, the AoA itself does not provide any particular definition to constitute the term. As the result of the uncertainty, the interpretation of the term has been varied among Members according to their own policies.

8. Indonesia highlighted the arguments of the United States derived from the Korea-Beef case on the methodology to interpret "eligible production". In the Appellate Body report, it is stated that the "quantity of production eligible to receive the applied administered price" was different from the "production actually purchased". In this regard, Indonesia requested for the Panel to put caution on applying the jurisprudence on this present case.

9. Indonesia would like to draw the attention on the nature of rulings made by the Appellate Body during the Beef case. In the case, the Korean government has declared specific quantities of the

[1] Communication from China. Working Party on the Accession of China, WT/ACC/CHN/38/Rev.3. 19 July 2001.

products to be purchased. Meanwhile, this may not be the case for all WTO Members. There are some conditions in which the government cannot make the declaration of quantity to be purchased at earlier stage due to certain reasons. On the other hand, WTO Members, especially those with large production and geographical coverage, may face a circumstance where the amount of production eligible for purchase in an administered price does not cover the total production of the product.

10. In this regard, Indonesia supported the argument in Paragraph 8 of India's Third Party Submission that "the interpretation of 'eligible production' in Korea-Beef cannot therefore be applied as a 'one size fits all' approach even in cases there is no declaration of quantity of production to be procured."

11. Accordingly, Indonesia requested the Panel to examine the interpretation of the aforesaid term, in order to clarify the WTO Members' obligation under the Paragraph 8 of Annex 3 of the AoA.

ANNEX C-9

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. ORAL STATEMENT

A. The Status of Support Tables Referenced in China's Schedules

1. In this dispute, the United States and China appear to have a difference in opinion regarding the methodology for calculating China's aggregate measurement of support (or "AMS"), based on their different views on the relationship between the text of the *Agreement on Agriculture* and the document referenced to as "Relevant Support Tables" in China's Schedules. This difference in views raises the issue of the proper status of this document as "the constituent data and methodology" referenced to in China's Schedule.[1]

2. As a general matter, it is Japan's view that a Member's Accession Protocol, including the Working Party Report and Schedules, is "an integral part of the WTO Agreement"[2] and as such their meaning must be discerned and ascertained in accordance with "customary rules of interpretation of public international law."[3]

3. The Appellate Body in *EU – Computer Equipment* recognized that the underlying principle that accords this status to these Member's Schedules is that, "while each Schedule represents the tariff commitments made by *one* Member, they represent a common agreement among *all* Members."[4] Thus the terms contained in "the constituent data and methodology" incorporated in a Member's Schedule may be viewed as representing the agreement of *all* Members.

4. In the present case, however, there may not have been an agreement among all Members regarding the supporting tables that formed the basis of the commitments contained in China's Schedules. Specifically, as the EU pointed out in its third party submission, the Working Party Report on the Accession of China recognized that "the document still contained issues which required further methodological clarification relating to policy classification," and that China would address this clarification in the context of its notification obligations under the *Agreement on Agriculture*.[5] It is not clear whether such clarification was made, or if it was, whether all Members concerned have agreed on the clarification offered by China.

B. Whether the Temporary Purchase and reserve Policy for Corn Forms Part of the Specific Measure at Issue that Falls Within the Terms of Reference

5. China contends that the TPRP for corn for the period 2012 to 2015 was terminated and replaced with another measure as of 2016, and therefore, is not a "measure at issue" under Article 6.2 of the DSU.[6] Accordingly, it is China's view that the measure falls outside of the Panel's terms of reference. The United States, on the other hand, argues that the TPRP is not itself a specific measure at issue, but rather, a series of legal instruments issued annually through which China provides domestic support to corn producers.[7] Moreover, according to the United States, the retrospective nature of agricultural domestic support commitments necessitates an examination of the level of domestic support provided over a period of time.[8] Thus, the Parties appear to disagree on whether the TPRP is itself a "measure" that was not in existence at the time of panel establishment, or part of a series of legal instruments that form the basis for the measure at issue.

[1] China's First Written Submission, para. 90 (referencing U.S. First Written Submission, para. 90).
[2] Accession of the People's Republic of China, WT/L/432, p. 2.
[3] DSU Article 3.2
[4] Appellate Body Report, *EC – Computer Equipment*, para. 109 (emphasis in original); *see also* China's First Written Submission, para. 155.
[5] EU Third Party Written Submission, para. 37 and footnote 23.
[6] China's First Written Submission, paras. 286-289 and 325-342.
[7] Comments of the United States on China's Challenge to the Panel's Terms of Reference, para. 15.
[8] Comments of the United States on China's Challenge to the Panel's Terms of Reference, paras. 8-10 and 17.

6. As noted by China, as a general rule, "the measures included in a panel's term of reference must be measures that are in existence at the time of the establishment of the panel."[9]

7. However, Japan agrees with the United States that the specific nature of the obligations in question may affect the way that a measure's consistency with those obligations is analyzed. For example, in *India – Agricultural Products*, the Appellate Body observed that "the obligation in Article 6.1 [of the SPS Agreement] does not apply only at one specific point in time … but is, instead, an ongoing one." Given this ongoing nature of the obligation, the Appellate Body continued, SPS measures are required to "be adjusted over time so as to establish and maintain their continued suitability in respect of the relevant SPS characteristics of the relevant areas."[10] Thus, when the obligation is one of an ongoing nature, an analysis of a measure's consistency with the obligations would necessarily require a dynamic – rather than a static – inquiry as to whether the measure has been "adjusted over time" to ensure the measure's "continued suitability."

8. Even where a legal instrument ceases to exist, an examination of the legal instrument may still be relevant to the resolution of the matter in issue in the dispute.[11] For example, the United States notes that "[t]he nature of domestic support commitments, including the need for data on the amount and value of production for purposes of calculating market-price support and the applicable *de minimis* exemption, necessitates a backward-looking analysis of data covering a previous time period."[12]

9. Thus, it is appropriate to examine the substance of the TPRP to the extent that the operation of the TPRP affects measures at issue which were identified in the United States' panel request.

II. RESPONSE TO PANEL QUESTIONS

10. First, as regards Annex 3 of the Agreement on Agriculture, Japan considers that "constituent data and methodology" is important in clarifying the methodology used to calculate product-specific AMS. However, as articulated in Article 21 of the Agreement on Agriculture, "the provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of [the Agreement on Agriculture]." Therefore, Japan considers that the methodology set out in Annex 3 should not be regarded as only a fall back option.

11. Second, as regards the methodology for determining eligible production, paragraph 238 of the Working Party report on the Accession of China recognized that "the document still contained issues which required further methodological clarification relating to the policy classification." Therefore, all WTO Members did not agree with all elements of the methodology and policy classifications. As eligible production is not explicitly excluded from this category, Japan considers it proper to include eligible production as part of the methodology and policy classification that required further clarification.

12. Third, Annex 3 of the Agreement on Agriculture provides a single definition of "eligible production" as "production eligible to receive the applied administered price." Moreover, the methodology for calculating market price support set out in paragraph 8 of Annex 3 does not differ for each country. Therefore, Japan does not believe that the definition of "eligible production" differs by country.

13. However, whether production consumed on the farm should be included in the calculation of the quantity of eligible production may differ based on the circumstances of each country, because the manner in which the numerical value of market price support is captured may be different for each country, given the differences in product characteristics, circumstances surrounding production and distribution, and the policy design of market price support in each country.

14. Fourth, when it comes to China's Schedule of Concessions, i.e. the legal instrument "Schedule CLII – People's Republic of China", "an agreed terms of China's accession to the WTO" is what is

[9] China's First Written Submission, para. 327 and footnote 340 (referencing Appellate Body Report, *EC-Chicken Cuts*, para. 156).

[10] Appellate Body Report, *India – Agricultural Products*, para.5.132.

[11] *See* China's First Written Submission para. 330 and footnote 343 (referencing Panel Report, *Argentina – Textiles and Apparel*, para. 6.13 and Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19).

[12] Comments of the United States on China's Challenge to the Panel's Terms of Reference, para. 2.

stated in Part II, paragraph 1, of China's Accession Protocol, which reads "[t]he Schedules annexed to this Protocol shall become the Schedule of Concessions and Commitments annexed to the GATT 1994". In other words, by having been annexed to China's Accession Protocol, China's Schedule was made "an integral part of" the GATT 1994. Assuming that the supporting table referenced in Section I of Part IV of China's Schedule which contains the use of the 1996 − 1998 period is a part of China's Schedule, then, the question is whether the terms of the GATT 1994 can prevail over, or modify, the terms of the Agreement on Agriculture.

15. The relationship between the Agreement on Agriculture and other multilateral trade agreements including the GATT 1994 is expressly regulated by Article 21 of the Agreement on Agriculture, which provides "[t]he provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex A to the WTO Agreement shall apply subject to the provisions of this Agreement". As the Appellate Body explained,

> Members explicitly recognized that there may be conflicts between the Agreement on Agriculture and the GATT 1994, and explicitly provided, through Article 21, that the Agreement on Agriculture would prevail to the extent of such conflicts.[13]

16. Thus, contrary to what China appears to posit, the supporting table referenced in China's Schedule cannot change, modify or replace the terms actually used in the relevant provisions of the Agreement on Agriculture, including the terms used in paragraph 9 of Annex 3.

17. This does not mean that the supporting tables referenced in a Member's Schedule have no interpretive value in ascertaining the meaning of provisions in the Agreement on Agriculture. Indeed, Article 1(a) (ii) of the Agreement of Agriculture expressly provides the AMS "during any year of the implementation period or thereafter" is "calculated in accordance with the provisions of Annex 3 of this Agreement and taking into account the constituent data and methodology used in the tables".

18. Japan further recalls that, in *Chile − Price Band System*, the Appellate Body stated that "[t]he Schedule of one Member, and even the scheduling practice of a number of Members, is not relevant in interpreting the meaning of a treaty provision, unless that practice amounts to 'subsequent practice in the application of the treaty' within the meaning of Article 31(3)(b) of the Vienna Convention."[14] Thus according to the Appellate Body, the scheduling activity or practice which "amounts to 'subsequent practice'" shall be taken into account, together with the context, in interpreting relevant provisions of covered agreements, including paragraph 9 of Annex 3. Japan notes, in this respect, that more than 30 accession Members have already used a base period other than 1986-1988, and it might be difficult for some new accession Members to obtain data from 1986-1988. Indeed, some countries were not in existence at that time.

19. Therefore, to the extent the use of a period other than 1986-1988 in the scheduling activity of newly acceding Members' Accession Protocols amounts to "subsequent practice" in the application of [Annex 3, paragraph 9, of the Agreement on Agriculture] which shows the common understanding of WTO Members, such practice is certainly relevant to the interpretation of that particular provision.[15]

[13] Appellate Body Report, *EC-Export Subsidies on Sugar*, para. 221.

[14] Appellate Body Report, *Chile-Price Band System*, para.272

[15] Paragraph 9 of Annex 3 provides "The fixed external reference price shall be *based on* the years 1986 to 1988 ...". (emphasis added) Japan notes that, in interpreting Article 3 of the SPS Agreement, the Appellate Body observed "[a] thing is commonly said to be 'based on' another thing when the former 'stand' or is 'founded' or 'built' upon or 'is supported by' the latter" and "[a] measure ... based on the same standard might not conform to that standard, as where only some, not all, of the elements of the standard are incorporated into the measure." Appellate Body Report, *EC − Hormones*, para.163.

ANNEX C-10

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF KAZAKHSTAN*

Distinguished Chairman, Members of the Panel,

Kazakhstan appreciates the opportunity to express its view on certain aspect of systemic importance for Kazakhstan. In particular, we would like to present our view with respect to interpretation of accession terms of Members acceded to the WTO under Article XII of Marrakesh Agreement Establishing the World Trade Organization (hereinafter - Marrakesh Agreement) as applied to determination of base period for the purposes of calculation of market price support ((hereinafter - MPP), and specifically fixed external reference prices.

Article 3.2 of the Dispute Settlement Understanding (DSU) prescribes that the "covered agreements", i.e. WTO Agreements, should be clarified in accordance with the customary rules of interpretation of public international law. As we know, the customary rules of interpretation of public international law are codified in the relevant provisions of the *Vienna Convention on the Law of Treaties*[1] (hereinafter – "Vienna Convention"). We would like to turn the attention of the Panel to Article 30 of the Vienna Convention. Paragraph 2 of the Article stipulates that when a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail. Article 30 sets out to resolve conflicts arising from successive treaties, i.e., an earlier and a later treaty both of which are in force. No distinction is made as to the types of treaties. Article 30 extends in its scope beyond the notion of conflicts and incompatibility by addressing more generally the rights and obligations of States parties to successive treaties relating to the same subject-matter and in particular the priority among them[2].

Kazakhstan considers that in the context of the obligations and commitments of China acceded under Article XII Marrakesh Agreement, the Accession Protocol encompassing *inter alia* Schedules of Tariff Concessions (hereinafter – Schedule) and Report of the Working Party on Accession of China to the WTO must be regarded as a later treaty while the Marrakesh Agreement itself with its Annexes, including Agreement on Agriculture, must be treated as an earlier treaty within the meaning of Article 30 Vienna Convention.

If the Panel agrees with this approach, two questions inevitably arise:

- What are the provisions of the two treaties, which could be found incompatible?
- Whether they are incompatible?

Kazakhstan further proposes its analysis in the context of determination of the base period for the purposes of calculation of MPP, including fixed external reference prices.

What are the provisions of the two treaties, which could be found incompatible?

Paragraph 9 Annex 3 of the Agreement on Agriculture prescribes that fixed external reference price shall be calculated based on the years of 1986 to 1988. Whereas in Part IV of China's Schedule, the fixed external reference price in calculation of MPP is based on the years of 1996 to 1998.

It is clear that there are two approaches contained in the documents pertaining to the same subject matter, i.e. China's agricultural domestic support commitments which could be found incompatible.

Whether they are incompatible?

After finding the two provisions, the most important question is whether they are incompatible? To answer this question we would like to turn the attention of the Panel to the ordinary meaning of the

* Kazakhstan requested that its oral statement be treated as its executive summary.

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

[2] Commentary on the 1969 Vienna Convention on the Law of Treaties, Mark E. Villiger, Brill Online Books and Journals, http://booksandjournals.brillonline.com/content/books/b9789004180796_036, page 402

word "incompatible". From the definitions suggested by online dictionaries[3] it can be drawn that the word "incompatible" implies that two or more things cannot coexist, i.e. cannot exist together or at the same time.

In the context of the present example, the question is whether the requirement to use fixed external prices based on 1986-1988, as required by Annex 3 of the Agreement on Agriculture, or those based on the years of 1996 to 1998, as applied in Part IV of China's Schedule. In order to be incompatible or to be incapable of coexisting, only one of these two parameters would be valid because of competing nature of their application.

Annex 3 explicitly points to the years of 1986 to 1988. This is straightforward. The question now is whether the WTO commitments of China stipulate that fixed external reference prices of 1996-1998 are equally valid to render period of 1986 to 1988 "incompatible".

With respect to this issue we would like to refer to the relevant case law developed by the WTO jurisprudence, in particular to the finding of the Panel in its Report "China — Measures Related to the Exportation of Various Raw Materials"[4] (hereinafter – "China - Raw Materials") and to the Report of the Appellate Body "China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum" (hereinafter – "China - Rare Earth Metals")[5].

In "China — Raw Materials", in a finding not appealed by any party to the dispute, the Panel explained that the terms of accession protocols are integral parts of the WTO Agreement[6]:

> "Accession to the WTO is achieved through negotiation with other WTO Members. Pursuant to Article XII of the Marrakesh Agreement, accessions take place 'on terms to be agreed' between the acceding Member and the WTO membership. Most accession processes take several years to complete and lead to detailed negotiated provisions. The terms of each WTO Member's accession are set out in its Accession Protocol and accompanying Working Party Report. The negotiated agreement between the WTO membership and the acceding Member results in a delicate balance of rights and obligations, which are reflected in the specific wording of each commitment set out in these documents….
> WTO Members' accession protocols are considered to form integral parts of the WTO Agreement"[7].

The Appellate Body in "China - Rare Earth Metals" reaffirms the findings of the Panel:

> "In sum, Article XII:1 of the Marrakesh Agreement provides the *general* rule for acceding to the WTO. Its first sentence stipulates that accession is to be accomplished on "terms" to be agreed between the acceding Member and the WTO, and its second sentence makes clear that such accession applies to the entire package of WTO rights and obligations, consisting of the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto..."[8].

In both cases the adjudicators confirm that the accession package, i.e. Accession Protocol together with its Annexes shall be applied in its entirety forming integral parts of the WTO Agreement. Likewise, we assert that it cannot be true that one part of the accession terms applies and another part is not valid. In the context of this dispute, Part IV of China's Schedule indicates the level of its commitment with respect to Total Aggregate Measurement of Support (AMS). Part IV of China's Schedule refers to the document WT/ACC/CHN/38/Rev.3 (hereinafter – Rev.3). In this case, it is evident that the two base periods in Annex 3 of the Agreement on Agriculture and Part IV of China's Schedule are incompatible.

---

[3] Online Oxford Dictionary: https://en.oxforddictionaries.com/definition/incompatible, Merriam-Webster Dictionary: https://www.merriam-webster.com/dictionary/incompatible

[4] Document WT/DS394/R, WT/DS395/R, WT/DS398/R of 5 July 2011.

[5] WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R of 7 August 2014.

[6] The explanation is drawn from the WTO Analytical Index — Guide to WTO Law and Practice: https://www.wto.org/english/res_e/booksp_e/analytic_index_e/wto_agree_03_e.htm#articleXIIB1f

[7] Ibid para. 7.112

[8] Ibid para. 5.34

In the light of Article 30 of Vienna Convention and the logic of the WTO jurisprudence, WTO Members should find the base period for calculation of fixed external reference price of China in the same document, i.e. in Table DS:5 *"Product-Specific Aggregate Measurement of Support: Market Price Support"* of Rev. 3. Therefore, fixed external reference prices of China should be based on the years of 1996 to 1998.

In conclusion, Kazakhstan would like to call the attention of the Panel that the outcome of this dispute is of systemic importance and would affect the membership terms of more than 30 Members acceded under Article XII of Marrakesh Agreement since all these Members follow the same practice as China applies in its domestic support calculations, including Kazakhstan.

This concludes our statement.

Thank you!

ANNEX C-11

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE RUSSIAN FEDERATION

1. The Russian Federation would like to present, as a third party in this dispute, the summary of its arguments that mostly relate to the issues concerning the determination of representative period used to calculate the fixed external reference price (FERP).

2. The Russian Federation would like to highlight the systemic nature of the issues raised in this dispute and their importance for those Members that acceded after the Uruguay Round with an AMS reduction commitment in their Schedules.

3. According to Article XII of the WTO Agreement "any State [...] may accede to this Agreement, on terms to be agreed between it and the WTO". The terms of accession, contained in the Protocol of Accession, the Report of the Working Party, and the Schedules of commitments, including the Base Total AMS, constitute an integral part of the WTO Agreement.

4. During the accession process the same representative period is used to calculate the fixed external reference price, the level of market price support, product-specific AMS and the Base Total AMS. Such representative period, according to the WTO Secretariat[1], normally comprises the last three representative years. We would like to draw the attention of the Panel that the amount of the Base Total AMS depends on the level of market price support calculated during the accession process, and consequently on the fixed external reference price. It would be illogical and incoherent to first calculate the Base Total AMS using the last three representative years, and then, upon the accession and thereafter, to calculate Current Total AMS and market price support using another reference period. In such circumstances the amount of Current Total AMS cannot be compared with the amount of the Base Total AMS due to the fact that they were calculated on different terms and different basis. The situation of using different representative period to calculate the fixed external reference price, and as the result − Base Total AMS and Current Total AMS, could lead to the impairment of the right of a Member that acceded to the WTO after the Uruguay Round to provide the level of support within the agreed limits and based upon the terms it has agreed.

5. In its First Written Submission the United States claims that the fixed external reference price shall be based on the years 1986 to 1988 as it is set out in paragraph 9 of Annex 3 of the Agreement on Agriculture.[2]

6. In view of the Russian Federation the period of 1986 − 1988 referred to in paragraph 9 of Annex 3 of the Agreement on Agriculture was the basis for calculating fixed external reference price for the founding WTO Members due to the fact that this period was chosen during the Uruguay Round as the most recent representative period. For all Members (except one) that acceded to the WTO after 1995 the most recent representative period was the period other than 1986 − 1988 (for instance, for the Russian Federation this period was from 2006 to 2008, for China − from 1996 to 1998).

7. Article 31 of the Vienna Convention requires that the interpretation of a treaty shall take into account "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation". From the perspective of the Russian Federation, subsequent practice of calculating fixed external reference price demonstrates that all WTO Members during the accession processes agreed that for acceding Members the FERP could be based on the years other than 1986 to 1988. This is demonstrated by the supporting materials incorporated by reference in Part IV of Members' Schedules and, thereby, reflecting all WTO Members' agreement on all aspects of acceding Member's rights and obligations. Such subsequent practice is also reflected

[1] Technical Note of the WTO Secretariat, Procedures for Negotiations under Article XII, Information to be Provided on Domestic Support and Export Subsidies in Agriculture, WT/ACC/22/Add.1, 1 August 2014.

[2] The United States' First Written Submission, paras. 98, 113.

in the Technical Note of the WTO Secretariat on Procedures for Negotiations under Article XII[3], which says that the information on product-specific AMS measures, including the information on market price support, is normally used for each of *the last three years*. This document, as it was pointed out by the Secretariat, took into account the evolution of accession practices.[4] Notifications of the acceded WTO Members, including China, and review process within the work of the Committee on Agriculture on examination of those notifications also support this understanding.

8. Turning to practice, there were Members of the Working Party on the accession of the Russian Federation to the WTO (which consisted of 65 Members) that stated that the more recent reference period should be used to calculate the domestic support level as it is more adequate and statistically relevant. This common understanding was reflected throughout our accession process, *inter alia*, in some of the statements of the Working Party's Members. One Member of the Working Party expressed its view that "the base period used to establish commitments will need to be based on a recent three year period which reflects current agricultural support programs".[5] Moreover, other Member of the Working Party on the accession of the Russian Federation to the WTO said that "there is a general understanding that the Russian accession should be based on the methodology included in the WT/ACC/4 WTO document"[6] and that "it is intended that new Members initiate negotiations departing, at least, from figures based on volume and budgetary outlays related to the base period mentioned in the WT/ACC/4 WTO document"[7]. It should also be noted that in the document WT/ACC/4 the structure of methodology to calculate domestic support measure that affects the producer price implies that the fixed external reference price shall be provided for each of the last three years

9. The definition of Aggregate Measurement of Support set out in Article 1(a)(ii) of the Agreement on Agriculture clearly demonstrates that Annex 3 is not the only source for AMS calculation − "constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule" shall also be taken into account.

10. In the view of the Russian Federation, the logic used by the panel and the Appellate Body in *Korea − Various Measures on Beef* shows that if agricultural products were included in corresponding supporting materials incorporated in Member's Schedule, calculation of AMS shall be based not only on Annex 3 but also shall take into account "constituent data and methodology".[8] Since wheat and rice were included in China's supporting materials, the "constituent data and methodology" shall be considered in this dispute.

11. From the perspective of the Russian Federation, "constituent data and methodology" in this context refers to the period for calculation of the fixed external reference price. The Appellate Body in *Korea − Various Measures on Beef* examined the issue of determination of basic period for calculation of market price support for beef. According to the Appellate Body, since beef was not included in Korea's supporting materials, then the reference period for it shall be 1986 − 1988, and not 1989 − 1991 as for those agricultural products which were included in Korea's corresponding tables.[9] In a similar vein, since wheat and rice were included in China's supporting materials, the period of 1996 − 1998 shall be used to calculate the fixed external reference price for these products.[10]

12. Therefore, the Russian Federation believes that for Members acceded to the WTO after the Uruguay Round the basic period for fixed external reference price calculation should be the period

[3] Technical Note of the WTO Secretariat, Procedures for Negotiations under Article XII, Information to be Provided on Domestic Support and Export Subsidies in Agriculture, WT/ACC/22/Add.1, 1 August 2014, para. 15.

[4] Technical Note of the WTO Secretariat, Information to be Provided on Domestic Support and Export Subsidies in Agriculture, WT/ACC/4/Rev.1, 1 August 2014.

[5] WT/ACC/RUS/23/Add.1, p. 1.

[6] WT/ACC/RUS/17/Add.1, p. 13.

[7] WT/ACC/RUS/17/Add.1, p. 14.

[8] Panel Report, *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef,* paras. 811-812, 830. Appellate Body Report, *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef,* paras. 113-114, 117-118.

[9] Appellate Body Report, *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef,* paras. 113-114, 117-118.

[10] WT/ACC/CHN/38/Rev.3.

used in the tables of supporting materials incorporated by reference in Part IV of the Member's Schedule, rather than the period used in paragraph 9 of Annex 3 of the Agreement on Agriculture.

ANNEX D

RAW DATA

ANNEX D

RAW DATA

1.1. The following tables contain data for the products forming part of the United States' complaint, i.e. wheat, Indica rice, Japonica rice and corn, as presented by the parties[1], and revised in some cases by the Panel, where necessary.[2] This information is presented without prejudice to the Panel's findings in sections 7 and 8 of the Panel Report or of the calculations performed in tables 10-16 of the Panel Report.

1.1 Wheat

	Source	Units	2012	2013	2014	2015	2016[3]
Total national production	China	million tons	121.023	121.926	126.208	130.185	128.845
	US	million tons	121.024	121.926	126.208	130.185	-
Producer price	US/China	¥/ton	2,166.20	2,356.20	2,411.80	2,328.60	2,232.60
Production by province							
Hebei	US	million tons	13.377	13.872	14.299	14.350	14.333
Jiangsu	US	million tons	10.488	11.013	11.604	11.740	11.196
Anhui	US	million tons	12.940	13.320	13.936	14.110	13.859
Shandong	US	million tons	21.795	22.188	22.638	23.466	23.446
Henan	US	million tons	31.774	32.264	33.290	35.010	34.660
Hubei	US	million tons	3.708	4.168	4.216	4.209	4.282
Total	US	million tons	94.082	96.825	99.983	102.885	101.776
Out-of-grade percentage							
Hebei	China	percentage	0.0	1.0	0.0	0.0	0.0
Jiangsu	China	percentage	2.0	1.0	0.3	1.0	0.0
Anhui	China	percentage	1.0	0.0	0.0	1.7	0.0
Shandong	China	percentage	0.0	1.0	0.2	0.0	0.0
Henan	China	percentage	1.0	0.0	0.0	0.0	0.0
Hubei	China	percentage	8.0	0.0	0.0	0.0	0.0
AAP	US/China	¥/ton	2,040.00	2,240.00	2,360.00	2,360.00	2,360.00
1996-1998 FERP (c.i.f. price)	China	¥/ton	1996-1998			Average 1996-1998	
			1,885.00	1,629.60	1,579.80	1,698.13	
1986-1988 FERP (c.i.f. price)	US	¥/ton	431.11[4]				
Quantity procured under measures							
Hebei	China	million tons	0.774	0	0	0.591	3.1765
Jiangsu	China	million tons	5.319	3.61	6.708	5.474	4.0765
Anhui	China	million tons	4.126	2.9315	6.648	3.97	5.515

[1] See United States' response to Panel question No. 96, (Exhibit USA-106); China's response to Panel question No. 96, (Exhibit CHN-146).

[2] These revisions involved adjusting certain of the original figures presented by the parties to express them in a common unit (renminbi/ton and million tons), and to present quantities using the same number of decimal places (where useful).

[3] All 2016 data was provided by China.

[4] Only one value was provided by the United States. See United States' first written submission, Table 7: Fixed External Reference Price.

	Source	Units	2012	2013	2014	2015	2016[3]
Shandong	China	million tons	1.769	0	0.032	1.242	3.109
Henan	China	million tons	9.815	0.698	10.423	8.948	12.1415
Hubei	China	million tons	1.369	0.939	1.534	0.559	0.492
Total amount procured	China	million tons	23.172	8.182	25.345	20.784	28.5105

1.2 Rice

	Source	Units	2012	2013	2014	2015	2016
Total national rice production	US/China	million tons	204.236	203.612	206.507	208.225	207.075
Total rice production in covered provinces	US/China	million tons	159.34	160.09	162.06	164.14	162.73

1.2.1 Japonica rice

	Source	Units	2012	2013	2014	2015	2016
Total national production	China	million tons	68.011	67.803	68.767	69.339	68.956
	US	million tons	64.539	64.341	65.256	65.760	-
Producer price	US/China	¥/ton	2,919.60	2,936.60	3,035.20	2,951.20	2,935.40
FERP (f.o.b. prices - milled)	China	¥/ton	1996-1998			Average 1996-1998	
			3,682.90	2,862.10	3,326.90	3,290.63	
1986-1988 FERP (f.o.b. price) (unmilled equivalent)	US	¥/ton	546.62[5]				
Production by province							
Liaoning	US	million tons	5.078	5.069	4.515	4.677	-
Jilin	US	million tons	5.320	5.633	5.876	6.301	-
Heilongjiang	US	million tons	21.712	22.206	22.510	21.997	-
Jiangsu	US	million tons	16.360	16.551	16.461	16.811	-
Anhui	US	million tons	2.422	2.364	2.431	2.592	-
Total	US	million tons	50.892	51.823	51.793	52.378	-
Out-of-grade percentage							
Liaoning	China	percentage	0.0	0.0	0.0	0.0	-
Jilin	China	percentage	0.0	0.0	0.0	0.0	-
Heilongjiang	China	percentage	0.0	0.0	0.0	0.3	-
Jiangsu	China	percentage	0.0	0.0	0.0	1.5	-
Anhui	China	percentage	0.0	0.0	0.0	0.0	-
AAP (unmilled)	US/China	¥/ton	2,800.00	3,000.00	3,100.00	3,100.00	3,100.00
Quantity of paddy rice purchased under the measures							
Liaoning	China	million tons	0	0.351	0.175	0	0
Jilin	China	million tons	0.057	0.713	0.58	1.1675	0.133
Heilongjiang	China	million tons	3.842	10.625	15.025	16.897	17.7745

[5] Only one average value was provided by the United States. See United States' first written submission, Table 7: Fixed External Reference Price.

	Source	Units	2012	2013	2014	2015	2016
Jiangsu	China	million tons	0	1.352	1.796	1.089	1.5765
Anhui	China	million tons	0.063	0.481	0.615	0.965	1.478
Hubei	China	million tons	0	0.019	0.02	0.018	0.0265
Total	China	million tons	3.962	13.541	18.211	20.137	20.989

1.2.2 Indica rice

1.2.2.1 Early-season

	Data provided by	Units	2012	2013	2014	2015	2016
Total national production	US	million tons	33.291	34.145	34.012	33.687	-
Producer price (early-season)	US/China	¥/ton	2,622.00	2,603.20	2,681.60	2,687.40	2,602.60
1996-1998 FERP (f.o.b. prices - milled)	China	¥/ton	1996-1998			Average 1996-1998	
			3,082.10	2,033.00	1,913.90	2,343.00	
1986-1988 FERP (f.o.b. price) (unmilled equivalent)	US	¥/ton	470.83[6]				
Production by province							
Anhui	US	million tons	1.320	1.308	1.283	1.092	-
Jiangxi	US	million tons	8.002	8.280	8.201	8.119	-
Hubei	US	million tons	2.089	2.228	2.387	2.523	-
Hunan	US	million tons	8.187	8.605	8.548	8.589	-
Guangxi Zhuang Autonomous Region	US	million tons	5.449	5.552	5.433	5.288	-
Total		million tons	25.047	25.973	25.852	25.611	-
Out-of-grade percentage							
Anhui	China	percentage	0.0	0.0	0.0	0.0	-
Jiangxi	China	percentage	1.0	1.0	0.0	0.0	-
Hubei	China	percentage	0.0	0.0	0.0	0.0	-
Hunan	China	percentage	1.0	0.0	3.0	1.0	-
Guangxi Zhuang Autonomous Region	China	percentage	1.0	1.0	1.0	0.0	-
AAP (unmilled)	US/China	¥/ton	2,400.00	2,640.00	2,700.00	2,700.00	-
Quantity of paddy rice purchased under the measures							
Anhui	China	million tons	0.0000	0.0665	0.0870	0.0400	0.0215
Jiangxi	China	million tons	0.0000	3.3340	2.1450	1.4500	1.3065
Hubei	China	million tons	0.0000	0.0985	0.0600	0.0960	0.0485
Hunan	China	million tons	0.0000	2.2000	1.9420	1.4300	1.1890
Guangxi Zhuang Autonomous Region	China	million tons	0.0000	0.0360	0.0110	0.0000	0.0000
Total	China	million tons	0.0000	5.7350	4.2450	3.0160	2.5655

[6] Only one average value was provided by the United States. See United States' first written submission, Table 7: Fixed External Reference Price.

1.2.2.2 Mid-late-season

	Data provided by	Units	2012	2013	2014	2015	2016
Total national production	US	million tons	106.406	105.136	107.239	108.739	-
Producer price (mid-season Indica)	US/China	¥/ton	2,697.40	2,627.20	2,658.00	2,601.60	2,603.40
Producer price (late-season Indica)	US/China	¥/ton	2,769.40	2,713.40	2,838.20	2,787.00	2,768.40
1996-1998 FERP (f.o.b. prices - milled)	China	¥/ton	1996-1998			Average 1996-1998	
			3,082.10	2,033.00	1,913.90	2,343.00	
1986-1988 FERP (f.o.b. price) (unmilled equivalent)	US	¥/ton	470.83[7]				
Production by province							
Jiangsu	US	million tons	2.641	2.672	2.658	2.714	-
Anhui	US	million tons	10.193	9.951	10.232	10.910	-
Jiangxi	US	million tons	11.758	11.760	12.051	12.153	-
Henan	US	million tons	4.926	4.858	5.286	5.315	-
Hubei	US	million tons	14.425	14.539	14.908	15.584	-
Hunan	US	million tons	18.130	17.011	17.792	17.859	-
Guangxi Zhuang Autonomous Region	US	million tons	5.971	6.010	6.228	6.090	-
Sichuan	US	million tons	15.354	15.490	15.261	15.526	-
Total		million tons	83.398	82.291	84.416	86.151	-
Out-of-grade percentage							
Jiangsu	China	percentage	0.0	0.0	0.0	0.0	-
Anhui	China	percentage	1.0	1.0	0.8	0.0	-
Jiangxi	China	percentage	1.0	0.0	0.0	0.0	-
Henan	China	percentage	0.0	3.0	2.2	1.1	-
Hubei	China	percentage	0.0	4.0	0.7	0.0	-
Hunan	China	percentage	0.0	1.0	0.0	1.7	-
Guangxi Zhuang Autonomous Region	China	percentage	1.0	1.0	0.0	0.0	-
Sichuan	China	percentage	0.0	0.0	1.3	1.0	-
AAP (unmilled)	US/China	¥/ton	2,500.00	2,700.00	2,760.00	2,760.00	-
Quantity of paddy rice purchased under the measures							
Jiangsu	China	million tons	0.0000	0.1565	0.1310	0.0985	0.0050
Anhui	China	million tons	0.0000	3.9235	2.8050	3.1585	1.9705
Jiangxi	China	million tons	0.0790	2.1660	1.3700	0.9480	0.6000
Henan	China	million tons	0.0000	1.8160	1.2480	1.4550	1.5695
Hubei	China	million tons	0.0000	2.5780	1.7800	2.9635	2.0895

[7] Only one average value was provided by the United States. See United States' first written submission, Table 7: Fixed External Reference Price.

	Data provided by	Units	2012	2013	2014	2015	2016
Hunan	China	million tons	0.0000	1.3820	1.2630	0.9105	0.7965
Sichuan	China	million tons	0.0000	1.2970	1.0810	0.6540	0.4645
Total	China	million tons	0.079	13.319	9.678	10.188	7.4955

1.3 Corn

	Data provided by	Units	2012	2013	2014	2015
Total national production	US	million tons	205.614	218.489	215.646	224.632
Producer price	US/China	¥/ton	2,222.60	2,176.20	2,237.00	1,884.60
1996-1998 FERP (f.o.b. price)	China	¥/ton	1996-1998		Average 1996-1998	
			1581.40	1075.80 939.20	1,198.80	
1986-1988 FERP (f.o.b. price)	US	¥/ton	366.07[8]			
Production by province						
Heilongjiang	US	million tons	28.879	32.164	33.434	35.441
Jilin	US	million tons	25.788	27.757	27.335	28.057
Liaoning	US	million tons	14.235	15.632	11.705	14.035
Inner Mongolia	US	million tons	17.844	20.697	21.861	22.508
Total	US	million tons	86.746	96.250	94.335	100.041
Out-of-grade percentage						
Heilongjiang	US/China	percentage	0.0	0.0	0.0	0.0
Jilin	US/China	percentage	0.0	0.0	0.0	0.0
Liaoning	US/China	percentage	0.0	0.0	0.0	0.0
Inner Mongolia	US/China	percentage	0.0	0.0	0.0	0.0
AAP Heilongjiang	US	¥/ton	2,100.00	2,220.00	2,220.00	2,000.00
AAP Jilin	US	¥/ton	2,120.00	2,240.00	2,240.00	2,000.00
AAP Liaoning	US	¥/ton	2,140.00	2,260.00	2,260.00	2,000.00
AAP Inner Mongolia	US	¥/ton	2,140.00	2,260.00	2,260.00	2,000.00
Quantity of corn purchased under the measures						
Heilongjiang	China	million tons	0.326	6.205	8.369	21.897
Jilin	China	million tons	0.130	4.777	7.874	11.780
Liaoning	China	million tons	0.030	15.903	25.402	34.530
Inner Mongolia	China	million tons	2.334	16.353	23.047	57.149
Total	China	million tons	2.820	43.236	64.690	125.356

_____

[8] Only one average value was provided by the United States. See United States' first written submission, Table 7: Fixed External Reference Price.

WORLD TRADE ORGANIZATION

WT/DS511/R/Add.1

28 February 2019

(19-1134)

Original: English

CHINA – DOMESTIC SUPPORT FOR AGRICULTURAL PRODUCERS

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to D to the Report of the Panel to be found in document WT/DS511/R.

_____

LIST OF ANNEXES

ANNEX A

WORKING PROCEDURES OF THE PANEL

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX D

RAW DATA

ANNEX A

WORKING PROCEDURES OF THE PANEL

ANNEX A

WORKING PROCEDURES OF THE PANEL

ADOPTED ON 11 AUGUST 2017

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

5. Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which its presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel. Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

6. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If the United States requests such a ruling, China shall submit its response to the request in its first written submission. If China requests such a ruling, the United States shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

7. Each party shall submit all factual evidence to the Panel no later than during the first substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the first substantive meeting.

8. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. The Panel may grant an extension to this deadline. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

9. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions attached as Annex 1, to the extent that it is practical to do so.

.....

10. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by the United States could be numbered USA-1, USA-2, etc. If the last exhibit in connection with the first submission was numbered USA-5, the first exhibit of the next submission thus would be numbered USA-6.

Questions

11. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to each substantive meeting.

Substantive meetings

12. Each party shall provide to the Panel the list of members of its delegation in advance of each meeting with the Panel and no later than 5.00 p.m. the previous working day.

13. The first substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall invite the United States to make an opening statement to present its case first. Subsequently, the Panel shall invite China to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the United States presenting its statement first.

14. The second substantive meeting of the Panel with the parties shall be conducted as follows:

a. The Panel shall ask China if it wishes to avail itself of the right to present its case first. If so, the Panel shall invite China to present its opening statement, followed by the United States. If China chooses not to avail itself of that right, the Panel shall invite the United States to present its opening statement first. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters, through the Panel Secretary. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if any, preferably at the end of the meeting, and in any event no later than 5.00 p.m. of the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with the party that presented its opening statement first, presenting its closing statement first.

Third parties

15. The Panel shall invite each third party to transmit to the Panel a written submission prior to the first substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

16. Each third party shall also be invited to present its views orally during a session of this first substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

17. The third-party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third-parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

18. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

19. Each party shall submit an integrated executive summary of the facts and arguments as presented to the Panel in its written submissions and oral statements, in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions. Each party's integrated executive summary shall not exceed 30 pages. The Panel will not summarize in the descriptive part of its report, or annex to its report, the parties' responses to questions.

20. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

Interim review

21. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

22. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

23. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

24. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file 2 paper copies of all documents it submits to the Panel. Exhibits may be filed in 4 copies on CD-ROM or DVD and 2 paper copies. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy to ****.****@wto.org, ****.****@wto.org and ****.****@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the first substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When

the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

25. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES

EXECUTIVE SUMMARY OF THE U.S. FIRST WRITTEN SUBMISSION

1. Each year, the People's Republic of China ("China") provides a significant level of domestic support to its agricultural producers through a variety of subsidy programs and other measures. This dispute addresses a single means of agricultural support, "market price support" ("MPS"), which China utilizes to support farmer incomes and increase production for basic agricultural products, including wheat, Indica rice, Japonica rice, and corn. Through this form of support alone, China has provided support far in excess of its WTO commitments. The level of domestic support China provided to its agricultural producers in 2012, 2013, 2014, and 2015 exceeded the level set out in Section I of Part IV of China's Schedule of Concessions on Goods ("CLII"). China's level of domestic support in favor of agricultural producers has therefore breached Articles 3.2 and 6.3 of the *Agreement on Agriculture* ("Agriculture Agreement") for the years 2012, 2013, 2014, and 2015.

2. China's MPS programs announce on an annual basis an applied administered price that will be available to farmers either immediately upon initiation of each year's program, as for corn, or when market prices drop below the applied administered price, as for wheat, Indica rice, and Japonica rice. This applied administered price is provided or furnished to farmers in the major producing provinces during the period immediately following harvest. By guaranteeing farmers an established price for their commodities, China's MPS programs for wheat, Indica rice, Japonica rice, and corn ensure that commodity prices in the relevant provinces are maintained at the Chinese government's chosen support level.

I. CHINA'S IMPLEMENTATION OF MARKET PRICE SUPPORT PROGRAMS

3. Per the annual policy direction in the *Document Number 1* and regulatory framework provided by the *2004 Grain Distribution Regulation*, China issued annual announcements of minimum prices for wheat, Indica rice (early season and mid-to-late season), and Japonica rice, and implementation plans for purchasing those grains harvested in 2012, 2013, 2014, and 2015 at the established prices. Together these instruments form the wheat, Indica rice, and Japonica rice MPS Programs. China has also maintained similar MPS Programs for corn announced through an annual notice in the years 2012, 2013, 2014, and 2015.

A. China's Wheat Market Price Support Program

4. Wheat is China's second most prevalent crop, after rice, and China is one of the world's top wheat producers. Between 2005 and 2015, wheat production in China increased by 25 percent, with production in 2015 reaching 130.19 million metric tons ("MT") annually.

5. China issues two documents each harvest year to implement the MPS Program for wheat. First, prior to the planting of winter wheat, China announces the annual "minimum purchase price" in a *Notice on Raising the Wheat Minimum Purchase Price* or *Notice on Announcing the Wheat Minimum Purchase Price* ("*Wheat MPS Notices*"). This is China's applied administered price for wheat. China's National Development and Reform Commission ("NDRC"), Ministry of Finance ("MoF"), Ministry of Agriculture ("MoA"), State Administration of Grain, and the Agricultural Development Bank of China jointly issue the annual *Wheat MPS Notice*s.

6. The *Wheat MPS Notices* are directed to China's "development and reform commissions, price bureaus, finance departments (bureaus), agricultural departments (bureaus, commissions, offices), grain bureaus, and Agricultural Development Bank of China branches in all provinces, autonomous regions, and municipalities directly under the central government." The *Wheat MPS Notices* state that "each locality is required to earnestly and properly carry out dissemination work for the grain minimum purchase price policy." The *2015 Wheat MPS Notice* states that "[i]n order to protect the interests of farmers and prevent 'low grain prices hurting farmers,'" the *Notice* is provided to "guide farmers to plant rationally, and promote the stable development of grain production."

7. Second, the NDRC, MoF, MoA, State Administration of Grain, Agricultural Development Bank, and China Grain Reserves Corporation ("Sinograin") publish a *Notice on Issuing the Wheat and Rice*

Minimum Purchase Price Implementation Plan, "in order to implement and fulfill the spirit of the [*2015 Document Number 1*]." Attached to the notice is a detailed *Wheat and Rice Minimum Purchase Price Implementation Plan* (the "*Wheat MPS Implementation Plans*") that is issued "in accordance with the relevant provisions in the [*2004 Grain Distribution Regulation*]."

8. The annual *Wheat MPS Implementation Plans* reaffirm the applied administered price initially announced in the *Wheat MPS Notices*, noting that this is "the at-depot price of direct purchases [of wheat] from farmers by the purchasing and storage depots responsible for making purchases at the minimum purchase price." The *Wheat MPS Implementation Plans* subsequently set forth the parameters of that season's MPS Program for wheat including: (1) the geographic scope, (2) characteristics of qualifying wheat, (3) relevant timeframe, (4) the roles and responsibilities of the numerous Chinese government entities involved in implementing, and financing the MPS Program.

9. Each year to implement the Wheat MPS Program, local offices of Sinograin and the Agricultural Development Bank of China must identify and authorize "entrusted purchasing and storage depots" in each affected province. These depots or warehouses must satisfy a number of specific criteria to be eligible to participate in the program. Further, "the total depot storage capacity volume of the entrusted purchasing and storage depots within each county shall be linked to the forecast volume of grain purchases at minimum purchase prices in that locality."

10. Under the Wheat MPS Program, "entrusted purchasing and storage depots . . . are required to announce, on a board in a prominent location at the purchasing site, policy information relating to the implementation of the minimum purchase price for each grain variety, . . . including the purchase price, quality standards, deduction methods for weight increase of moisture and impurities, the purchase settlement method, and the implementation period, so that farmers can transact in 'grain with peace of mind.'"

11. The *Wheat MPS Implementations Plans* clarify that entrusted purchasing and storage depots "must not" "refuse grain sold by farmers that meets the standard;" "will promptly settle the grain sales price with the farmer, and must not issue IOUs to the farmers." Further, entities charged with making purchases "shall actively enter the market to purchase new grain."

12. Purchase and administration costs under the MPS Program for wheat are financed through loans "secured by a directly affiliated enterprise of [Sinograin], [in the form of] a loan uniformly from the Agricultural Development Bank of China, at the locality [of the depots]." Further, ownership "rights belong to the State Council, and the grain must not be put to use nor mortgaged without approval by the state." The wheat held by the entrusted purchasing and storage depots will eventually be sold "according to the principle of selling at profitable prices, rationally formulate base sales prices, and auction [the grain] at public auctions on grain wholesale markets or online."

13. The Chinese instruments setting out the MPS Programs for wheat instruct central and provincial government officials to initiate a program of wheat purchases on an annual basis. The MPS Programs ensure that farmers in the six major wheat producing provinces are able to make sales of qualifying wheat at the announced applied administered price, if the prevailing domestic market price falls below the applied administered price. As described below, the MPS Programs for Indica rice and Japonica rice operate in a similar manner.

B. China's Indica Rice and Japonica Rice Market Price Support Programs

14. China is the world's largest rice market, accounting for nearly a third of global production and consumption. Between 2005 and 2015, total rice production in China increased by 15 percent, with production in 2015 reaching 208.23 million MT annually.

15. China issues two documents each harvest year to implement the MPS Programs for Indica rice and Japonica rice. China first issues an annual *Notice on Raising the Rice Minimum Purchase Price* or *Notice on Announcing the Rice Minimum Purchase Price* ("*Rice MPS Notices*") each year, which defines the "minimum purchase price" or applied administered price for three products: early-season Indica rice, mid-to-late season Indica rice, and Japonica rice. NDRC, MoF, MoA, State Administration of Grain, and the Agricultural Development Bank jointly issue the annual *Rice MPS Notices.*

16. The *Rice MPS Notices* are directed to China's "development and reform commissions, price bureaus, finance departments (bureaus), agriculture departments (bureaus, commissions, and offices), grain bureaus, and Agricultural Development Bank of China branches of all provinces, autonomous regions, and municipalities directly under the central government." The *Rice MPS Notices* are issued in January or February, which is well in advance of planting. The *Rice MPS Notices* state that "[a]s it is currently the middle of the preparatory spring plowing period, all localities are required to earnestly and properly carry out dissemination work for the grain minimum purchase price policy." The *Rice MPS Notices* continue that the announced price is to "guide farmers to plant rationally, and promote the stable development of grain production."

17. Second, the NDRC, in conjunction with the MoF, MoA, State Administration of Grain, Agricultural Development Bank of China, and Sinograin, publish an annual *Notice on Issuing the Wheat and Rice Minimum Purchase Price Implementation Plan,* "in order to implement and fulfill the spirit of the [2015 Document Number 1]." Attached to the notice is a detailed *Wheat and Rice Minimum Purchase Price Implementation Plan* (the "*Indica Rice and Japonica Rice MPS Implementation Plans*") that is issued "in accordance with the relevant provisions in the [*2004 Grain Distribution Regulation*].

18. Typically, the early Indica rice Implementation Plan is released first, and a joint mid-to-late Indica rice and Japonica rice plan follows during the later planting season. In other instances, the *Indica Rice and Japonica Rice MPS Implementation Plans* are announced in the same document as the *Wheat MPS Implementation Plan,* as was the case for 2015.

19. The annual *Indica Rice and Japonica Rice MPS Implementation Plans* reaffirm the applied administered price initially announced in the *Rice MPS Notices*, noting that this is "the at-depot price of direct purchases [of rice] from farmers by the purchasing and storage depots responsible for making purchases at the minimum purchase price." The *Indica Rice and Japonica Rice MPS Implementation Plans* subsequently set forth the parameters of that season's MPS Program for wheat including: (1) the geographic scope, (2) characteristics of qualifying Indica rice or Japonica rice, (3) relevant timeframe, and (4) the roles and responsibilities of the numerous Chinese government entities involved in implementing, and financing the MPS Program.

20. Each year to implement the Indica Rice and Japonica Rice MPS Programs, local offices of Sinograin and the Agricultural Development Bank of China must identify and authorize "entrusted purchasing and storage depots." These depots or warehouses must satisfy a number of specific criteria to be eligible to participate in the program. Further, "the total depot storage capacity volume of the entrusted purchasing and storage depots within each county shall be linked to the forecast volume of grain purchases at minimum purchase prices in that locality."

21. When the Indica Rice and Japonica Rice MPS Programs are activated, "entrusted purchasing and storage depots . . . are required to announce, on a board in a prominent location at the purchasing site, policy information relating to the implementation of the minimum purchase price for each grain variety, [this information] will include the purchase price, quality standards, deduction methods for weight increase of moisture and impurities, the purchase settlement method, and the implementation period, so that farmers can transact in 'grain with peace of mind.'"

22. The *Indica Rice and Japonica Rice MPS Implementation Plans* clarify that entrusted purchasing and storage depots "must not" "refuse grain sold by farmers that meets the standard," "will promptly settle the grain sales price with the farmer, and must not issue IOUs to the farmers." Further, entities charged with making purchases "shall actively enter the market to purchase new grain."

23. Purchase and administration costs under the MPS Program for rice are financed through loans "secured by a directly affiliated enterprise of [Sinograin], [in the form of] a loan uniformly from the Agricultural Development Bank of China, at the locality [of the depots]." Ownership "rights belong to the State Council, and the grain must not be put to use nor mortgaged without approval by the state." The Indica rice and Japonica rice held by the entrusted purchasing and storage depots, will eventually be sold "according to the principle of selling at profitable prices, rationally formulate base sales prices, and auction [the grain] at public auctions on grain wholesale markets or online."

24. The Chinese instruments setting out the MPS Programs for Indica rice and Japonica rice instruct central and provincial government officials to initiate a program of Indica rice or Japonica rice purchases on an annual basis. The MPS Programs ensure that farmers in the identified major rice producing provinces are able to make sales of qualifying rice at the announced applied administered price, if the prevailing domestic market price falls below the applied administered price. The MPS Program for corn operates in a similar manner.

C. China's Corn Market Price Support Program

25. China is the world's second largest producer of corn. Since 2005, China's corn production has increased 38 percent. Corn is primarily grown in northern and northeastern China.

26. As described in China's *Document Number 1*, the measures related to corn procurement are part of a "temporary" program to procure and store corn. To implement market price support for corn, China issues a single document titled the *Notice on Issues Relating to National Temporary Reserve Purchases of Corn in the Northeast Region* (the "*Notice on Purchases of Corn*"). The *Notices on Purchases of Corn* are issued jointly by NDRC, the State Administration of Grain, MoF, and Agricultural Development Bank of China, and provide details on the available applied administered price, geographic scope, timing, and requirements of the Corn MPS Program.

27. The Corn MPS Programs provide that the applied administered price is to be available in three Northeast provinces − Liaoning, Jilin, and Heilongjiang − and the Inner Mongolia Autonomous Region. The *Notices on Purchases of Corn* for 2012 through 2015 provide the applied administered prices in the referenced provinces and autonomous region. This price is "the at-depot purchase price of direct purchases from farmers by the purchasing and storage depots."

28. The Corn MPS Program operates from when the *Notice on Purchases of Corn* is issued typically in late November or early December until April 30 of the following calendar year. This is the period immediately following the corn harvest in northeastern China.

29. The Corn MPS Program provides that the applied administered price is for "domestically produced corn produced in 2015, meeting the quality standards for national at-grade product," or "Grade 3" corn. The applied administered price is "the at-depot purchase price of direct purchases from farmers by the purchasing and storage depots." Corn that meets a lower or higher grade may also be purchased and "[p]rice differences between adjacent grades will be controlled at 0.02 yuan per *jin* [half kilogram]."

30. Sinograin is "entrusted by the state to act as the primary policy implementation entity," and in particular "will make open purchases of farmers' surplus grain and prevent the occurrence of farmers' 'difficulty selling grain.'" Aspects of the work are also delegated to the provincial governments who may issue their own implementing measures.

31. The *Notices on Purchases of Corn* further provide that "COFCO, Chinatex, and [Aviation Industry Corporation of *China ("*AVIC")], as the supplemental forces for [Sinograin], are entrusted by [Sinograin] to undertake purchasing and storage tasks, and will independently take on loans from the Agricultural Development Bank of China." Other warehouses and granaries may be designated as "purchasing and warehouse sites" by joint decision of local subsidiaries of Sinograin, and the Agricultural Development Bank of China, as well as local grain administration authorities. Further, permanent and temporary storage facilities may be built by Sinograin and provincial officials where there is determined to be a need for additional storage.

32. Each identified "purchasing and warehouse site" throughout the Northeast region is "required to openly post and purchase in accordance with stipulated prices." Further, they must "ensur[e] that grain standards and quality and price policies are posted and standard sample products are displayed." While assuring that these requirements are followed, the sites will also "make open purchases of farmers' surplus grain and will prevent the occurrence of 'difficulty selling grain' among farmers."

33. The Chinese instruments setting out the MPS Programs for corn instruct central and provincial government officials to initiate a program of corn purchases on an annual basis. The MPS

Programs ensure that farmers in the northeast provinces are able to make sales of qualifying rice at the announced applied administered price, once notice of the program has been issued.

II. CHINA MUST MAINTAIN DOMESTIC SUPPORT EXPRESSED AS CURRENT TOTAL AMS AT LEVELS BELOW CHINA'S FINAL BOUND COMMITMENT LEVEL WHEN CALCULATED IN ACCORDANCE WITH THE AGRICULTURE AGREEMENT

34. China may, like other Members of the WTO, maintain domestic support programs, including market price support programs, as long as the domestic support provided under those programs does not exceed the Member's fixed commitment levels. The basic obligations in the Agriculture Agreement regarding domestic support are set forth as follows: (1) Article 3.2 states that: "[s]ubject to the provisions of Article 6, a Member shall not provide support in favour of domestic producers in excess of the commitment levels specified in Section I of Part IV of its Schedule;" (2) Article 6.3 states that: "[a] Member shall be considered to be in compliance with its domestic support reduction commitments in any year in which its domestic support in favour of agricultural producers expressed in terms of Current Total AMS does not exceed the corresponding annual or final bound commitment level specified in Part IV of the Member's Schedule"; and (3) finally, Article 7.2(b) states that: "[w]here no Total AMS commitment exists in Part IV of a Member's Schedule, the Member shall not provide support to agricultural producers in excess of the relevant *de minimis* level set out in paragraph 4 of Article 6."

35. The Agriculture Agreement thus frames a WTO Member's obligation to limit domestic support: first, the Member's individual commitment recorded in Section I of Part IV of the Member's Schedule, and second, the *de minimis* level of support that may be provided by a Member to its producers of basic agricultural products, without including the value of that product-specific AMS in the calculation of Current Total AMS.

36. China scheduled a "Final Bound Commitment Level" of "nil" in Section I of Part IV of its Schedule of Concessions on Goods ("China's Schedule CLII"). China's consistency with this commitment is measured in terms of its Current Total Aggregate Measurement of Support (Current Total AMS), which is the sum of the Aggregate Measurement of Support (AMS) provided to each basic agricultural product.

37. Pursuant to Article 1(a) of the Agriculture Agreement, the AMS for each basic agricultural product must be "calculated in accordance with the provisions of Annex 3 of this Agreement and taking into account the constituent data and methodology used in the tables of support material incorporated by reference in Part IV of the Member's Schedule." Article 1(h), in turn, provides that a Member's "Total AMS" for a given year refers to "the sum of all domestic support provided in favour of agricultural producers, calculated as the sum of all aggregate measurements of support for basic agricultural products, all non-product-specific agreement measurements of support and equivalent measurements of support for agricultural products." Pursuant to Article 6.4 of the Agriculture Agreement, a Member's Current Total AMS does not include product-specific AMS values that are less than or equal to the relevant *de minimis* level of support. For China, the *de minimis* level of support equals 8.5 percent of the total value of production of a basic agricultural product during the relevant year.

38. Therefore, to determine China's Current Total AMS for each year, the Panel first must calculate the product-specific AMS for each basic agricultural commodity, and compare that value to the total value of production for that agricultural product. To the extent that the product-specific AMS for a particular basic agricultural product exceeds China's *de minimis* level of 8.5 percent, the full value of the product-specific AMS would be included in China's Current Total AMS. Because China has committed to a level of domestic support of "nil" or zero, in the event the product-specific AMS for any basic agricultural product exceeds the *de minimis* level of 8.5 percent, China will have breached Articles 3.2 and 6.2 of the Agriculture Agreement.

Market Price Support

39. Annex 3 of the Agriculture Agreement identifies support that "shall" be included in a Member's AMS calculation. It states that "an Aggregate Measurement of Support (AMS) shall be calculated on a product-specific basis for each basic agricultural product receiving *market price support*, non-exempt direct payments, or any other subsidy not exempted from the reduction

commitment ("other non-exempt policies")." Thus, the Agriculture Agreement states that "market price support" in favor of basic agricultural products is a form of non-exempt domestic support and must be included in a Member's AMS calculation.

40. The Agriculture Agreement does not expressly define the term "market price support;" it is useful to consider the ordinary meaning of the constituent terms of "market price support" to understand the scope of domestic support programs contemplated by this term. A "market" is the physical or geographic place where commercial transactions take place, or the business of buying and selling, including the rate of purchase or sale, of a particular good or commodity. "Price" is defined as "a sum in money or goods for which a thing is or may be bought or sold." "Support" is defined as "the action of holding up, keeping from falling, or bearing the weight of something" or "the action of contributing to the success of or maintaining the value of something."

41. Relevant to the consideration of the term "market price support," the dictionary also supplies a number of definitions of compound terms. The *Shorter Oxford English Dictionary*, defines "market price" as "the current price which a commodity or service fetches in the market." Further, it defines "price support" as "assistance in maintaining the levels of prices regardless of supply and demand."

42. Thus, the ordinary meaning of the constituent terms, as well as the compound phrases indicates that "market price support" is the provision of assistance in holding up or maintaining the price for a product in the market, regardless of supply and demand. In the context of Annex 3, paragraph 1, an AMS for "each basic agricultural product" includes the provision of assistance in holding up or maintaining a market price for that agricultural product.

43. Paragraph 8 of Annex 3 provides the methodology for calculating the specific type of support at issue in this dispute − market price support. Paragraph 8 states that "market price support shall be calculated using the *gap* between a *fixed external reference price* and the *applied administered price* multiplied by the *quantity of production eligible* to receive the applied administered price." The paragraph goes on to provide that "[b]udgetary payments made to maintain this gap, such as buying-in or storage costs, shall not be included in the AMS."

44. Thus, the calculation of market price support is based on the price gap between the "applied administered price" identified in the domestic support measure and the "fixed external reference price," multiplied by the quantity of eligible production.

Applied Administered Price

45. The Agriculture Agreement does not define the term "applied administered price". It is therefore necessary to evaluate the ordinary meaning of the constituent terms of "applied administered price." Specifically, "applied" is defined as to "put to practical use; having or concerned with practical application." This definition suggests an actual or real life action. With respect to "administered," "administer" is defined as to "carry on or execute (as office, affairs, etc.)," to "execute or dispense," or to "furnish, supply, give (orig. something beneficial to)." Finally, as described above, "price" is defined as "a sum in money or goods for which a thing is or may be bought or sold" or its "value or worth."

46. Considering these definitions, the "applied administered price" is the price a Member dispenses or furnishes to support a particular basic agricultural product. Paragraph 8 also refers to "the" applied administered price, suggesting that this price is known and discernable. The applied administered price is thus price set or established by the government and is, as such, distinguishable from a prevailing domestic market price. The "applied administered price" is the price the Chinese government *provides* for each of the basic agricultural products and is *identified* for each product and each year in the Chinese legal instruments implementing the program (Relevant data available at U.S. First Written Submission, Table 6; Exhibits US-20 − US-23, US-39 − US-42, US-52 − US-55).

Fixed External Reference Price

47. The "fixed external reference price" is a *static reference value* defined by the Agriculture Agreement in Annex 3, paragraph 9. This states that the price "shall be based on the years 1986 to 1988" and "may be adjusted for quality differences as necessary." These fixed external reference

prices can be determined using official Chinese customs data from these years (Relevant data available at U.S. First Written Submission, Table 7; Exhibit US-65).

Eligible Production

48. The third element of the market price support calculation methodology contained in Annex 3, paragraph 8, of the Agriculture Agreement directs that the established price gap be multiplied "by the quantity of production eligible to receive the applied administered price." The ordinary meaning of the terms indicates that "eligible production" is all of the production entitled or permitted to receive the administered price. Specifically, the ordinary meaning of "eligible" is "[f]it or entitled to be chosen for a position, award, etc." Thus, the "quantity of production eligible" is a portion or amount of the commodity produced that is entitled to receive the applied administered price. It is the amount of agricultural production that has the rightful claim to receive the applied administered price, whether or not that amount of production actually received the specified applied administered price.

49. The Appellate Body in *Korea – Beef* considered the meaning of the phrase "quantity of production eligible to receive the applied administered price" and reached a similar understanding. The Appellate Body stated that "production eligible to receive the applied administered price" has "a different meaning in ordinary usage from 'production actually purchased.'" The Appellate Body further defined "eligible" as that which is "fit or entitled to be chosen." It noted that "a government is able to define and limit 'eligible' production," and that "[p]roduction actually purchased may often be less than eligible production." Thus, "eligible production" within the meaning of Annex 3, paragraph 8 of the Agriculture Agreement is production, which is fit or entitled to receive the administered price, whether or not the production was actually purchased.

50. Because under China's programs all production in identified provinces is fit or entitled to receive the applied administered price, the "quantity of production eligible" is drawn from China's National Bureau of Statistic and Ministry of Agriculture official wheat, rice, and corn production volumes (Relevant data available at U.S. First Written Submission, Table 8; Exhibits US-18, US-73 – US-75).

III. CHINA'S MPS PROGRAMS FOR WHEAT, INDICA RICE, JAPONICA RICE, AND CORN PROVIDE GREATER THAN DE MINIMIS LEVELS OF DOMESTIC SUPPORT AND THUS RESULT IN CHINA EXCEEDING ITS DOMESTIC SUPPORT COMMITMENT FOR 2012, 2013, 2014, AND 2015

51. China's MPS Programs for wheat, Indica rice, Japonica rice, and corn are "market price support" measures as contemplated by Annex 3 of the Agriculture Agreement. As a preliminary matter, China has notified its Wheat and Rice MPS Programs on the "Product Specific Aggregate Measure of Support: Market Price Support" supporting table "DS:5" of its annual notification. These programs are notified as "product-specific." Therefore, China itself has stated that the MPS Programs for wheat, Indica rice, and Japonica rice operate as product-specific "market price support" and has characterized these programs as such to WTO Members.

52. Further, China's MPS Programs for wheat, Indica rice, Japonica rice, and corn constitute "market price support" within the meaning of Annex 3, because each Program exhibits an "applied administered price" and "quantity of production eligible." Specifically, China announces for each MPS Program the "minimum procurement price" at which designated state-owned enterprises will purchase wheat, Indica rice, Japonica rice, and corn. This annually announced "minimum procurement price" constitutes an "applied administered price," because it is the known or discernable price China dispenses or furnishes for each basic agricultural product, regardless of the price that would be otherwise determined by the market. This offers price support to Chinese farmers in the designated regions.

53. China's MPS Programs also each establish a "quantity of eligible production." The MPS Programs specify that production in designated provinces is eligible for support, and in those provinces the state-owned enterprises will purchase all proffered product. Therefore, the portion or amount of the commodity produced that is entitled to receive the administered price is identified in the MPS Programs as all production produced in the identified provinces.

54. For these reasons, China's MPS Programs for wheat, Indica rice, Japonica rice and corn are "market price support" programs for the purposes of the Agriculture Agreement and must be evaluated per the methodology set forth in Annex 3.

55. As described above, Annex 3, paragraph 8, of the Agriculture Agreement provides the calculation methodology for market price support as:

*(Applied Administered Price − Fixed External Reference Price) * Quantity of Production Eligible = AMS*

56. Based on the values for each element of the "market price support" calculation, as well as the "total value of production" data, China has provided support in excess of its *de minimis* level for each of wheat, Indica rice, Japonica rice, and corn solely through its market price support programs for the years 2012, 2013, 2014, and 2015. Accordingly, China has acted inconsistently with its obligations pursuant to Articles 3.2 and 6.3 of the Agriculture Agreement on the basis of the level of domestic support provided through China's market price support measures in favor of wheat, Indica rice, Japonica rice, and corn, viewed separately or collectively. Therefore, the United States requests that the panel issue the mandatory recommendation for China to bring its measures into conformity with the Agriculture Agreement.

EXECUTIVE SUMMARIES OF THE U.S. COMMENTS ON CHINA'S CHALLENGE TO THE PANEL'S TERMS OF REFERENCE, U.S. ORAL STATEMENTS AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL, AND THE U.S. RESPONSES TO THE PANEL'S FIRST SET OF QUESTIONS

57. [Summaries of the U.S. comments on China's challenge to the Panel's terms of reference, the U.S. oral statements at the first substantive meeting, and the U.S. Responses to the Panel's First Set of Questions are reflected in the Executive Summary of the U.S. First and Second Written Submissions.]

EXECUTIVE SUMMARY OF THE U.S. SECOND WRITTEN SUBMISSION

I. DOMESTIC SUPPORT PROVIDED BY CHINA TO ITS CORN PRODUCERS IN 2012 THROUGH 2015 IS PROPERLY WITHIN THE PANEL'S TERMS OF REFERENCE

58. During this panel proceeding, China has not denied that it provided domestic support to corn producers from 2012 through 2015 in excess of its Final Bound Commitment Level. Instead, China erroneously argues that the Panel is precluded from examining and making findings and recommendations on China's provision of domestic support to its corn producers from 2012 through 2015. China argues that the annual legal instruments through which China provided domestic support to its corn producers in 2015 have "expired," and on that basis the provision of domestic support provided to Chinese corn producers from 2012 through 2015 is outside the Panel's terms of reference.

59. China's arguments misunderstand "the matter" at issue in this dispute, and the nature of domestic support challenges generally, which necessarily relate to past action by a responding Member. As explained below, the United States properly identified the matter at issue in its panel request − the only matter as of the date of panel establishment that would permit an examination, and a finding of WTO-inconsistency. The DSU thus requires the Panel to examine and make findings and a recommendation regarding China's provision of domestic support during the relevant years. The expiration of annually-issued legal instruments through which China provided such support in the relevant years does not alter the Panel's terms of reference. Moreover, China's non-transparency prevents it from demonstrating that China ceased to provide domestic support to its corn producers in excess of its commitment level prior to the establishment of the Panel.

60. The "matter" to be resolved is that described in Article 7.1 of the DSU. This provision states that a panel's terms of reference are "[t]o examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), *the matter referred to the DSB* by the [United States] in [its panel request] …, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreements". With respect to Article 7.1 of the DSU, the Appellate Body has stated: "[a] panel's terms of reference are governed by the request for the establishment of a panel. In other words, the panel request identifies the measures and the claims that a panel will have the authority to examine and on which it will

have the authority to make findings." Accordingly, the matter that the DSB places within a panel's terms of reference for its examination is defined by the complaining Member's panel request.

61. Thus, as set out in the U.S. panel request and explained in prior submissions, the United States has challenged China's provision of domestic support to its agricultural producers during the years 2012, 2013, 2014, and 2015 as inconsistent with China's Final Bound Commitment Level of "nil" and in breach of Articles 3.2 and 6.3 of the Agriculture Agreement. The panel request describes four measures at issue: the "domestic support provided by China" (or "China's domestic support in favor of agricultural producers") in each of the years 2012, 2013, 2014, and 2015. It also describes eight affirmative claims, i.e., the United States challenges that the levels of domestic support provided for each of the four years exceeds China's final bound commitment level in breach of Article 3.2 and of Article 6.3 of the Agriculture Agreement. These four measures and eight claims constitute the "matter" that the DSB has charged the Panel with examining through its terms of reference.

62. In addition to identifying the "matter," the U.S. panel request also includes additional information that previews the main arguments the United States will advance in its First Written Submission to demonstrate its claims. Prior panels and the Appellate Body have explained that there is a significant difference between the claims identified in a panel request, which establish the panel's terms of reference under Article 7 of the DSU, and the arguments supporting those claims, which are set out and clarified progressively in the written and oral submissions. The United States has identified both in its panel request.

63. The U.S. panel request is best understood by parsing the constituent parts of the three sentences in the U.S. panel request. The italicized language identifies the measures, the bolded language identifies the claims, and the underlined language previews the arguments put forward by the United States.

> The United States considers that China has acted inconsistently with its obligations pursuant to Articles 3.2 and 6.3 of the Agriculture Agreement because the level of *domestic support provided by China* exceeds China's commitment level of "nil" specified in Section I of Part IV of China's Schedule CLII. In particular, *China's domestic support in favor of agricultural producers*, expressed in terms of its current Total Aggregate Measurement of Support ("Total AMS"), exceeds China's final bound commitment level in 2012, 2013, 2014, and 2015 on the basis of domestic support provided to producers of, *inter alia*, wheat, Indica rice, Japonica rice, and corn. The United States further considers that, to the extent applicable, *these measures* are inconsistent with China's obligation under Article 7.2(b) of the Agriculture Agreement because, in 2012, 2013, 2014, and 2015, *China provides domestic support* for wheat, Indica rice, Japonica rice, and corn in excess of its product-specific de minimis level of 8.5 percent for each product.

64. The first sentence includes the measures and claims. The second sentence previews that the claims will be demonstrated on the basis of a specific argument. The third sentence includes an alternative claim and argument. As the Appellate Body recognized in *EC − Selected Customs*, "nothing in Article 6.2 prevents a complainant from making statements in the panel request that foreshadow its arguments in substantiating the claim. If the complainant chooses to do so, these arguments should not be interpreted to narrow the scope of the measures or the claims." Accordingly, the U.S. panel request includes both the matter referred to the DSB under Article 7 of the DSU, and a preview of the arguments supporting those claims that the United States advanced progressively in its written and oral submissions.

65. Therefore, contrary to China's claims that the Panel is precluded from examining China's provision of domestic support to its corn producers in 2012, 2013, 2014, and 2015, the Panel's function pursuant to Article 11 of the DSU is to make an objective assessment of "the matter" before it − the same "matter" that the DSB has put within the Panel's terms of reference. In this dispute, in light of the U.S. panel request and Article 7.1 of the DSU, the Panel must make an objective assessment as to whether China's provision of domestic support to Chinese agricultural producers in each of the relevant years exceeded China's commitment level and thereby breached its commitments under the Agriculture Agreement.

A. China's Rebuttal Arguments Do Not Establish that the Measures and Claims Identified in the U.S. Panel Request Fall Outside the Panel's Terms of Reference

66. In China's Response to the Panel's Questions, China makes a number of false statements and advances arguments unsupported by the DSU and the Agriculture Agreement. First, China argues that "domestic support" and the "level of domestic support" are not measures but a "legal concept," and therefore are insufficient to present the problem clearly under Article 6.2 of the DSU. In supporting its argument, China tries to draw a parallel between "domestic support" covered by the Agriculture Agreement and "subsidies" disciplined under the SCM Agreement. Further, it argues that the "level of domestic support" is not a measure, but an unspecified reference to a numerical value that fails to "identify the specific measures that are alleged to have contributed to the level of domestic support." China's arguments are in error and must fail principally because the United States properly identified the measure at issue in its panel request.

67. The United States has not identified the measure in its panel request as simply the "level of domestic support" or "domestic support." China has failed to provide the complete and accurate identification of the measure included in the U.S. panel request. As stated repeatedly, the measure at issue is "China's domestic support in favor of agricultural producers" (also expressed as the "domestic support provided by China"), and the panel request then lists legal instruments through which that support is provided. The measure is therefore neither a numerical value, nor a legal concept but *action* by China. As China itself noted in its answer, the measure at issue in a dispute may be any act or omission attributable to the responding Member. The United States, indeed, identified the measure as "China's domestic support in favor of agricultural producers" and "domestic support provided by China." Thus, the United States identified a specific measure at issue − an act attributable to China − in its panel request.

68. Moreover, contrary to China's argument, a comparison between domestic support under the Agriculture Agreement and a subsidy under the SCM Agreement does not support China's position that the provision of domestic support by China is insufficient to identify the specific measure at issue. Unlike the Agriculture Agreement, the SCM Agreement prohibits Members from providing certain types of subsidies, known as prohibited subsidies, and seeks to neutralize adverse trade effects on the interests of another Member, through serious prejudice actions and authorizing the use of countervailing measures. Conversely, the Agriculture Agreement neither prohibits any specific form of domestic support, nor seeks to counter any negative effects of the provision of support. The Agriculture Agreement simply seeks to limit the amount of domestic support provided by a Member and requires that the Member calculate and notify the amount of support given in accordance with certain methodologies.

69. In addition, China seems to conflate terms of reference issues with issues to be resolved on the merits. The question of whether the measures identified in the panel request can breach an obligation under a covered agreement is a substantive issue to be addressed and resolved on the merits. China's argument that "domestic support" and "level of domestic support" are legal concepts not only misstates the U.S. identification of the measure, but asserts that these "concepts" *cannot* breach the Agriculture Agreement themselves. The Panel should examine whether the measure identified by the United States (the provision of domestic support by China) breaches the Agriculture Agreement as part of its review of the merits.

70. In a final attempt to persuade the Panel, China baselessly argues that the right to challenge "domestic support" or the "level of domestic support" would deprive the respondent of its due process rights to know the case it must answer, result in uncertainty about the steps it must take to bring its measure into conformity, and permit a complaining Member to inappropriately broaden the scope of any compliance proceeding. China's concerns are unfounded. First, as explained above, the United States did in fact identify the specific measure at issue. Second, the concern China advances is not present in this dispute. The U.S. panel request, in addition to identifying "China's domestic support in favor of agricultural producers," also sets out the instruments through which the support is provided (and the United States has not sought to rely on any other instruments). It further listed the agricultural products through which China's breach would be demonstrated (and the United States has not sought to prove its case on the basis of other products). Thus, China's concern may apply to another dispute and another panel request, but the circumstances China concerns itself with are not present here. Typically, original panels do not dictate to respondents how to bring their measures into conformity; rather, a panel's recommendation is simply to bring

measures into conformity with the covered agreement. Respondents have the flexibility to choose how to comply with a panel's recommendation. Therefore, despite China's arguments, the U.S. identification of "China's domestic support in favor of agricultural producers," including domestic support to China's corn producers, is not contrary to the DSU and would not permit challenges to unidentified measures.

71. Second, China mischaracterizes the nature of a domestic support challenge. To overcome an objection that its terms of reference argument renders domestic support unchallengeable, China goes so far as to argue that a complaining Member could bring an AMS claim *before* the necessary data is available to prove a breach. China's statement reflects a fundamental misunderstanding of WTO AMS commitments and would, indeed, render such commitments beyond challenge. A Member's domestic support commitments, in terms of their Final Bound Commitment Level, apply with respect to domestic support provided over a full calendar, marketing, or financial year. Therefore, the question of whether a WTO Member is in breach of its domestic support commitments necessarily involves a retrospective examination of the level of domestic support, calculated as Current Total AMS provided over a period of time. Where a challenge involves market price support programs, the complaining party must produce, among other things, data related to a country's total annual production volume and average farm-gate prices for the full years at issue in order to establish the level of domestic support provided and then compare that support to a Member's AMS commitments.

72. With respect to the market price support at issue in this dispute, data for both annual production and prices for each product were necessary for the United States to examine whether China had exceeded its Final Bound Commitment Level. And, importantly, the United States and other WTO Members do not have access to the necessary data until *China itself* releases it to the public. The complete data required for the United States to analyze China's compliance with WTO rules for the year 2015 were not publicly available *until November 2016* − nearly a year after the end of the relevant time period. Therefore, the United States filed its request for establishment of a panel as soon as was feasible, on December 5, 2016, less than a month after the complete data became available.

73. Under these circumstances, China's argument that the United States is precluded from challenging China's provision of domestic support to its corn producers for 2012-2015 would, indeed, frustrate the ability of the United States or any other WTO Member to challenge China's provision of domestic support in excess of its WTO commitments. If the Panel were precluded from examining past provisions of domestic support simply because a program has allegedly changed, given the retrospective nature of domestic support obligations, simple changes to a legal instrument would preclude challenges to a Member's domestic support without the Member having achieved conformity of its support with its WTO obligations. The Panel should not endorse a legally erroneous approach that would also open such a loophole in WTO rules. Instead, consistent with the DSU and the Agriculture Agreement, the Panel should consider China's domestic support provided through annual legal instruments during the years at issue, as set out in the U.S. panel request and therefore within the Panel's terms of reference.

74. Such an analysis is exactly what the panel and Appellate Body did in *Korea − Beef*. Specifically, in *Korea − Beef*, the United States and Australia requested the DSB to establish a panel on April 15, 1999 and July 12, 1999, respectively, and the panel was established on May 26, 1999. The panel and Appellate Body issued findings concerning domestic support provided in 1997 and 1998 − that is, the two years *prior to* the complaining parties' requests for panel establishment. Moreover, in examining whether Korea's provision of domestic support in 1997 and 1998 exceeded its domestic support commitments, the panel reviewed annual legal instruments that were no longer in effect at the time the DSB established the panel to examine the matter raised in the requests for panel establishment.

75. The U.S. approach in this dispute is the same as that taken in *Korea − Beef*, the only prior WTO dispute addressing market price support programs. In both, a complaining party seeks to demonstrate a Member's breach of its domestic support commitments through the domestic support provided through the legal instruments capable of examination. Accordingly, the Panel should approach the domestic support China confers, and the time-bound legal instruments it employs, no differently than did the panel and Appellate Body in *Korea − Beef*. Failing to do so would ignore the fact that Current Total AMS is determined annually, as well as ignore the annual nature of market price support programs in China.

B. China's Rebuttal Arguments Do Not Establish that the Panel Is Precluded From Making Findings and Recommendations On the Measures Identified in the U.S. Panel Request

76. The United States has explained that it is not challenging a measure that had expired prior to panel establishment, but rather is challenging the domestic support provided by China. China has not alleged or demonstrated that the legal instruments through which it provided domestic support in 2016 had removed any WTO-inconsistency as of the date of panel establishment. Therefore, the replacement of the annual 2015 corn legal instrument with another instrument for 2016 is not relevant. To the extent the 2015 corn support legal instrument is considered to have "expired," it would be appropriate for the Panel to make findings and recommendations in light of the Panel's terms of reference and the DSU provision (Article 19.1) requiring a recommendation for any measure within the panel's terms of reference found to be WTO-inconsistent.

77. The Appellate Body reports in *China − Raw Materials* demonstrate that expiry of an annual legal instrument should not deprive the complaining party of a finding and recommendation on a WTO-inconsistent measure within a panel's terms of reference. The situation in this dispute is similar to that in *China − Raw Materials*, which also dealt with a series of annual Chinese measures. The Appellate Body held that with respect to annual instruments that implement a measure (in that dispute, export duties or quotas), a panel should make findings on a recurring measure, as evidenced by annual legal instruments that may have been superseded in the course of the dispute. In so doing, both the panel and Appellate Body examined the measure *as it existed at the time of panel establishment*. The Appellate Body noted that if complainants were precluded from challenging measures of an annual nature that may have expired during the course of the panel proceedings, it would create a loophole in the system. Complainants could find themselves 'taking aim' at 'appearing and disappearing targets,' and responding parties could evade a panel's scrutiny by removing measures during the panel proceedings and reinstating them in the future without any consequences.

78. In the present dispute, China argues that *Raw Materials* is not applicable because the annual legal instruments that implement the provision of domestic support for corn in 2015 allegedly expired before panel establishment. However, as explained above, China is incorrect that the expiration of an annual legal instrument for a particular year prevents a panel from making findings on the domestic support provided through that instrument in the relevant year − the U.S. panel request sets out the only "matter" that existed and demonstrated China's WTO-inconsistent support as of that date. Moreover, in the context of domestic support, China's argument creates the very loophole the panel and Appellate Body in *Raw Materials* sought to avoid.

79. Most of the instruments identified in the U.S. panel request are annual in nature − both for corn and for wheat and rice. China has indicated that it does not argue that the market price support programs for wheat or rice have expired. As China explained at the first panel meeting and in its answers to the Panel's questions, the rice and wheat programs essentially operate in the same way the export duties and quotas in *Raw Materials* operated − *i.e.*, they consist of an ongoing legislative framework and a series of annual measures that identify the specific applied administered price and implementation plans for each year in which the MPS program operates. However, China has not explained why the Panel should view the instruments for corn any differently, or why the differences between the annual legal instruments for corn in 2015 and 2016 mean that the expiration of the 2015 legal instruments extinguishes the Panel's authority with respect to the provision of support during 2012-2015.

80. Specifically, China does not dispute that all of the annual legal instruments for rice and wheat issued in 2012 through 2015 in fact expired prior to the establishment of the panel. Therefore, China appears to suggest that the continued existence of the ongoing legal framework measures, including the 2004 Grain Distribution Regulation, preserves the Panel's authority to make findings regarding the provision of domestic support for rice and wheat in the relevant years. But China's argument does not support finding that corn domestic support has "expired", for two reasons.

81. First, the *2004 Grain Distribution Regulation* provides authority for China to implement market price support for corn, as well as for wheat and rice. The annual legal instruments for each product covers one year (and therefore could be argued to "expire" with that year). There is no logical basis to distinguish rice and wheat from corn, then, and to think that the authorizing framework that applies to the three products provides a basis for the Panel's terms of reference for rice and wheat,

but not for corn. China's approach would lead to the very "disappearing target" dilemma the panel and Appellate Body in *Raw Materials* warned against.

82. Second, China's argument apparently relies on the absence of a regulatory framework pursuant to which the corn instruments were enacted. But, if the mere absence of an ongoing legal framework meant that the expiration of annual instruments precluded a panel from making findings, this again would allow the same "disappearing target" danger − a constantly moving target that required a complainant to continually update its analysis in hopes of keeping up with the changing measures. Moreover, such a finding would encourage Members to reduce the level of transparency in their systems and instead rely on annual, and even *ad hoc*, legal instruments alone − a development that would only add to a complainant's difficulty in bringing a successful challenge.

83. As the United States has explained previously (and again in the next section of this submission), the fact is we do not know − and the Panel therefore cannot properly evaluate − the factual and legal situation in China in 2016. Under such circumstances, and given the nature of challenges to a Member's AMS, to avoid prejudicing U.S. rights to meaningful findings and recommendations with respect to the provision of domestic support in 2012-2015, including through support for corn, the Panel must make findings on the matter as articulated in the U.S. panel request. That the specific legal instruments upon which those findings would be based may have expired does not alter the matter at issue or exclude the relevant measures from the Panel's terms of reference.

84. In addition to being required to examine the "matter" before it, if the Panel finds China's provision of domestic support to be inconsistent with China's obligations, it must, pursuant to Article 19.1 of the DSU, recommend that China bring its measure(s) into conformity with the Agriculture Agreement. Pursuant to Article 11, therefore, the Panel must make an objective assessment as to whether China's provision of domestic support to Chinese agricultural producers in each of the relevant years is in excess of its commitment level and thereby breaches China's commitments under the Agriculture Agreement. If the Panel finds China's provision of domestic support to be inconsistent with China's obligations, it must, pursuant to Article 19.1 of the DSU, recommend that China bring its measure(s) into conformity with the Agriculture Agreement.

85. Thus, a panel is required to make a recommendation on any measure that it finds to be inconsistent with China's WTO obligations; and such a recommendation is the right of a complainant under the DSU. Therefore, if this Panel finds that China has provided domestic support in excess of its AMS commitments for any of the relevant years, the Panel must recommend that China bring the measure(s) into compliance with its obligations.

C. China Has Not Demonstrated That Its Market Price Support Program for Corn "Expired," or That It Ceased to Provide Domestic Support for Corn in Excess of Its Commitment Level in 2016

86. As explained in the preceding section, the matter at issue before the Panel is whether China's provision of domestic support to its agricultural producers from 2012 through 2015 is inconsistent with its domestic support commitments. Based on the U.S. panel request and the nature of AMS disputes, the expiration of specific legal instruments through which the United States has demonstrated that China has breached its Final Bound Commitment Level does not preclude the Panel from making findings on this matter. For completeness, however, the United States also explains in this section why China also has failed to show that its market price support program for corn had "expired" by the time of the Panel's establishment, or that it ceased to provide domestic support for corn in excess of its commitment level in 2016.

87. First, China asserts at some length that after the "expiry" of the 2015 corn market price support instrument, it moved to a system of "market-oriented purchase" by "market players," where all types of entities may decide to make purchases "on their own initiative." According to China, the 2016 corn purchasing instruments are "*seeking* to achieve a market-based price discovery." China supports this assertion with the text of the 2016 corn purchasing instruments. However, the market-based aspirations espoused in the *2016 Northeast Region Corn Purchase* are simply not sufficient to demonstrate that China no longer provides domestic support for corn in excess of its commitments. The United States notes that *seeking* market-based price discovery is not the same as *eliminating* price support policies for corn, and "reform" of the price support program is not the same as

termination. On its face, then, the instrument China identifies does *not* support its assertion that market-price support had "expired" or been withdrawn.

88. The aspirations and policy "reform" reflected in the *2016 Northeast Region Corn Purchase Notice* and other 2016 policy statements are in fact similar to those identified in the *2004 Grain Opinion* and *2004 Grain Distribution Regulation*, pursuant to which China's market price support for wheat and rice are implemented. For instance, the *2004 Grain Distribution Regulation* states that the "state encourages market entities of various forms of ownership to engage in grain business operations, so as to promote fair competition" and that the "grain price is formed principally by market supply and demand." But the *2004 Grain Distribution Regulation* also provides that, "to protect the interests of grain farmers, the State Council may decide, when necessary, to implement minimum purchase prices in the main grain-producing regions." In this manner, though China's *2016 Northeast Region Corn Purchase Notice* calls for "advancing corn purchasing and storage system reform," this reform is similar to the "marketization reform in grain purchasing and sales" pursued in 2004.

89. This dichotomy between encouraging "market-oriented purchases" and maintaining government control also is apparent on the face of the 2016 corn purchasing instruments and reflected in China's responses to the Panel's Questions. The *2016 Northeast Region Corn Purchase Notice* cites as its goal facilitating a situation where farmers "sell corn according to the fluctuating market price," and that "market entities of all types [are] independently entering the market to make purchases." However, China's *2016 Northeast Region Corn Purchase Notice* simultaneously provides that relevant regions must "comprehensively organize the branches of central government-owned enterprises under jurisdiction and local backbone grain enterprises to lead the way in entering the market for purchasing." The 2016 instrument further states that "[r]elevant central government-owned enterprises such as COFCO and AVIC must fully utilize their own channels and advantages to launch marketized purchasing, striving not to go lower than the policy-based purchasing amount of the previous year, and properly bring into play their guiding and driving role." All of this is to "prevent the occurrence of farmers having "difficulties in selling grain.'" Therefore, while the 2016 measure does encourage "all types" of entities to enter the market, it *also* recognizes and provides for the continuing role of state-owned enterprises tasked with ensuring the market operates properly to compensate farmers and avoid difficulty selling corn by purchasing substantial volumes of newly harvested corn. Thus, direction towards increased "marketization" does not, and has not in the past, meant that the Chinese government cannot continue to engage in the provision of domestic support through government purchasing, including at support prices.

90. The provincial implementation measure from Heilongjiang, the *2016 Notice on Proper Handling of Corn in Heilongjiang*, similarly recognizes the separate roles of private actors beginning to "marketize" the corn market, and state-owned enterprises tasked with driving the market by making purchases at levels similar to prior years. For instance, the regional implementing instrument states that "all types of entities can enter the market to purchase the corn as they wish." To that end, the provincial government is both "encouraging multiple market players to actively purchase and sell corn in the market," and "mak[ing] overall plans on coordinating the branches of central enterprises and major local grain enterprises in the administrative regions to take the lead to purchase corn in the market." Specifically, the instrument provides that "[a]ssociated branches of central enterprises, such as COFCO, Chinatex Corporation, Aviation Industry Corporation of China, etc. shall make full use of their own advantages and channels to carry out the market-oriented purchase, work harder to ensure the purchase volume [is] no less than that of the policy-based purchase last year, and play a leading role in stabilizing the market and guiding the expectations." Thus, while the instrument released at the provincial level by Heilongjiang suggests a desire for private enterprises to enter the market and purchase corn, it also recognize the need for state-owned enterprises to guide the market through continuing purchasing activities and ensuring that farmers are able to sell their corn.

91. Second, China argues in its responses to Panel Question 2(b) that prices for corn are now determined by the market and "reflect[] the market forces of supply and demand." To support this assertion, China cites to an NDRC press release reporting that "[c]orn prices are based on the market," and reflect "reasonable price differences resulting from regional differences and corn quality differences." The United States notes that the press release was published on June 23, 2017, *seven months* after the U.S. panel request. The NDRC press release contains *no* citations or data, and therefore consists of a series of unsubstantiated assertions. This new exhibit provides no information that is pertinent to the Panel's assessment of "the matter" as of the date of panel establishment.

92. Moreover, that China permitted prices for corn to decline from artificially high levels does not demonstrate that China has instituted a "market-based price discovery mechanism," or that Chinese corn prices have "linked up with the international market." To the contrary, Chinese corn prices have remained above international prices for corn throughout 2016 and 2017 as illustrated by Exhibit US-94. Further, the GAIN Reports cited by China further illustrate the continuing differential between Chinese domestic prices for corn and international prices. According to the GAIN Reports, the "spot market" for corn in early December 2016 provided a price of 1,681 RMB or $244 per ton. The Report compares these Chinese port prices to the U.S. corn import price in December 2016 which "landed at Chinese ports is about 1,500 RMB per ton ($218)," and other competing grain imports such as U.S. sorghum, which costs 1,690 RMB or $205. Thus, the lack of an applied administered price communicated to private market actors and farmers does not mean that the domestic price is market-based, or that the purchases made by state-owned enterprises were not done at support prices.

93. Third, China makes a number of other erroneous assertions regarding its 2016 corn purchasing instruments and activities. In particular, China states that that the 2016 instruments "are *not* designating enterprises to purchase corn." As the United States described in its response to Panel Question 2(a)-(c), the central and provincial level instruments implemented in 2016 mirrored prior corn market price support instruments in all relevant policy and logistical elements − including the designation of state-owned enterprises, such as Sinograin, COFCO, and AVIC, to purchase corn. Like in prior years, private entities may also purchase corn, but designated state-owned enterprises have a "guiding and driving role." These state-owned enterprises "must fully utilize their own channels and advantages to launch marketized purchasing, striving not to go lower than the policy-based purchasing amount of the previous year." Further, both the 2015 and 2016 corn purchasing instruments also provide for financing through the Agricultural Development Bank of China, and making available storage for purchased grain.

94. Next, China erroneously asserts that "there is no purchase of corn by government entities after 30 April 2016," and that "the Chinese government does not have statistics" regarding purchases after the expiry of the TRPR. However, as described in the response of the United States to Panel Question 2(a)-(c), Sinograin, a state-owned enterprise also charged with making purchases between 2012 and 2015, reported that it purchased 21.41 million metric tons of corn during the 2016/17 harvest through 743 Sinograin depots in the northeast region. According to Sinograin, this was 21 percent of the production in northeast China and 70 percent of the volume procured by state-owned enterprises. Describing its activities, Sinograin further reported that "[i]n circumstances where purchasing entities have decreased, the strength of the market is insufficient, and there is downward pressure on prices, [Sinograin headquarters] *does not push prices even lower*; it actively enters the market to expand the number of depots and accelerate the rate of purchasing to send a strong signal to stabilize and guide market expectations." Moreover, in addition to the statistics kept by state-owned enterprises, such as Sinograin, the 2016 corn purchasing instruments direct certain recordkeeping and reporting activities. The *2016 Northeast Region Corn Purchase Notice,* states that "[a]ll relevant regions must . . . strengthen situation analysis and evaluation, closely track market changes, regularly announce information such as grain purchasing progress and market price trends." Thus, it appears that records regarding purchasing and pricing activity are held by the Chinese government through its provinces and state-owned enterprises.

95. Finally, the United States notes that it is China that argues that its market price support for corn "expired" in 2016, and therefore it is for China to demonstrate that this claim is supported by the record facts. To make this argument China must demonstrate that as of the date of panel request it had ceased to provide support for corn in excess of its commitments. China has made this assertion, but as described above and in the U.S. response to the Panel's Question 2, it was not clear at the time of panel request and it is not clear now that China has ceased to provide support prices to Chinese corn farmers, or that it no longer provides support in excess of its commitment levels.

II. China has Failed to Rebut the United States' Claim that China Breached its Domestic Support Commitments

96. China attempts to rebut the U.S. showing that China has exceeded its permitted levels of domestic support by arguing that it is permitted to use an alternative approach to the computation of the product-specific AMS. Specifically, China argues that the methodology contained in Annex 3 of the Agriculture Agreement is only a "fallback" option, and that the Supporting Tables attached to

Part IV of its Schedule of Concessions contain agreed China-specific methodologies that supplant the methodology required by the Agriculture Agreement. However, China's position is unsupported by the text and structure of the relevant covered agreements, including China's Protocol of Accession.

97. China, like all WTO Members, committed to abide by the rules outlined in the Agriculture Agreement, as well as maintain a level of domestic support at or below its Final Bound Commitment Level of "nil." Paragraph 1.3 of China's Protocol of Accession specifically states: "*[e]xcept as otherwise provided for in this Protocol*, those obligations in the Multilateral Trade Agreements annexed to the WTO Agreement that are to be implemented over a period of time starting with entry into force of that Agreement shall be implemented by China as if it had accepted that Agreement on the date of its entry into force." The Agriculture Agreement is one of the listed Multilateral Trade Agreements annexed to the WTO Agreement, and with which China has agreed to comply.

98. Consistent with Paragraph 1.3 Members also agreed in China's Accession Protocol to certain modifications of the calculation methodology for Current Total AMS. Specifically, pursuant to paragraph 235 of China's Working Party Report, incorporated by reference into China's Protocol of Accession, China agreed that, for purposes of Article 6.4, it would maintain product-specific domestic support at or below a *de minimis* level of 8.5 percent of the total value of production for each basic agricultural product and that China would not have recourse to Article 6.2.

99. In contrast to Paragraph 235, Paragraph 238 of the Working Party Report records that Members did not agree with all elements of the methodology and policy classifications used in China's Supporting Tables. Specifically, Members asked China to clarify methodological issues contained in its Supporting Tables, and, China agreed to clarify the methodological issue in the context of its notification obligations under the Agriculture Agreement. This demonstrates that WTO Members did not view China's Supporting Tables as reflecting new rights or obligations of China to which they were "agreeing."

100. Therefore, for China, as for other Members, Paragraph 8 of Annex 3 of the Agriculture Agreement mandates the methodology for calculating the value of the type of domestic support at issue in this dispute − market price support. Paragraph 8 states that "market price support shall be calculated using the *gap* between a *fixed external reference price* and the *applied administered price* multiplied by the *quantity of production eligible to receive* the applied administered price."

101. China has argued that the Panel can look to information contained in its Supporting Tables to identify China-specific methodologies for identification of the fixed external reference price and the quantity of eligible production, and that these methodologies supplant the "fallback" obligations contained in Annex 3 of the Agriculture Agreement. Specifically, China argues that "Articles 1(a)(ii) and 1(h)(ii) of the *Agreement on Agriculture* … specifically designate the 'constituent data and methodology' as the elements from the supporting tables that give rise to domestic-support-related rights and obligations in the calculation of Current (Total) AMS." China relies on the Appellate Body report in *Korea − Beef* to argue that there is no hierarchy between the relevant provisions of Annex 3 and a Member's constituent data and methodology. China's arguments misunderstand the relationship between the Agriculture Agreement and a Member's Schedule of Concessions and Supporting Tables, as well as the role and status of information contained in Supporting Tables under the Agriculture Agreement.

102. The Agriculture Agreement provides the ways in which the information contained in a Member's Supporting Tables may be used in the calculation of a Member's Current Total AMS, but it does not give rise to domestic-support related rights and obligations in the calculation of Current Total AMS. The Agriculture Agreement directs the reliance of a Member's Supporting Table to provide Member-specific factual information used to understand a Member's agricultural sector. Specifically, Article 1(b) states that "basic agricultural product" "is defined as the product as close as practicable to the point of first sale as specified in a Member's Schedule and in the related supporting material." Similarly, the definition of "year" provided by the Agriculture Agreement in Article 1(i) "refers to the calendar, financial or marketing year specified in the Schedule relating to that Member." Thus, the Agriculture Agreement directs the use of a Member's Supporting Table to glean Member-specific factual information for purposes of identifying the basic agricultural products in the Member's territory and definition of year for a particular program; it does not create independent rights and obligations.

103. Where the Agriculture Agreement does not expressly direct recourse to information contained in the Supporting Tables, the information may be used only as provided in Articles 1(a) and 1(h). Specifically, Article 1(a)(ii) of the Agriculture Agreement states that the product-specific AMS must be "calculated *in accordance with* the provisions of Annex 3 of this Agreement and *taking into account* the constituent data and methodology used in the tables of support material incorporated by reference in Part IV of the Member's Schedule." Article 1(h), in turn, provides that a Member's "Total AMS" refers to "the sum of all domestic support provided in favour of agricultural producers, calculated as the sum of all aggregate measurements of support for basic agricultural products, all non-product-specific aggregate measurements of support and equivalent measurements of support for agricultural products." For a given year, the "Current Total AMS" must be calculated *in accordance with* the provisions of this Agreement, including Article 6, *and with* the constituent data and methodology used in the supporting material."

104. The inclusion of the phrase "in accordance with" in Article 1(a)(ii) indicates that a product-specific AMS calculation must be conducted "consistent with" the methodology provided in Annex 3. Conversely, the use of the phrase "taking into account" in reference to constituent data and methodology requires a panel to "take into consideration, [or] notice" that information. This indicates that the Panel must consider any relevant constituent data and methodology, but may not accord a higher degree of consideration to that information than it does the methodology in Annex 3.

105. Contrary to China's argument, the Appellate Body report in *Korea – Beef* supports this understanding. In that dispute, the Appellate Body noted the distinction reflected in the text of Article 1(a)(ii) between the phrases "in accordance with" and "taking into account," and found that the ordinary meaning of the phrases suggests a hierarchy attributing a "more rigorous standard" to Annex 3, than to constituent data and methodology. The Appellate Body did not limit this statement regarding the supremacy of Annex 3 to those circumstances in which *no* constituent data and methodology were provided by a Member; nor would the text of the Agriculture Agreement have supported such a view. Rather, the text of the Agriculture Agreement suggests that, when performing the calculation of AMS for a particular product pursuant to Annex 3, the data and methodology contained in the supporting material may provide additional information relevant to the calculation of support for the specific product at issue, but it does not permit Members to use alternative methodologies in its Supporting Table.

106. When discussing how a panel should treat a conflict between Annex 3 and a Member's constituent data and methodology, China states that "the Appellate Body in *Korea – Beef* did not resolve the question of any hierarchy between the relevant provisions of Annex 3 and a Member's constituent data and methodology . . . the Appellate Body therefore explicitly left open the question of a hierarchy, and even entertained the possibility that the hierarchy could be in favor of the constituent data and methodology." Contrary to China's argument, the Appellate Body in *Korea – Beef* did address the apparent hierarchy between Annex 3 and a Member's constituent data and methodology, and did not find that Article 1(a)(ii) permitted a panel to favor a Member's constituent data and methodology.

A. The Legal Status of a Member's Supporting Table Is the Same regardless of When the Member Joined the WTO

107. China also argues that the constituent data included in a Member's Supporting Tables has a different legal status depending on whether the Member is an original Member or a recently acceding Member. Specifically, China argues that, "for each original Member of the WTO, . . . based on the incorporation by reference of a Member's supporting tables into that Member's Schedule of Concessions, the supporting tables constitute an integral part of the GATT 1994." However, in contrast to original WTO Members, China argues that for "later-acceded Members . . . the supporting tables are an integral part of the terms of that Member's accession to the WTO, under Article XII:1 of the Marrakesh Agreement." This is false, and China's argument must fail for two reasons.

108. First, China's Schedule of Concessions, including Part IV, does not form part of China's Accession Protocol. Rather, as stated in Part II, paragraph 1 of China's Protocol of Accession: "[t]he Schedules annexed to this Protocol shall become the Schedule of Concessions and Commitments annexed to the GATT 1994." This is consistent with the treatment of other WTO Members' Schedules of Concessions, which also form part of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"). Thus, it is clear that China's Schedule of Concessions is not part of the Accession Protocol, but the GATT 1994.

109. Second, Article 21, paragraph 1 of the Agriculture Agreement clarifies the relationship between the Agriculture Agreement and the GATT 1994. It states that the "provisions of the GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the other provisions of this *Agreement*." In other words, where there is a conflict between the provisions of the Agriculture Agreement and the GATT 1994, the Agriculture Agreement would prevail.

110. In the *EC − Export Subsidies on Sugar* dispute, the panel and the Appellate Body agreed that "WTO Members may use entries in their Schedules of Concession to clarify and qualify the 'concession' they individually agree to assume," but they may not "reduce or conflict with obligations they have assumed under the GATT or WTO Agreement, including the Agreement on Agriculture." This echoed prior statements by a GATT 1947 panel in *US − Sugar* suggesting that a "Schedule[] of Concessions" is for Members to "incorporate . . . acts yielding rights under the General Agreement but not acts diminishing obligations under that Agreement." Therefore, where, as here, a Member's Schedule conflicts with the obligations of the Agriculture Agreement, the provisions of that Schedule must fail, and the Panel must apply the applicable provisions of the Agriculture Agreement instead.

111. We note that the European Union relies on *EC − Export Subsidies on Sugar* to suggest that a Member may deviate from agreements found in the covered agreement in its Schedule where the deviation "does not 'reduce' *per se* the commitments of the newly acceded Members under the Agriculture Agreement." That is, the European Union suggests that a panel must evaluate the apparent change to the Member's commitment to determine whether it in fact "reduces" the commitment, or only alters it. However, the European Union fails to provide the legal basis for such a position, much less explain how or why in practice such a rule could operate. Similar to China's arguments, the European Union's argument would mean that every WTO Member could in theory be bound by as-of-yet unknown commitments, different from those reflected in the texts of the covered agreements as agreed by WTO Members, and different from the commitments of every other WTO Member.

112. The only vehicle through which China could accede to a commitment not consistent with the obligations of the Agriculture Agreement was its Accession Protocol, including any paragraphs of the Working Party Report incorporated by reference into that Protocol. Absent such a commitment, China must comply with the obligations of the Agriculture Agreement like any other WTO Member must, including the methodological obligations contained in Annex 3 with respect to the calculation of market price support. For these reasons, the Supporting Tables thus do not, and could not, themselves set out any legally permissible deviation from the Agriculture Agreement.

113. Even aside from the fact that China may not alter an Agriculture Agreement commitment through its Schedule or Supporting Table, we note that China's Supporting Tables contain no reference to an article in the Agriculture Agreement, nor any express language indicating that the Membership agreed to alter a commitment specifically for China. Compare the language included in China's Supporting Table to the language used in China's Working Party to deviate from the *de minimis* amount outlined in Article 6.4 of the Agriculture Agreement.

114. When WTO Members agreed to provide China with an obligation different from the Agriculture Agreement, they clearly referenced the legal obligation to be modified by name. The Working Party Report thus clearly evinces that WTO Members *agreed* to provide China with a different *de minimis* than that provided for in the Agriculture Agreement, and *agreed* that China would not have recourse to Article 6.2 of the Agriculture Agreement. In contrast, China's Supporting Table contains no similar reference. On the face of the Supporting Table, there is no indication that the WTO Members agreed to modify *any* legal obligation (because there was no agreement), and there is no reference to Annex 3 or any other provision in the Agriculture Agreement. Accepting China's argument would create a situation where, again, Members would not know what other Members' obligations are, because numerous implicit methodologies could be drawn from the data and descriptions provided in a Member's Supporting Tables. Such an interpretation lacks any legal basis and would lead to absurd and unworkable results.

115. This dilemma becomes apparent when looking more closely at China's arguments regarding the quantity of eligible production. China argues that the Panel should use the procurement amounts for purposes of calculating MPS for the programs at issue here, because it used procurement for the programs in existence when it calculated its base AMS. However, the description provided in the Supporting Table does not make clear how the China's market price support programs operated,

including whether the programs limited purchases to a specific amount. Were the latter to be true, total production would not have been the appropriate value to use for eligible production.

116. China argues that any differences between the programs does not matter, because constituent data and methodology apply to products, and not measures. However, China fails to explain how this view supports its arguments. With respect to eligible production, for example, China argues that the Panel must calculate market price support based on the calculation of the market price support program (measure) in its Supporting Tables. China therefore appears to suggest that while the methodology in the Supporting Tables relates to a particular program, the methodology now must necessarily be used with respect to all market price support measures for the same product regardless of the differences between the market price support programs at issue. However, if constituent data and methodology apply to products and not measures, then the more logical consequence of this view would be that China's use of an alternative methodology with respect to the calculation of a particular program simply does not reflect the type of constituent data and methodology the Panel must take into account in determining China's current product-specific AMS for the relevant products. Regardless, as the United States has explained, China may not rely on constituent data and methodology where the methodology is inconsistent with the requirements of the Agriculture Agreement.

117. Moreover, not knowing how a program described in China's Supporting Tables works, it is unclear on what basis the Panel would be able to determine that the values used in that calculation reflect the intention by the Members to alter the market price support methodology for purposes of calculating China's product-specific and Current Total AMS. That is, the Panel cannot determine based on the record before it whether the calculation provided in the Supporting Table is consistent with Annex 3 or not. Therefore, based on the vague factual descriptions provided in the Supporting Table alone, China asks the Panel to assume an intention on the part of the WTO Membership to amend an obligation under the Agriculture Agreement as it applied to China only.

118. The situation regarding the fixed external reference price is no different. China used a value in its Supporting Tables for purposes of calculating Base Total AMS and now asks the Panel to derive from that usage an intention by the Members to alter the terms of China's accession. Not only would such an exercise be inconsistent with the terms of China's Accession Protocol, it would create significant uncertainty with respect to Members' obligations, not only under the Agriculture Agreement, but under the *General Agreement on Trade in Services* ("GATS") and any number of other Agreements.

119. The second concern raised by China's argument is the disparity it would create between original and acceding Members to the WTO. Without a clear indication in the legal texts, a Member like China acceding to the WTO six years after the conclusion of the Uruguay round would have been able to do so on terms significantly more production- and trade-distorting than original Members. That is, were China able to use a quantity of eligible production limited only to the quantity actually procured, China's freedom to distort would be compounded, as the effect of such support might be provided to total production, but the calculation would only need to reflect a small portion of that support. China thus could have an identical program to another Member like India, but, unconstrained by the same obligations as those other Members, be able to provide significantly more support to its producers, increasing consequent production and trade effects. China has provided no argumentation that would allow such an interpretation in the absence of the clear, and legally confirmed intention of WTO Members, and the Panel should reject China's arguments accordingly.

120. Accordingly, the Panel should reject China's interpretations of the relevant Agreements, because they lack any legal basis and would give rise to serious concerns regarding the status and content of the WTO commitments of all Members.

B. China Has Not Demonstrated the Existence of a Subsequent Practice or Subsequent Agreement Regarding the Use of an Alternative Fixed External Reference Price For Newly Acceding WTO Members

121. In addition to its argument that both its quantity of eligible production and its fixed external reference price were modified by virtue of information contained in its Supporting Table, China has now argued in its responses to questions that the "practice of Members to use, for later-acceded Members, a different base period, including for the fixed external reference price, constitutes a

subsequent practice in the application of the treaty, within the meaning of Article 31 of the Vienna Convention."

122. The use of post-1986-1988 fixed external reference prices by recently acceding Members does not fit within the definition of subsequent practice or subsequent agreement per Article 31(3) of the *Vienna Convention on the Law of Treaties* ("VCLT"). Article 31(3) of the VCLT provides, in relevant part, that with respect to the general rule of interpretation "[t]here shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."

123. That is, Article 31(3) directs that a panel shall take into account that subsequent practice "which establishes the *agreement of the parties* regarding [the] *interpretation*" of the treaty. Therefore, for the practice of WTO Members to be relevant to the Panel's interpretive exercise, the practice must relate to the interpretation of a relevant provision of the Agriculture Agreement. In this dispute, the Panel is charged with interpreting and applying China's obligations under Article 3.2 and 6.3 of the Agriculture Agreement regarding Current Total AMS. The Agriculture Agreement provides instructions for the calculation of each of China's product-specific AMSs, and then its Current Total AMS, in Articles 1(a)(ii) and 1(h)(ii), and by extension in Annex 3 and Article 6.

124. The heart of the interpretative concern is Annex 3, paragraph 9 of the Agriculture Agreement, which states the "fixed external reference price shall be based on the years 1986 to 1988." The text of Annex 3 is clear in requiring Members to calculate market price support for purposes of product-specific AMS using a fixed external reference price of 1986-1988. Customary rules of interpretation do not permit an interpreter to use context, or a subsequent practice or agreement, to reach an interpretation inconsistent with the ordinary meaning of the terms of the provision in question, such that they create a derogation or exception from the provisions of the treaty. Rather, these sources of interpretation must be used to determine the particular meaning of the terms as used in the relevant provision.

125. The Appellate Body in *EC − Bananas (Article 21.5)* made a similar finding with respect to subsequent agreements. It noted that Article 31(3)(a) relates to the situation where an agreement specifies how existing rules or obligations in force are to be "applied;" the term does not connote the creation of new or the extension of existing obligations. Therefore, a subsequent practice, like a subsequent agreement, cannot have the legal effect of changing the obligation set out in a covered agreement.

126. China has shown no subsequent agreement regarding the interpretation of Annex 3, paragraph 9, because it has pointed to no text in any supporting table that even refers to that provision and it has pointed to no "agreement" that speaks to an "interpretation" of that provision. Moreover, a panel cannot refer to subsequent practice in order to develop an interpretation of a legal provision that applies to some Members only, and not to other Members. China appears to suggest that the alleged subsequent practice would support *different meanings* of the text of the Agriculture Agreement for different Members. But while a legal provision may be susceptible to multiple interpretations, the interpretative exercise cannot change depending on the Member in question. This would lead to an illogical result, whereby each Member may be subject to potentially very different obligations.

127. Therefore, the Panel should reject China's argument that the use of an alternative fixed external reference price for newly acceding WTO member amounts to a subsequent practice or subsequent agreement under the VCLT.

EXECUTIVE SUMMARY OF U.S. ORAL STATEMENTS AT THE SECOND SUBSTANTIVE MEETING WITH THE PANEL

I. CHINA ERRS IN CLAIMING THAT THE PANEL MUST CALCULATE CHINA'S CURRENT AMS CONSISTENT WITH CHINA'S BASE AMS

128. Throughout this dispute, China has argued that China's "Current Total AMS" for subsequent years must be calculated consistently with the calculation of its "Base Total AMS," as set out in its Supporting Tables. China asserts that "the same constituent data and methodology, including the same fixed external reference prices and the same methodology for determining eligible production,

must be used to calculate both *Base* (Total) AMS and *Current* (Total) AMS." While China insists that the Agriculture Agreement and its Supporting Tables can be interpreted harmoniously, it is clear that China is suggesting that a Member's Supporting Table can supplant the calculation requirements provided in the Agriculture Agreement for calculation of AMS and Current Total AMS with country-specific methodologies. This would both contradict the Agriculture Agreement and significantly expand China's ability to provide domestic support while other WTO Members are subject to different rules. The text of the WTO Agreements simply does not support this understanding.

129. The Agriculture Agreement defines the terms "AMS," "Base Total AMS," and "Current Total AMS," and sets out specific instructions and methodologies for the calculation of "AMS" and "Current Total AMS." The Agriculture Agreement does not impose specific requirements on the calculation of AMS during a base period or Base Total AMS. Indeed, Base Total AMS is not relevant as an obligation of a Member; rather, that calculation provided a basis for the Annual and Final Bound Commitment Levels that are the subject of a Member's commitments under Article 3.2 and 6.3. Naturally, then, the Agriculture Agreement nowhere requires "consistency" between the calculation of Current Total AMS and the calculation of Base Total AMS.

130. First, turning to AMS, it is described in Article 1(a). AMS is the annual level of non-exempt domestic support, expressed in monetary terms, provided to the producers of the basic agricultural product or non-product-specific support provided in favor of the agricultural producers generally. Romanette (i) of Article 1(a) states that AMS "with respect to support provided during the base period" is "specified in the relevant tables of supporting material incorporated by reference in Part IV of a Member's Schedule." From the plain text, it is clear that Article 1(a)(i) does not set out or mandate any calculation for AMS during the base period, but rather identifies where the value of such support is recorded for the base period. Romanette (ii) addresses AMS "with respect to support provided during any year of the implementation period and thereafter." As we described earlier, Article 1(a)(ii) does require a calculation. Each product-specific AMS in a subsequent year will be "calculated in accordance with the provisions of Annex 3 of this Agreement and taking into account the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule."

131. Thus, Article 1(a)(ii) provides a calculation requirement for AMS in the subsequent years, while Article 1(a)(i) provides no such requirement for AMS provided during the base period. Nothing in the Agreement suggests that the method a Member used to calculate AMS in the base period would have the effect of nullifying the obligation to calculate AMS in the subsequent years "in accordance with" Annex 3, and "taking into account" constituent data and methodology. As previously explained, "taking into account" does not require calculation consistent with or in conformity with information contained in the Supporting Tables. Rather, it requires a Panel to give consideration to country-specific "constituent data and methodology" − including the types of basic agricultural products grown in that Member's territory, the "year" relevant for domestic support, or whether supported products have unique attributes that affect the calculation of support such as multiple growing seasons, processing practices or requirements, or issues of quality − when calculating AMS.

132. The AMS or AMSs described in Article 1(a) are discrete component parts of a Member's Total AMS. Specifically, if individual AMSs exceed the *de minimis* level when calculated in accordance with Article 6 of the Agriculture Agreement, each such product-specific AMS (and if applicable a non-product specific AMS) must be included in the "Total AMS." Total AMS refers to a different stage in the computation of domestic support − namely, the summing of component parts. Article 1(h) defines Total AMS as the "sum of all domestic support provided in favour of agricultural producers, calculated as the sum of all aggregate measurements of support for basic agricultural products, all non-product-specific aggregate measurements of support and all equivalent measurements of support for agricultural products."

133. The definition of Total AMS informs the definition of both "Base Total AMS" and "Current Total AMS." Specifically, Article 1(h)(i) states that Base Total AMS, all domestic support provided in favor of agricultural producers in the "base period," is "as specified in Part IV of a Member's Schedule."

134. Critically, again, Article 1(h) does not provide a calculation methodology for determining the value of Base Total AMS; it indicates where the value of such support can be found. As the Appellate Body observed in *Korea − Beef*, "Base Total AMS, and the commitment levels resulting or derived

therefrom, are not themselves formulae to be worked out, but simply absolute figures set out in the Schedule of the Member concerned."

135. Separately, in romanette (ii), Article 1(h) provides the definition and calculation directions for "Current Total AMS." Current Total AMS is "the sum of all domestic support provided in favour of agricultural producers . . . actually provided during any year of the implementation period and thereafter." The Current Total AMS is "calculated in accordance with the provisions of this Agreement, including Article 6, and with the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule." Thus, Article 1(h)(ii) provides both a definition of Current Total AMS and instructions for the calculation of Current Total AMS.

136. Nothing in the text of the Agriculture Agreement provides, as suggested by China, that Base Total AMS calculations that may (or may not) be contained in a Member's Supporting Tables can supplant the rules in Article 1(h) to calculate "Current Total AMS." Because no particular calculation or rules for such a calculation is required to establish Base Total AMS, naturally, the Agreement nowhere suggests that consistency is required between the calculations. Rather, constituent data and methodology reflected in these documents may provide country-specific data and methodologies to inform, but not alter, the calculation requirements set out in Article 1(h).

137. China's proposed methodology is not consistent with the calculations contained in its supporting tables. Not only do China's arguments regarding "consistency" between the calculations of Base Total AMS and Current Total AMS fail because they are legally unfounded, but China's proposed market price support calculations are not in fact "consistent" with the calculations actually utilized in its Supporting Tables. This is a critical point, and fatal to China's case. Recall that China has been asserting that its Current Total AMS must be calculated using the *same* methodology as in its Schedule. But, on closer inspection, China *did not in fact use* a "fixed external reference price" based on the years 1996 to 1998 for wheat, Indica rice, Japonica rice, and corn in its original Base Total AMS. To recall, China asserts that the "*fixed external reference price* for wheat is 1698.1 Yuan per ton, as set out in Appendix DS 5-3 to Rev.3." Similarly, citing an appendix to DS-5 of its Supporting Tables, China provides a "fixed external reference price of 2343.0 yuan per ton for Indica rice and a fixed external reference price of 3290.6 yuan per ton for Japonica rice. China broadly notes "China's FERP for corn may be found in Rev.3." China further clarifies in its second written submission that "Rev.3 . . . includes FERPs for China that apply to certain products," and that "[t]hese FERPS are (i) based on a *three-year* base period of 1996-1998; (ii) based on China's status, during that period, *as a net exporter or net importer* of the product at issue; and, (iii) *fixed*."

138. However, China's calculation of its Base Total AMS *was not* based on a "fixed external reference price" or the values drawn from Appendix DS 5-3 or Appendix DS 5-4 of its Supporting Tables. Instead, China's market price support calculations for wheat, Indica rice, Japonica rice, and corn in its DS 5 Supporting Table used three different, annual "external reference price[s]" corresponding to each year of the base period. The fifth column in China's Support Table is labeled "external reference price" – not "fixed" external reference price; and the values contained in that column reflect three different prices, one for each year. According to footnotes 17 and 18 to the Supporting Table, these "external references prices" were calculated based on CIF prices for wheat, and on FOB prices for Indica rice, Japonica rice, and corn. Rather than use a *fixed* external reference price covering 1996-1998, as China has asserted to the Panel, China's market price support calculations thus compared a 1996 applied administered price to a 1996 external reference price, a 1997 applied administered price to a 1997 external reference price, and a 1998 applied administered price to a 1998 external reference price. The values of market price support calculated in these tables were included in China's DS 4 Table calculating its Base Total AMS. To illustrate, in the row covering wheat, for each year from 1996-1998, there is a separate price. So, it is not the same average price that would reflect a fixed external reference price.

139. Thus, Table DS 5, which contain the actual calculations of market price support for wheat, Indica rice, Japonica rice, and corn, reveals that the calculation of market price support during the base period did not utilize a "fixed" external reference price at all. Rather, the calculation appears to reflect an evaluation of market price support using the price gap between an applied administered price and the average FOB or CIF unit value for the basic agricultural product *in the specific year in question*.

140. Were this methodology applied to the calculation of market price support in this dispute, China's support would be determined based on the gap between the applied administered price for wheat in 2015, for example, and the average CIF prices for Chinese wheat imports *in 2015*, and similar external reference prices would be needed for each year from 2012 to 2014. China does not argue that a Panel may calculate market price support in this way, and Annex 3, which requires the use of a "fixed external reference price . . . based on the years 1986 to 1988," does not permit such a calculation methodology.

141. China draws its proposed "fixed external reference price" for each product, not from the Supporting Tables that informed its market price support (DS 5) and Base Total AMS (DS 4) calculations, but from a separate appendices included in its Rev. 3 containing values that appear not to have been used in the original calculation process. These appendices provide the underlying calculation for China's year-by-year external reference price calculation, including the import/export volumes, import/export values, CIF/FOB prices, and calculated CIF/FOB unit prices. The charts also contain an average of these values, but this is not utilized elsewhere in the document, and in particular to calculate the AMS for each product for each year.

142. For this reason, China's demand for consistency between the Base Total AMS and Current Total AMS seems misplaced. First, nothing in the text of the Agriculture Agreement provides, as suggested by China, that Base Total AMS calculations contained in a Member's Supporting Tables can replace the binding commitments in the Agreement to calculate "Current Total AMS" in accordance with Annex 3. Second, in any event, China's own Supporting Tables did not use the data or methodology suggested by China in its actual calculation of market price support and Base Total AMS. Rather, the Agriculture Agreement sets forth the requirements for calculating Current Total AMS in subsequent years and this includes recourse to country-specific data and methodology reflected in a Member's Supporting Tables to the extent that it informs, but does not alter, the calculation requirements.

II. China Has Not Established That the Panel Is Precluded from Issuing Findings and Recommendations Concerning China's Provision of Domestic Support to Corn Producers in 2012 through 2015

143. China has not demonstrated that its Corn MPS Program had "expired" prior to the Panel's establishment; nor has China shown that it ceased to purchase corn at administratively determined prices during the 2016/17 harvest. First, the introduction of a direct payment program for corn producers does not demonstrate that China no longer purchases corn at an administratively determined price. Second, while China asserts that its *2016 Northeast Region Corn Purchasing Notice* provides for "market-oriented" purchases by "market players," where all types of entities may decide to make purchases on their own initiative, the *2016 Notice* directs the same state-owned enterprises who were engaged in corn purchases in prior years to "striv[e] not to go lower than the policy-based purchasing amount of the previous year."

144. Although not required in order to satisfy the obligations of Article 6.2 of the DSU, the United States has continued to seek additional information and instruments related to China's 2016-17 corn purchase programs for the Panel's reference. The additional information found suggests that China had not ceased to provide market price support in 2016. First, despite China's statements regarding the transition to the use of a "market price" for government purchases of corn in 2016, the United States has identified a notice of administered prices issued by Sinograin to certain purchasing locations in Inner Mongolia on October 16, 2016. Entitled, *Notice on Activating 2016 Autumn Grains Corn Purchase Work* (Exhibit US-101), this document − released one month after the "reformed" purchasing instruments − announces the prices at which government purchases will be made, and directs local grain depots to display or post the available prices for new, standard grain corn in that area. This announcement read together with the 2016 Northeast Region Corn Purchase Notice (Exhibit US-87) are very similar in form and content to the 2012 − 2015 Corn MPS Programs.

145. Second, Exhibit US-102, entitled *Jilin Notice on Further Proper Handling of Corn Purchases and Sales Work* issued by the Jilin Province Grain Bureau, a provincial branch of the State Administration of Grain, directs Sinograin and other state-owned enterprises to enter the corn et and make corn purchases, in order to counteract negative market trends, including falling corn prices.

146. Third, Exhibit US-103, a May 2017 transcript of a live broadcast interview of the Jilin Province Grain Bureau Vice Director confirms that Sinograin's Jilin province subsidiary has given full play to its role of macro-control and as a 'stabilizing instrument' and 'ballast.'" Taken together, these documents suggest that China has not "ceased" government purchases of corn at pre-set prices.

U.S. Responses to the Panel's Second Set of Questions

Summary of U.S. Response to Panel Question 74

147. Generally, other Member's Supporting Tables may be considered "context" in instances where they assist in the interpretation as directed by Article 31 of the VCLT.

148. We also note that while other Members' Schedules may be looked to as context, they are only one source of context. Typically, interpreters look first to the "immediate context" of a term or provision, including for instance the rest of the particular provision at issue, the other provisions of the relevant WTO Agreement, other similar provisions in other Agreements, and the overall structure of the Agreement, which may be considered along with the Agreement's object and purpose.

149. Contrary to China's arguments, customary rules of interpretation do not permit an interpreter to use context to reach an interpretation inconsistent with the ordinary meaning of the terms of the provision in question, such that they create a derogation or exception from the provisions of the agreement. Importantly, when China points to certain other Members' Supporting Tables as context, it does not and cannot assert that those Supporting Tables provide context for the calculation of current AMS and Current Total AMS. Rather, it can only point to certain other Members' use of a different time period for purposes of calculating *base AMS*. Thus, to the extent these Supporting Table provide context, they do not provide *relevant* context − that is, context for the understanding of the particular calculation as described in the provision of the Agreement on Agriculture in question.

150. More relevant context is provided by China's Accession Protocol and Working Party Report. The clear intention to alter the calculation methodology for China for future years, including a China-specific *de minimis* support level, was recorded in paragraph 235 of the Working Party Report and incorporated into China's Accession Protocol. This demonstrates *how* WTO Members altered a WTO obligation when they *intended* to alter that obligation. Paragraph 235 does not contain any alteration to the Article 1(a)(ii) or Annex 3 current AMS obligations. China's Supporting Table is not the appropriate vehicle to alter a WTO obligation and contains no text suggesting an intention to alter an obligation.

Summary of U.S. Response to Panel Question 75

151. China has no reduction commitments and has an ongoing Final Bound Commitment Level of "nil." China is obligated to maintain Current Total AMS, when calculated in accordance with Annex 3 and Article 6 of the Agriculture Agreement, at a zero level.

U.S. Comments on China's Response to the Panel's Second Set of Questions

Summary of U.S. Comments on China's Response to Panel Question 52

152. China erroneously argues that Sinograin acted as a market player and subsequently "adjusted its prices" to reflect market prices reflected in Exhibits CHN-111-B − CHN-127-B. However, Sinograin is a state-owned enterprise directed by the State Council to actively enter the corn market and make purchases at amounts not lower than the prior year. Moreover, nothing in the documents presented by China indicates that Exhibit US-101 did not implement mandatory purchases at pre-set prices, or that this announcement was "replaced" with subsequent notices. Rather, the documents placed on the record by China appear to be internal price monitoring documents devoid of any indication of its authenticity and status, rather than directions to purchase at a particular price as provided for in Exhibit US-101.

Summary of U.S. Comments on China's Response to Panel Question 83

153. China asserts that constituent data and methodology "must be used consistently, where pertinent, for the calculation of that Member's Base (Total) AMS and Current (Total) AMS."

154. China misstates the requirements of Articles 1(a) and 1(h) of the Agriculture Agreement. Articles 1(a) and 1(h) prioritize consideration and use, not of what data and methodology were used to evaluate different programs at the time of accession, but rather the calculation requirements provided by the text of the Agriculture Agreement. This is made explicit by the hierarchy provided in Article 1(a)(ii). Article 1(a)(ii) does not use the same language or instruction to describe both elements of calculation, as suggested by China. Rather, it specifies Members are to calculate the value of AMS "in accordance with the provisions of Annex 3 of this Agreement," and that Members are to calculate AMS "taking into account the consistent data and methodology used in the tables of supporting material." Article 1(h)(ii) governing the calculation of Current Total AMS in subsequent years presents a similar hierarchy.

155. Articles 1(a)(ii) and 1(h)(ii) do not limit the application of constituent data "to the same measures that already existed during the base year." Instead, the text limits the application by first plainly stating that the calculation in subsequent years must be consistent with the text of the Agriculture Agreement. The subsequently used data and methodology may not be not inconsistent with the requirements of the Agriculture Agreement. The reference to constituent data and methodology does not, as suggested by China, permit the use of a methodology that was accurate for a program in the base period (such as the using a pre-set maximum procurement volume as the quantity of eligible production) to calculate the value of support provided through a different program that requires a different evaluation pursuant to the requirements of Annex 3.

156. In support of the application of "methodology" used to evaluate *different* domestic support measures that operated under *different* legal requirements and parameters, China again falls back on its demand for "consistency." China suggests that a calculation not based on this historic methodology used to evaluate a different program would "involve substantial distortions," and "would become a meaningless apples-to-oranges comparison." China's argument is again without merit.

157. Consistency from year-to-year and, crucially, amongst Members is provided by observing the requirements of the Agriculture Agreement, including Annex 3 and Article 6, regardless of the domestic support program, agricultural product, or Member at issue. Consistency with the requirements of the Agriculture Agreement with regard to quantity of production eligible to receive the applied administered price and with regard to the fixed external reference price is what ensures a meaningful evaluation, and is the basis for evaluating the value of domestic support provided in any year after accession.

158. Finally, with regard to the statements of the panel and the Appellate Body in *Korea − Beef*, China suggests that the Appellate Body "shared the panel's understanding of . . . the need for consistency with Base AMS." The United States does not share China's reading the Appellate Body's statements. Specifically, the Appellate Body's footnote citing to the panel report in *Korea − Beef* appears to indicate that while the panel and Appellate Body both agreed they did not need to reach the issue of how to address constituent data and methodology, the Appellate Body *disagreed* with the panel's broad statements regarding consistency between the calculation of Base Total AMS and Current Total AMS. Specifically, the Appellate Body asserted that a hierarchy exists between the text of the Agreement and a Member's constituent data and methodology, and this would appear to directly refute China's proposed blanket requirement for "consistency."

ANNEX B-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA

I. INTRODUCTION

1. This dispute arises against the background of the complexity and special characteristics of the agricultural sector of the People's Republic of China ("China"). It concerns the nature and scope of China's right to provide domestic support for its wheat, rice and corn farmers. It also raises important systemic issues regarding the interpretation and application of the methodology for the calculation of aggregate measurement of support ("AMS"), under the terms of both (i) Annex 3 of the *Agreement on Agriculture* and (ii) a Member's negotiated and agreed "constituent data and methodology", as found in the Member-specific Supporting Tables incorporated by reference in Part IV of each Member's Schedule. For Members that have acceded to the World Trade Organization ("WTO") subsequent to the Uruguay Round, such as China, these "constituent data and methodology" are of particular relevance because they are also part of those Members' terms of accession, and a basis upon which China and other later-acceded Members have undertaken their domestic support reduction commitments.

2. In its submissions to the Panel, China has rebutted U.S. claims, under Articles 3.2, 6.3 and 7.2(b) of the *Agreement on Agriculture*, that China's AMS from market price support for wheat, indica rice and japonica rice exceeds China's domestic support reduction commitments. China has also demonstrated that alleged market price support for corn, under China's Temporary Purchase and Reserve Policy ("TPRP"), expired prior to panel establishment, and is thus outside the Panel's terms of reference. Accordingly, the Panel is precluded from making any findings or recommendations with respect to the TPRP for corn.

II. RELEVANT BACKGROUND

3. China's past and present domestic support policies for its agricultural sector, and the direction in which they are evolving, can be understood only against the background of the particular challenges facing China. First and foremost amongst those is the unique challenge of ensuring a sufficient, stable, reliable and affordable supply of food for China's population of 1.38 billion people, the largest in the world. In meeting the challenge of ensuring food security, consistent with its WTO obligations, China employs a variety of agricultural policy measures, including public stockholding.

4. While China imports large volumes of grains – in 2016, 167 million tons – the bulk of China's food requirements is supplied by China's domestic agricultural sector. That sector is dominated by small-scale family farms, relying predominantly on family labor, and other smallholder farms. Indeed, for a large part of China's population, these small-scale household farms constitute the main source of both income and other means to support their livelihood, including through the consumption of agricultural commodities grown on their family farms. To appreciate the importance of China's agricultural policies, China notes that, in 2016, its rural population accounted for 590 million people. Of that rural population, many are involved in the production of wheat, rice and corn, the agricultural products at issue in this dispute. Thus, China's agricultural policies necessarily affect the well-being of a significant proportion of its population, and accordingly have an important impact on the stability and the sustainable development of China's society and economy.

5. These complex and important policy considerations are enshrined in China's regulation of the marketing and distribution of basic agricultural products, including for wheat, rice and corn. At the same time, China's agricultural policies for wheat, rice and corn are moving towards a comprehensive opening of those grain markets.

6. China's unique agricultural challenges stand in sharp contrast to the situation in the United States and other large agricultural commodity-exporting countries, where agricultural production is dominated by very large and highly mechanized farm operations. Indeed, the average size of a U.S. farm is several hundred times larger than the average size of a farm in China. The advantage of large-sized U.S. farms is further enhanced by the United States' USD 19.1 billion AMS entitlement.

Together, scale and substantial amounts of domestic support have enabled U.S. farmers to produce large volumes of agricultural products, and to sell them cheaply. As a result, the United States is a net *exporter* of agricultural products, including for corn and wheat. By contrast, China is a net *importer* of grains.

7. China and the WTO Membership negotiated and agreed China's domestic-support-related commitments under the *Agreement on Agriculture* against this background. China's objective in those negotiations was to ensure it retained the flexibility to provide domestic support for food security purposes, and to encourage Chinese farmers to remain on their farms to grow the staple crops, including wheat, rice and corn, necessary to feed China's large population.

8. Like most developing countries, China was not in the position to declare a Base Total AMS for its 1996-1998 base period. Accordingly, China accepted a domestic support reduction commitment of "nil", limiting domestic support to levels below its *de minimis* threshold. China was further required to accept a *de minimis* threshold of 8.5% of the value of production of each basic agricultural product, instead of the 10% level for developing countries, provided for under Article 6.4 of the *Agreement on Agriculture*. In exchange, China secured agreement to use "the amount purchased" as the measure of "eligible production" in the context of market price support measures. In addition, China uses fixed external reference prices from its 1996-1998 base period. These agreed commitments, which are included in China's "constituent data and methodology" in its Supporting Tables in WT/ACC/CHN/38/Rev.3, or "Rev.3", are incorporated in China's Accession Protocol.

9. Since its accession to the WTO in 2001, China has relied on, *inter alia*, the negotiated and agreed constituent data and methodology in Rev.3 to devise its agricultural policies consistent with its domestic support reduction commitments. Specifically, in 2004, China implemented reform of its agricultural policies, adopting a market-oriented grain policy, with direct government intervention into the market authorized only in exceptional circumstances to protect farmers from the effects of significant fluctuations in supply and demand. For example, under the minimum procurement price ("MPP") programs for wheat, indica rice and japonica rice, which apply in certain provinces, purchases occur only when market prices fall below the established MPP level. The MPP program is not available when prices are above that level. Moreover, prior to 2016, China implemented the TPRP for corn in four northeast provinces/regions, designed to meet food security purposes. In 2016, China reformed the TPRP and enacted market-based reforms. China's new corn measures involve the use of direct payments to farmers growing corn, with the amount of payments determined by historic benchmarks. The measures further seek to limit the production of corn.

III. THE MEASURES AT ISSUE UNDER THE PANEL'S TERMS OF REFERENCE

10. The United States' panel request defines the Panel's terms of reference. It identifies as the specific measures at issue, pursuant to Article 6.2 of the DSU, the MPP programs for wheat, indica rice and japonica rice, and the (albeit expired) TPRP for corn. Consistent with its identification of the measures at issue, the United States presented arguments and evidence in its First Written Submission.

11. However, upon China's showing, in its own First Written Submission, that the TPRP for corn had expired prior to panel establishment, and was, thus outside the Panel's terms of reference, the United States attempted to re-define the "measures at issue" in this dispute as the "levels of domestic support", or "domestic support" in each of the years 2012-2015.

12. The Panel must make its own objective assessment of its terms of reference, and of the measures at issue. In so doing, the Panel must reject the United States' attempt to unilaterally re-define, following establishment of the Panel and its terms of reference, the "measures at issue" in these proceedings. As explained in the next section, the Panel must also find that the expired TPRP for corn is outside its terms of reference.

A. The United States' challenge in this dispute is limited to alleged market price support under the MPP for wheat, indica rice and japonica rice, and the (albeit expired) 2012-2015 TPRP for corn

13. The starting point of any WTO dispute is the identification of an act or omission by a Member as a specific "measure at issue", within the meaning of Article 6.2 of the DSU. It is *that* measure which is the object of claims of inconsistency with one or more of the provisions of the covered agreements. And it is *that* measure that may, if found to be inconsistent, become subject to recommendations, under Article 19.1 of the DSU.

14. Accordingly, the core requirements that any panel request must fulfill, consistent with Article 6.2, are the identification of the specific "measures at issue" and the claims raised. These requirements "serve the due process objective of notifying the parties and third parties of the nature of a complainant's case".[1]

15. China has established that, properly construed, the U.S. panel request identifies the legal basis of the complaint, *i.e.*, the claims at issue as follows: "[t]he level of domestic support China provides is in excess of its commitment level of 'nil'", resulting in an alleged inconsistency with Articles 3.2, 6.3 and 7.2(b) of the *Agreement on Agriculture*.[2]

16. The U.S. panel request then proceeds to identify the specific measures at issue. It explains that "*[t]he legal instruments through which China provides domestic support* in favor of agricultural producers, including support in favor of producers of wheat, indica rice, japonica rice, and corn, operating collectively or separately, include, but are not limited to"[3] a list of individually specified legal instruments. These legal instruments permit the identification of the following specific measures at issue: the MPP programs for wheat, indica rice and japonica rice and the (albeit expired) TPRP for corn.

17. Thus, the U.S. panel request identifies as the measures at issue the MPP programs for wheat, indica rice and japonica rice, and the (albeit expired) 2012-2015 TPRP for corn. Contrary to the U.S. assertion, the MPP and TPRP measures identified do not constitute mere "additional information", "argument" or "evidence" to provide a preview of the U.S. case − they comprise and delimit the specific "measures at issue".

18. Indeed, while the United States erroneously parses out the text of the U.S. panel request into alleged "measures", "claims" and "arguments", the United States is forced to accept that its panel request

> sets out the instruments through which the support is provided (and the United States has not sought to rely on any other instruments). It[s panel request] further listed the agricultural products through which China's breach would be demonstrated (and the United States has not sought to prove its case on the basis of other products).[4]

Thus, the United States accepts that its case is limited to alleged market price support provided by the MPP programs for wheat and rice and the (albeit expired) TPRP for corn, as the specific measures under its panel request. Not surprisingly, these are also the sole measures for which the U.S. submissions assert, based on argument and evidence, alleged inconsistencies with the covered agreements.

19. The United States further attempts to support its erroneous argument that its panel request covers "domestic support", by arguing that that it "does not seek a finding that any particular legal instrument … is in breach of China's commitments … because the existence or maintenance of a market price support program or any other legal instrument would not itself necessarily lead to the breach of a domestic support commitment".[5] Yet, the U.S. argument does not support its position.

[1] Appellate Body Report, *US − Carbon Steel*, para. 126.
[2] United States, first written submission, para. 15, *citing* WT/DS511/8, p. 1 (second substantive paragraph) (underlining added).
[3] WT/DS511/8, p. 1 (second substantive paragraph) (emphasis added).
[4] United States, second written submission, para. 27.
[5] United States, response to Panel Question 5, para. 32.

Instead, the U.S. argument is a mere reflection of the fact that the U.S. claims are of an "as applied" nature, rather than "as such". As the Appellate Body explained in *US − Continued Zeroing*, "the distinction between 'as such' and 'as applied' claims does not govern the definition of a measure for purposes of WTO dispute settlement".[6] Thus, the U.S. clarification that it is challenging certain measures "as applied", as opposed to "as such", has no bearing on the identification of the measures at issue, and certainly does not establish that the measure at issue must be "domestic support".

B. Identification of "domestic support" as the specific measure at issue would fail to meet the "specificity requirements" of Article 6.2 of the DSU

20. In any event, the U.S. identification of "domestic support" as the measure at issue would fail to meet the specificity requirements under the DSU. As the Appellate Body explained in *US − Continued Zeroing*, "the specificity requirement means that the measures at issue must be identified with sufficient precision so that what is referred to adjudication by a panel may be discerned from the panel request".[7]

21. China has explained that the reference to the legal concept of "domestic support" cannot be used to identify a specific measure. Instead, it *characterizes* an otherwise specifically identified measure under WTO law. This is consistent with the fact that the legal concept of "domestic support" itself covers many different forms of domestic support, including: different forms of "amber box", "blue box", and "green box" domestic support measures. The United States is forced to recognize that domestic support does not specifically identify any particular measure at issue. It explains that "the Agriculture Agreement gives WTO Members the flexibility to provide domestic support *in various forms*".[8] In these circumstances, a mere reference to "domestic support" is insufficient to meet the specificity requirements under Article 6.2 of the DSU.

22. While the Appellate Body has accepted that "there may be circumstances in which a party describes a measure in a more generic way", the Appellate Body nonetheless required that such generic characterization "allow[] the measure to be discerned".[9] Indeed, the inability of the legal concept "domestic support" under the *Agreement on Agriculture* to allow the measure at issue to be discerned is similar to that of the legal concept of a "subsidy", under the *SCM Agreement* − both of which are used to characterize a specific measure under the substantive provisions at issue, but are insufficient to identify a specific measure under Article 6.2.

23. Finally, in re-defining "domestic support" as the "measure at issue", the United States reduces the specifically identified and enumerated legal instruments in its panel request to mere "evidence". As mere evidence of an alleged breach (and not identifications of the measures at issue), the Panel would be precluded to rely on that evidence to inform the meaning and scope of the U.S. reference to "domestic support" as the alleged measure at issue. That is, the Panel cannot rely on that evidence to inform its understanding of the meaning and scope of the term "domestic support" in a manner that permits that term to meet the specificity requirements under Article 6.2. In those circumstances, The Panel would have to find that the U.S. panel request, in its entirety, fails to meet the specificity requirements.

24. The United States does not address any of China's arguments set out above. Instead, it simply asserts that "domestic support" can be a measure at issue because it fulfills one relevant requirement − namely that it constitutes *action* by China. Yet, to constitute a "measure at issue", any challenged "act or omission" by a Member must, additionally, be identified in a panel request with the required level of specificity.

25. In short, if the Panel were to find that the U.S. panel request identified "domestic support" as the "measure at issue", that request would fail to meet the specificity requirement under Article 6.2, and the Panel would have to deny the U.S. claims in this dispute. By contrast, the Panel would be able to consider the particular measures and claims that an objective assessment of the U.S. panel request reveals, as set out above. This is a further reason on which the Panel should reject the United States' post-hoc rationalization of its panel request, which the United States only adopted following China's demonstration that the U.S. panel request inappropriately challenges the

[6] Appellate Body Report, *US − Continued Zeroing*, para. 179.
[7] Appellate Body Report, *US − Continued Zeroing*, para. 168.
[8] United States, second written submission, para. 28 (emphasis added).
[9] Appellate Body Report, *US − Zeroing (Japan) (Article 21.5 − Japan)*, para. 116.

expired TPRP for corn.

C. Permitting claims against a measure identified as "domestic support" raises serious systemic concerns

26. Moreover, accepting "domestic support" as the "measure at issue" raises due process concerns. Under Article 19.1 DSU, a panel may make recommendation only with respect to "measures at issue", and it is with respect to those measures that an implementing Member is required to achieve compliance. Thus, the scope of any recommendation is constrained by the specific measures identified in a panel request.

27. In these proceedings, the United States appears to seek a recommendation that China bring its "domestic support" into conformity, without limiting that recommendation to those market-price-support-related measures that have been the sole focus of the United States' case before the Panel. Specifically, the United States argues that the recommendation should cover "domestic support", and that "[t]he Panel need not include a further characterization of the measures in its recommendation".[10]

28. The United States errs. Under Article 3.7 of the DSU, WTO dispute settlement must contribute to a "positive solution to the dispute". This objective requires a panel to inform a respondent, through specific findings, of the particular measures that have resulted in particular WTO inconsistencies. Pursuant to a recommendation under Article 19.1 of the DSU, a respondent is then under an obligation to remedy the WTO inconsistencies identified, by bringing the measures found to have resulted in the WTO inconsistencies into conformity with its WTO obligations. The particular findings of WTO inconsistencies that form the basis for a recommendation are framed with reference to the specific arguments and evidence provided by the parties, and cannot relate to specific measures or claims not covered by the parties' arguments and evidence. Otherwise, recommendations could cover specific measures that may potentially fall under the umbrella of "domestic support", but for which the respondent has not had a chance to defend itself. This would violate the respondent's due process rights.

29. Accordingly, a panel's recommendation must identify, and must be limited to, the particular measures (amongst those properly before a panel) that the panel has found to have resulted in particular WTO inconsistencies, based on the parties' arguments and evidence.

D. Conclusion

30. The U.S. panel request reflects a deliberate choice to challenge the MPP programs for wheat, indica rice and japonica rice, and the (albeit expired) 2012-2015 TPRP for corn. That choice has consequences − China's due process rights and the jurisdiction of the Panel mean that the United States cannot, belatedly, broaden the scope of the measures at issue.

IV. THE TPRP FOR CORN EXPIRED PRIOR TO PANEL ESTABLISHMENT AND IS THEREFORE OUTSIDE THE PANEL'S TERMS OF REFERENCE

31. China has further established that its TPRP for corn expired prior to panel establishment, and is therefore outside the Panel's terms of reference. Yet, the United States asserts, erroneously, that the expiry of the TPRP for corn prior to panel establishment did not affect the Panel's terms of reference, and that, in any event, the TPRP continues to exist.

A. Factual background

32. From 2012 to 2015, China's Central Government provided for a TPRP for corn in Liaoning, Jilin, and Heilongjiang Provinces and in the Inner Mongolia Autonomous Region. The TPRP for corn was established through annual TPRP Notices issued by several national-level government authorities. These TPRP Notices set out the geographic and temporal scope of the TPRP, and determined the TPRP price at which designated entities offered to purchase corn during a defined period of time. For example, the 2015 TPRP Notice set a TPRP purchase price of RMB 1 yuan per jin for "grade 3" corn offered for purchase at certain purchasing and storage depots in the Jilin, Liaoning,

[10] United States, response to Panel Question 59, para. 39.

Heilongjiang Provinces and the Inner Mongolia Region. This price was available for a purchasing period that lasted from 1 November 2015 to 30 April 2016.

33. In announcing the discontinuation of the TPRP for corn, on 28 March 2016, the deputy director of the National Development and Reform Commission of the People's Republic of China ("NDRC") explained that the TPRP for corn had encountered "prominent problems", including a "heavy financial burden".[11] Similarly, a *Ministry of Finance ("MOF") Opinion* explained that "the corn temporary purchase and reserve system does not fit into the current situation".[12] Starting with the 2016 harvest, China "has made the reform of the [TPRP], pursuant to the principle of 'Price formed by market and decoupling of price and subsidy'", involving the expiry of the TPRP and the introduction of "'market-oriented purchase' plus ' direct subsidies'".[13] Such direct payments are available to producers of corn in the four provinces/region, subject to certain requirements to limit production.

B. Under Article 6.2 of the DSU, measures that have expired prior to panel establishment generally fall outside a panel's terms of reference

34. Under Article 6.2 of the DSU, the general rule is that a measure that no longer exists at the time of panel establishment is outside a panel's terms of reference. For example, in *EC − Chicken Cuts*, the Appellate Body noted that a measure at issue must be "in existence at the time of the establishment of the panel".[14] Likewise, in *China − Raw Materials*, the panel noted that "the date of a panel's establishment is critical in deciding which measures may be included in a panel's terms of reference".[15] And in *EC − Biotech*, the panel held that "the question [that this panel] is mandated to answer is whether on the date of its establishment, … the European Communities applied a general *de facto* moratorium on approvals".[16]

35. China explained that, for expired measures, there is one notable exception to the general rule that a measure at issue, under Article 6.2, must exist at the time of panel establishment. Specifically, a measure that has expired prior to panel establishment may be properly before a panel where it is demonstrated that it continues to affect the operation of a covered agreement. The burden of prove to establish that the expired measure continues to affect the operation of a covered agreement falls on the complaining Member. Here, the United States has not even attempted to meet that burden.

36. Instead, the United States simply ignores the well-established case law in favor of asserting that failure to make a recommendation on the matter that the DSB referred to the Panel would deprive the United States of its rights under the DSU. In particular, the United States argues that "[t]he alleged expiry of a legal instrument does not change the matter the DSB put within the Panel's terms of reference, nor does it make another matter susceptible to examination by the Panel".[17] In short, the United States argues that, since the "matter" referred to this Panel includes the expired TPRP measure, the Panel must review that measure. Yet, while the United States may have *intended* to place an expired measure before the Panel, its expiry before panel establishment means that that measure was never properly part of the matter referred to the Panel by the DSB. The case law is clear − a measure that has expired at the time of panel establishment is *not* properly before a panel.

37. In its Second Written Submission, the United States appears to have recognized the existence of the general rule, when referring to situations where an expired measure has been replaced by a new measure that is of the "same essence". The United States argues that "a panel should make findings on a *recurring* measure".[18] Indeed, consistent with the case law on expired measures, a "recurring" measure could be properly before a panel in a situation where a specifically listed measure has expired prior to panel establishment, but where that measure has been replaced

[11] The State Council, News Report "Corn Temporary Purchase and Reserve System will be Shifted to a 'Market-oriented Purchase' and 'Direct Subsidies'", available at: http://www.gov.cn/xinwen/2016-03/28/content_5059171.htm (last viewed 26 October 2017) (English translation), (Exhibit CHN-74-B).

[12] MOF Opinion, May 2016, (Exhibit CHN-73-B), Section I.

[13] *Notice on Proper Handling of Corn Purchase Work in Northeast China This Year (2016)* (Guo Liang Tiao [2016] No. 210), 19 September 2016 (English translation), (Exhibit CHN-80-B), p. 1.

[14] Appellate Body Report, *EC − Chicken Cuts*, para. 156.

[15] Panel Report, *China − Raw Materials*, para. 7.19.

[16] Panel Report, *EC − Biotech*, para. 7.1301 (underlining added).

[17] United States, response to Panel Question 11, para. 56.

[18] United States, second written submission, para. 39 (emphasis added).

by is a new measure that is of the "same essence" as the expired measure. In fact, in those circumstances, the measure at issue has not truly expired. Yet, on the facts of this case, the United States has not, and cannot, demonstrate that the TPRP for corn has been replaced by a measure that is of "the same essence". China turns to these factual issues in the next section.

38. The United States also argues that domestic support cases are somehow unique, allegedly because "a dispute challenging the conformity of a Member's domestic support with its domestic support commitments necessarily involves a retrospective analysis".[19] In making this argument, the United States confuses the distinction between the existence of a measure, and the existence of evidence necessary to show a WTO inconsistency.

39. With respect to the existence of a *measure*, there is nothing inherently different about claims involving domestic support measures compared to claims involving other measures. That is, nothing warrants a carve-out from the case law on expired measures. In particular, domestic support measures do not necessarily involve annual measures that would always have expired, as the United States initially argued. In fact, domestic support measures often involve long-standing programs supporting agriculture through payments or other support. Annual measures may also form part of an ongoing program. This was precisely the situation in *US − Upland Cotton* where the United States provided annual marketing loan payments pursuant to a multi-year marketing loan program.

40. Moreover, with respect to the evidence, China explained that domestic support measures are not the only type of measure for which an assessment of their WTO consistency may involve consideration of historic evidence. Indeed, while a domestic support *measure* must exist at the time of panel establishment, its WTO consistency may be assessed in light of (i) evidence predating panel establishment, (ii) evidence contemporaneous with panel establishment, or (iii) the most recent evidence, depending on their availability. These considerations apply across many types of measures and disputes. Yet, the need for evidence that may predate panel establishment, to enable assessing the WTO consistency of a measure, does not remove the requirement for the measures to exist at the time of panel establishment.

41. Finally, systemic concerns arise were the Panel to accept the U.S. argument that panels are required to make findings and recommendations on expired measures. Accepting the U.S. argument would result in purely declaratory judgments. Yet, WTO dispute settlement is not designed to deliver declaratory judgments.[20] Rather, it is designed to secure a positive solution to the dispute. The Panel must, thus, avoid a declaratory judgment.

42. Contrary to the U.S. assertions, this would not prejudice the United States. This is because the United States has no right to purely declaratory judgment. To recall, in *US − Certain EC Products*, the Appellate Body held that panels may not make recommendations with respect to expired measures. It explained that this rule exists because there is an "obvious inconsistency" between, on the one hand, a finding that a measure has expired, and, on the other hand, a panel's recommendation that such expired measure be brought into conformity with the applicable WTO obligations, including through its withdrawal.[21]

43. The United States' reliance on the panel report in *EC − Biotech* and the Appellate Body report in *China − Raw Materials* does not change that finding. Indeed, the United States mischaracterizes *EC − Biotech* as standing for the proposition that panels may make recommendations on expired measures. In fact, the opposite is true. The panel in *EC − Biotech* made recommendations with respect to an unwritten general *de facto* moratorium on the approval of biotech products − *which it found existed at the time of panel establishment*. In the face of uncertainty whether the measure continued to exist, or had subsequently ceased to exist during the panel proceedings, as the European Communities asserted, the panel made a recommendation "to the extent that[] that measure ha[d] not already ceased to exist".[22] This is evidently different from the situation here, where the evidence demonstrates that the TPRP for corn has *expired prior to panel establishment*.

44. With respect to *China − Raw Materials*, the United States fails to appreciate that the concern to which it referred, involving an "endlessly moving target" loophole, is resolved through the case

[19] United States, response to Panel Question 4, para. 21.
[20] Appellate Body Report, *US − Wool Shirts and Blouses*, p. 19.
[21] Appellate Body Report, *US − Certain EC Products*, para. 81.
[22] Panel Report, *EC − Biotech*, para. 8.16.

law, including *China − Raw Materials* itself. That case law permits challenges of, and eventually recommendations on, measures (including programs and "series of measures") *that continue to exist at the time of panel establishment or measures that have "replaced" them, where they are of the "same essence"*. However, contrary to the U.S. assertions, neither the case law in general, nor *China − Raw Materials* in particular, stand for the proposition that a panel must, or even may, make recommendations with respect to measures (i) that did not exist at the time of panel establishment or (ii) that expired during panel proceedings, in situations where those measures have not been "replaced" by new measures that are of the "same essence". In other words, *China − Raw Materials* does not permit, let alone require, panels to make recommendations with respect to expired measures.

45. In these circumstances, the Panel should conclude that the TPRP for corn, which expired prior to panel establishment, is outside the Panel's terms of reference.

C. The evidence demonstrates that the TPRP for corn has expired

46. As noted above, the TPRP for corn expired prior to panel establishment. China has established that, in its place, and starting with the 2016 harvest, China began providing direct payments to producers of corn in the four provinces/region, subject to certain requirements to limit production, and established a market-based price discovery mechanism, with prices reflecting the supply-demand relationship.

47. Initially, the United States asserted that the 2012-2015 TPRP for corn continues to exist because China allegedly had merely "reformed" its corn policy. The United States errs. In China, a policy "reform" generally refers to a fundamental change in that policy, resulting in the discontinuation of the previously existing policy. Indeed, the *MOF Opinion* that announced the new corn measures described these measures as a "reform of market economy system, emphasizing the decisive role of the market in the allocation of grain resources and better performing the role of government".[23] Indeed, the fundamental "reform" that occurred in China's domestic support for its corn producers was to abolish the previous fixed TPRP prices and introduce a new direct payment program for producers of corn. As the NDRC official announcing the reform explained, it would result in a "price formed by the market and decoupling of price and subsidy"[24] − *i.e.*, the absence of an applied administered price, under "the principle of 'Price formed by market and decoupling of price and subsidy'".[25]

48. Outside this litigation, the United States fully agrees. Indeed, since early 2016, the United States Department of Agriculture ("USDA") has consistently explained, in report after report, that China abandoned the TPRP. Even in this litigation, the United States admits that purchases under the TPRP ended on 30 April 2016.[26]

49. Nonetheless, the United States makes vague allegations about the existence of an applied administered price for corn during 2016 and beyond. Confusing the question before the Panel further, the United States also asserts that it is China's burden to "demonstrate that it had withdrawn or modified its support so as to come within its domestic support commitments for corn by the time of panel establishment".[27] That U.S. assertion reflects a misunderstanding of the general principle on the burden of proof. Since the United States, and not China, asserts that there continues to exist an applied administered price in the new corn measures, the United States carries the burden to provide evidence to substantiate this assertion. Absent such evidence, there is no legal basis for the United States to claim that the Panel must make findings and recommendations regarding the TPRP.

50. In fact, evidence from before panel establishment demonstrates that the key elements of the reform consisted of three major new components: (i) the establishment and operation of a direct

[23] MOF Opinion, May 2016, (Exhibit CHN-73-B), Section I.

[24] The State Council, News Report "Corn Temporary Purchase and Reserve System will be Shifted to a 'Market-oriented Purchase' and 'Direct Subsidies'", available at: http://www.gov.cn/xinwen/2016-03/28/content_5059171.htm (last viewed 26 October 2017) (English translation), (Exhibit CHN-74-B); MOF Opinions, May 2016, (Exhibit CHN-73-B), Section I.

[25] *Notice on Proper Handling of Corn Purchase Work in Northeast China This Year (2016)* (Guo Liang Tiao [2016] No. 210), 19 September 2016 (English translation), (Exhibit CHN-80-B), p. 1.

[26] United States, 12 December 2017 comments, para. 35.

[27] United States, responses to Panel Questions 4 and 9, paras. 25, 48-49.

payment program for eligible Northeast corn producers based on historic areas planted to corn, and not connected to the price for corn; (ii) the establishment and implementation of a series of measures designed to limit production of corn in the provinces/region adopting the new corn measures; and, (iii) the implementation of policies seeking to achieve a market-based price discovery mechanism for corn, resulting from a market with diversified purchasers and sellers, and multi-channel distribution, of corn.

51. The USDA recognized the production-limiting effects of the new corn direct payment program, as implemented in China's Northeast region, noting a drop in corn harvested area and expectations of further decline. Similarly, price developments in China's corn market since the 2016 introduction of the production-limiting direct payment program are consistent with a market-based price discovery mechanism and the absence of market price support.

52. The United States also argued that the TPRP for corn continued to exist based on allegedly significant *similarities* between the *2015 TPRP Notice* and a *2016 Northeast Region Corn Purchase Notice*. Issued following the expiry of the TPRP for corn, the *2016 Notice* requires provincial/regional governments to *encourage* market participants to purchase corn and to collaborate in the orderly purchasing, financing, storage, and warehousing of corn in the Northeast region. That is, the *2016 Notice* sets out government tasks to support the new market-based price discovery mechanisms.

53. Crucially, while mischaracterizing the alleged policy objective of the *2016 Notice* as involving purchase work similar to that under the TPRP price, the United States ignores entirely the absence of any applied administered price from the *2016 Notice*. Instead, the United States asserts irrelevant similarities. Yet, there are fundamental differences between the *2015 TPRP Notice* and the *2016 Notice* that reflect the core of the fundamental reform in China's TPRP for corn, which resulted in the absence of a Government-determined TPRP price at which designated entities purchase corn. For example, while the United States highlights that, under the *2015 TPRP Notice*, China Grain Reserves Corporation ("SinoGrain") was "entrusted by the State"[28] to perform purchases at the TPRP price, it remains silent regarding the absence of any such entrustment under the *2016 Notice*. Indeed, the new corn measures established a *market-based price discovery mechanism*, and the *2016 Notice* repeatedly references criteria and elements to be adopted to create and sustain that mechanism. These references are found throughout the *2016 Notice*, but are entirely absent from the *2015 TPRP Notice*. In these circumstances, the *2016 Notice* contradicts the U.S. assertion of a continued existence of the TPRP for corn.

54. Late in the proceedings, the United States then purported to have found evidence of China's alleged continued application of an applied administered price for corn. As support, the United States produced a notice by SinoGrain's Inner Mongolia Branch to its depots in Inner Mongolia, communicating prices at which to purchase corn.

55. The United States errs in asserting that it has identified an applied administered price for corn. In fact, the document identified by the United States consists of a set of different, *market-based purchase prices* at which SinoGrain's Inner Mongolia Branch offered, on 14 October 2016, to purchase corn at various of its depots in the Inner Mongolia Region. That is, rather than constituting evidence of an applied administered price, the document identified by the United States involved an *offer*, *at a particular point in time*, to purchase corn at *varying market-based prices* in different locations in the Inner Mongolia Region.

56. Moreover, China has established that this offer by one of many purchasers of corn in China (SinoGrain) was superseded by later market-based offers from the same entity to purchase corn at different market-based prices. Specifically, the evidence demonstrates that SinoGrain's market-based price offers change from time to time, and reflect changing *market prices* in line with *market developments*. Indeed, after 30 April 2016, SinoGrain had no mandate from the Chinese Government to purchase corn at an applied administered price. Thus, and contrary to the U.S. assertion, the SinoGrain branch notice identified by the United States is not based on any authority or legal basis flowing from the *2016 Notice*.

57. By way of background, the evidence demonstrates that SinoGrain headquarters issues, from time to time, notices with guidance prices for corn purchases to its provincial/region branches. Those guidance prices take into account market price information observed, collected and published by

[28] United States, response to Panel Question 55, para. 23.

China's State Administration of Grain, similarly to the manner in which U.S. corn traders take into account information on corn prices continuously published by the USDA. Moreover, these guidance prices are not determinative of prices offered by each SinoGrain depot. Instead, each of the four SinoGrain's branches in China's Northeast region enjoys discretion to set, through consecutive branch notices, the prices at which its local depots offer, from time to time, to purchase corn, based on local market conditions. Each SinoGrain depot in these four provinces/region then offers to purchase corn at the market-based price set for it in the most recent branch notice. That is, depending on evolving market conditions, one set of prices offers will be superseded by a later set of prices offers, adjusted either upwards or downwards, reflecting market developments. In short, China has established that SinoGrain's purchase price offers are consistent with local *market prices*.

58. While SinoGrain has, at present, no mandate from the Chinese Government to purchase corn *at an applied administered price*, purchasing corn remains one of its core business activities. Consistent with the fact that, after 30 April 2016 and under the new corn measures, the Chinese corn market is characterized by a market-based price discovery mechanism, SinoGrain follows a market-based process to purchase corn at market prices. Indeed, the evidence demonstrates that, in making fluctuating price offers, SinoGrain follows a common and well-established practice that is consistent with that adopted by large commodity traders worldwide. Like SinoGrain, those traders inform potential sellers of corn of the price at which they would, from time to time, purchase corn. Specifically, China demonstrated that other major purchasers of corn in China similarly publish price offers to purchase corn, and that those price offers fluctuate based on market developments. China further established that it is a common practice in the United States for small and large purchasers of corn to publish announced prices at which they will purchase corn.

59. Thus, China demonstrated that the announcement of offered purchase prices by SinoGrain and other corn purchasers in China is a completely *normal*, *expected*, and *necessary* element of a functioning price-discovery mechanism. That announcement does not establish the existence of an applied administered price, as the United States argues. With SinoGrain's prices indistinguishable from market prices, the United States cannot show the existence of an applied administered price. Accordingly, it cannot show that the TPRP for corn continues to exist.

D. Conclusion

60. In sum, the Panel should conclude that the 2012-2015 TPRP for corn, which expired prior to panel establishment, is outside the Panel's terms of reference.

V. THE UNITED STATES FAILED TO DEMONSTRATE THAT CHINA'S DOMESTIC SUPPORT FOR WHEAT AND RICE VIOLATES ARTICLES 3.2, 6.3, AND 7.2 OF THE *AGREEMENT ON AGRICULTURE*

A. Factual background on China's MPP for wheat and rice

61. Pursuant to China's *2004 Grain Opinion* and *2004 Grain Distribution Regulation*, China implemented market price support in the form of minimum procurement price ("MPP") programs for wheat, indica rice and japonica rice for each of the years 2012-2016. These programs are established through annual MPP Notices that are adopted jointly by a number of different entities, including the NDRC, MOF, Ministry of Agriculture ("MOA"), and State Administration of Grain ("SAG"). The annual MPP Notices set the annual level of the MPP for wheat, indica rice and japonica rice of particular quality grades, with MPP prices defined for a standard Grade 3 and adjusted for Grades 1-2 and 4-5.

62. The same entities that adopt the MPP Notice also introduce annual MPP Implementation Plans. These Implementation Plans inform implementing authorities[29] of, *inter alia*, the geographic scope, relevant timeframe, rules on the activation and deactivation of the MPP programs, and the characteristics of qualifying wheat and rice.

63. With respect to the geographic scope of the MPP programs in 2012-2016, the MPP program for wheat covered six wheat-producing provinces (Hebei, Jiangsu, Anhui, Shandong, Henan and Hubei); the MPP programs for indica rice and japonica rice covered (i) five early-season indica rice

[29] These include the provincial Development and Reform Commissions, Price Bureaus, Departments (Bureaus) of Finance, Agriculture Departments (Bureaus, Commissions, Offices), Administrations of Grain, and autonomous regions and municipalities.

producing provinces (Anhui, Jiangxi, Hubei, Hunan and Guangxi); and, (ii) eleven mid-to-late season indica and japonica rice producing provinces (Liaoning, Jilin, Heilongjiang, Jiangsu, Anhui, Jiangxi, Henan, Hubei, Hunan, Guangxi and Sichuan).

64. Under the MPP Implementation Plans, the time period during which the MPP programs may be implemented during the applicable year is limited. For example, purchases of wheat under the MPP program may take place between May 21 to September 30 of each applicable year; MPP purchases of early-season indica rice may take place between 16 July and September 30 of each applicable year; and for purchases of mid-to-late season indica rice and japonica rice, the timeframes differ depending on the province. For Jiangsu, Anhui, Jiangxi, Henan, Hubei, Hunan, Guangxi, and Sichuan Provinces, the MPP program is implemented between mid-September and 31 January, and for Liaoning, Jilin, Heilongjiang Provinces, it is implemented between October/November and February/March.

65. Moreover, purchases under the MPP programs are not activated during the entirety of the implementation period. The MPP Implementation Plans provide that purchases at the MPP are activated only "when the grain market price drops to the minimum procurement price stipulated by the government".[30] Purchases are deactivated when the market price rises again above the MPP. It follows that the MPP programs retain, as the guiding principle, market-based price discovery and purchases by market actors, and intervene only where market prices drop below the MPP. Thus, and consistent with the *2004 Grain Opinion* and *2004 Regulation on Grain Distribution*, the grain price is formed principally by supply and demand, except when a "material change occurs in the relationship between supply and demand of grain".[31] Thus, the actual application of the MPP program is further limited to (i) the *timeframe* during which prices are found to fall below the MPP; and (ii) *areas* within its geographic scope where prices were found to have fallen below the MPP price.

66. As noted above, the MPP applies to wheat, indica rice and japonica rice of particular qualities. Specifically, only purchases of in-grade grains may occur − *i.e.*, wheat or rice that is of Grades 1 to 5 of China's National Grain Standard. Out-of-grade grains − *i.e.*, wheat and rice that is of a quality lower than Grade 5 − may not be purchased under the MPP programs.

67. Despite the existence of the MPP programs, the vast majority of wheat and rice is sold on the market. Indeed, purchases under the wheat MPP program did not exceed 25% of total production in the covered provinces (or 22% of total production in China), and purchases under the rice MPP programs did not exceed 20% of total rice production in the covered provinces (or 16% of total production in China).

68. As an important background fact, China further notes that, similarly to the situation in many other developing countries, small-scale farms in China typically consume a significant portion of the staple foods that they produce, including wheat and rice. It follows that the total amount of wheat and rice available to be sold by farmers on the market or under the MPP programs is smaller than the total amount of wheat and rice actually produced. Based on data from China's *Rural Statistical Yearbook*, between 9-18% of total wheat production in China in 2012-2015, and between 17-22% of total rice production was consumed or retained by Chinese farmers, and not available for purchase in the marketplace.

B. Legal argument

69. Contrary to the U.S. claims, China's market price support, under its MPP programs for wheat, indica rice and japonica rice, is consistent with its domestic support commitments under Articles 3.2, 6.3 and 7.2(b) of the *Agreement on Agriculture*.

70. Under Articles 3.2 and 6.3, Members shall not provide overall annual domestic support for their agricultural producers, calculated as Current Total AMS, in excess of their Member-specific domestic support reduction commitments, as set out in Part IV of their Schedules. Those domestic support reduction commitments, in turn, result from a Member-specific calculation of Base Total AMS − *i.e.*, Total AMS during each Member's base period. Article 7.2(b) further clarifies that, where

[30] *See, e.g.*, 2015 Wheat & Rice Implementation Plan, (Exhibit CHN-28-B), Article 6; 2016 Wheat & Rice Implementation Plan, (Exhibit CHN-32-B), Article 8.

[31] *Regulation on the Administration of Grain Distribution*, 2004 (English translation), (Exhibit CHN-9-B), Article 27.

a Member's domestic support reduction commitment is "nil", as in the case of China, that Member shall not provide domestic support in excess of its *de minimis* level. For China, paragraph 235 of its Working Party Report, as incorporated into China's Accession Protocol, sets that *de minimis* level at 8.5% of the total value of production of each basic agricultural product.

71. As summarized below, the United States has failed to establish that China's Current AMS, calculated for each of its market price support measures for wheat, indica rice and japonica rice, exceeds China's *de minimis* support level of 8.5% of the total value of production of each of these products. Accordingly, the United States has failed to establish that China's Current Total AMS exceeds China's "nil" domestic support reduction commitment. Below, China first summarizes its arguments regarding general concepts for the calculation of AMS, in particular the role of a Member's constituent data and methodology, before turning to the AMS calculation for market price support at issue here, and any applicable conflict rules. China then provides the resulting AMS calculations.

1. The role of a Member's constituent data and methodology in the calculation of Current AMS

72. China has established that, in calculating Current AMS and Current Total AMS under Articles 1(a)(ii) and 1(h)(ii) of the *Agreement on Agriculture*, the United States errs by relying *solely* on the provisions of Annex 3. Pursuant to Articles 1(a)(ii) and 1(h)(ii), that calculation must consider both (i) the framework for the calculation of AMS set out in Annex 3 of the *Agreement on Agriculture*, *and* (ii) China's constituent data and methodology, included in its Supporting Tables in Rev.3. Consideration of, additionally, China's constituent data and methodology has important consequences for two key variables in the calculation of Current AMS from China's market price support for wheat and rice. As discussed in more detail below, these variables are (i) China's fixed external reference prices for these products, taken from China's Member-specific 1996-1998 base period, and (ii) China's methodology for the determination of the amount of "eligible production" as "amount purchased", both as detailed in China's Supporting Tables in Rev.3.

73. Under customary rules of treaty interpretation, it is well-established that "a treaty should be interpreted as a whole",[32] and that a treaty interpreter must not read out entire aspects of a treaty. Moreover, "a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously".[33] Application of the *Vienna Convention* rules on treaty interpretation also requires a treaty interpreter to avoid, where possible, reading two provisions of the same treaty as conflicting. As set out below, a holistic and harmonious reading of Annex 3 and China's constituent data and methodology is possible. Nonetheless, below, China also addresses the applicable conflict rule.

a. *Articles 1(h)(ii) and 1(a)(ii) of the Agreement on Agriculture require a holistic and harmonious interpretation*

74. The requirement to interpret a treaty holistically and harmoniously, and not to read out entire aspects of that treaty, applies with even greater force where, as here, the treaty requires that two provisions be considered together. As noted, the starting point of the interpretive exercise determining the applicable calculation rules for Current AMS and Current Total AMS are Articles 1(a)(ii) and 1(h)(ii) of the *Agreement on Agriculture*, which define Current AMS and Current Total AMS. For purposes of their calculation, Articles 1(a)(ii) and 1(h)(ii) direct a treaty interpreter to consider and give meaning to *two sources of treaty text*: (i) Annex 3; and, (ii) a Member's "constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule". Thus, the Panel must attempt to adopt a holistic and harmonious interpretation that gives meaning to both.

b. *The meaning of "constituent data and methodology" in Articles 1(a)(ii) and 1(h)(ii)*

75. China considers it useful to begin by exploring the meaning of the phrase "constituent data and methodology". That phrase covers those data and methodologies in a Member's Supporting Tables that are *characteristic*, *formative*, *essential*, and *integral* for the calculation of both *Base* and

[32] Appellate Body Report, *Korea – Dairy*, para. 81.

[33] Appellate Body Report, *Argentina – Footwear (EC)*, para. 81 and footnote 72 thereto (emphasis in original).

Current AMS and *Base* Total AMS and *Current* Total AMS. Under Articles 1(a)(i) and 1(h)(i) both "constituent data" and "constituent methodology", applied together with other elements of the Supporting Tables, gave rise to a Member's *Base* AMS and *Base* Total AMS (collectively referred to as "Base (Total) AMS"), and, thus, that Member's domestic support reduction commitments. Under Articles 1(a)(ii) and 1(h)(ii), both remain relevant for, and must be applied in, the calculation of a Member's *Current* AMS and *Current* Total AMS (collectively referred to as "Current (Total) AMS"). That is, *Base* (Total) AMS and *Current* (Total) AMS are calculated by reference to the same Member-specific constituent data and methodology in a Member's Supporting Tables.

76. In this respect, China explained that "constituent data and methodology" must be able to constitute an unchanging element (either a data point or a methodology) that carries over from the calculation of *Base* (Total) AMS to the calculation of *Current* (Total) AMS. As detailed below, for China's market price support for wheat and rice, the term (i) "constituent data" applies to: (a) the numerical value of the fixed external reference prices based on data from the 1996-1998 base period, and (b) the conversion rate of 70% for paddy-rice-based data into milled-rice-based data. In turn, (ii) "constituent methodology" applies to: (a) the methodology for the determination of eligible production as "amount purchased", and (b) the methodology for converting paddy-rice-based data into milled-rice-based data.

77. Although, the Parties provided similar definitions of "data", "methodology" and "constituent", and agreed that "constituent" qualifies "data" and "methodology", the U.S. interpretation of "constituent data and methodology" effectively fails to give any meaning to the phrase. Fundamentally, the United States takes the flawed view that "constituent data and methodology" are only of historical, and/or factual interest, and not relevant for the calculation of Current (Total) AMS. While the United States provides a few examples of what it considers to be constituent data and methodology, these examples are largely covered under other provisions. For example, the United States refers to the definition of the "basic agricultural product" and the "year" for which AMS is to be calculated. Yet, both are covered separately by Articles 1(b) and 1(i) of the *Agreement on Agriculture*.

78. If the role of constituent data and methodology were, as the United States argues, either non-existent or extremely limited, there would have been no need for Articles 1(a)(ii) and 1(h)(ii) to refer to them as one of two elements necessary for, and relevant to, the calculation of Current (Total) AMS from present domestic support. Accordingly, the U.S. position effectively reduces the references to "constituent data and methodology" to nullity, contrary to the customary rules of treaty interpretation, and Article 3.2 of the DSU.

c. The ordinary meaning of "in accordance with" and "taking into account" in Articles 1(h)(ii) and 1(a)(ii)

79. Articles 1(a)(ii) and 1(h)(ii) also speak to the relationship between the framework for the AMS calculation in Annex 3 and a Member's constituent data and methodology. That relationship must be determined based on the ordinary meaning of the terms "in accordance with" and "taking into account" in Articles 1(a)(ii) and 1(h)(ii), in their context, and in light of the object and purpose of the *Agreement on Agriculture*. In addition, there is limited guidance from the findings of the panel and the Appellate Body in *Korea – Beef* – although on the facts of that dispute, Korea had no relevant constituent data and methodology for beef.

80. Article 1(a)(ii) provides that Current AMS is "calculated *in accordance with* the provisions of Annex 3 …, and *taking into account* the constituent data and methodology". Article 1(h)(ii) uses only the phrase "in accordance with", providing that Current Total AMS shall be "calculated *in accordance with* the provisions of this Agreement, including Article 6 [which includes Annex 3], *and with* the constituent data and methodology". China has established that, contrary to the U.S. view, the term "in accordance with" applies to both sources of treaty text referenced. The dictionary meaning of "in accordance with" is "in agreement or harmony with, in conformity to, according to".[34] That is, under Article 1(h)(ii), Current Total AMS must be calculated "in agreement or harmony with" *both* (i) the framework of Annex 3 and (ii) "the constituent data and methodology". The same requirement flows from Article 1(a)(ii), which also uses the phrase "in accordance with" when referring to Annex 3. Indeed, in *Korea – Beef*, the Appellate Body confirmed the meaning of the term "in accordance with",

[34] Oxford English Dictionary, OED Online, "in accordance with, n.", pp. 2-3, available at: http://www.oed.com/view/Entry/1170? (last viewed 26 October 2017), (Exhibit CHN-53).

and also recognized that Article 1(h)(ii) attributes equal importance to both sources of treaty text.[35]

81. Article 1(a)(ii) uses the phrase "taking into account" when referring to "the constituent data and methodology". The meaning of "to take into account" is "to include something in an account or reckoning".[36] Thus, similarly to Article 1(h)(ii), Article 1(a)(ii) also emphasizes the role of "the constituent data and methodology" in calculating AMS.

82. In short, Articles 1(a)(ii) and 1(h)(ii) require the Panel to give meaning to both Annex 3 and the constituent data and methodology, in a holistic and harmonious manner. Contrary to the U.S. arguments, they are not conflict rules that give, in all circumstances, precedence to Annex 3 over a Member's constituent data and methodology. In any event, questions of hierarchy become relevant only where a conflict existed between Annex 3 and a Member's constituent data and methodology, which does not arise on the facts of this dispute.

d. Current AMS and Current Total AMS are part of the same overall calculation

83. The relationship between Annex 3 and a Member's constituent data and methodology is also defined by the fact that Articles 1(a)(ii) and 1(h)(ii) are part of the same overall calculation. They do not involve different assessments, as the United States argues in an attempt ultimately to remove China's constituent data and methodology from the calculation of Current AMS. Instead, Annex 3 and a Member's constituent data and methodology must each be given the same meaning and the same weight in the calculation of both AMS and Total AMS.

84. As China has explained, the notion of AMS, which expresses domestic support in monetary terms, is built into each of the concepts of AMS, Total AMS, Current Total AMS and Base Total AMS. As the panel in *Korea − Beef* held, "all these concepts, e.g. domestic support, AMS, Current Total AMS, and total domestic support and the provisions of Articles 1(a), 1(h), 3.2, 6.4, and 7.2 are organically and inextricably linked".[37] It follows that AMS must be calculated in the same manner for purposes of both AMS and Total AMS. This requirement flows also from the fact that Total AMS is defined, in Article 1(h), as the sum of the AMS calculations for each basic agricultural product (along with non-product-specific AMS), subject only to *de minimis* exclusion rules under Article 6.4. In the summing-up that results in Total AMS, each AMS component remains unaltered, however, and is *not* re-calculated, demonstrating that calculating both AMS and Total AMS is part of the same overall calculation.

85. Indeed, both AMS and Total AMS, whether calculated for the base period or for current domestic support, are elements of the same overall calculation of a level of domestic support. In the case of *Base* AMS and *Base* Total AMS, the AMS components are part of the calculation that yielded a Member's Base Total AMS and the resulting annual and final bound commitment levels, including where the reduction commitment is "nil". And, in the case of *Current* AMS and *Current* Total AMS, they are part of the calculation that assesses whether a Member's domestic support in any year after the base period has exceeded that Member's domestic support reduction commitments, in violation of Articles 3.2 and 6.3.

86. Thus, contrary to the U.S. assertions that both are separate exercises, there is no basis to require one set of calculations for Current AMS, under Article 1(a)(ii), and another set of calculations for the same Current AMS that is summed up into Current *Total* AMS, under Article 1(h)(ii) (subject only to *de minimis* exclusions).

e. *The relevant context, and object and purpose of the Agreement, reflecting the requirement for consistency in the calculation of Base (Total) AMS and Current (Total) AMS*

87. Further illuminating the role of a Member's constituent data and methodology in the calculation of Current AMS and Current Total AMS is the need for consistency in the calculation of (i) Base (Total) AMS and (ii) Current (Total) AMS. That need for consistency flows from relevant

[35] Appellate Body Report, *Korea − Beef*, footnote 111.

[36] Oxford English Dictionary, OED Online, "to take account of, n.", pp. 21-22, available at: http://www.oed.com/view/Entry/1194? (last viewed 26 October 2017), (Exhibit CHN-54).

[37] Panel Report, *Korea − Beef*, para. 813.

context and the object and purpose of the *Agreement on Agriculture*. The need for consistency is an important element in the Panel's consideration of the role, in calculating Current AMS from China's market price support for wheat and rice, of China's constituent data and methodology in Rev.3. Specifically, it is relevant for the identification of the appropriate fixed external reference prices sources from data reflecting the China's 1996-1998 base period; the methodology for the determination of eligible production as "amount purchased"; and, the methodology for converting paddy-rice-based data into milled-rice-based data, reflecting a conversion rate of 70%.

88. Beginning with *context*, Articles 1(a)(i) and 1(h)(i) refer to AMS and Total AMS during the base period "as specified in the relevant tables of supporting material incorporated by reference in Part IV of a Member's Schedule" and "as specified in Part IV of a Member's Schedule", respectively. Thus, they refer to the *same* Member-specific Supporting Tables that, pursuant to Articles 1(a)(ii) and 1(h)(ii) include constituent data and methodology as elements of the calculation of Base AMS and Base Total AMS.

89. The calculations of Base (Total) AMS in those Supporting Tables reflect the framework in Annex 3 and Member-specific constituent data and methodologies. Indeed, paragraph 5 of Annex 3 explains that Annex 3 also served as a framework for the calculation of the Base (Total) AMS, as recorded in a Member's Supporting Tables. Paragraph 5 stipulates that "[t]he AMS calculated as outlined below [*i.e.*, in paragraphs 6-13 of Annex 3] for the base period shall constitute the base level for the implementation of the reduction commitment on domestic support". As a result, a Member's Base (Total) AMS will generally reflect the framework set out in Annex 3. Accordingly, the United States errs in arguing that *Base* AMS calculations occurred in a legal vacuum, allegedly because "the Agreement does not provide a specific calculation methodology".[38] Instead, Base AMS calculations were guided by the framework in Annex 3 (as set out in paragraph 5 thereof) and included Member-specific constituent data and methodology (as noted in Articles 1(a)(ii) and 1(h)(ii)).

90. China also rebutted the related, and equally erroneous, U.S. argument that there is no requirement for consistency in the calculation of Base (Total) AMS and Current (Total) AMS because the former is of historical interest only. As set out above, the U.S. position is contradicted by the *Agreement on Agriculture*. Articles 1(a)(ii) and 1(h)(ii) signify that the choices Members made in the calculation of Base (Total) AMS have consequences in the calculation of Current (Total) AMS. Specifically, while *Base* AMS and *Current* AMS differ with respect to the time period for which they are calculated, they are calculated using the *same* calculation framework under Annex 3 and the *same* constituent data and methodology. Thus, contrary to the U.S. assertion, they are "inextricably linked",[39] and the constituent data and methodology from the calculation of Base (Total) AMS remain relevant for the calculation of Current (Total) AMS.

91. Further relevant context is provided by the domestic support provisions in the *Agreement on Agriculture* – *i.e.*, Articles 6.1, 6.3, 7.1, 20, title of Annex 2, paragraph 1 of Annex 3. They each refer to domestic support *reduction* commitments. Similarly, recital 3 of the *Agreement's* preamble provides that the object and purpose of the *Agreement*, with regard to domestic support, is to achieve "progressive reductions in agricultural support".

92. Consistency with the objective to reduce domestic support requires that compliance with a Member's domestic support reduction commitments is assessed in a meaningful manner – *i.e.*, in a manner that permits drawing conclusions about a Members' *reduction* of its domestic support. This requires consistency in the calculation of *Base* (Total) AMS (which reflects domestic support during the base period and served as the basis for a Member's domestic support reduction commitments) and *Current* (Total) AMS (which reflects current domestic support). A lack of consistency in the calculation of both would undermine the usefulness of the Current (Total) AMS calculation as a proxy for the level of current domestic support, relative to a Member's domestic support reduction commitments, which flow from *Base* (Total) AMS. Indeed, the panel in *Korea – Beef* explicitly recognized this need for consistency.[40] The Appellate Body found no error in the panel's findings.[41]

93. As China has shown, failure to use, where pertinent, consistently the *same* constituent data

[38] United States, response to Panel Questions 62, para. 46.
[39] Panel Report, *Korea – Beef*, para. 813.
[40] Panel Report, *Korea – Beef*, para. 811.
[41] Appellate Body Report, *Korea – Beef*, paras. 113-114 (footnote 49), and 118.

and methodology together with the framework of Annex 3 leads to substantial distortions in the calculation of *Current* (Total) AMS, relative to *Base* (Total) AMS. Specifically, if constituent data and methodology used for the calculation of *Current* (Total) AMS *differed* from those used for the calculation of *Base* (Total) AMS, AMS calculations would become meaningless *apples-to-oranges* comparisons that reveal nothing about actual reductions in domestic support. Variations in the constituent data and methodology mean that one cannot know whether, for example, a Member's compliance with its reduction commitments results from (i) actual reductions in its domestic support, or (ii) simply from the use of *different* constituent data and methodology.

94. Importantly, where *different* constituent data and methodology are used, a reduction in AMS may be found, and may mask actual levels of domestic support that either remain unchanged or have even increased. These distortions are illustrated by the exaggerating effect on China's *Current* AMS of the United States' application of (i) entirely new fixed external reference prices for wheat and rice, based on 1986-1988 (rather than 1996-1998) data; and, (ii) a different methodology for the determination of "eligible production".

95. While the United States, at times, recognized these distortions, and argued that constituent data and methodology may be used where a Member continues to apply *the same program*, there is no basis for that narrow reading of the consistency requirement. In any event, the United States appears to have abandoned that argument.

96. In short, the requirement for consistency in the calculation of Base (Total) AMS and Current (Total) AMS that flows from the text and context in Articles 1(a) and 1(h), the context of paragraph 5 of Annex 3, and the design and architecture of the *Agreement on Agriculture*. It follows that the framework in Annex 3 and a Member's constituent data and methodology must be used consistently in the same manner when a Member continues more broadly to use certain forms of domestic support for a basic agricultural product for which its Supporting Tables include relevant constituent data and methodology. The United States' negation of the need for such consistency is without a basis in the *Agreement on Agriculture*.

97. Finally, and contrary to the U.S. assertion, China has established that the need for consistency applies irrespective of whether a Member has a "positive" or a "nil" domestic support reduction commitment. Under the terms of the *Agreement on Agriculture*, and contrary to the U.S. assertions, both constitute reduction commitments. Thus, China's commitment level of "nil" is an ongoing domestic support "*reduction*" commitment. Indeed, absent a *reduction* commitment, the domestic support disciplines of Articles 3.2 and 6.3 of the *Agreement on Agriculture* would not apply to China.

f. Constituent data and methodology are an important basis for a Member's domestic support reduction commitments

98. The considerations above highlight that a Member's domestic support reduction commitments arise, in important part, from its Member-specific constituent data and methodology. Ignoring those constituent data and methodology in assessing compliance with individually negotiated and Member-specific domestic support reduction commitments, as the United States does, would be tantamount to re-writing that Member's commitments. Moreover, using different constituent data and methodology would undermine the utility of Current AMS calculations as a means to assess compliance with Member-specific domestic support *reduction* commitments.

i. For later-acceded Members their constituent data and methodology are also part of their Accession Protocols

99. The implications of the United States' attempt at reading out a Member's constituent data and methodology are aggravated for later-acceded Members, such as China. For those Members, their constituent data and methodology are not only part and parcel of their domestic support reduction commitments, but also of their "terms of accession", under Article XII:1 of the Marrakesh Agreement. Contrary to the U.S. assertions, China's Supporting Tables in Rev.3, which include its constituent data and methodology, are *part of* China's Accession Protocol. Specifically, Annex 8 thereto includes China's Schedule of Concessions and Commitments on Goods ("Schedule"), which incorporates Rev.3. Indeed, China's Schedule notes that it "result[ed] from the negotiations between the People's Republic of China and WTO Members [*and that it*] *is annexed to the Protocol of Accession*

of China".[42] As part of China's Accession Protocol, Rev.3 enjoys the same legal status as the Accession Protocol.

100. The United States further errs in arguing that China's Schedule, including Rev.3, lost its status as part of China's Accession Protocol because it became annexed to the GATT 1994. The legal status of Rev.3 as part of China's Accession Protocol is not affected by its integration into the GATT 1994. As noted, Schedules of Concessions in an accession protocol form part of the "terms of accession", under Article XII:1 of the Marrakesh Agreement. They are an integral part of the package of rights and obligations under which that Member acceded to the WTO, and can never lose their status as "terms of accession".

ii. The constituent data and methodology give rise to China's domestic support commitments

101. China's constituent data and methodology gave rise to binding commitments, as part of China's domestic support reduction commitments. Contrary to the U.S. assertions, they do not "alter" or "supplant" those commitments. Instead, they are themselves China's negotiated and agreed "terms of accession". China has explained that the U.S. position rests on an erroneous understanding of the relationship between an Accession Protocol and the *Agreement on Agriculture.* When a new Member accedes to the WTO under Article XII:1 of the Marrakesh Agreement, it does not agree to undertake pre-existing commitments in the *Agreement on Agriculture*, as those commitments stood prior to its accession. Instead, it accedes to the *Agreement on Agriculture* subject to individually negotiated and agreed commitments that are set out in the "terms of accession" under the Accession Protocol.

102. For China, this is confirmed by paragraphs 1.2 and 12.1 of China's Accession Protocol. Paragraph 1.2 confirms that the Accession Protocol, including the domestic-support-related commitments, "shall be an integral part of the WTO Agreement". Paragraph 12.1 then stipulates that "China shall implement the provisions contained in China's Schedule of Concessions and Commitments on Goods and, as specifically provided in this Protocol, those of the Agreement on Agriculture". Thus, China is required to implement the provisions of the *Agreement on Agriculture* subject to the terms of its Accession Protocol. That is, China's Accession Protocol does not "alter" domestic support reduction commitments; it gives rise to those commitments.

103. Moreover, China has rebutted the U.S. arguments that aim to invalidate the binding nature of China's constituent data and methodology. First, China has demonstrated that paragraph 1.3 of China's Accession Protocol does not speak to the question of substantive commitments China allegedly undertook as those commitments stood prior to its accession. Instead, it relates to potential transition periods, and explains that, unless specifically stated, China is not entitled to them. Second, China explained that paragraph 238 of China's Working Party Report does not reflect a disagreement between China and its negotiating partners as to China's constituent data and methodology that would invalidate them. Rather, paragraph 238 records concerns regarding certain policy classification of certain "green box" support unrelated to China's domestic support reduction commitments. Finally, China has explained that the case law from *EC − Sugar* regarding the role of schedules in undertaking commitments is inapposite. This is because Rev.3 is part of China's Accession Protocol, and because, in any event, the scheduling rules for export subsidy and domestic support commitments are very different in light of the Member-specific nature of domestic support reduction commitments, including the ability to use Member-specific constituent data and methodology that give rise to these commitments.

2. The appropriate methodology to calculate Current (Total) AMS for China's market price support measures for wheat and rice

104. Having set out the general interpretative framework, and the need for consistency in the calculation of Base (Total) AMS and Current (Total) AMS, China turns to demonstrating the importance of using its own constituent data and methodology, where relevant. Specifically, China now turns to the AMS calculations required for market price support pursuant to paragraph 8 of Annex 3, and identifies on the basis of a holistic and harmonious interpretation the data and

[42] WT/ACC/CHN/49/Add.1 (emphasis added).

methodologies to be used in those calculations.

105. To begin, AMS from market price support is to be calculated on the basis of the difference between the fixed external reference price ("FERP") for the product at issue and its applied administered price ("AAP"), multiplied by the quantity of eligible production. Most of these input factors have been the subject of intense debate.

a. The appropriate fixed external reference prices based on data from 1996-1998

106. China has demonstrated that its FERPs must be sourced from its 1996-1998 base period. This result flows from a holistic and harmonious interpretation, consistent with the customary rules of treaty interpretation, of all relevant provisions of the *Agreement on Agriculture*, in light of relevant context and the object and purpose of the treaty.

107. By contrast, the United States takes the view that China's FERPs must be identified reflecting a 1986-1988 base period. For the United States, this flows from the alleged clarity and plain meaning of a few words in paragraph 9 of Annex 3, ignoring the rest of the *Agreement on Agriculture* and China's constituent data and methodology in Rev.3. The United States errs, and bases its interpretation on only a subset of relevant materials. China established that the case law provides numerous examples where consideration of all relevant text, context and the objective and purpose of the treat result in interpretations of a provision, or select words in a provision, that go beyond the alleged clarity of those words.

108. Thus, in approaching the interpretative task of identifying the relevant base period for Chinas' FERPs, the Panel's first task is to identify *what* it is being called upon to interpret. Only then is it meaningful to discuss *how* that interpretative exercise must proceed. Contrary to the U.S. assertion, the Panel is not called upon to interpret a few words in paragraph 9 of Annex 3 in clinical isolation from all the other provisions of the *Agreement on Agriculture*.

109. Instead, the Panel is required to interpret, holistically and harmoniously, all provisions of the *Agreement* that deal with the determination of the base period for the FERPs, in the light of relevant context and the object and purpose of the *Agreement*. This involves consideration of Articles 1(a) and 1(h), as well as paragraphs 5 and 9 of Annex 3, and additionally China's constituent data and methodology in Rev.3, along with the context from other Members' Supporting Tables, as included in those Members' Schedules, and the need to ensure consistency in the calculation of Base (Total) AMS and Current (Total) AMS, which flows from the design and architecture of the *Agreement on Agriculture*.

110. Following the correct interpretative approach, China has established that the proper, holistic and harmonious interpretation of these provisions establishes a single rule regarding the identification of the applicable base period for Members' domestic support commitments, including for their FERPs. That single rule requires each Member to use a three-year base period for establishing its domestic support reduction commitments, including for the identification of the applicable FERPs to be used in the calculation of Base (Total) AMS and Current (Total) AMS. *Under that single rule, the three-year base period must be sufficiently proximate to the time of the Member's accession*.

111. Consistent with the context provided by Members' Supporting Tables, this single rule is implemented through different modalities. For original Members, the base period proximate to the time of the creation of the WTO is generally 1986-1988, as memorialized in paragraph 9 of Annex 3 and in those Members' Supporting Tables. For each of the 36 later-acceded Members, there are Member-specific three-year base periods that are each proximate to the time of accession of the later-acceded Member concerned, as agreed in the relevant accession protocol between that Member and the WTO, and as memorialized in each of those later-acceded Members' Supporting Tables. Specifically, of the 36 Members that acceded to the WTO after the conclusion of the Uruguay round, all[43] used a three-year base period for the calculation of Base (Total) AMS that was proximate to their accession, and later than 1986-1988. And all 10 later-acceded Members that maintained market price support measures during their Member-specific base periods drew their FERPs from the same base period used to calculate Base (Total) AMS. For China specifically, that base period is 1996-1998, as indicated in its Supporting Tables, which are also part of its Accession Protocol. Indeed, each of the draft Schedules China prepared during the five-year negotiating period from 1997 to 2001 consistently used the most recent three-year time period, and none used 1986-1988. No Member objected to this approach.

112. Thus, the context provided by other Members' Supporting Tables reinforces the interpretation of the relevant treaty provisions that China has advanced in these proceedings, whereby (i) original Members were generally required to use a 1986-1988 base period, including for their fixed external reference prices, while (ii) later-acceded Members were required to use a later base period, including for their fixed external reference prices, that was proximate to the time of their accession. That is, for Members that acceded after the Uruguay Round, including China, this context supports the conclusion that they are not required to calculate their FERPs on the basis of a 1986-1988 base period; instead, they must use the base period in their respective Schedules – *i.e.*, for China, 1996-1998, as set out in Rev.3. China considers that the Panel should give significant weight to this context.[44]

113. Moreover, the object and purpose of the *Agreement on Agriculture* demonstrates the error in the United States' treatment of the 1996-1998 base period, resulting from the above interpretative exercise, as relevant only for the calculation of Base (Total) AMS, but not Current (Total) AMS. This U.S. argument ignores the role and purpose of FERPs and the requirement for consistency in the *Agreement*. To recall, a FERP acts as a benchmark to permit an assessment of a Member's Current AMS from market price support relative to its Base AMS from market price support, in line with that Member's domestic support reduction commitments. A WTO Member must calculate its Current (Total) AMS consistently by using the same constituent data and methodology it used to calculate its Base (Total) AMS, including the same FERPs. Otherwise, it would be subjected to AMS commitments it did not undertake, in violation of Article 3.2 of the DSU.

114. The existence of the single rule that the three-year base period, including for the FERPs, must be sufficiently proximate to the time of the Member's accession is consistent with a 2010 Technical Note by the WTO Secretariat, which explains that, "[w]hereas a fixed period (1986-1988) was established for commitments on domestic support and export subsidies undertaken in the Uruguay Round, the base periods for Members acceding under Article XII of the WTO Agreement have been determined on an individual basis".[45] Indeed, for later-acceding Members, a 1996 Technical Note from the WTO Secretariat on the accession process emphasizes that acceding governments should calculate an "external reference price" from data "normally for *each of the last three years*".[46]

115. China further notes that forcing each of the 36 later-acceded Members, including China, to calculate, going forward, Current AMS using different FERPs has important systemic consequences. During none of the accession negotiations did the United States, or any other Member, suggest that

[43] There is one exception, Bulgaria, which arose from the particular factual situation regarding its accession.

[44] China also notes that, alternatively, the Panel could perhaps view the Schedules of later-acceded Members as evidence of a common, concordant and consistent "subsequent practice" relating to the interpretation of the relevant provisions of the *Agreement on Agriculture.* The Panel's conclusions under both approaches would remain unchanged. Indeed, resort to subsequent practice merely confirms, and does not in any way modify, the meaning that results from a holistic and harmonious interpretation employing other tools of treaty interpretation.

[45] WT/ACC/10/Rev.4, p. 25.

[46] WT/ACC/4, pp. 3-4 (emphasis added).

a 1986-1988 base period had to be used, including for the FERPs. Doing so now forces later-acceded Members to comply with commitments not undertaken, in violation of not only Article 3.2 of the DSU, but also each of their respective accession protocols. Moreover, for several of these Members, there may be no 1986-1988 data from which to draw FERPs, given that several countries at issue did not even exist in 1986-1988. Rather than using proxy data, as the United States suggests, under the proper interpretation, those Members should simply use their own FERPs in their Supporting Tables.

116. Finally, the United States errs in arguing that China's three-year average FERPs were not "used" in its Supporting Tables, and must therefore be ignored when calculating Current AMS. China's FERPs appear in Rev.3 as the three-year average of external references prices during China's 1996-1998 base period. Moreover, in calculating Base AMS, China used the data for the external reference prices for each of the three years of its 1996-1998 base period. Specifically, for each year of the 1996-1998 base period, China used the external reference price from the year at issue. Thus, the U.S. allegation that "China did not 'use' these data points (or methodologies) in the calculation of its market price support"[47] is unavailing.

117. Indeed, China's approach is consistent with the need to use constituent data and methodology for the calculation of both *Base* (Total) AMS and *Current* (Total) AMS. China calculated Base AMS using annual 1996-1998 external reference prices. It continues to calculate *Current* AMS using FERPs that reflect the average of those *same* external reference prices. This ensures consistency as China's FERPs are *fixed* and serve as external reference prices situated in the 1996-1998 base period.

b. The appropriate applied administered prices

118. The dictionary meaning of an "administered price" refers to a price "determined not by market forces but by administrative action".[48] The dictionary meaning of "applied" includes "brought to bear, made effective, acting at a point or place".[49] Thus, the AAP refers to the price, as set or established by a government, at which a Member effectively provides market price support for the producers of a basic agricultural product. Similarly, the United States observed that an AAP must be "known and discernible", and that it is a "price set or established by a government and …, as such, *distinguishable from a prevailing market price*".[50]

119. The requirement for a comparison between the AAP and the FERP means that "both the FERP and the AAP must be calculated at an equivalent stage of processing or converted accordingly".[51] As paragraphs 8 and 9 of Annex 3 require the FERP to be *fixed* − limiting permissible adjustment to those for quality differences − any adjustment to make the required price/product comparison must be made to the AAP. Thus, the United States errs in adjusting the FERP. Instead, as China has demonstrated that relevant adjustments must be made to the AAP and the amount of eligible production. China addresses the Parties' debate regarding the appropriate conversion factor in the context of identifying the basic agricultural product, below.

c. The appropriate methodology for determining eligible production

120. Under paragraph 8 of Annex 3, calculating AMS from market price support requires that the difference between the FERP and the AAP be multiplied by the quantity of eligible production. In the case of China's market price support for wheat and rice, the methodology to determine that amount is included as a constituent methodology in its Supporting Tables. Specifically, in calculating Base AMS for wheat and rice, China determined "eligible production" as the "amount purchased".

[47] *See* United States, response to Panel Question 79, para. 136.

[48] Oxford English Dictionary, OED Online, "administered, adj.", available at: http://www.oed.com/view/Entry/2532? (last viewed 26 October 2017), (Exhibit CHN-60).

[49] Oxford English Dictionary, OED Online, "applied, adj.", available at: http://www.oed.com/view/Entry/9713? (last viewed 26 October 2017), (Exhibit CHN-61).

[50] United States, first written submission, para. 97 (emphasis added).

[51] Panel Report, *Korea − Beef*, para. 828.

121. By way of background, Rev.3 records the "amount purchased" methodology as having been used for both market price support measures that China maintained during the base period for wheat and rice. Specifically, it explains that "*eligible production* for State Procurement Price" refers to "*the amount purchased* by state-owned enterprises from farmers at state procurement price for the food security purpose", and that "*eligible production* for Protective Price" refers to "*the amount purchased* by state-owned enterprises from farmers at protective price in order to protect farmer's income".[52] Indeed, each of the draft Schedules China prepared during the five-year negotiating period from 1997 to 2001 consistently used this methodology for the determination of the amount of eligible production. Throughout the 14 working party meetings and numerous informal consultations, there is no record of any WTO Member disputing this methodology. Instead, the use of purchased amounts to determine eligible production is part of the custom-made package that China and all Members agreed to as part of China's "terms of accession".

122. Contrary to the erroneous U.S. argument, China's methodology for the determination of "eligible production" is not only of historical interest since it was applied to the measures that existed during the 1996-1998 base period. Instead, it remains relevant as a constituent methodology under Articles 1(a)(ii) and 1(h)(ii) of the *Agreement on Agriculture* for the calculation of China's Current AMS and Current Total AMS from market price support for wheat and rice. Moreover, and contrary to the U.S. assertions, it is a constituent *methodology* because it sets out a method for the determination of eligible production that applies consistently across the two different market price support measures that China maintained at the time for wheat and rice. Thus, and contrary to the U.S. assertions, it was not tied to, and applicable for, only those specific measures.

123. The U.S. error in concluding that China's constituent methodology in Rev.3 may be ignored results in the U.S. reliance on solely the dictionary definition of the term "eligible". For that, the United States points to the findings of Appellate Body in *Korea − Beef*, arguing on that basis that "eligible" refers to the total amount of production in the geographic area where a market price support measure operates.

124. The United States errs. Exclusive reliance on an undefined term in Annex 3 could only be warranted in situations in which there is no relevant constituent data and methodology for the product at issue. That was precisely the situation in *Korea − Beef*, where Korea's Schedule did not contain relevant constituent data and methodology for beef. By contrast, market price support for wheat and rice was included in China's calculation of its Base Total AMS, and there are relevant constituent data and methodology. Indeed, unlike the situation in *Korea − Beef*, the constituent data and methodology incorporated in China's Supporting Tables contains a specific methodology for the determination of the amount of eligible production for the products at issue.

125. In these circumstances, the Panel must consider the text in paragraph 8 and China's constituent methodology, relevant context and the object and purpose of the treaty. Adopting this approach, WTO panels and the Appellate Body consistently look *beyond* a few words considered in isolation in one provision, and consider relevant context and the object and purpose of the treaty to arrive at a meaning that may qualify or depart from the literal meaning of those few words used, when considered alone.

126. Indeed, unlike the United States' interpretative approach (which is based solely on the text of paragraph 8 and ignores all other elements of the interpretative exercise), China's interpretation is arrived at by appropriately considering, in a holistic and harmonious manner, all elements of the interpretive exercise under Article 31 of the *Vienna Convention − i.e.*, all applicable text, the context and the object and purpose of the *Agreement on Agriculture*.

127. To begin, paragraph 8 refers to "the quantity of production eligible to receive the applied administered price". As the Appellate Body held in *Korea − Beef*, the dictionary meaning of "eligible" is "fit or entitled to be chosen".[53] To recall, in that dispute, the Appellate Body focused its interpretation on the dictionary meaning of the term "eligible", because Korea had no constituent data and methodology for beef. Thus, where there is no further relevant text or context − and in particular in the absence of relevant constituent data and methodology − "eligible" production may be determined based on production that is "fit or entitled to be chosen". It is against that legal

[52] WT/ACC/CHN/38/Rev.3, note 19.
[53] Appellate Body Report, *Korea − Beef*, para. 122.

standard then that the specific facts surrounding the measure at issue must be assessed.

128. Thus, the United States misunderstands the Appellate Body in *Korea – Beef*. Contrary to the U.S. assertions, the Appellate Body did not find that, where a Member's market price support measures do not declare any quantity of production as "eligible" to receive the applied administered price, the default "interpretation" requires use of "total production" as "eligible production", when calculating market price support under paragraph 8 of Annex 3. Instead, the legal standard in the absence of any relevant constituent data and methodology continues to be production that is "fit or entitled to be chosen".

129. In the circumstances of this dispute, the Panel must also take into account China's constituent methodology in Rev.3, determining the amount of "eligible production" as "the amount purchased". China has established that, contrary to the U.S. position, a holistic and harmonious interpretation of (i) paragraph 8 of Annex 3 and (ii) the constituent data and methodology in Rev.3 is possible. Indeed, paragraph 8 does not prescribe in detail how "eligible production" must be identified, and does not specify a singular methodology for doing so.

130. China's interpretation that eligible production for its market price support for wheat and rice must be determined based on "the amount purchased" flows, in particular, from the context and object and purpose of the *Agreement on Agriculture*, which require consistency in the calculation of Base (Total) AMS and Current (Total) AMS – *i.e.*, a proper apples-to-apples comparison in assessing compliance with China's domestic support reduction commitments. Indeed, and contrary to the U.S. assertion, China's interpretation of "eligible production" ensures that China is held to the domestic support reduction commitments that it agreed with the Membership, and recorded in its Accession Protocol.

131. In short, and as China has explained in detail, considering all the elements of the interpretative exercise – *i.e.*, the texts and context of Articles 1(a) and 1(h), as well as paragraphs 5 and 8 of Annex 3, and, China's constituent methodology in Rev.3, and in light of their context and the object and purpose of the *Agreement on Agriculture* – the proper interpretation of the methodology for the determination of the amount of "eligible production" for China's market price support for wheat and rice is "amount purchased". Thus, when calculating AMS from China's market price support for wheat and rice, it is necessary to apply a methodology for determining eligible production based on the "amount purchased".

132. The United States also sought to support its arguments for a methodology to determine "eligible production" as "total production" based on alleged market effects of market price support measures. Yet, the United States finally recognized that the *Agreement on Agriculture* does not "seek[] to counter any negative effects of the provision of support".[54] This confirms China's position that the calculation of AMS from market price support is not linked to, and does not measure, the "effects" of such measures. Indeed, reading an "effects" test into the rules on the calculation of a Member's AMS would be inconsistent with the *Agreement's* definition of AMS as a measure of a Member's "annual level of support, *expressed in monetary terms*" under Article 1(a).

d. The relevant basic agricultural products

133. For each calculation of Current AMS, it is necessary to identify the relevant basic agricultural product, for which that calculation must be undertaken. The United States argues that, pursuant to paragraph 7 of Annex 3, AMS must be calculated at the "point of first sale" of an *agricultural commodity* – *i.e.*, for the product that leaves the farm.

134. Yet, as China has explained, Article 1(b) and paragraph 7 of Annex 3 require AMS to be calculated for "the *product as close as practicable* to the point of first sale *as specified in a Member's Schedule and in the related supporting material*".[55] Thus, as the United States accepts elsewhere, Article 1(b) of the *Agreement on Agriculture* defines the basic agricultural product, for which AMS is to be calculated, by reference to a Member's Supporting Tables, as included in its Schedule. There is no requirement that the "basic agricultural product" "specified" in a Member's Supporting Tables is the product at the beginning of the processing chain, as sold at the point of first sale. Rather, that product is simply as specified in a Member's Supporting Tables, and may be processed. It is that

[54] United States, second written submission, para. 25.
[55] Emphasis added.

product, for which data need to be sourced as close as practicable to the point of its first sale.

135. In these proceedings, issues regarding the identification of the relevant basic agricultural product have arisen principally in the context of rice. The United States erroneously calculated Current AMS for each of *paddy* indica rice and *paddy* japonica rice. By contrast, China's Supporting Tables in Rev.3 identify the basic agricultural rice products as *milled* indica rice and *milled* japonica rice. Specifically, for both types of rice, China's FERPs in Rev.3 are expressed in terms of HS10063000 – *i.e.*, "semi-milled or wholly milled rice, whether or not polished or glazed". Similarly, China's Base AMS in Supporting Table DS:5 was calculated for *milled* indica rice and *milled* japonica rice. Pursuant to Articles 1(b) and paragraph 7 of Annex 3, China's Current AMS must, therefore, similarly be calculated on the basis of *milled* indica rice and *milled* japonica rice.

136. As noted, where certain variables for the calculation of AMS from market price support are reported for a form of processing other than that of the basic agricultural product, these variables need to be converted to represent the basic agricultural product. Relevant conversion rates may be included in a Member's constituent data and methodology in their Supporting Tables.

137. As relevant to these proceedings, China's AAPs and amounts of eligible production are reported in terms of *paddy* rice. To convert these price and volume data into *milled* rice equivalents, China's Supporting Tables in Rev.3 used a single 70% conversion rate, which is derived from volume-based data. As constituent data, the Panel should apply this same conversion rate. This conversion rate is, moreover, reasonable, appropriate, and consistent with an objective assessment of the facts. It reflects a milling rate applicable between paddy rice and milled rice and is acknowledged and accepted, including by the OECD and the USDA. Use of a volume-based conversion rate is self-evidently reasonable and appropriate for a volume-based conversion, such as for the amount of eligible production. Use of that same conversion rate is also reasonable and appropriate for the price-based conversion for the AAP, where precise data is unavailable, as the United States accepts. Indeed, the volume/quantity effect of further processing rice is the predominant factor affecting the price of rice at different levels of processing.

138. By contrast, the United States uses a 60% price conversion rate for its conversion of FERPs into *paddy* rice data. It derived this conversion rate from a ratio between (i) the retail price for *paddy* rice and (ii) the price of *polished* rice in the Chinese retail market. Using polished rice, the United States selected the most processed product, with the highest price, among the varieties of rice falling under HS10063000, thereby distorting the applicable conversion rate. The U.S. proposed conversion rate is further inappropriate, because it adjusts not only the level of processing, but also the level of trade of the data concerned.

139. In sum, the Panel should use the 70% conversion rate included in China's constituent data and methodology to convert data on the AAP and the eligible production, and to ensure that both data are expressed at the equivalent level of processing as the rice FERPs in Rev.3.

e. China's de minimis level

140. Under paragraph 235 of China's Working Party Report, which is incorporated in China's Accession Protocol, China is entitled to a *de minimis* level of 8.5% of the total value of production for each basic agricultural product, instead of the 10% that apply for other developing Members under Article 6.4 of the *Agreement on Agriculture*. Thus, as long as China's product-specific domestic support for a basic agricultural product is equivalent to, or less than, 8.5% of the total value of production of that product, China is not required to include such support in its Current Total AMS under Articles 3.2 and 6.3 of the *Agreement*, and complies with its domestic support reduction commitments, including under Article 7.2(b).

f. Total value of production of a basic agricultural product

141. China's *de minimis* assessment requires calculating AMS as a percentage of the total value of production for the basis agricultural product at issue. As noted above, pursuant to Article 1(b), the relevant basic agricultural product is identified in a Member's Supporting Tables. Paragraph 7 of Annex 3 further provides that "AMS shall be calculated as close as practicable to the point of first sale of the basic agricultural product concerned". Similarly, the total value of production of the basic agricultural product must be calculated "as close as practicable to the point of first sale" of the

product concerned. Thus, the total value of production for wheat and rice should be calculated by multiplying the total amount of wheat, *milled* indica rice and *milled* japonica rice produced in China with the producer price for these products, determined as the weighted average of market prices and government administered prices. This approach is consistent with the manner in which total value of production is determined in Rev.3.

3. In case the Panel finds a conflict, the Accession Protocol, including Rev.3, prevails over the *Agreement on Agriculture*

142. If the Panel were to disagree that a harmonious interpretation of Annex 3 and China's constituent data and methodology in Rev.3 is possible, and were to find a conflict for any of the data or methodologies to be used, China has explained that its constituent data and methodology in Rev.3 prevail to the extent of that conflict. To recall, China's constituent data and methodology in Rev.3 are part of its Accession Protocol and, thus, the Marrakesh Agreement. Accordingly, when resolving a conflict between China's constituent data and methodology in Rev.3 and the provisions of the *Agreement on Agriculture*, the applicable conflict rule is that in Article XVI:3 of the Marrakesh Agreement. Article XVI:3 provides as follows: "In the event of a conflict between a provision of this Agreement [*i.e.*, the Marrakesh Agreement] and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict". Accordingly, in the event of a conflict, Rev.3 would prevail over the *Agreement on Agriculture*, to the extent of that conflict.

143. The United States recognizes that application of this conflict rule means that precedence must be given to the Accession Protocol. Indeed, it properly relies on the same mechanism to support its argument that the applicable *de minimis* support level for the calculation of China's Current Total AMS is 8.5%, rather than the 10% otherwise applicable under Article 6.4(b) of the *Agreement on Agriculture*. According to the United States, this result flows from paragraph 235 of China's Working Party Report, as included in China's Accession Protocol, which prevails to the extent of its conflict with Article 6.4(b).

144. China further rebutted all three alleged conflict rules that the United States considers apply so as to displace China's constituent data and methodology in Rev.3. First, China explained that the alleged hierarchy in Article 1(a)(ii) of the *Agreement on Agriculture* does not exist, and that, in any event, Article 1(a)(ii) does not constitute a conflict rule. Second, China explained that Article 21.1 of the *Agreement on Agriculture* is applicable only to conflicts between the GATT 1994 and the *Agreement on Agriculture*. It does not apply in case of conflict between a "term of accession" and the provisions of the *Agreement on Agriculture*. For later-acceded Members, Article XVI:3 of the Marrakesh Agreement, as a higher level conflict rule, takes priority over any other conflict rule in the covered agreements. Indeed, to the extent that a conflict rule in a Multilateral Trade Agreement, such as Article 21.1, were to suggest a different conflict resolution from that dictated by Article XVI:3, that rule would itself be in conflict with Article XVI:3, which would prevail. Third and finally, China explained that, likewise, the case law from *EC − Sugar* regarding conflicts between a Schedule and a covered agreement does not apply in case of a conflict between a "term of accession" and the provisions of the *Agreement on Agriculture*.

4. Conclusion

145. In sum, either through a holistic and harmonious interpretation, or on the basis of the applicable conflict rule, the Panel must recognize the role of China's constituent data and methodology, and use them, as identified above, in the calculation of China's Current (Total) AMS for wheat and rice.

C. China's AMS calculation for market price support for wheat and rice

1. China's domestic support for wheat for 2012-2016 is within its 8.5 percent *de minimis* commitment level

146. Having identified the legal errors in the U.S. approach to calculating AMS from market price support for wheat, provided under the MPP for wheat, China then set out the accurate calculations. Specifically, in its AMS calculations, China used the appropriate *1996-1998* FERP for wheat, as included in Rev.3, rather than the flawed FERP used by the United States, based on 1986-1988 data.

Moreover, like the United States, China sourced the AAP for wheat from the annual wheat MPP measures for each of the years 2012-2016. Finally, and again consistent with Rev.3, China used as the amount of eligible production the amount of wheat that was actually purchased under the MPP program in each of years 2012-2016, instead of the, legally incorrect, total amount of wheat production in the MPP provinces, as used by the United States.

147. China demonstrated that its AMS from market price support for wheat in each of these years was less than 8.5% of the total value of wheat production in China. Specifically, China's product-specific AMS from market price support for wheat, as a percentage of the total value of production in 2012, 2013, 2014, 2015, and 2016, is 3.02%, 1.54%, 5.51%, 4.54%, and 6.56, respectively.[56] Each of these values is below the *de minimis* level of 8.5% of the total value of China's wheat production. Thus, China's market price support for wheat is consistent with its domestic support reduction commitments under the *Agreement on Agriculture*.

2. China's domestic support for indica rice and japonica rice for 2012-2016 is within its 8.5 percent *de minimis* commitment level

148. As explained above, the United States advanced an incorrect interpretative approach to the identification of many of the relevant elements of the calculation of AMS from market price support for indica rice and japonica rice. Accordingly, the United States' AMS calculations are seriously flawed, reflecting the flawed legal bases on which they are built.

149. To begin, the United States calculated AMS for the wrong basic agricultural rice product – *i.e.*, for *paddy* indica rice and *paddy* japonica rice. Yet, a proper interpretation of Articles 1(b) and paragraph 7 of Annex 3, along with Rev.3, compels the conclusion that, for China, AMS for rice must be calculated for each of *milled* indica rice and *milled* japonica rice. Accordingly, the Panel should rely on China's AMS calculations for these products.

150. Correcting for further U.S. errors, China calculated AMS using the appropriate *1996-1998* FERPs for *milled* indica rice and *milled* japonica rice, as included in Rev.3. These FERPs replace the flawed FERPs used by the United States, which are, erroneously, converted into *paddy* indica rice and *paddy* japonica rice, and based on *1986-1988* data, rather than data from China's 1996-1998 base period. Like the United States, China sourced the AAP for paddy indica rice and paddy japonica rice from the annual MPP indica rice and japonica rice measures for each of the years 2012-2016. However, China converted these values into *milled* indica rice and *milled* japonica rice values, using the appropriate 70% conversion rate. Finally, and consistent with Rev.3, China used as the amount of eligible production the amount of indica rice and japonica rice that was actually purchased under the MPP programs in each of years 2012-2016, instead of the total amount of indica rice and japonica rice production in the MPP provinces, as used by the United States. Again, China converted the amount of *paddy* indica rice and *paddy* japonica rice purchased into *milled* indica rice and japonica rice equivalents, using the appropriate 70% conversion rate.

151. On the basis of the appropriate calculations, China's product-specific AMS from market price support for *milled indica rice*, as a percentage of the total value of production in 2012, 2013, 2014, 2015, and 2016, was 0.02%, 5.52%, 4.08%, 3.91%, and 3.00%, respectively.[57] Moreover, China's product-specific AMS from market price support for *milled japonica rice*, as a percentage of the total value of production in 2012, 2013, 2014, 2015, and 2016, was 0.99%, 4.74%, 6.95%, 7.84% and 8.26, respectively.[58] Each of these values is below the *de minimis* level of 8.5% of the total value of China's milled indica rice and milled japonica rice production. Thus, China's market price support for indica rice and japonica rice is consistent with its domestic support reduction commitments under the *Agreement on Agriculture*.

152. In the alternative, China also calculated AMS from market price support for indica rice and japonica rice combined. China's product-specific AMS from market price support for rice, as a percentage of the total value of rice production in 2012, 2013, 2014, 2015, and 2016 is 0.36%, 4.87%, 4.82%, 5.00%, and 4.55%, respectively.[59] Each of these values is below the *de minimis* level of 8.5% of the total value of China's rice production. Again, China's market price support for

[56] China, first written submission, para. 273 (Table 22) and Exhibit CHN-88 (Table 22).
[57] China, first written submission, para. 261 (Table 17) and Exhibit CHN-88 (Table 17).
[58] China, first written submission, para. 261 (Table 18) and Exhibit CHN-88 (Table 18).
[59] China, first written submission, para. 264 (Table 19) and Exhibit CHN-88 (Table 19).

rice is consistent with its domestic support reduction commitments under the *Agreement on Agriculture*.

VI. CONCLUSION AND REQUEST FOR RELIEF

153. For the summarized above, and set out in detail in its submissions, China requests the Panel to find as follows:

- For wheat, indica rice and japonica rice, China requests the Panel to find that the United States has failed to establish that China provided domestic support in excess of its *de minimis* commitment level of 8.5% of the value of production, and therefore has failed to establish that China acted inconsistently with Articles 3.2, 6.3, and 7.2(b) of the *Agreement on Agriculture*.

- For corn, since the TPRP expired in 2016, and thus before panel establishment, China requests that the Panel find that this measure falls outside the Panel's terms of reference.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF AUSTRALIA

I. INTRODUCTION

1. Australia's submissions in this dispute have focused on the relationship between a Member's Schedule and obligations in WTO Agreements; as well as the legal interpretation of key provisions in the Agreement on Agriculture, including the methodology used to calculate market price support, the meaning of "production eligible" in Annex 3, and the reference period for the "fixed external reference price".

2. In Australia's view, the Agreement on Agriculture provides clear and precise direction for calculating market price support, including the reference period to be used for a fixed external reference price. In *Korea – Beef*,[1] the WTO Appellate Body has also provided clear and unambiguous guidance on what is meant by the term "production eligible" in Annex 3.

3. As relevant context for interpreting the provisions at issue, it is important to recall that the Agreement on Agriculture provides "a framework for the long-term reform of agricultural trade and domestic policies, with the aim of leading to fairer competition and a less distorted sector".[2] The Agreement not only places *rules* and *limitations* on domestic agricultural support by Members, it also aspires to *reduce* domestic support. The Agreement on Agriculture recognises Members' long term objective of "provid[ing] for substantive progressive *reductions* in agricultural support"[3] and contains commitments by Members to continue reforms to *reduce* support.[4]

4. Accordingly, Australia is of the view that any outcome in this dispute that would effectively allow Members, including China, to *increase* levels of domestic support would be in direct conflict with the object and purpose of the Agreement on Agriculture.

II. Relationship between a Member's Schedule and obligations in WTO Agreements

5. Much of China's legal argument in this dispute centres on the status of WT/ACC/CHN/38/Rev.3 (hereafter referred to as 'Rev. 3') a document included as a reference under the heading "Relevant Supporting Tables and document" in Part IV of China's Schedule. China argues that the document should be considered treaty level text.

6. In Australia's view, Rev. 3 is not in itself a Schedule, it is merely a reference in a Schedule which provides an illustration of domestic support in China at the time of its accession.

7. Even if the Panel were to take a different view on the status of Rev.3, Australia observes that Members cannot use Schedules to unilaterally modify their obligations under the WTO Agreements.[5] In particular, information in a document referenced in one Member's Schedule cannot be used to override legal obligations in the Agreement on Agriculture.

III. Calculating market price support

8. In Australia's view, the Agreement on Agriculture provides clear and unequivocal guidance for calculating market price support. It provides that AMS should be "calculated *in accordance with* the provisions of Annex 3" and "*taking into account* the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of a Member's Schedule".

9. In this dispute, the US has put forward its estimations of China's market price support using the provisions of Annex 3, whereas China argues that the "constituent data and methodology" in Rev. 3 is the more relevant authority. While both of these sources are *valid* for calculating market

[1] Appellate Body Report, *Korea – Various Measures on Beef*.
[2] WTO, "Agriculture gateway" available online at https://www.wto.org/english/tratop_e/agric_e/agric_e.htm, accessed on 19 January 2018.
[3] Preamble, Agreement on Agriculture.
[4] Article 20, Agreement on Agriculture.
[5] Appellate Body Report, *EC – Export Subsidies on Sugar,* paras. 212-213 and 220.

price support, the Agreement on Agriculture makes clear that their status under the WTO Agreement is not *equal*.

10. The phrase "in accordance with" indicates that the calculation of domestic support *must comply with* the provisions of Annex 3. By contrast, the phrase "taking into account" requires that *consideration be given* to a Member's Schedule, without specifying the weight such consideration should be accorded. This interpretation has been affirmed by the Appellate Body in *Korea − Various Measures on Beef*.[6]

11. In Australia's view, two points are therefore clear: (i) reference to Annex 3 is mandatory; and (ii) the relevance of a Member's Schedule is of a lesser nature and, at the very least, subsidiary to Annex 3. As such, there is no direct obligation on the Panel to *accept* or *apply* the constituent data and methodology in China's Schedule. The Panel is only required to "*consider*" it. However, in any event, the requirements of Annex 3 override any methodology contained in a Member's Schedule (or contained in a reference within a Member's Schedule).

IV. The meaning of "production eligible"

12. In Australia's view, the Appellate Body's findings in *Korea − Beef* make clear that, absent exceptional circumstances, "production eligible" is all production *"fit or entitled"* to be purchased and will generally equate to total production.[7]

13. Accordingly, in applying the text of the WTO Agreement to the facts in this dispute, Australia considers that the relevant values to be used for "eligible production" in the calculation for market price support should be the value of total production of each given commodity in the identified provinces.

14. China submits that this definition of "production eligible" does not apply and the Panel should instead rely on the definition of "eligible production" in Rev. 3.[8] The Rev. 3 definition limits eligible production to "the amount *purchased* by state-owned enterprises from farmers".

15. China's alternative definition of "eligible production" − which seeks to limit eligible production to the amount *actually purchased* − cannot be accepted for three reasons.

16. First, the definition does not reflect the economic impact of market price support programs, which provides producers with the "assurance that their products can be marketed at least at the support price".[9] Given this assurance, the price distorting effect of market price support takes place the moment a product is *eligible* to be purchased by the government.

17. Second, the definition is contrary to the terms of Annex 3 of the Agreement on Agriculture, as interpreted and applied by the Appellate Body in *Korea −Beef*.[10] Since a Member cannot use its Schedule to reduce or modify commitments under WTO Agreements, China's proposed alternative definition is not legally valid − even if Rev. 3 had the status of a Schedule.

18. Third, limiting eligible production to the actual amount purchased would permit Members to underreport the level of domestic support they provide and, as a consequence, effectively allow Members to *increase* such support. Any outcome that would lead to increased levels of domestic support would undermine the object and purpose of the Agreement on Agriculture to not only *limit* domestic support but also to *reduce* it.

V. The reference period for the "fixed external reference price"

[6] Appellate Body Report, *Korea − Various Measures on Beef*, para. 111.

[7] Appellate Body Report, *Korea − Various Measures on Beef*, para. 120. The Panel in *Korea − Various Measures on Beef* had earlier specified that the actual amount purchased by a government is not relevant, nor are the government outlays involved: Panel Report *Korea − Various Measures on Beef*, para. 827.

[8] China's first written submission, paras. 196-203.

[9] Panel Report, *Korea − Various Measures on Beef*, para. 827.

[10] Appellate Body Report, *Korea − Various Measures on Beef*, para. 120. The Panel in *Korea − Various Measures on Beef* had earlier specified that the actual amount purchased by a government is not relevant, nor are the government outlays involved: Panel Report *Korea − Various Measures on Beef*, para. 827.

19. The methodology for calculating market price support is set out in paragraph 8 of Annex 3 of the Agreement on Agriculture. One of the figures to be inserted into the formula is the "fixed external reference price".

20. Paragraph 9 of Annex 3 specifies that "the fixed external reference price shall be based on the years 1986 to 1988". The text in the Agreement on Agriculture is mandatory and unambiguous.

21. In this dispute, China asserts that an alternative reference period − namely, the years 1996-1998 − applies in calculating China's market price support. China argues this on the basis that: this is the period used in Rev. 3 (the supporting material referenced in China's Schedule); WTO Members accepted this period as one of the terms of China's accession to the WTO; this approach would be in accordance with a technical note by the WTO Secretariat for acceding Members[11]; and all accessions since the establishment of the WTO in 1995 have used base periods other than 1986-88.

22. In Australia's view, the text of the Agreement is clear. The Agreement on Agriculture specifies that the fixed external reference price *shall* be based on the years 1986 to 1988; and neither China's Accession Protocol nor its Working Party Report specifies that an alternative reference period to 1986-88 must be used. While the documents and practice put forward by China in support of an alternative reference period highlight key *policy* considerations, they do not constitute a *legal* basis on which to apply a later reference period.

23. In Australia's view, if WTO Members determine that a new reference period should apply for acceding Members this should be provided for explicitly − either through amendment of the Agreement on Agriculture or express provision in relevant Accession Protocols.

[11] (WT/ACC/4, pp3-4) which provides that "in order to calculate a product-specific AMS for these products, relevant tables from Supporting Tables DS:5 and DS:7 should be used" and that an "external reference price" is to be calculated from data "normally for each of the last three years"

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

I. CHINA'S CLAIM REGARDING THE TPRP CORN MEASURE (ARTICLES 6.2 AND 7.1 OF THE DSU)

1. China argues that the Temporary Purchase and Reserve Policy ("TPRP") for corn, which was applied between 2012 and 2015, does not constitute a "measure at issue" under Article 6.2 of the DSU because the TPRP had been terminated by the time the United States requested the establishment of the Panel, and would thus fall outside the Panel's terms of reference under Article 7.1 of the DSU[1].

2. Brazil understands, however, that if a measure no longer in effect is still relevant to the dispute, the Panel should exercise caution before deciding to exclude it from its terms of reference. An excessively restrictive interpretation of the measures considered to be within the terms of reference could undermine the ability of the dispute settlement system to bring about a positive solution to the dispute, in conformity with Article 3.7 of the DSU. Brazil notes that, in the present case, the parties do not seem to dispute that the TPRP was in force between 2012 and 2015 and that such market price support subsidy was used to calculate China's Current Total AMS for those years. Thus, Brazil understands that the TPRP should be considered by the Panel for a proper assessment of this case.

II. CALCULATION METHODOLOGY ON CHINA'S DOMESTIC PRICE SUPPORT MEASURES FOR WHEAT, CORN AND RICE

3. In Brazil's view, the Panel in the present dispute is challenged to set a proper balance regarding the relation between Annex 3 and a Member's "data and methodology", on the basis of Article 1(a)(ii) of the Agreement on Agriculture (AoA). Brazil considers that the analysis by the Panel concerning the calculation of China's market price support should focus separately on the concepts of FERP and eligible production.

4. With regard to the FERP, Brazil recalls China's argument about the principle set out in WTO Document WT/ACC/4 (a WTO Secretariat note providing guidance for acceding Members), which provides that "[i]n order to calculate a product-specific AMS, an 'external reference price' is to be calculated from data 'normally for each of the last three years'"[2]. As China accession to the WTO occurred in 2001, the base period of 1996-1998 instead of 1986-1988, as disposed in paragraph 9 of Annex 3 of the AoA, could be considered acceptable. Besides, utilizing the most recent data available for the calculation of the FERP consists of a common practice among Members that have joined the WTO after 1995.

5. About the calculation of eligible production, China claims its constituent data and methodology set out in its schedule should be "taken into account". In accordance with that document, China's eligible production for wheat and rice should be "the amount purchased" by state owned enterprises. This proposed methodology, however, conflicts with the established definition of "eligible production", which comprises the whole set of production that could potentially be purchased by the government as defined by the Member's municipal rules. In that sense, the Appellate Body found in *Korea – Beef* that "production eligible to receive the applied administered price" in paragraph 8 of Annex 3 has a different meaning in ordinary usage than "production actually purchased"[3].

6. Brazil notes that any disposition on a Member's data and methodology regarding eligible production cannot modify its obligations under the AoA, in line with the findings by the Appellate

[1] China's First Written Submission, para. 323.
[2] China's First Written Submission, para. 48.
[3] Appellate Body Report, *Korea – Various Measures on Beef*, para. 120.

Body in *EC – Export Subsidies on Sugar*: "we find no provision under the AoA that authorizes Members to depart, in their Schedules, from their obligations under that Agreement"[4].

7. In conclusion, Brazil views that, in order to maintain a harmonious interpretation of the covered agreements, the concept of "eligible production" cannot have different meanings depending on the Members' Schedules. A Member could, however, insert elements of clarification in its data and methodology regarding its understanding of "eligible production" only to the extent it is commensurate with the established definition of said term.

[4] Appellate Body Report, *EC – Export Subsidies on Sugar*, para. 220.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. INTRODUCTION

1. Canada presents its views on three issues in this case. First, it is an accepted custom that acceding Members use more recent reference years than 1986 to 1988. Second, for the definition of eligible production, the text of the Agreement on Agriculture must take priority over the supporting tables where there is any contradiction. Third, the proper methodology for determining eligible production for market price support is to use the amount "fit or entitled" to be purchased, which can be the total production of the product if no limitations are imposed.

II. ACCEDING MEMBERS MAY USE A MORE RECENT REFERENCE PERIOD FOR THE FIXED EXTERNAL REFERENCE PRICE

2. While paragraph 9 of Annex 3 of the Agreement on Agriculture refers to the years 1986 to 1988 for the reference period, this does not prevent Members acceding to the WTO under Article XII of the Marrakesh Agreement from using a more recent base period. It is fair and reasonable to use more recent and up-to-date information for acceding countries, as data going back to 1986 may not be available, and acceding countries may not have been formally independent or even existed at that time. Members have consistently and uniformly applied the practice of Article XII acceding Members using the three most recent years in reporting the fixed external reference price. As such, this constitutes an international custom in the context of Paragraph 9 of Annex 3.

3. Article 3.2 of the DSU requires the DSB to resolve disputes in accordance with the customary rules of interpretation of public international law. The Appellate Body has on numerous occasions recognized the relevance and application of customary international law in WTO dispute settlement[1].

4. In this instance, the WTO Membership has applied a consistent practice over the course of thirty-six post-Uruguay Round accessions. Every acceding Member that reported data in its constituent data and methodology used a more recent base period with respect to Supporting Table DS:5. In all of the supporting tables of all acceding Members, the only acceding Member that ever used a 1986 to 1988 base period in its supporting tables was Bulgaria, which is explained by the fact that it acceded so soon after entry into force of the WTO Agreement as the second newly acceding Member. However, even Bulgaria provided data up to 1990 where it was available for one table. The first acceding Member, Ecuador, did not report any support programs and therefore had no data in supporting tables.

5. Thus, in every instance of accession following the conclusion of the Uruguay Round over more than 20 years, there has been a consistent and uniform practice among Members. All Members were aware of this practice and consented to it, or at the very least acquiesced to this practice. During the thirty-six accession processes, no Member has objected to the use of the three most recent reference years.

6. Moreover, the recognition by the Membership that this practice was required under the Agreement on Agriculture is demonstrated by Members' consistent use of the Technical Note by the *Secretariat on Information to be Provided on Domestic Support and Export Subsidies in Agriculture* in accessions[2]. Members have consistently referred to this document during accession processes and the requirement to use the three most recent years of available data and concluded thirty-six accessions with no stated objection to the use of those reference years. The uniform, consistent use of the three most recent years for the relevant reference period following the conclusion of the

[1] See e.g. Appellate Body reports, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 301-316; *EC – Hormones*, paras. 120-125; *US – Line Pipe*, para. 259.

[2] Information to be provided on Domestic Support and Export Subsidies in Agriculture – Technical Note by the Secretariat, WT/ACC/4.

Uruguay Round shows that Members considered this practice to be consistent with the Agreement on Agriculture.

7. During the Uruguay Round itself, the years 1986 to 1988 were chosen as three recent representative years in order for the fixed external reference price to reflect the actual extent of support provided as accurately as possible[3]. The continued use of the three most recent years by acceding Members represents the application of that same principle.

8. This consistent and uniform practice of every WTO Member in every accession process, accompanied with the *opinio juris* of Members that this practice was consistent with the Agreement on Agriculture, shows that Members have adopted a customary rule of using the three most recent years for the reference period for acceding Members. This custom applies only with respect to Members acceding under Article XII of the Marrakesh Agreement. Paragraph 9 of Annex 3 remains applicable to original Members under Article XI of the Marrakesh Agreement.

III. THE TEXT OF THE AGREEMENT ON ELIGIBLE PRODUCTION TAKES PRIORITY OVER CHINA'S SUPPORTING TABLES

9. There is an apparent contradiction between the supporting tables and the text of Annex 3 in respect of China's use of production actually purchased in China's supporting tables rather than the quantity of production eligible to receive the applied administered price as required under paragraph 8 of Annex 3. However, in this case there is no consistent, uniform practice that implies that all WTO Members intended to allow for China to employ a methodology for calculating eligible production in a manner different from Annex 3 and different from the requirements for other WTO Members. As such, there is no customary norm with respect to eligible production that could modify the obligation under the Agreement on Agriculture.

10. The text of Article 1(a) of the Agreement on Agriculture sets out the meaning of Aggregate Measurement of Support or AMS. Article 1(a)(ii) specifies that support shall be calculated in accordance with Annex 3, which is an integral part of the Agreement. It also provides that the constituent data and methodology incorporated by reference into the Member's schedule must be taken into account when calculating AMS. In defining Total AMS, Article 1(h)(ii) also makes reference to the constituent data and methodology, stating that Total AMS shall be calculated "in accordance with" the Agreement on Agriculture and the constituent data and methodology.

11. The Appellate Body in *Korea − Various Measures on Beef* examined these provisions and found that the relationship between Annex 3 and the constituent data and methodology was one of an "apparent hierarchy"[4]. It found that the provisions of Annex 3 take priority over the constituent data and methodology used in a Member's supporting tables[5].

12. In Canada's view, this approach is reasonable. Annex 3 of the Agreement on Agriculture provides an explicit requirement for how market price support is to be calculated. As per Article 21.2, Annex 3 is an integral part of the Agreement on Agriculture. The supporting material incorporated by reference in Part IV of a Member's Schedule, however, is not an integral part of the Agreement.

13. A Member cannot use its Schedule to reduce its commitments nor to depart from its obligations under the Agreement[6]. Logically, this principle also applies to supporting tables incorporated by reference into a Member's Schedule. China, like all other WTO members, must abide by the terms of the treaty, including paragraph 8 of Annex 3. Upon its accession to the WTO, China agreed to comply with the entire WTO Agreement, including the Agreement on Agriculture. China cannot reduce its obligations or commitments under the Agreement on Agriculture or any other agreement through the supporting tables incorporated by reference into its Schedule. As the Appellate Body found in *EC − Export Subsidies on Sugar*, "we find no provision under the Agreement on Agriculture that authorizes Members to depart, in their Schedules, from their obligations under that Agreement."[7] Thus, China cannot justify departing from its obligations under Annex 3 of the

[3] See e.g. GATT documents MTN.GNG/NG5/TG/W/12, para. 11 (Exhibit CAN-1); MTN.GNG/NG5/TG/W/15, para. 11 (Exhibit CAN-2); and MTN.GNG/NG5/TG/W/16, para. 4 (Exhibit CAN-3).
[4] Appellate Body Report, *Korea − Various Measures on Beef*, paras. 112-113.
[5] Appellate Body Report, *Korea − Various Measures on Beef*, para. 114.
[6] Appellate Body Report, *EC − Export Subsidies on Sugar*, paras. 217-220.
[7] Appellate Body Report, *EC − Export Subsidies on Sugar*, para. 220.

Agreement on Agriculture on the basis of an endnote to a supporting table incorporated by reference into its Schedule.

14. China's commitment in paragraph 238 of the Working Party Report to provide "further methodological clarification" to its supporting tables ("Rev.3") supports these tables must be of a lower precedence than Annex 3 of the Agreement on Agriculture. A document that is expressly acknowledged as containing methodological issues that require further clarification cannot have the same status as binding treaty text. Paragraph 238 of the Working Party Report notes China's commitment that the issues requiring methodological clarification "would be addressed in the context of China's notification obligations under the Agreement on Agriculture". However, any subsequent unilateral notification made by China on applicable methodology cannot have the power to modify China's treaty obligations. Therefore, contrary to China's argument that Rev.3 must be considered as having equal value to the treaty text[8], the reference to Rev.3 in paragraph 238 of the Working Party Report clearly supports Canada's argument that this should not be the case.

15. Of course, Members are required to take the supporting tables into account, as required by Article 1(a)(ii). However, in the event of a contradiction between the Agreement and the supporting material incorporated by reference in a Member's Schedule, the text of the Agreement must take priority.

IV. ELIGIBLE PRODUCTION MEANS PRODUCTION "FIT OR ENTITLED" TO RECEIVE THE APPLIED ADMINISTERED PRICE

16. The definition of eligible production must be the same for all Members. The provisions of the covered agreements must be interpreted in a coherent and consistent manner, giving meaning to all applicable provisions harmoniously[9]. Having an interpretation that would allow for a different definition of eligible production for China alone would be inconsistent with this principle. Moreover, it would result in an inconsistent application of market price support disciplines.

17. In examining the meaning of eligible production, the Appellate Body in *Korea − Various Measures on Beef* found the following: under paragraph 8 of Annex 3, "production eligible to receive the applied administered price" means "production that is 'fit or entitled' to be purchased rather than production that was actually purchased"[10]. "Production actually purchased may often be less than eligible production"[11].

18. While in *Korea − Various Measures on Beef*, the measure in question applied to a fixed, announced quantity of production that was eligible for purchase, the findings and principles from that case remain applicable in the present dispute. The object and purpose of the Agreement on Agriculture includes the objective of providing for "substantial progressive reductions in agricultural support and protection sustained over an agreed period of time resulting in correcting and preventing restrictions and distortions in world agricultural markets"[12]. The panel in *Korea − Various Measures on Beef* noted specifically that the purpose of disciplining the provision of market price support related to "the effect of a government policy measure on agricultural producers of a basic product rather than the budgetary cost of that measure borne by government"[13].

19. This is because the distortive effect produced by a market price support measure occurs when the applied administered price is announced. The existence of a minimum support price provides economic guarantees to producers, which affects the market. The effect continues to exist as long as producers of the product benefit from the assurance of the minimum support price. As a result, the quantity of production actually purchased may have no relevance to these distortive effects.

20. This is why the reasoning in *Korea − Various Measures on Beef* is applicable to the present dispute. If, as in the facts of *Korea − Various Measures on Beef*, a government limits the quantity of production eligible for purchase at the applied administered price to a fixed quantity, then the distortion of the market for that product will be limited in scope to that quantity. As the Appellate

[8] China's first written submission, paras. 104-158.
[9] Appellate Body Report, *US − Anti-Dumping and Countervailing Duties (China)*, para. 570.
[10] Appellate Body Report, *Korea − Various Measures on Beef*, para. 120.
[11] Ibid.
[12] Agreement on Agriculture, Preambular para. 3.
[13] Panel Report, *Korea − Various Measures on Beef*, para. 827.

Body found, "in establishing its program for future market price support, a government is able to define and limit 'eligible' production"[14]. However, if the government does not set *any* limitations, then the signal to the market is that *all* production is "fit or entitled" to receive the applied administered price. Thus it is reasonable and appropriate in this situation that *all* production should be reported as eligible production.

21. The Appellate Body's interpretation of eligible production, meaning production "fit or entitled" to be purchased, allows for a logical and harmonious application to different factual circumstances of any given market price support program. The facts related to the particular measure establish how eligible production is determined. For example, if there is an announcement that the administered price will be applied only to a given quantity, then that defines the production eligible to receive that price for the purposes of paragraph 8 of Annex 3. As another example, if the measure operates only in certain regions, then the quantity of eligible production may be limited to production in those regions.

22. However, the amount of grain used by farmers for their own consumption is irrelevant to the quantity of production eligible to receive the applied administered price. Farmers consuming their own products are not isolated from the market or from the market price support program. If there are no limitations on the amount of production eligible to receive the applied administered price, then the government has distorted the market in a way that affects all production. If the applied administered price is high enough, a farm household could sell part or all of their production and then buy cheaper alternative foodstuffs. The fact that some production might not have been sold or that some farmers might consume some of their own production is irrelevant to the distortions caused by the market price support program, which is what the Membership negotiated these provisions of the Agreement on Agriculture to discipline.

23. The quantity of production consumed by farmers is thus not independent of the price policy. The quantity of eligible production is about *production*. There are no exceptions in the Agreement on Agriculture for production that is not sold, because all of the production can *potentially* be sold. The text of the Agreement is clear: all production eligible to receive the applied administered price shall be included in the calculation for market price support. All production eligible to receive the applied administered price is covered by the market price support program regardless of how or whether it is sold, and therefore it must be considered in calculating the product-specific AMS.

24. The disciplines in the Agreement on Agriculture seek to reduce and prevent restrictions and distortions in agricultural markets. The legal test is not whether an individual farmer would personally benefit from a market price support program by selling at a higher price. The question is whether the production is affected by the market distortions caused by the market price support program. The Agreement on Agriculture requires that all eligible production be considered in the calculation because the price distortions affect the entire market if no limit is imposed on the amount of production that is eligible to receive the applied administered price.

25. The question in each case is how to determine "the quantity of production eligible to receive the applied administered price". To ensure a harmonious interpretation of the covered agreements vis-à-vis each WTO Member, the core elements of eligible production need to be respected when it is being applied to particular measures, in accordance with the principles elaborated upon in *Korea − Various Measures on Beef*. Namely, the quantity of production must be considered "fit or entitled" to receive the applied administered price.

26. The reasoning and findings in *Korea − Various Measures on Beef* are consistent with the text of the Agreement on Agriculture and its object and purpose. Therefore, the Panel must examine how China has defined and limited eligible production in its market price support measures. If there are no limitations on purchases of a particular product, then the total quantity of production must be considered "fit or entitled" to receive the applied administered price, regardless of the actual purchases made by the government.

[14] Appellate Body Report, *Korea − Various Measures on Beef*, para. 120.

ANNEX C-4

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF COLOMBIA

1. The government of Colombia intervened in this case given its systemic interest in the application of several provisions of the Agreement on Agriculture. Therefore, Colombia provided its views on some of the legal claims discussed before the Panel.

2. While not taking a final position on the specific merits of this case, Colombia acknowledged the importance of the issues discussed for the clarification of the obligations under the Agreement on Agriculture presented by the Parties to the dispute. In particular, with respect to the issue of the methodology for calculating the amount of "market price support", Colombia encourage this Panel to carefully review the scope and clarify two important concepts: (i) the "fixed external reference price"; and, (ii) "eligible production", with respect to Paragraphs 9 and 8 of Annex 3 of the aforementioned Agreement.

3. With respect to the former, Colombia submitted that the "fixed external reference price" for China should be based on its Accession Protocol documented in the Working Party on the Accession of China, Document WT/ACC/CHN/38/Rev.3. of 19 July 2001. The average contained therein reflects the prices of 1996-98. Although this reference period may deviate from that specified in Paragraph 9 of Annex 3, reliance thereon appears relevant in the case at hand.

4. The principle of *lex specialis* prescribes that the law governing a specific subject matter takes precedence over a more general provision. Here, the conflict between China's Accession Protocol, constituting an integral part of its WTO obligations, and Paragraph 9 of Annex 3 may be resolved by reference to this principle. It appears that China's obligations concerning the establishment of a "fixed external reference price" would, thus, be governed by the more specific rule, its Accession Protocol. Furthermore, from a practical perspective, it is not feasible to necessarily rely on the period specified in Paragraph 9 concerning acceding members as opposed to original WTO members. Data for the period of 1986-88 may be may be incomplete or inaccessible for national authorities. Therefore, in the case of China, the reference period should be that of 1996-98.

5. Furthermore, Colombia submitted that the appropriate "fixed external reference price" should be adjusted taking into account the prices of goods at the same level of trade. Under Paragraph 9, this is contained within the wider formulation that "[t]he fixed external reference price may be adjusted for quality differences as necessary." In the case of rice, if the "applied administered price" was provided for unmilled rice by China, then the "fixed external reference price" should be adjusted to "unmilled rice", even though the accession document (Rev 3) does not reflect this difference.

6. Lastly, with respect the concept of "eligible production", Colombia submitted that, in the absence of a pre-announced limit on the quantity to be bought, all production is eligible to receive the applied administered price. In the case of China "eligible production", thus, includes all selected provinces where the measures of support are available.

7. The Panel's findings in *Korea-Various Measures on Beef* paragraph 827 support this approach. In that case it was stated that "eligible production (…) should comprise the total marketable production of all producers which is eligible to benefit from the market price support, even though the proportion of production that is actually purchased by a governmental agency may be relatively small or even nil". The Appellate Body confirmed this approach in Paragraph 120 of its Report. Hence, eligible production in the case at hand includes all the production fit to receive the support, whether actually bought or not, whether consumed on-farm or not.

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF ECUADOR

1 GENERAL ISSUES

Ecuador considers that the specific calculations for certain products should be applicable to all equally, for example in the case of products that are not included in the Part IV of a Member's Schedule. The Appellate Body or the Panel reports which have been prepared after analysis and investigation, provide recommendations that should be taken into account as a kind of opinio juris and in turn be a guide on similar cases, therefore the panel in the case Korea - Beef has already ruled that the calculation method of Annex 3 should be applied only in cases where the product is not in Part IV of the Members' agenda.

2 QUANTITY OF ELIGIBLE PRODUCTION (QEP)

Ecuador considers that if a requirement was imposed on China to accede to the WTO and it was complied with, it is perfectly valid and applicable. The requirement imposed on China is what determines if it's eligible production on the basis of the quantity of production compared with a market price support measure, which is detailed in document WT / ACC / CHN / 38 / Rev.3, issued in September 2001. If China had the faculty to establish these measurement parameters, they should be taken into account at the time of calculations and not those parameters which are applicable to other countries. China must follow its obligations adopted as agreed while it was negotiating it's accession.

The issue that a certain amount of grain production is for it's own consumption is relevant since taking into account the size and the population of China it can be interpreted that the levels of measurement of their total production will be on a larger scale at the moment of making the calculation. However, by stating that a percentage does not go to the market, the situation may change because the calculations are not directly proportional when talking about the total production of grains versus grains destined for trade and for the market.

3 FIXED EXTERNAL REFERENCE PRICE (FERP)

In the document of Accession of China to the WTO WT / ACC / CHN / 38 / Rev.3 it is observed that the calculations are made in-the period 1996-1998, the accession document was approved, besides being used for references in other cases, so it is tacitly understood that the period that is used in the cases of China is the one mentioned above. It must be considered as well that no other Member and also Ecuador has expressed opposition to the period of time for reference, especially for those members who acceded to the WTO after 1995.

4 CALCULATIONS AND METHODOLOGY

The legal status of the document WT/ACC/CHIN/38/rev.3, when incorporated in the original list submitted by China as a list of concessions acquires the same legal status as the lists annexed to the its Accession Protocol.

Regarding the tables presented, Ecuador considers that they are not incompatible with the regulations, statements and of the Agreement on Agriculture. Therefore, the tables presented cannot modify the commitments made, nor can they be used as lists to modify agreements.

The *Agreement of Agriculture* on its Annex 3 determines that the market price support should be:

- Market price support: market price support shall be calculated using the gap between a fixed external reference price and the applied administered price multiplied by the quantity of production eligible to receive the applied administered price. Budgetary payments made to maintain this gap, such as buying-in or storage costs, shall not be included in the AMS

- The fixed external reference price shall be based on the years 1986 to 1988 and shall generally be the average f.o.b. unit value for the basic agricultural product concerned in a net exporting country and the average c.i.f. unit value for the basic agricultural product concerned in a net importing country in the base period. The fixed reference price may be adjusted for quality differences as necessary.

Therefore, any methodology and trade measure under the Agreement of Agriculture should be based on Annex 3 definitions and calculations.

ANNEX C-6

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION

I. THE RELATIONSHIP BETWEEN THE MEMBERS' SCHEDULES AND THE AOA

1. The commitments limiting subsidization undertaken by Members pursuant to the AoA are included in Part IV of each Member's Schedule and are an integral part of the GATT 1994. The Appellate Body addressed comprehensively the issue of the relationship between the commitments on subsidization included in a Member's Schedule and the provisions of the AoA in *EC − Export Subsidies on Sugar*. There, the Appellate Body confirmed that, just like under the GATT 1994, there is "no provision under the Agreement on Agriculture that authorizes Members to depart in their Schedules from their obligations under that Agreement"[1].

2. Therefoire, the domestic support commitments specified in the Schedules (including the supporting documents incorporated by reference in the Schedules, such as WT/AC/CHN/38/Rev. 3) must be in conformity with the provisions of the AoA and do not allow Members to depart from the obligations imposed by those provisions.

II. WHAT IS THE RELEVANT PERIOD FOR CALCULATING THE FIXED EXTERNAL REFERENCE PRICE?

3. The reference in paragraph 9 of Annex 3 to the years 1986-1988 does not prevent those Members acceding to the WTO after its establishment from specifying in their Schedules a more recent base period, agreed by all Members as part of the accession process. The calculation of the current AMS must "take into account"/be "in accordance with" such more recent base period, as required by Article 1(a)(ii) and Article 1(h)(ii) of the AoA. The reference in paragraph 9 of Annex 3 to the years 1986-1988 reflects the fact that this was the period which had been used by the participants in the Uruguay Round negotiations for the purposes of quantifying their base AMS in accordance with the Modalities Paper. For that reason, the requirement to use that period is addressed primarily to the original Members of the WTO.

4. In the EU's view, it would be unreasonable to require that the accession terms of new Members continue to be negotiated on the basis of data which, by now, are more than 30 years old. Moreover, the use of more recent data does not "reduce" *per se* the commitments of the newly acceded Members under the AoA, unlike in *EC − Export Subsidies on Sugar*. As observed by the Appellate Body in *Korea − Beef*, there is no reason why the FERP for a more recent period should be necessarily higher than the FERP for the years 1986-1989. Moreover, in the case of China, the same period has been used consistently for calculating both the applied administered price and the FERP for the base AMS and the FERP used in the current AMS.

5. For those reasons, the reference to the years 1986-1989 in paragraph 9 of Annex 3 must be understood dynamically. In other words, where a newly acceded Member has used a more recent period for calculating the base AMS in its Schedule, as agreed during the accession process, the current AMS must be based on that period, provided that such period has the same basic characteristics, in respect of that Member, as the years 1986-1988, in respect of the original Members. In particular, that period should pre-date as closely as possible to the date of accession and be sufficiently representative. This interpretation of paragraph 9 of Annex 3 of the AoA is comforted by well-established WTO practice. As pointed out by China, the Schedules of each and every one of the thirty-six Members that have acceded to the WTO since the establishment of the WTO specify base periods other than 1986-88 for the purposes of Supporting Table DS:5.

III. WHAT IS THE RELEVANT "ELIGIBLE PRODUCTION"?

6. For the reasons explained by the United States and not contested by China, the ordinary meaning of 'eligible production' is all of the production entitled or permitted to receive the administrative price, regardless of the quantity actually purchased by the Government. That reading

[1] Appellate Body Report, *EC − Export Subsidies on Sugar*, para. 220

is confirmed by the fact that the words "production eligible" are followed in paragraph 8 by the words "to receive … " and not by other terms that would point to the quantities actually purchased, such as "that received …" or "actually receiving …". That reading, moreover, reflects the *rationale* or purpose of market price support policies (or of the various arrangements that governments may put in place to provide market price support to producers of basic agricultural products), which is to maintain the price of the whole production of a certain product at a desired level.

7. The Appellate Body explicitly confirmed these findings of the Panel by stating that:

> We share the Panel's view that the words "production eligible to receive the applied administered price" in paragraph 8 of Annex 3 have a different meaning in ordinary usage from "production actually purchased ". The ordinary meaning of "eligible" is "fit or entitled to be chosen". Thus, "production eligible" refers to production that is "fit or entitled" to be purchased rather than production that was actually purchased. In establishing its program for future market price support, a government is able to define and to limit "eligible" production. Production actually purchased may often be less than eligible production.[2]

8. In essence, since the notion of 'market price support' seeks to gauge the effects of a government policy measure on agricultural producers of a basic product and, as a matter of fact, these effects depend on the production that may be purchased at the administered price (and not solely or necessarily on the quantity actually purchased), it follows that the notion of 'eligible production' must refer to production that is "fit or entitled" to be purchased, rather than production that was actually purchased,

9. As regards China's argument that it is entitled to calculate market price support by using actual purchases, because it used actual purchases in its calculations in the tables of supporting material in its Schedule, the European Union would note, first of all, that the meaning of footnote 19 to Rev. 3 is by no means unequivocal. More importantly, as indicated in paragraphs 237 and 238 of the Working Party Report on the Accession of China some Members raised concerns with regards to the Supporting Tables in Rev.3. Furthermore, if a Member were authorised to calculate market price support basing itself merely on the actual production purchased by the Government, it would almost systematically underestimate its AMS. Indeed, it is only where the quantity actually purchased tallies with the eligible production that that Member would not underestimate its AMS, whereas in all other frequent situations China's approach would allow a Member to underestimate its AMS, even though the support it provides benefits the marketable production as a whole.

10. It follows that China's line of defence would allow a Member not simply to clarify and qualify the commitments that it has undertaken at the moment of accession but rather "to reduce or conflict" with the obligations already imposed on it by the provisions of the AoA, and notably by paragraph 8 of Annex 3, as they result from their ordinary meaning, *rationale* and previous case law.

[2] Appellate Body Report, *Korea – Beef*, para. 120.

ANNEX C-7

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDIA

1. India welcomes the opportunity to present its views to the Panel on certain systemic issues arising for interpretation under the Agreement on Agriculture ("AoA"). India's views in this submission are limited to the issue of assessment of "*production eligible to receive the applied administrative price"*, for the purposes of calculation of Aggregate Measurement of Support ("AMS") in the AoA.

2. India notes that the First Written Submission of the United States as well as the Third Party Written Submissions by Australia, Brazil, Canada and EU have relied on *Korea-Beef* to state that "production eligible to receive the applied administered price" has a different meaning in ordinary usage from "production actually purchased"[1] and that "eligible production" within the meaning of Annex 3, Paragraph 8 of the AoA is production which is fit or entitled to receive the administered price, whether or not the production was actually purchased.[2] Australia has further stated that *'production eligible' is all production 'fit or entitled' to be purchased and will generally equate to total production*."[3]

3. In India's view, these submissions, while relying on the findings of *Korea-Beef,* have not considered the facts and circumstances of that dispute, which provide context and rationale for the findings. The findings of the panel and the Appellate Body in *Korea-Beef* were specific to a circumstance when there was a declaration by Korea of an eligible quantity for purchase at the support price, which was held to be the "eligible production". The panel and the Appellate Body considered this declared quantity to constitute "eligible production", which was different from what Korea eventually procured under the facts of that dispute. In its reasoning, the Appellate Body relied on the ordinary meaning of "eligible" and explained that this referred to what is "fit or entitled to be chosen", and further that "production eligible" refers to production that is "fit or entitled" to be purchased rather than production that was actually purchased. This was in the context of the announcement made by Korea in the facts of that dispute, to purchase a specified quantity of cattle for the 1997 calendar year.[4]

4. In India's third-party submission, India has explained that there would be situations wherein there is no specification of any quantity; but a mere listing of crops that a government may or may not procure. Not all countries, for instance, pre-determine the quantity of production that may be procured, since this will be based on the needs and resources available, which may vary across time and geographical areas. The quantity eligible for procurement is therefore determined only at the time when such procurement is required and made.

5. Being a complex and sensitive issue, the manner in which to administer domestic support for agriculture is not always determined at the federal level in all countries, but often at the regional/ sub-federal levels, leading to wide variations in procurement models. Sometimes Members simply list crops/products, and not the quantities that would be procured, thereby leaving determination of quantity eligible for procurement to the time of such procurement, which may be done at the sub-federal level. There are also instances when numerous products are listed in a Member's listing of price support, but these may not be procured at all. In such situations, it is simply illogical to state that all quantities of the specific product that is produced, will be eligible for procurement. Such a proposition is absurd and unrealistic, since it may be virtually impossible to extend the price support to the entire production.

6. Australia argues that *"the price distorting effect of a product takes place the moment it is eligible to be purchased"* which is why *"any consideration of the product distorting effect of market*

[1] Para 103, First Written Submissions by the United States, *referring to Korea – Beef* (AB), para. 120.
[2] Para 103, First Written Submissions by the United States, *referring to Korea – Beef* (Panel), para. 827 (noting that "eligible production for the purposes of calculating the market price support component of current support should comprise the total marketable production of all producers which is eligible to benefit from the market price support, even though the proportion of production which is actually purchased by a governmental agency may be relatively small or even nil").
[3] Para 22, Third Party Submission of Australia
[4] *Korea-Beef* (AB), para. 121

support must be taken at that point."[5] Clearly, in situations where the total production is never procured, and there is no expectation even among producers that the total production will ever be procured, there is no question of any price distorting effect arising from the market support till the time that procurement actually takes place. It would be highly incongruous to suggest, then, that the mere listing of crops would cause a price-distorting effect equivalent to the procurement of the entire quantity produced!

7. In India's view, it is crucial to recognise the multiplicity of political and economic realities underlying agricultural policies of various countries, especially developing countries, instead of assuming that there is one immutable "economic reality" that should inform all asessments of domestic support requirements.

8. The interpretation of "eligible production" in Korea-Beef cannot therefore be extended to be applied in the abstract in cases when there is no declaration of quantity of production to be procured. Such a reasoning is not only devoid of any basis in actual procurement practices of countries but could lead to an anomalous result of considering all production of a particular product in a Member's territory as "eligible production"- a proposition that can only be considered as fanciful for most Members.

9. India reiterates that the term "eligible production" necessitates the specification of a *quantity* that is eligible. The absence of any specification of a quantity for procurement cannot mean that the entire production of the listed crop would constitute 'eligible production'. Rather, the reality of the situation would be that what is eligible for procurement is determined *only at the time that a procurement needs to be made*.

10. In addition, it is significant to underscore that the term used in the AOA is 'production eligible to receive the applied administered price' and not 'crops/ products eligible to receive the applied administered price'. A mere listing of crops, which, if considered as eligible for procurement, would receive the applied administered price, cannot be interpreted to mean that *all production* of such crops would be eligible for procurement.

11. In conclusion, India would like to state that the reasoning in *Korea-Beef* should be viewed in light of the very specific context in which it arose – one where there is a difference between the Korean Government's declaration of an "intent" and its actual procurement of beef. The identification of such "intent" in other cases may require application of a more context-specific methodology where there is no declaration of intent by specifying eligibility in quantitative terms. It is important to take into consideration context-specific evidence such as the actual procurement practices of Members, and their notifications under Article 18 of the AoA. It follows that if there is no conflict between any declared quantity and *actual* procurement, and the price support is in effect available only for the quantities procured, then it follows that only what is *actually* procured is *entitled* to the price support.

12. India requests the panel to carefully scrutinize and consider the interpretive issues under the AoA which would benefit from further clarification in light of the present dispute.

[5] Para 28, Third Party Submission of Australia

ANNEX C-8

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDONESIA

I. INTRODUCTION

1. Indonesia exercises its rights to participate as a third party in this case due to its systemic concern on the interpretation and application of the provisions of the covered agreement at issue in this dispute, in particular Paragraph 9 Annex 3 and Paragraph 8 Annex 3 of the Agreement on Agriculture ("AoA").

II. INTERPRETATION AND APPLICATION OF "FIXED EXTERNAL REFERENCE PRICE"

2. As indicated in Indonesia's third party statement, Indonesia highlights the interpretive issue of the terms which will clarify the obligation of WTO Member according to the AoA. In this case, Indonesia pays attention to the terms of: (1) "Fixed External Reference Price" as set out in the Paragraph 9 Annex 3; and (2) "Eligible Production" as indicated through Paragraph 8 of Annex 3 of the AoA.

3. In order to calculate the market price support provided by particular Member, the Annex 3 Paragraph 8 of the AoA provides that "market price support shall be calculated using the gap between a fixed external reference price and the applied administered price multiplied by the quantity of production eligible to receive the applied administered price....".

4. Consequently, the reference to the fixed external reference price provided under the Paragraph 9 of Annex 3 states that "the fixed external reference price shall be based on the years 1986 to 1988 and shall generally be the average f.o.b. unit value for the basic agricultural product concerned in a net exporting country and the average c.i.f. unit value for the basic agricultural product concerned in a net importing country in the base period. The fixed external reference price may be adjusted for quality differences as necessary."

5. In their written submission, China has argued that the United States has erroneously referred to the fixed external reference price based on the prices of 1986-1988. Indonesia took note that China has relied on its Part IV of China's Schedule's notification (Rev.3) that the reference shall be the 1996-98 average of FOB and CIF prices given as export and import unit values.[1]

6. Indonesia is on the view that it is necessary for the Panel to analyze and pay to attention the methodology to execute the adjustability nature of the fixed external reference price as set out under the last sentence of Paragraph 9 of Annex 3. Consequently, Panel should also determine the conditions in order to deem the adjustment as "necessary" for the reference of Fixed External Reference Price. The interpretation itself will be the key element to examine the arguments provided by the Parties in this case.

III. INTERPRETATION AND APPLICATION OF "ELIGIBLE PRODUCTION"

7. In the calculation of Market Price Support, the term of "production eligible to receive the applied administered price" has also been the key component. Meanwhile, the AoA itself does not provide any particular definition to constitute the term. As the result of the uncertainty, the interpretation of the term has been varied among Members according to their own policies.

8. Indonesia highlighted the arguments of the United States derived from the Korea-Beef case on the methodology to interpret "eligible production". In the Appellate Body report, it is stated that the "quantity of production eligible to receive the applied administered price" was different from the "production actually purchased". In this regard, Indonesia requested for the Panel to put caution on applying the jurisprudence on this present case.

9. Indonesia would like to draw the attention on the nature of rulings made by the Appellate Body during the Beef case. In the case, the Korean government has declared specific quantities of the

[1] Communication from China. Working Party on the Accession of China, WT/ACC/CHN/38/Rev.3. 19 July 2001.

products to be purchased. Meanwhile, this may not be the case for all WTO Members. There are some conditions in which the government cannot make the declaration of quantity to be purchased at earlier stage due to certain reasons. On the other hand, WTO Members, especially those with large production and geographical coverage, may face a circumstance where the amount of production eligible for purchase in an administered price does not cover the total production of the product.

10. In this regard, Indonesia supported the argument in Paragraph 8 of India's Third Party Submission that "the interpretation of 'eligible production' in Korea-Beef cannot therefore be applied as a 'one size fits all' approach even in cases there is no declaration of quantity of production to be procured."

11. Accordingly, Indonesia requested the Panel to examine the interpretation of the aforesaid term, in order to clarify the WTO Members' obligation under the Paragraph 8 of Annex 3 of the AoA.

ANNEX C-9

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. ORAL STATEMENT

A. The Status of Support Tables Referenced in China's Schedules

1. In this dispute, the United States and China appear to have a difference in opinion regarding the methodology for calculating China's aggregate measurement of support (or "AMS"), based on their different views on the relationship between the text of the *Agreement on Agriculture* and the document referenced to as "Relevant Support Tables" in China's Schedules. This difference in views raises the issue of the proper status of this document as "the constituent data and methodology" referenced to in China's Schedule.[1]

2. As a general matter, it is Japan's view that a Member's Accession Protocol, including the Working Party Report and Schedules, is "an integral part of the WTO Agreement"[2] and as such their meaning must be discerned and ascertained in accordance with "customary rules of interpretation of public international law."[3]

3. The Appellate Body in *EU – Computer Equipment* recognized that the underlying principle that accords this status to these Member's Schedules is that, "while each Schedule represents the tariff commitments made by *one* Member, they represent a common agreement among *all* Members."[4] Thus the terms contained in "the constituent data and methodology" incorporated in a Member's Schedule may be viewed as representing the agreement of *all* Members.

4. In the present case, however, there may not have been an agreement among all Members regarding the supporting tables that formed the basis of the commitments contained in China's Schedules. Specifically, as the EU pointed out in its third party submission, the Working Party Report on the Accession of China recognized that "the document still contained issues which required further methodological clarification relating to policy classification," and that China would address this clarification in the context of its notification obligations under the *Agreement on Agriculture*.[5] It is not clear whether such clarification was made, or if it was, whether all Members concerned have agreed on the clarification offered by China.

B. Whether the Temporary Purchase and reserve Policy for Corn Forms Part of the Specific Measure at Issue that Falls Within the Terms of Reference

5. China contends that the TPRP for corn for the period 2012 to 2015 was terminated and replaced with another measure as of 2016, and therefore, is not a "measure at issue" under Article 6.2 of the DSU.[6] Accordingly, it is China's view that the measure falls outside of the Panel's terms of reference. The United States, on the other hand, argues that the TPRP is not itself a specific measure at issue, but rather, a series of legal instruments issued annually through which China provides domestic support to corn producers.[7] Moreover, according to the United States, the retrospective nature of agricultural domestic support commitments necessitates an examination of the level of domestic support provided over a period of time.[8] Thus, the Parties appear to disagree on whether the TPRP is itself a "measure" that was not in existence at the time of panel establishment, or part of a series of legal instruments that form the basis for the measure at issue.

[1] China's First Written Submission, para. 90 (referencing U.S. First Written Submission, para. 90).
[2] Accession of the People's Republic of China, WT/L/432, p. 2.
[3] DSU Article 3.2
[4] Appellate Body Report, *EC – Computer Equipment*, para. 109 (emphasis in original); *see also* China's First Written Submission, para. 155.
[5] EU Third Party Written Submission, para. 37 and footnote 23.
[6] China's First Written Submission, paras. 286-289 and 325-342.
[7] Comments of the United States on China's Challenge to the Panel's Terms of Reference, para. 15.
[8] Comments of the United States on China's Challenge to the Panel's Terms of Reference, paras. 8-10 and 17.

6. As noted by China, as a general rule, "the measures included in a panel's term of reference must be measures that are in existence at the time of the establishment of the panel."[9]

7. However, Japan agrees with the United States that the specific nature of the obligations in question may affect the way that a measure's consistency with those obligations is analyzed. For example, in *India – Agricultural Products*, the Appellate Body observed that "the obligation in Article 6.1 [of the SPS Agreement] does not apply only at one specific point in time … but is, instead, an ongoing one." Given this ongoing nature of the obligation, the Appellate Body continued, SPS measures are required to "be adjusted over time so as to establish and maintain their continued suitability in respect of the relevant SPS characteristics of the relevant areas."[10] Thus, when the obligation is one of an ongoing nature, an analysis of a measure's consistency with the obligations would necessarily require a dynamic – rather than a static – inquiry as to whether the measure has been "adjusted over time" to ensure the measure's "continued suitability."

8. Even where a legal instrument ceases to exist, an examination of the legal instrument may still be relevant to the resolution of the matter in issue in the dispute.[11] For example, the United States notes that "[t]he nature of domestic support commitments, including the need for data on the amount and value of production for purposes of calculating market-price support and the applicable *de minimis* exemption, necessitates a backward-looking analysis of data covering a previous time period."[12]

9. Thus, it is appropriate to examine the substance of the TPRP to the extent that the operation of the TPRP affects measures at issue which were identified in the United States' panel request.

II. RESPONSE TO PANEL QUESTIONS

10. First, as regards Annex 3 of the Agreement on Agriculture, Japan considers that "constituent data and methodology" is important in clarifying the methodology used to calculate product-specific AMS. However, as articulated in Article 21 of the Agreement on Agriculture, "the provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of [the Agreement on Agriculture]." Therefore, Japan considers that the methodology set out in Annex 3 should not be regarded as only a fall back option.

11. Second, as regards the methodology for determining eligible production, paragraph 238 of the Working Party report on the Accession of China recognized that "the document still contained issues which required further methodological clarification relating to the policy classification." Therefore, all WTO Members did not agree with all elements of the methodology and policy classifications. As eligible production is not explicitly excluded from this category, Japan considers it proper to include eligible production as part of the methodology and policy classification that required further clarification.

12. Third, Annex 3 of the Agreement on Agriculture provides a single definition of "eligible production" as "production eligible to receive the applied administered price." Moreover, the methodology for calculating market price support set out in paragraph 8 of Annex 3 does not differ for each country. Therefore, Japan does not believe that the definition of "eligible production" differs by country.

13. However, whether production consumed on the farm should be included in the calculation of the quantity of eligible production may differ based on the circumstances of each country, because the manner in which the numerical value of market price support is captured may be different for each country, given the differences in product characteristics, circumstances surrounding production and distribution, and the policy design of market price support in each country.

14. Fourth, when it comes to China's Schedule of Concessions, i.e. the legal instrument "Schedule CLII – People's Republic of China", "an agreed terms of China's accession to the WTO" is what is

[9] China's First Written Submission, para. 327 and footnote 340 (referencing Appellate Body Report, *EC-Chicken Cuts*, para. 156).

[10] Appellate Body Report, *India – Agricultural Products*, para.5.132.

[11] *See* China's First Written Submission para. 330 and footnote 343 (referencing Panel Report, *Argentina – Textiles and Apparel*, para. 6.13 and Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19).

[12] Comments of the United States on China's Challenge to the Panel's Terms of Reference, para. 2.

stated in Part II, paragraph 1, of China's Accession Protocol, which reads "[t]he Schedules annexed to this Protocol shall become the Schedule of Concessions and Commitments annexed to the GATT 1994". In other words, by having been annexed to China's Accession Protocol, China's Schedule was made "an integral part of" the GATT 1994. Assuming that the supporting table referenced in Section I of Part IV of China's Schedule which contains the use of the 1996 − 1998 period is a part of China's Schedule, then, the question is whether the terms of the GATT 1994 can prevail over, or modify, the terms of the Agreement on Agriculture.

15. The relationship between the Agreement on Agriculture and other multilateral trade agreements including the GATT 1994 is expressly regulated by Article 21 of the Agreement on Agriculture, which provides "[t]he provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex A to the WTO Agreement shall apply subject to the provisions of this Agreement". As the Appellate Body explained,

> Members explicitly recognized that there may be conflicts between the Agreement on Agriculture and the GATT 1994, and explicitly provided, through Article 21, that the Agreement on Agriculture would prevail to the extent of such conflicts.[13]

16. Thus, contrary to what China appears to posit, the supporting table referenced in China's Schedule cannot change, modify or replace the terms actually used in the relevant provisions of the Agreement on Agriculture, including the terms used in paragraph 9 of Annex 3.

17. This does not mean that the supporting tables referenced in a Member's Schedule have no interpretive value in ascertaining the meaning of provisions in the Agreement on Agriculture. Indeed, Article 1(a) (ii) of the Agreement of Agriculture expressly provides the AMS "during any year of the implementation period or thereafter" is "calculated in accordance with the provisions of Annex 3 of this Agreement and taking into account the constituent data and methodology used in the tables".

18. Japan further recalls that, in *Chile − Price Band System*, the Appellate Body stated that "[t]he Schedule of one Member, and even the scheduling practice of a number of Members, is not relevant in interpreting the meaning of a treaty provision, unless that practice amounts to 'subsequent practice in the application of the treaty' within the meaning of Article 31(3)(b) of the Vienna Convention."[14] Thus according to the Appellate Body, the scheduling activity or practice which "amounts to 'subsequent practice'" shall be taken into account, together with the context, in interpreting relevant provisions of covered agreements, including paragraph 9 of Annex 3. Japan notes, in this respect, that more than 30 accession Members have already used a base period other than 1986-1988, and it might be difficult for some new accession Members to obtain data from 1986-1988. Indeed, some countries were not in existence at that time.

19. Therefore, to the extent the use of a period other than 1986-1988 in the scheduling activity of newly acceding Members' Accession Protocols amounts to "subsequent practice" in the application of [Annex 3, paragraph 9, of the Agreement on Agriculture] which shows the common understanding of WTO Members, such practice is certainly relevant to the interpretation of that particular provision.[15]

[13] Appellate Body Report, *EC-Export Subsidies on Sugar*, para. 221.

[14] Appellate Body Report, *Chile-Price Band System*, para.272

[15] Paragraph 9 of Annex 3 provides "The fixed external reference price shall be *based on* the years 1986 to 1988 ...". (emphasis added) Japan notes that, in interpreting Article 3 of the SPS Agreement, the Appellate Body observed "[a] thing is commonly said to be 'based on' another thing when the former 'stand' or is 'founded' or 'built' upon or 'is supported by' the latter" and "[a] measure ... based on the same standard might not conform to that standard, as where only some, not all, of the elements of the standard are incorporated into the measure." Appellate Body Report, *EC − Hormones*, para.163.

ANNEX C-10

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF KAZAKHSTAN*

Distinguished Chairman, Members of the Panel,

Kazakhstan appreciates the opportunity to express its view on certain aspect of systemic importance for Kazakhstan. In particular, we would like to present our view with respect to interpretation of accession terms of Members acceded to the WTO under Article XII of Marrakesh Agreement Establishing the World Trade Organization (hereinafter - Marrakesh Agreement) as applied to determination of base period for the purposes of calculation of market price support ((hereinafter - MPP), and specifically fixed external reference prices.

Article 3.2 of the Dispute Settlement Understanding (DSU) prescribes that the "covered agreements", i.e. WTO Agreements, should be clarified in accordance with the customary rules of interpretation of public international law. As we know, the customary rules of interpretation of public international law are codified in the relevant provisions of the *Vienna Convention on the Law of Treaties*[1] (hereinafter – "Vienna Convention"). We would like to turn the attention of the Panel to Article 30 of the Vienna Convention. Paragraph 2 of the Article stipulates that when a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail. Article 30 sets out to resolve conflicts arising from successive treaties, i.e., an earlier and a later treaty both of which are in force. No distinction is made as to the types of treaties. Article 30 extends in its scope beyond the notion of conflicts and incompatibility by addressing more generally the rights and obligations of States parties to successive treaties relating to the same subject-matter and in particular the priority among them[2].

Kazakhstan considers that in the context of the obligations and commitments of China acceded under Article XII Marrakesh Agreement, the Accession Protocol encompassing *inter alia* Schedules of Tariff Concessions (hereinafter – Schedule) and Report of the Working Party on Accession of China to the WTO must be regarded as a later treaty while the Marrakesh Agreement itself with its Annexes, including Agreement on Agriculture, must be treated as an earlier treaty within the meaning of Article 30 Vienna Convention.

If the Panel agrees with this approach, two questions inevitably arise:

- What are the provisions of the two treaties, which could be found incompatible?
- Whether they are incompatible?

Kazakhstan further proposes its analysis in the context of determination of the base period for the purposes of calculation of MPP, including fixed external reference prices.

What are the provisions of the two treaties, which could be found incompatible?

Paragraph 9 Annex 3 of the Agreement on Agriculture prescribes that fixed external reference price shall be calculated based on the years of 1986 to 1988. Whereas in Part IV of China's Schedule, the fixed external reference price in calculation of MPP is based on the years of 1996 to 1998.

It is clear that there are two approaches contained in the documents pertaining to the same subject matter, i.e. China's agricultural domestic support commitments which could be found incompatible.

Whether they are incompatible?

After finding the two provisions, the most important question is whether they are incompatible? To answer this question we would like to turn the attention of the Panel to the ordinary meaning of the

* Kazakhstan requested that its oral statement be treated as its executive summary.

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

[2] Commentary on the 1969 Vienna Convention on the Law of Treaties, Mark E. Villiger, Brill Online Books and Journals, http://booksandjournals.brillonline.com/content/books/b9789004180796_036, page 402

word "incompatible". From the definitions suggested by online dictionaries[3] it can be drawn that the word "incompatible" implies that two or more things cannot coexist, i.e. cannot exist together or at the same time.

In the context of the present example, the question is whether the requirement to use fixed external prices based on 1986-1988, as required by Annex 3 of the Agreement on Agriculture, or those based on the years of 1996 to 1998, as applied in Part IV of China's Schedule. In order to be incompatible or to be incapable of coexisting, only one of these two parameters would be valid because of competing nature of their application.

Annex 3 explicitly points to the years of 1986 to 1988. This is straightforward. The question now is whether the WTO commitments of China stipulate that fixed external reference prices of 1996-1998 are equally valid to render period of 1986 to 1988 "incompatible".

With respect to this issue we would like to refer to the relevant case law developed by the WTO jurisprudence, in particular to the finding of the Panel in its Report "China — Measures Related to the Exportation of Various Raw Materials"[4] (hereinafter – "China - Raw Materials") and to the Report of the Appellate Body "China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum" (hereinafter – "China - Rare Earth Metals")[5].

In "China — Raw Materials", in a finding not appealed by any party to the dispute, the Panel explained that the terms of accession protocols are integral parts of the WTO Agreement[6]:

> "Accession to the WTO is achieved through negotiation with other WTO Members. Pursuant to Article XII of the Marrakesh Agreement, accessions take place 'on terms to be agreed' between the acceding Member and the WTO membership. Most accession processes take several years to complete and lead to detailed negotiated provisions. The terms of each WTO Member's accession are set out in its Accession Protocol and accompanying Working Party Report. The negotiated agreement between the WTO membership and the acceding Member results in a delicate balance of rights and obligations, which are reflected in the specific wording of each commitment set out in these documents….
> WTO Members' accession protocols are considered to form integral parts of the WTO Agreement"[7].

The Appellate Body in "China - Rare Earth Metals" reaffirms the findings of the Panel:

> "In sum, Article XII:1 of the Marrakesh Agreement provides the *general* rule for acceding to the WTO. Its first sentence stipulates that accession is to be accomplished on "terms" to be agreed between the acceding Member and the WTO, and its second sentence makes clear that such accession applies to the entire package of WTO rights and obligations, consisting of the Marrakesh Agreement and the Multilateral Trade Agreements annexed thereto..."[8].

In both cases the adjudicators confirm that the accession package, i.e. Accession Protocol together with its Annexes shall be applied in its entirety forming integral parts of the WTO Agreement. Likewise, we assert that it cannot be true that one part of the accession terms applies and another part is not valid. In the context of this dispute, Part IV of China's Schedule indicates the level of its commitment with respect to Total Aggregate Measurement of Support (AMS). Part IV of China's Schedule refers to the document WT/ACC/CHN/38/Rev.3 (hereinafter – Rev.3). In this case, it is evident that the two base periods in Annex 3 of the Agreement on Agriculture and Part IV of China's Schedule are incompatible.

---

[3] Online Oxford Dictionary: https://en.oxforddictionaries.com/definition/incompatible, Merriam-Webster Dictionary: https://www.merriam-webster.com/dictionary/incompatible

[4] Document WT/DS394/R, WT/DS395/R, WT/DS398/R of 5 July 2011.

[5] WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R of 7 August 2014.

[6] The explanation is drawn from the WTO Analytical Index — Guide to WTO Law and Practice: https://www.wto.org/english/res_e/booksp_e/analytic_index_e/wto_agree_03_e.htm#articleXIIB1f

[7] Ibid para. 7.112

[8] Ibid para. 5.34

In the light of Article 30 of Vienna Convention and the logic of the WTO jurisprudence, WTO Members should find the base period for calculation of fixed external reference price of China in the same document, i.e. in Table DS:5 *"Product-Specific Aggregate Measurement of Support: Market Price Support"* of Rev. 3. Therefore, fixed external reference prices of China should be based on the years of 1996 to 1998.

In conclusion, Kazakhstan would like to call the attention of the Panel that the outcome of this dispute is of systemic importance and would affect the membership terms of more than 30 Members acceded under Article XII of Marrakesh Agreement since all these Members follow the same practice as China applies in its domestic support calculations, including Kazakhstan.

This concludes our statement.

Thank you!

ANNEX C-11

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE RUSSIAN FEDERATION

1. The Russian Federation would like to present, as a third party in this dispute, the summary of its arguments that mostly relate to the issues concerning the determination of representative period used to calculate the fixed external reference price (FERP).

2. The Russian Federation would like to highlight the systemic nature of the issues raised in this dispute and their importance for those Members that acceded after the Uruguay Round with an AMS reduction commitment in their Schedules.

3. According to Article XII of the WTO Agreement "any State [...] may accede to this Agreement, on terms to be agreed between it and the WTO". The terms of accession, contained in the Protocol of Accession, the Report of the Working Party, and the Schedules of commitments, including the Base Total AMS, constitute an integral part of the WTO Agreement.

4. During the accession process the same representative period is used to calculate the fixed external reference price, the level of market price support, product-specific AMS and the Base Total AMS. Such representative period, according to the WTO Secretariat[1], normally comprises the last three representative years. We would like to draw the attention of the Panel that the amount of the Base Total AMS depends on the level of market price support calculated during the accession process, and consequently on the fixed external reference price. It would be illogical and incoherent to first calculate the Base Total AMS using the last three representative years, and then, upon the accession and thereafter, to calculate Current Total AMS and market price support using another reference period. In such circumstances the amount of Current Total AMS cannot be compared with the amount of the Base Total AMS due to the fact that they were calculated on different terms and different basis. The situation of using different representative period to calculate the fixed external reference price, and as the result − Base Total AMS and Current Total AMS, could lead to the impairment of the right of a Member that acceded to the WTO after the Uruguay Round to provide the level of support within the agreed limits and based upon the terms it has agreed.

5. In its First Written Submission the United States claims that the fixed external reference price shall be based on the years 1986 to 1988 as it is set out in paragraph 9 of Annex 3 of the Agreement on Agriculture.[2]

6. In view of the Russian Federation the period of 1986 − 1988 referred to in paragraph 9 of Annex 3 of the Agreement on Agriculture was the basis for calculating fixed external reference price for the founding WTO Members due to the fact that this period was chosen during the Uruguay Round as the most recent representative period. For all Members (except one) that acceded to the WTO after 1995 the most recent representative period was the period other than 1986 − 1988 (for instance, for the Russian Federation this period was from 2006 to 2008, for China − from 1996 to 1998).

7. Article 31 of the Vienna Convention requires that the interpretation of a treaty shall take into account "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation". From the perspective of the Russian Federation, subsequent practice of calculating fixed external reference price demonstrates that all WTO Members during the accession processes agreed that for acceding Members the FERP could be based on the years other than 1986 to 1988. This is demonstrated by the supporting materials incorporated by reference in Part IV of Members' Schedules and, thereby, reflecting all WTO Members' agreement on all aspects of acceding Member's rights and obligations. Such subsequent practice is also reflected

[1] Technical Note of the WTO Secretariat, Procedures for Negotiations under Article XII, Information to be Provided on Domestic Support and Export Subsidies in Agriculture, WT/ACC/22/Add.1, 1 August 2014.

[2] The United States' First Written Submission, paras. 98, 113.

in the Technical Note of the WTO Secretariat on Procedures for Negotiations under Article XII[3], which says that the information on product-specific AMS measures, including the information on market price support, is normally used for each of *the last three years*. This document, as it was pointed out by the Secretariat, took into account the evolution of accession practices.[4] Notifications of the acceded WTO Members, including China, and review process within the work of the Committee on Agriculture on examination of those notifications also support this understanding.

8. Turning to practice, there were Members of the Working Party on the accession of the Russian Federation to the WTO (which consisted of 65 Members) that stated that the more recent reference period should be used to calculate the domestic support level as it is more adequate and statistically relevant. This common understanding was reflected throughout our accession process, *inter alia*, in some of the statements of the Working Party's Members. One Member of the Working Party expressed its view that "the base period used to establish commitments will need to be based on a recent three year period which reflects current agricultural support programs".[5] Moreover, other Member of the Working Party on the accession of the Russian Federation to the WTO said that "there is a general understanding that the Russian accession should be based on the methodology included in the WT/ACC/4 WTO document"[6] and that "it is intended that new Members initiate negotiations departing, at least, from figures based on volume and budgetary outlays related to the base period mentioned in the WT/ACC/4 WTO document"[7]. It should also be noted that in the document WT/ACC/4 the structure of methodology to calculate domestic support measure that affects the producer price implies that the fixed external reference price shall be provided for each of the last three years

9. The definition of Aggregate Measurement of Support set out in Article 1(a)(ii) of the Agreement on Agriculture clearly demonstrates that Annex 3 is not the only source for AMS calculation − "constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule" shall also be taken into account.

10. In the view of the Russian Federation, the logic used by the panel and the Appellate Body in *Korea − Various Measures on Beef* shows that if agricultural products were included in corresponding supporting materials incorporated in Member's Schedule, calculation of AMS shall be based not only on Annex 3 but also shall take into account "constituent data and methodology".[8] Since wheat and rice were included in China's supporting materials, the "constituent data and methodology" shall be considered in this dispute.

11. From the perspective of the Russian Federation, "constituent data and methodology" in this context refers to the period for calculation of the fixed external reference price. The Appellate Body in *Korea − Various Measures on Beef* examined the issue of determination of basic period for calculation of market price support for beef. According to the Appellate Body, since beef was not included in Korea's supporting materials, then the reference period for it shall be 1986 − 1988, and not 1989 − 1991 as for those agricultural products which were included in Korea's corresponding tables.[9] In a similar vein, since wheat and rice were included in China's supporting materials, the period of 1996 − 1998 shall be used to calculate the fixed external reference price for these products.[10]

12. Therefore, the Russian Federation believes that for Members acceded to the WTO after the Uruguay Round the basic period for fixed external reference price calculation should be the period

[3] Technical Note of the WTO Secretariat, Procedures for Negotiations under Article XII, Information to be Provided on Domestic Support and Export Subsidies in Agriculture, WT/ACC/22/Add.1, 1 August 2014, para. 15.

[4] Technical Note of the WTO Secretariat, Information to be Provided on Domestic Support and Export Subsidies in Agriculture, WT/ACC/4/Rev.1, 1 August 2014.

[5] WT/ACC/RUS/23/Add.1, p. 1.

[6] WT/ACC/RUS/17/Add.1, p. 13.

[7] WT/ACC/RUS/17/Add.1, p. 14.

[8] Panel Report, *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef,* paras. 811-812, 830. Appellate Body Report, *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef,* paras. 113-114, 117-118.

[9] Appellate Body Report, *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef,* paras. 113-114, 117-118.

[10] WT/ACC/CHN/38/Rev.3.

used in the tables of supporting materials incorporated by reference in Part IV of the Member's Schedule, rather than the period used in paragraph 9 of Annex 3 of the Agreement on Agriculture.

ANNEX D

RAW DATA

ANNEX D

RAW DATA

1.1. The following tables contain data for the products forming part of the United States' complaint, i.e. wheat, Indica rice, Japonica rice and corn, as presented by the parties[1], and revised in some cases by the Panel, where necessary.[2] This information is presented without prejudice to the Panel's findings in sections 7 and 8 of the Panel Report or of the calculations performed in tables 10-16 of the Panel Report.

1.1 Wheat

	Source	Units	2012	2013	2014	2015	2016[3]
Total national production	China	million tons	121.023	121.926	126.208	130.185	128.845
	US	million tons	121.024	121.926	126.208	130.185	-
Producer price	US/China	¥/ton	2,166.20	2,356.20	2,411.80	2,328.60	2,232.60
Production by province							
Hebei	US	million tons	13.377	13.872	14.299	14.350	14.333
Jiangsu	US	million tons	10.488	11.013	11.604	11.740	11.196
Anhui	US	million tons	12.940	13.320	13.936	14.110	13.859
Shandong	US	million tons	21.795	22.188	22.638	23.466	23.446
Henan	US	million tons	31.774	32.264	33.290	35.010	34.660
Hubei	US	million tons	3.708	4.168	4.216	4.209	4.282
Total	US	million tons	94.082	96.825	99.983	102.885	101.776
Out-of-grade percentage							
Hebei	China	percentage	0.0	1.0	0.0	0.0	0.0
Jiangsu	China	percentage	2.0	1.0	0.3	1.0	0.0
Anhui	China	percentage	1.0	0.0	0.0	1.7	0.0
Shandong	China	percentage	0.0	1.0	0.2	0.0	0.0
Henan	China	percentage	1.0	0.0	0.0	0.0	0.0
Hubei	China	percentage	8.0	0.0	0.0	0.0	0.0
AAP	US/China	¥/ton	2,040.00	2,240.00	2,360.00	2,360.00	2,360.00
1996-1998 FERP (c.i.f. price)	China	¥/ton	1996-1998			Average 1996-1998	
			1,885.00	1,629.60	1,579.80	1,698.13	
1986-1988 FERP (c.i.f. price)	US	¥/ton	431.11[4]				
Quantity procured under measures							
Hebei	China	million tons	0.774	0	0	0.591	3.1765
Jiangsu	China	million tons	5.319	3.61	6.708	5.474	4.0765
Anhui	China	million tons	4.126	2.9315	6.648	3.97	5.515

[1] See United States' response to Panel question No. 96, (Exhibit USA-106); China's response to Panel question No. 96, (Exhibit CHN-146).

[2] These revisions involved adjusting certain of the original figures presented by the parties to express them in a common unit (renminbi/ton and million tons), and to present quantities using the same number of decimal places (where useful).

[3] All 2016 data was provided by China.

[4] Only one value was provided by the United States. See United States' first written submission, Table 7: Fixed External Reference Price.

	Source	Units	2012	2013	2014	2015	2016[3]
Shandong	China	million tons	1.769	0	0.032	1.242	3.109
Henan	China	million tons	9.815	0.698	10.423	8.948	12.1415
Hubei	China	million tons	1.369	0.939	1.534	0.559	0.492
Total amount procured	China	million tons	23.172	8.182	25.345	20.784	28.5105

1.2 Rice

	Source	Units	2012	2013	2014	2015	2016
Total national rice production	US/China	million tons	204.236	203.612	206.507	208.225	207.075
Total rice production in covered provinces	US/China	million tons	159.34	160.09	162.06	164.14	162.73

1.2.1 Japonica rice

	Source	Units	2012	2013	2014	2015	2016
Total national production	China	million tons	68.011	67.803	68.767	69.339	68.956
	US	million tons	64.539	64.341	65.256	65.760	-
Producer price	US/China	¥/ton	2,919.60	2,936.60	3,035.20	2,951.20	2,935.40
FERP (f.o.b. prices - milled)	China	¥/ton	1996-1998			Average 1996-1998	
			3,682.90	2,862.10	3,326.90	3,290.63	
1986-1988 FERP (f.o.b. price) (unmilled equivalent)	US	¥/ton	546.62[5]				
Production by province							
Liaoning	US	million tons	5.078	5.069	4.515	4.677	-
Jilin	US	million tons	5.320	5.633	5.876	6.301	-
Heilongjiang	US	million tons	21.712	22.206	22.510	21.997	-
Jiangsu	US	million tons	16.360	16.551	16.461	16.811	-
Anhui	US	million tons	2.422	2.364	2.431	2.592	-
Total	US	million tons	50.892	51.823	51.793	52.378	-
Out-of-grade percentage							
Liaoning	China	percentage	0.0	0.0	0.0	0.0	-
Jilin	China	percentage	0.0	0.0	0.0	0.0	-
Heilongjiang	China	percentage	0.0	0.0	0.0	0.3	-
Jiangsu	China	percentage	0.0	0.0	0.0	1.5	-
Anhui	China	percentage	0.0	0.0	0.0	0.0	-
AAP (unmilled)	US/China	¥/ton	2,800.00	3,000.00	3,100.00	3,100.00	3,100.00
Quantity of paddy rice purchased under the measures							
Liaoning	China	million tons	0	0.351	0.175	0	0
Jilin	China	million tons	0.057	0.713	0.58	1.1675	0.133
Heilongjiang	China	million tons	3.842	10.625	15.025	16.897	17.7745

[5] Only one average value was provided by the United States. See United States' first written submission, Table 7: Fixed External Reference Price.

	Source	Units	2012	2013	2014	2015	2016
Jiangsu	China	million tons	0	1.352	1.796	1.089	1.5765
Anhui	China	million tons	0.063	0.481	0.615	0.965	1.478
Hubei	China	million tons	0	0.019	0.02	0.018	0.0265
Total	China	million tons	3.962	13.541	18.211	20.137	20.989

1.2.2 Indica rice

1.2.2.1 Early-season

	Data provided by	Units	2012	2013	2014	2015	2016
Total national production	US	million tons	33.291	34.145	34.012	33.687	-
Producer price (early-season)	US/China	¥/ton	2,622.00	2,603.20	2,681.60	2,687.40	2,602.60
1996-1998 FERP (f.o.b. prices - milled)	China	¥/ton	1996-1998			Average 1996-1998	
			3,082.10	2,033.00	1,913.90	2,343.00	
1986-1988 FERP (f.o.b. price) (unmilled equivalent)	US	¥/ton	470.83[6]				
Production by province							
Anhui	US	million tons	1.320	1.308	1.283	1.092	-
Jiangxi	US	million tons	8.002	8.280	8.201	8.119	-
Hubei	US	million tons	2.089	2.228	2.387	2.523	-
Hunan	US	million tons	8.187	8.605	8.548	8.589	-
Guangxi Zhuang Autonomous Region	US	million tons	5.449	5.552	5.433	5.288	-
Total		million tons	25.047	25.973	25.852	25.611	-
Out-of-grade percentage							
Anhui	China	percentage	0.0	0.0	0.0	0.0	-
Jiangxi	China	percentage	1.0	1.0	0.0	0.0	-
Hubei	China	percentage	0.0	0.0	0.0	0.0	-
Hunan	China	percentage	1.0	0.0	3.0	1.0	-
Guangxi Zhuang Autonomous Region	China	percentage	1.0	1.0	1.0	0.0	-
AAP (unmilled)	US/China	¥/ton	2,400.00	2,640.00	2,700.00	2,700.00	-
Quantity of paddy rice purchased under the measures							
Anhui	China	million tons	0.0000	0.0665	0.0870	0.0400	0.0215
Jiangxi	China	million tons	0.0000	3.3340	2.1450	1.4500	1.3065
Hubei	China	million tons	0.0000	0.0985	0.0600	0.0960	0.0485
Hunan	China	million tons	0.0000	2.2000	1.9420	1.4300	1.1890
Guangxi Zhuang Autonomous Region	China	million tons	0.0000	0.0360	0.0110	0.0000	0.0000
Total	China	million tons	0.0000	5.7350	4.2450	3.0160	2.5655

[6] Only one average value was provided by the United States. See United States' first written submission, Table 7: Fixed External Reference Price.

1.2.2.2 Mid-late-season

	Data provided by	Units	2012	2013	2014	2015	2016
Total national production	US	million tons	106.406	105.136	107.239	108.739	-
Producer price (mid-season Indica)	US/China	¥/ton	2,697.40	2,627.20	2,658.00	2,601.60	2,603.40
Producer price (late-season Indica)	US/China	¥/ton	2,769.40	2,713.40	2,838.20	2,787.00	2,768.40
1996-1998 FERP (f.o.b. prices - milled)	China	¥/ton	1996-1998			Average 1996-1998	
			3,082.10	2,033.00	1,913.90	2,343.00	
1986-1988 FERP (f.o.b. price) (unmilled equivalent)	US	¥/ton	470.83[7]				
Production by province							
Jiangsu	US	million tons	2.641	2.672	2.658	2.714	-
Anhui	US	million tons	10.193	9.951	10.232	10.910	-
Jiangxi	US	million tons	11.758	11.760	12.051	12.153	-
Henan	US	million tons	4.926	4.858	5.286	5.315	-
Hubei	US	million tons	14.425	14.539	14.908	15.584	-
Hunan	US	million tons	18.130	17.011	17.792	17.859	-
Guangxi Zhuang Autonomous Region	US	million tons	5.971	6.010	6.228	6.090	-
Sichuan	US	million tons	15.354	15.490	15.261	15.526	-
Total		million tons	83.398	82.291	84.416	86.151	-
Out-of-grade percentage							
Jiangsu	China	percentage	0.0	0.0	0.0	0.0	-
Anhui	China	percentage	1.0	1.0	0.8	0.0	-
Jiangxi	China	percentage	1.0	0.0	0.0	0.0	-
Henan	China	percentage	0.0	3.0	2.2	1.1	-
Hubei	China	percentage	0.0	4.0	0.7	0.0	-
Hunan	China	percentage	0.0	1.0	0.0	1.7	-
Guangxi Zhuang Autonomous Region	China	percentage	1.0	1.0	0.0	0.0	-
Sichuan	China	percentage	0.0	0.0	1.3	1.0	-
AAP (unmilled)	US/China	¥/ton	2,500.00	2,700.00	2,760.00	2,760.00	-
Quantity of paddy rice purchased under the measures							
Jiangsu	China	million tons	0.0000	0.1565	0.1310	0.0985	0.0050
Anhui	China	million tons	0.0000	3.9235	2.8050	3.1585	1.9705
Jiangxi	China	million tons	0.0790	2.1660	1.3700	0.9480	0.6000
Henan	China	million tons	0.0000	1.8160	1.2480	1.4550	1.5695
Hubei	China	million tons	0.0000	2.5780	1.7800	2.9635	2.0895

[7] Only one average value was provided by the United States. See United States' first written submission, Table 7: Fixed External Reference Price.

	Data provided by	Units	2012	2013	2014	2015	2016
Hunan	China	million tons	0.0000	1.3820	1.2630	0.9105	0.7965
Sichuan	China	million tons	0.0000	1.2970	1.0810	0.6540	0.4645
Total	China	million tons	0.079	13.319	9.678	10.188	7.4955

1.3 Corn

	Data provided by	Units	2012	2013	2014	2015
Total national production	US	million tons	205.614	218.489	215.646	224.632
Producer price	US/China	¥/ton	2,222.60	2,176.20	2,237.00	1,884.60
1996-1998 FERP (f.o.b. price)	China	¥/ton	1996-1998		Average 1996-1998	
			1581.40	1075.80 939.20	1,198.80	
1986-1988 FERP (f.o.b. price)	US	¥/ton	366.07[8]			
Production by province						
Heilongjiang	US	million tons	28.879	32.164	33.434	35.441
Jilin	US	million tons	25.788	27.757	27.335	28.057
Liaoning	US	million tons	14.235	15.632	11.705	14.035
Inner Mongolia	US	million tons	17.844	20.697	21.861	22.508
Total	US	million tons	86.746	96.250	94.335	100.041
Out-of-grade percentage						
Heilongjiang	US/China	percentage	0.0	0.0	0.0	0.0
Jilin	US/China	percentage	0.0	0.0	0.0	0.0
Liaoning	US/China	percentage	0.0	0.0	0.0	0.0
Inner Mongolia	US/China	percentage	0.0	0.0	0.0	0.0
AAP Heilongjiang	US	¥/ton	2,100.00	2,220.00	2,220.00	2,000.00
AAP Jilin	US	¥/ton	2,120.00	2,240.00	2,240.00	2,000.00
AAP Liaoning	US	¥/ton	2,140.00	2,260.00	2,260.00	2,000.00
AAP Inner Mongolia	US	¥/ton	2,140.00	2,260.00	2,260.00	2,000.00
Quantity of corn purchased under the measures						
Heilongjiang	China	million tons	0.326	6.205	8.369	21.897
Jilin	China	million tons	0.130	4.777	7.874	11.780
Liaoning	China	million tons	0.030	15.903	25.402	34.530
Inner Mongolia	China	million tons	2.334	16.353	23.047	57.149
Total	China	million tons	2.820	43.236	64.690	125.356

_____

[8] Only one average value was provided by the United States. See United States' first written submission, Table 7: Fixed External Reference Price.